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Via U.S. Mail and Electronic Mail

Chief Karen Humes
Population Division
U.S. Census Bureau
Room 6H174
Washington, DC 20233
Pop.2020.Residence.Rule@census.gov

RE: Proposed 2020 Census Residence Rule and Residence Situations, 81 Fed. Reg. 42577 (June 30, 2016).

Dear Chief Humes,

The Campaign Legal Center and the Voting Rights Institute welcome the opportunity to submit this comment in response to the Census Bureau's federal register notice regarding the proposed 2020 Census Residence Rule and Residence Situations, 81 Fed. Reg. 42577 (June 30, 2016). The Campaign Legal Center and the Voting Rights Institute are disappointed that the Census Bureau has proposed to continue counting incarcerated people at the particular facility they happen to be located on Census Day, despite overwhelming consensus among public comments urging the Census Bureau to change course and count incarcerated people in their home communities. The proposed rule, if made final, discredits the Census as an accurate snapshot of our nation and limits its functionality as a tool to assess local demographics. Most importantly, it perpetuates distortions in our representative democracy, inflates the voting power of the few at the expense of the many, and imposes disproportionate representational harms on minority communities. The Campaign Legal Center and Voting Rights Institute urge the Census Bureau to reverse course, rescind the proposed rule, and count incarcerated people where they resided prior to their incarceration.

The Campaign Legal Center is a nonpartisan, nonprofit legal organization committed to improving our representative democracy and protecting the fundamental right of all Americans to participate in the political process. Through its redistricting and voting rights programs, CLC participates in state and federal litigation to ensure that all communities, and particularly minority communities, are afforded equal access to our democratic system. The Voting Rights

Institute is a project of the American Constitution Society, Campaign Legal Center, and Georgetown University Law Center. It was founded in 2013 to protect the fundamental right to vote by training the next generation of voting rights attorneys and experts. Since 2013, it has held trainings in over a dozen cities nationwide for over 700 attorneys and law students. It also maintains a website that contains information about protecting the right to vote and a database of legal documents for approved voting rights attorneys.

At the center of the missions of both the Campaign Legal Center and the Voting Rights Institute is the right of all Americans to equal representation. The Supreme Court has long recognized this central premise of our democracy through its one-person, one-vote doctrine, which mandates that electoral districts have roughly equal population. The current proposal by the Census Bureau to count incarcerated people as artificial residents in the prison facility where they happen to be incarcerated on Census day rather than in their home communities flies in the face of these basic democratic principles that our Constitution envisions.

1. The proposed rule erodes equality of representation for prisoners and other residents alike and allots unfair influence to a random assortment of constituents that live adjacent to prison facilities.

Every decade, state and local governments redraw thousands of state and local legislative districts in order to ensure that each legislative district contains the same total population and thus affords each member of the community equal representation. States almost exclusively rely on Census data in order to perform this vital democratic task.¹ For that reason and others, as the Census Bureau itself has explained, “it is crucial that people are counted in the right place.”² As the Supreme Court recently reaffirmed, this task of equalizing districts seeks to protect voters from unfair dilution of their vote *and* ensure equality of representation.³ However, the Census Bureau’s practice of counting prisoners in the facility where they happen to be incarcerated on Census Day, rather than where they resided immediately prior to their incarceration, impedes both of these goals.

Since prisoners are ordinarily barred from voting⁴—and where they are permitted to vote do so in their home communities⁵—counting large prison populations in their adjacent districts, which are often in rural areas,⁶ greatly inflates the power of the relatively small number eligible voters in those districts at the expense of *all other voters* in the state. The consequences are

¹ See *Evenwel v. Abbott*, No. 14-940, 578 U.S. ___, slip op. at 4 (Apr. 4, 2016).

² 81 Fed. Reg. 42577 (June 30, 2016).

³ *Evenwel*, slip op. at 16.

⁴ See Sentencing Project, *Felony Disenfranchisement: A Primer* (May 10, 2016), <http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>

⁵ Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 *Stan. L. & Pol’y Rev.* 355, 366 (2011).

⁶ *Id.* at 362 (noting that “[r]ural communities make up only about 20% of the U.S. population, but an estimated 40% of all incarcerated persons are held in facilities located in rural areas”).

particularly stark at the local level where districts are small and the incarcerated population sometimes accounts for more than half of the total population.⁷ For example, after the 2000 Census, Lake County, Tennessee, drew a district “where 88% of the population [of the district] was not local residents, but incarcerated people” and therefore “every group of 3 residents in [the district had] as much say in county affairs as 25 residents in other districts.”⁸ This simply does not accord with basic principles of fairness, equality of representation, or the constitutional demand of one-person, one-vote.

Prisoners are simply not members of the residential communities surrounding the facilities where they happened to be incarcerated on Census day. They are physically prohibited from interacting with the community, using the community’s public transportation, parks, libraries, and other public spaces and services, voting or even participating in public debates and forums. They are ordinarily not affected by local regulations or changes in policy. They do not choose to live in that community, build no enduring ties to the community and, in fact, can and often do move from facility to facility at the discretion of prison officials during their term of confinement. Members of the relevant communities do not consider the prisoners confined in adjacent facilities to be their “neighbors.” Unsurprisingly, for all of these reasons, officials representing these communities do not substantively represent these temporary visitors in their districts. When an Iowa city councilman, representing a district whose population was 96% inmates, was asked whether he considered those incarcerated individuals to be his constituents, he answered, “not really.”⁹

But this does not mean that prisoners do not have any community whatsoever. As a former Census Bureau Director Kenneth Prewitt has explained, the current policy of counting prisoners in the facilities they happen to be assigned to on Census Day “ignore[s] the reality of prison life. Incarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration.”¹⁰ Prisoners continue to be meaningful members of their home communities and are entitled to equal representation there. They have children, spouses, families, and homes where they resided prior to their confinement and where they are almost certain to return after their confinement. Recognizing this reality, nearly every state has a constitutional provision or statute providing that an individual’s legal residence does not change as a result of incarceration.¹¹ Prisoners who are eligible to vote do so in their home communities.¹² Even as

⁷ See Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 William Mitchell L. Rev. 1241, 1245-46.

⁸ *Id.* at 1245 (quoting Peter Wagner & Aleks Kajstura, *Prison-Based Gerrymandering in Tennessee Counties*, Prison Pol’y Initiative (Sept. 26, 2011)).

⁹ Sam Roberst, *Census Bureau’s Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. Times, Oct. 23, 2008, http://www.nytimes.com/2008/10/24/us/politics/24census.html?_r=0.

¹⁰ Kenneth Prewitt, *Forward to Patricia Allard & Kristen D. Levingston, Accuracy Counts: Incarcerated People and the Census* i (2004), available at http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf

¹¹ Ho, *supra* note 5, at 364.

nonvoters, they “have an important stake in many policy debates”¹³ in their home communities and counting them there will ensure their “equitable and effective representation.”¹⁴ Counting them elsewhere deprives them individually and their communities of adequate representation.

2. The proposed rule’s democratic harms fall heavily and unevenly on minority communities.

While the distortions of prison gerrymandering were relatively minor when our prison population was small, drastic changes in the incarceration population in the United States in the past forty years have severely magnified the democratic harms it imposes. Over that time period, the incarceration population has increased by 500%.¹⁵ Today, there are 2.2 million people in our nation’s prisons and jails.¹⁶

Moreover, the drastic increase in incarceration is not evenly distributed across our communities. Our prison and jail population is overwhelmingly black and brown. While people of color make up only 37% of our nation’s population, they comprise 67% of our prison population.¹⁷ Black men are six times more likely to be incarcerated as white men and Hispanic men are more than twice as likely to be incarcerated as non-Hispanic white men.¹⁸ As a result of these disparities, the home communities of prisoners are typically urban minority communities.¹⁹ However, prisons are disproportionately located in rural, primarily white, communities.²⁰ In 2010, by counting prisoners as residents of their prison cells, the Census displaced a population that is disproportionately male, urban, and Black or Latino and concentrated them into just 5,393 census blocks far from their homes, both physically and demographically.²¹ For example, in Illinois, sixty percent of incarcerated people are from Chicago but 99% of those individuals were counted outside of Cook County (Chicago).²² This pattern holds throughout much of the nation. The upshot is that the Census Bureau’s rule of counting prisoners where they are confined on Census day systematically diminishes the political representation of urban minority communities and unjustifiably shifts that political power to rural white communities.²³

¹² *Id.* at 366.

¹³ *Evenwel*, slip op. at 18.

¹⁴ *Id.* at 19.

¹⁵ Sentencing Project, Fact Sheet: Trends in U.S. Corrections (2015), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Sentencing Project, Criminal Justice Facts, <http://www.sentencingproject.org/criminal-justice-facts/>.

¹⁹ Ho, *supra* note 5, at 361-62.

²⁰ *Id.*

²¹ Prison Pol’y Initiative, Detailed demographics of correctional populations now available for nation (Sept. 13, 2011), <http://www.prisonersofthecensus.org/news/2011/09/13/sf1/>.

²² Rose Heyer & Peter Wagner, Too Big to Ignore: How Counting People in Prisons Distorted Census 2000 (Apr. 2004), <http://www.prisonersofthecensus.org/toobig/>.

²³ See Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, and Transforming Democracy 189-190* (2002) (“The strategic placement of prisons in predominantly white rural districts often means

3. The proposed rule diminishes the Census’s usefulness as a demographic tool.

The Census provides some of the most reliable demographic data about our nation available. Researchers, policy makers, and analysts rely on this data to provide easily accessible and accurate information about our states and localities. But the Census’s continued choice to count prisoners in the wrong place distorts its data and provides an inaccurate picture of many of our communities. It suggests that many otherwise homogenous counties and localities with a prison facility are far more racially and ethnically diverse than they actually are. In 2010, there were 161 counties where incarcerated Black individuals outnumbered non-incarcerated Black individuals.²⁴ The distorted picture created by counting prisoners in the wrong places causes an informational harm that is unnecessary and problematic for all those who seek to rely on Census data to understand local community dynamics.

4. The concept of “usual residence” does not demand this illogical and unjust rule.

In response to the Census Bureau’s request for public comment on its residence rules last year, 96 percent of the comments regarding residence rules for incarcerated persons urged the Bureau to count incarcerated persons at their home address for all of the reasons stated above. Nonetheless, the proposed rule is to maintain the Bureau’s misguided practice of counting prisoners in the wrong place on the basis of the concept of “usual residence.” The Bureau’s response states: “[U]sual residence is defined as the place where a person lives and sleeps most of the time, which is not always the same as their legal residence, voting residence, or where they prefer to be counted. Therefore, counting prisoners anywhere other than the facility would violate the concept of usual residence, since the majority of people in prisons live and sleep most of the time at the prison.”²⁵

However, it is simply not true that the amorphous concept of “usual residence” requires this harmful result. First, there is nothing “usual” about the inherently time-limited period an incarcerated individual spends confined in a government facility. Except for the fact of their incarceration, which disrupts their “usual” lives, most prisoners live and sleep in their home communities.

The Census Bureau’s determination that the prison facility an individual is confined in on Census day best represents where incarcerated individuals live and sleep “most of the time” ignores many key considerations. First, the rule broadly covers short and long-term incarcerated individuals alike. The rule covers local jails where the average length of stay nationwide is well

that these districts gain more political representation based on the disenfranchised people in prison, while the inner-city communities these prisoners come from suffer a proportionate loss of political power and representation.”). ²⁴

Prison Pol’y Initiative, The Racial Geography of Mass Incarceration, <http://www.prisonpolicy.org/racialgeography/report.html>.

²⁵ 81 Fed. Reg. 42578.

under thirty days²⁶ and many in the confinement population stay less than forty-eight hours. Even for those in state and federal prisons, the median length of stay in prison is approximately sixteen months,²⁷ far less than the ten years that the Census will count that individual as being away from his home. Of course, many prisoners only spend a few months in prison and yet will be miscounted for the rest of the decade. In Rhode Island, for example, the majority of prisoners spend less than 100 days in a correctional facility. If these prisoners were spending this time at a summer residence rather than a correctional facility, they would be counted at their regular home address. There is no reason why the Census should treat them unequally because they happen to be in prison.

Second, even for those prisoners who spend long periods of time in correctional facilities, there is no guarantee those prisoners will live in any particular facility throughout that time period. Many prisoners will be moved among facilities throughout their period of confinement. Therefore, the only stable long-term address where prisoners will definitely spend most of their time living and sleeping is their home address where they will live and sleep before and after their period of confinement (which will ordinarily be shorter than the decennial census period).

Finally, the Census Bureau has also deviated from the “usual residence” rule in other circumstances where it does not appropriately reflect an individual’s community. Most notably, the Census already counts boarding school students living away from their parental home while attending boarding school below college level at their parental home rather than their boarding school. Boarding school students interact with their surrounding community at boarding school far more than prisoners interact with the surrounding community of their confinement facility. Boarding school students are also likely to reside at the same school for far longer than the average prisoner at any given correctional facility. Yet the Census counts students at their parental home because of “the likelihood that they would return to their parents’ residence when they are not attending their boarding school (*e.g.*, weekends, summer/winter breaks, and when they stop attending the school.)”²⁸ The reasons for this departure in the boarding school context apply with far greater force in the prisoner context, especially given the democratic and equality costs the current rule exacts. Therefore, to the extent that counting prisoners at their homes occasionally requires a departure from the “usual residence” rule, the precedent of the Census’s counting of boarding school students allows for such a minor departure in order to more accurately reflect the location of prisoners’ community ties and long-term residential patterns.

²⁶ See Vera Inst. for Justice, *Incarceration’s Front Door: The Misuse of Jails in America* at 10 (2015) <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf> .

²⁷ Catie Clark, et al., Fla. Dep’t of Corrections & Fla. State Univ. College of Criminology & Crim. Justice, *Assessing the Impact of Post-Release Community Supervision on Post-Release Recidivism and Employment* (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/249844.pdf> (noting that in 2009 the median time served in prison for all offenses in the United States was 16 months); see also Ho, *supra* note 5, at 373 (noting that the median time served in prison in 2002 was 17 months).

²⁸ 81 Fed. Reg. 42580.

5. The Census Bureau’s alternative proposal to provide states and localities with alternative data is insufficient to remedy these harms.

Rather than simply counting prisoners in their home communities, the Census Bureau has proposed that it will provide the necessary data to states that wish “to ‘move’ their prisoner population back to the prisoners’ pre-incarceration addresses for redistricting and other purposes.”²⁹ However, this proposal is insufficient to remedy the democratic harms the current proposed rule imposes.

First, the Census Bureau’s decision to continue counting prisoners in the facility they are confined in on Census Day suggests to states and localities that this is a proper accounting of those prisoners’ residences, when it assuredly is not. Given the close tie between the Census, apportionment, and redistricting, the proposed rule undoubtedly reinforces the false perception that it is proper and acceptable to count prisoners in this manner for the purposes of redistricting despite the violence it does to the one-person, one-vote principle and the fundamental concept of equal representation. This not only perpetuates the democratic harms described above; it also exposes states and localities to potential legal liability. There have already been successful Equal Protection challenges to prison gerrymandering in federal district courts in Jefferson County, Florida and Cranston, Rhode Island.³⁰

The suggestion that some states might want “to ‘move’ their prison population” and the Census Bureau will aid them in doing so itself suggests that states and localities counting prisoners in their home communities are the outlier actors. And indeed, they are. While four states and more than 200 localities have taken the commendable affirmative step of ensuring that prisoners are counted in the right place,³¹ most states and localities do not. Moreover, some states legally cannot make these changes without a change to the underlying flawed Census data. The State of Massachusetts has informed the Census Bureau that its state constitution does not allow it to adjust the Census data in order to count prisoners in the right place and thus urged the Census to make this commonsense change.³² Finally, the proposed rule also unnecessarily places additional burdens on states seeking to count prisoners in the right place. This burden is exacerbated in those states whose laws require them to redistrict in odd-numbered years and therefore must redistrict immediately after the Census is released. The burden, in any event, should be on the Census Bureau to provide accurate data in the first instance about the nation’s residents.

²⁹ 81 Fed. Reg. 24578.

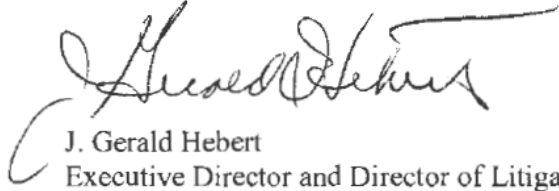
³⁰ See *Calvin v. Jefferson County Board of Commissioners*, No. 4:15-cv-131 (N.D. Fla. Mar. 19, 2016); *Davidson v. City of Cranston*, No. 14-91L (D. R.I. May 24, 2016).

³¹ Prison Pol’y Initiative, Prison Gerrymandering Project: Solutions, <http://www.prisonersofthecensus.org/solutions.html>.

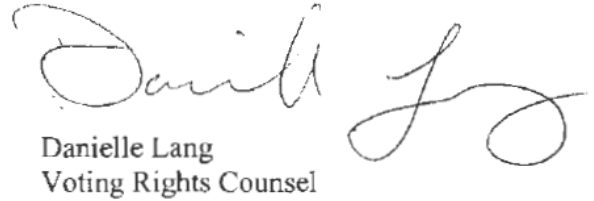
³² See Massachusetts General Court Resolution “Urging the Census Bureau to Provide Redistricting Data that Counts Prisoners in a Manner Consistent with the Principles of ‘One Person, One Vote’” (Adopted by the Senate on July 31, 2014, and the House of Representatives on August 14, 2014).

Thank you for this opportunity to comment on the Residence Rule and Residence Situations. As the Bureau strives to count everyone in the right place, it must afford prisoners the same right to be counted in their communities as it does other individuals who happen to be away from their homes on Census Day. In order to ensure a just and accurate 2020 Census, the Campaign Legal Center and the Voting Rights Institute strongly urge you to reverse course and count incarcerated people at home.

Sincerely,



J. Gerald Hebert
Executive Director and Director of Litigation



Danielle Lang
Voting Rights Counsel