



November 15, 2022

Comment submitted by Dēmos: Input or Suggestions on 2030 Census Preliminary Research, 87 FR 50599 (August 17, 2022), Docket No. 220526-0123

Topics Addressed:

**Reaching and Motivating Everyone
New Data Topics**

Dēmos appreciates the opportunity to submit this comment in response to the Census Bureau’s federal register notice regarding Input or Suggestions on 2030 Census Preliminary Research, 87 FR 50599 (August 17, 2022).

In 2020 and previous Censuses, the Bureau has counted incarcerated people as residents of the prison they were in on Census Day, rather than at their home address. The Bureau’s existing residence rule, as it applies to incarcerated persons, results in serious distortions in how our nation’s population is reflected and tabulated for state and local redistricting purposes and fails to reflect accurately the demographics of numerous communities throughout our country. Because of this outdated rule, hundreds of thousands of incarcerated people are being counted in the wrong place for purposes of redistricting, undermining the equal representation principle of the 14th Amendment to the U.S. Constitution.¹ Using this flawed data to draw local and state districts grants the people who happen to live near large prisons extra representation in government, at the expense of voters elsewhere in the jurisdiction, especially those who reside in the home communities of incarcerated persons.

These distortions and inaccuracies – commonly referred to as “prison gerrymandering” -- are especially harmful to racial equity. Our criminal legal system long has improperly targeted Black and brown people for discriminatory treatment, which means that Black and brown communities unfairly feel the brunt of prison gerrymandering.

To end these distortions and inaccuracies, Dēmos urges the Bureau to revise its Residence Rule to tabulate incarcerated people at their home address, rather than at the facility where they happen to be present on Census Day.

Dēmos has reviewed and fully endorses the factual background on this issue that is explained in the Joint Comment filed today by the Prison Policy Initiative and 35 other justice and voting rights organizations. To avoid duplication, we will not repeat that background here. Dēmos instead will use this comment primarily to discuss some of the key insights revealed by past and recent litigation over the issue of prison gerrymandering, and how such litigation reinforces why the Census Bureau must change its approach to tabulating incarcerated persons.

As background for this discussion, it is useful to refer to the U.S. Supreme Court’s 1992 decision in

¹ See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie* (March 14, 2022), available at <https://www.prisonpolicy.org/reports/pie2022.html>.

Franklin v. Massachusetts, 505 U.S. 788 (1992). In *Franklin*, the Supreme Court upheld the Census Bureau’s authority and decision to change its method of determining the residence of overseas military personnel. In that case, the Census Bureau advocated for a flexible interpretation of the usual residence rule, arguing that: “[i]t is far too late in the Nation’s history to suggest that enumeration of the population of the States must be based on a rigid rule of physical presence on the census date.”²

In its *Franklin* ruling, the Supreme Court upheld the Census Bureau’s decision to change its residence rule to count military personnel at their “home of record.” The Court distinguished “usual residence” from mere physical presence, noting that the former “has been used broadly enough to include some element of allegiance or enduring tie to a place.” 505 U.S. at 804.

Franklin supports the Census Bureau’s authority to change how it applies its residence rule to specific populations in response to changes in social and demographic factors affecting the rule’s application. In recent years, the Bureau’s current rules on tabulation of incarcerated persons have also proven to be outdated and to require change.

State Reforms

The inadequacies of the Bureau’s current counting rules with respect to incarcerated persons are reflected in the decision of thirteen states, thus far, to reject the Bureau’s population data on incarcerated persons, and to require instead that incarcerated persons be tabulated as residents of their pre-prison home addresses.³ Two of these states – New York and Maryland – implemented this change with respect to their states’ redistricting after the 2010 Census, while the remaining eleven implemented this change for the 2020 Census redistricting cycle.⁴

Dēmos reviewed the experiences of Maryland and New York in implementing their reform laws for the 2010 round of redistricting in a report prepared by Erika Wood, then-Professor of Law at New York Law School.⁵ The report demonstrates how state and local agencies can work together to successfully implement new and important policy reforms to alleviate the problem of prison gerrymandering.

Moreover, in both New York and Maryland, the reform laws withstood legal challenges. New York’s reform law was challenged on state constitutional grounds, but was upheld by state courts in 2011.⁶ In Maryland, the reform law came under a federal constitutional challenge. Demos, along with the ACLU of Maryland, the Maryland and Somerset County NAACP, the Howard University Civil Rights Clinic, and the

² Brief for the Appellants at 17, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502), cited in “Home” in 2010: A Report on the Feasibility of Enumerating People in Prison at their Home Addresses in the Next Census, Kirsten D. Levingston & Christopher Muller, Submitted to the U.S. Census Bureau February 15, 2006.

³ Andrea Fenster, *How many states have ended prison gerrymandering? About a dozen!*, Prison Policy Initiative, available at https://www.prisonersofthecensus.org/mews/2021/10/26/state_count/.

⁴ The states that first counted incarcerated persons at home for the 2020 redistricting cycle include California, Colorado, Connecticut, Delaware, Montana, Nevada, New Jersey, Pennsylvania, Rhode Island, Virginia, and Washington State.

⁵ Erika L. Wood, *Implementing Reform: How Maryland and New York Ended Prison Gerrymandering*, August 15, 2014, available at <http://www.demos.org/sites/default/files/publications/implementingreform.pdf>.

⁶ *Little v. Latfour*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011).

NAACP Legal Defense Fund, joined in filing an amicus brief to defend the constitutionality of Maryland's reform law. The three-judge federal district court agreed that Maryland's law requiring reallocation of incarcerated persons to their home addresses was fully consistent with the U.S. Constitution.⁷ On appeal of that ruling, the U.S. Supreme Court affirmed.⁸

How the Census' outdated rule continues to undermine accurate redistricting and create problems for courts and litigants

Despite the success of New York and Maryland in pioneering a state legislative response to prison-based gerrymandering, and surviving legal challenges, the Census' outdated rule for counting incarcerated persons has continued to stymie accurate redistricting at both the state and local levels. Examples from Kansas and Rhode Island will illustrate.

1. Kansas

A three-judge federal district court in Kansas had to grapple with the distortions caused by application of the usual residence rule to incarcerated persons in 2012, when the Kansas legislature failed to agree on a state legislative redistricting plan. The unique concentration of state, federal and private prisons in the Leavenworth area in Kansas posed a problem for map-drawers, because combining that population in one district would have meant that a substantial portion of that district would be made up of phantom constituents -- people who are from other parts of the state (or country) and who are not allowed to vote or interact with the community in any other way. The plan proposed by the Kansas House would have done precisely that, resulting in a district with 5,622 incarcerated persons and a population deviation of over 20%. This would have given every four residents of that district the political influence of 5 residents in any other district.⁹

The plan ultimately adopted by the federal district court ameliorated this problem by splitting the Leavenworth facilities among three different House districts instead of concentrating them into one.¹⁰ Nonetheless, this was still only a partial solution to the problem, because the federal court had no data on the actual home addresses of the persons incarcerated at the Leavenworth facilities, and thus could not assign them to their true residences. A change in the Census Bureau's rules on residency for incarcerated persons would avoid these problems because judges as well as state legislatures would receive the data they need for accurate redistricting from the Census Bureau itself.

⁷ *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 896 (D. Md. 2011) (three-judge court), *aff'd*, 567 U.S. 930 (2012) (mem).

⁸ *Fletcher v. Lamone*, 567 U.S. 930 (2012) (mem.).

⁹ Peter Wagner and Brenda Wright, "One Last Chance to Avoid Prison Gerrymandering in Kansas," May 28, 2012, available at https://www.prisonersofthecensus.org/kansas/one_last_chance.pdf; <https://www.prisonersofthecensus.org/news/2012/06/08/ks-court-maps/>

¹⁰ *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kansas 2012) (three-judge court); see also Peter Wagner, "Federal Judges save Kansas from 'worst prison gerrymander' award," June 8, 2012, available at <https://www.prisonersofthecensus.org/news/2012/06/08/ks-court-maps/>.

2. Cranston, Rhode Island

Facing an extreme instance of prison gerrymandering for the Cranston, Rhode Island City Council and School Committee districts, a group of Cranston residents, along with the Rhode Island ACLU, filed a federal court challenge under the one-person, one-vote doctrine of the 14th Amendment to the U.S. Constitution. Demos, the ACLU, and the Prison Policy Initiative represented the plaintiffs. The record created in litigating this case provides a close-up view of the troubling implications of the Census Bureau's current rules. And because the plaintiffs were unsuccessful, it underscores the need for the Census Bureau to act, rather than awaiting court intervention to solve the problem of prison-based gerrymandering.

Following the 2010 Census, the City of Cranston redrew the districts used to elect City Council and School Committee members. Cranston houses Rhode Island's only state prison complex, the Adult Correctional Institutions ("ACI"). The ACI contained an incarcerated population of 3,433 people.¹¹

During the public discussions leading up to Cranston's 2012 redistricting, the members of the City Council were confronted with the question of how and whether to count the incarcerated population of the ACI. At a public hearing on the proposed districting plan, the Council heard testimony as to the severe distortions that would be created by counting all of the inmates of the ACI in a single ward. Nevertheless, the City Council approved a districting plan that included the prison population in its base population count and counted the entire population of the only state correctional facility in Rhode Island in a single ward—Ward 6.¹²

Without the incarcerated population, Ward 6 included only 10,209 residents, compared with 13,000-14,000 persons making up each of the other five city wards. Thus, persons involuntarily incarcerated in the ACI—who are in no sense true "residents" of Ward 6—constituted almost a quarter of the population counted toward Ward 6's population total. This resulted in an actual maximum population deviation among all Cranston wards of approximately 28% -- far above the usual constitutional limit of plus or minus 10%.¹³

The District Court denied the City's motion to dismiss the case, holding that the plaintiffs had put forward a viable claim for relief. The District Court explained its reasoning as follows:

[T]he case now before this Court presents an alleged set of circumstances that appears to be justified by neither the principle of electoral equality nor of representational equality. Clearly, the inclusion of the ACI prison population is not advancing the principle of electoral equality because the majority of prisoners, pursuant to the State's Constitution, cannot vote, and those who can vote are required by State law to vote by absentee ballot from their pre-incarceration

¹¹ *Davidson v. City of Cranston*, 42 F.Supp.3d 325, 331-332 (D. R.I. 2014).

¹² *Id.*

¹³ Supplemental Declaration of William Cooper, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, June 15, 2015, Exh. A-1, Figure 5

address. Consequently, according to Plaintiffs, a full 25% of the population of Ward Six cannot vote in the Ward.

Furthermore, if Plaintiffs' allegations are true, the prisoners' inclusion in Ward Six does nothing to advance the principle of representational equality. Nonvoting residents generally have a right to petition elected officials, even if they were not able to vote for them; and they may generally be presumed to have a great interest in the management of their municipalities. This is true of minors, noncitizens, college students, and military and naval personnel. . . .

Based on Plaintiffs' allegations, it appears to the Court that the ACI population does not participate in any aspect of the City's civic life. According to Plaintiffs, they cannot send their children to school in Cranston; they cannot visit the City's parks; they do not pay taxes to the City; they do not drive on the City's roads. It is not clear from the information available to the Court at this juncture of the litigation that the prisoners at the ACI's inclusion in Ward Six furthers the Constitutional goals of either representational or electoral equality.¹⁴

Subsequent discovery in *Davidson v. City of Cranston* confirmed that the ACI population does not partake in the civic life of the community and is not represented by elected officials in Cranston in any meaningful sense. The overwhelming majority of persons incarcerated in the ACI were not domiciled residents in Ward 6, but remained residents of the communities where they lived prior to their incarceration.¹⁵ The median length of stay for individuals at the ACI was only 99 days.¹⁶ Incarcerated persons at the ACI did not choose where they would be incarcerated.¹⁷ They could not voluntarily visit or patronize public or private establishments and could not participate in the life of the Ward 6 community. Their children are not even permitted to attend Cranston public schools by claiming residence of the parent at the ACI.¹⁸

During the discovery process, the City produced no evidence that any elected official in Cranston made campaign visits to the ACI to seek the electoral support of persons incarcerated there or to identify their needs and views about city governance. The City Councilor who represented Ward 6 acknowledged in his deposition that he was unable to identify any group of persons in Ward 6 that is more isolated from the rest of the community than the ACI population.¹⁹ Unfortunately, the Cranston plaintiffs were ultimately unsuccessful. The City appealed the District Court's ruling in favor of plaintiffs, and the U.S. Court of Appeals for the First Circuit ruled against the Cranston citizens, holding that the distortions cause by prison-based gerrymandering could not be litigated in the courts as a Fourteenth Amendment

¹⁴ *Davidson v. City of Cranston*, 42 F.Supp.3d at 331-332.

¹⁵ Declaration of William Cooper, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, April 30, 2015.

¹⁶ *Id.* ¶ 26.

¹⁷ Affidavit of Joseph A. Dinitto, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, ¶14.

¹⁸ See Defendant's Response to Plaintiffs' First Set of Interrogatories, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, Inter. No. 3.

¹⁹ Deposition of Michael Favicchio, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, February 25, 2015, 41:16-41:20.

violation, but instead were “paradigmatically political decisions”.²⁰

Thus, without action by the Census Bureau to change its counting rules, countless citizens whose jurisdictions have not adopted their own reforms will continue to see their representation distorted by prison gerrymandering. And this will be particularly harmful to incarcerated persons, who will see their voices diminished because they are not represented by the communities where they are counted.

As noted at the outset, the facts and legal rulings discussed in this Comment make up only a small part of the vast record of evidence that the Census Bureau’s current residence rule, as applied to incarcerated persons, is outdated and no longer accurately reflects the population that it seeks to count. Dēmos urges the Census Bureau, in the 2030 Census, to tabulate incarcerated persons at their pre-prison home addresses.

Thank you very much for the opportunity to submit this Comment.

Sincerely,

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²⁰ *City of Cranston v. Davidson*, 837 F.3d 135, 144 (1st Cir. 2016).