

July 19, 2015

By email

Karen Humes
Chief, Population Division
U.S. Census Bureau, Room 5H174
Washington, D.C. 20233
pop.2020.residence.rule@census.gov

Re: 2010 Census Residence Rule and Residence Situations

Dear Chief Karen Humes:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) submits this comment letter in response to the Census Bureau’s federal register notice regarding the Residence Rule and Residence Situations, 80 FR 28950 (May 20, 2015), (“Rule”). Beginning with the 2020 Census and each subsequent decennial census, LDF urges the Census Bureau to count incarcerated people as residents of their last known pre-arrest home address, rather than of the particular prison facility where they happen to be located on Census day. Not only would this change to the Rule be consistent with many state laws, whereby incarcerated people maintain their pre-arrest address and do not lose that residence by virtue of being temporarily incarcerated, but also it would help bring the redistricting processes of states and localities into greater conformity with fundamental principles of an inclusive democracy.

Founded under the leadership of Thurgood Marshall, LDF, now in its 75th anniversary year, is the nation’s oldest civil rights and racial justice law firm. One of LDF’s core missions is the achievement of the full, equal, and active participation of all Americans, particularly Black Americans, in the political process.¹ Consistent with this mission, LDF has advocated – through litigation and public policy – for the elimination of prison-based gerrymandering, the practice by states and localities of counting, for redistricting purposes, incarcerated people as residents of the prison facilities where they are held, rather than where they actually lived prior to their arrest.²

¹ LDF has represented parties in voting rights cases before federal courts throughout the country and the U.S. Supreme Court. *See, e.g., Shelby County Alabama v. Holder*, 570 U.S. 2 (2013) (defending the constitutionality of Section 5 of the Voting Rights Act); *Nw. Austin Mun. Util. Dist. No. One v. Holder* 557 U.S. 193 (2009) (same); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (defining the scope of Section 2 of the Voting Rights Act); *Smith v. Allwright*, 321 US 649 (1944) (abolishing the white primary).

² *See, e.g.,* Brief of the Howard University School of Law Civil Rights Clinic, the American Civil Liberties Union of Maryland, the Maryland State Conference of the NAACP Branches, Somerset County Branch of the NAACP, the NAACP Legal Defense and Educational Fund, Inc., the Prison Policy Initiative and DEMOS as Amici Curiae Supporting Respondents, *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff’d*, 133 S. Ct. 29 (2012), <http://www.naacpldf.org/document/fletcher-v-lamone->

In carrying out prison-based gerrymandering, states and localities often rely on Census data and, under the current Rule, the Census Bureau counts incarcerated people where they are confined.³ As explained in further detail below, however, prison-based gerrymandering is unlawful precisely because it artificially inflates population numbers, and thus, the political influence, of districts where prisons are located, at the expense of voters living in all other districts. Indeed, prison-based gerrymandering is all-too reminiscent of the infamous “three-fifths compromise,” whereby enslaved and disfranchised African American people were counted to inflate the number of constituents in—and thus, the political influence of—Southern states before the Civil War.⁴

brief-naacp-legal-defense-and-educational-fund-inc-et-al (arguing for the constitutionality of Maryland’s legislation, “No Representation Without Population Act,” which, for purposes of redistricting, credited incarcerated people to their last known address); Decision/Order, Index No. 2310-201, *Little v. Latfor* (N.Y. Sup. Ct. Aug. 4, 2011), <http://www.naacpldf.org/document/order-granting-intervention> (granting motion to intervene of LDF, the Brennan Center for Justice, the Center for Law and Social Justice, Dēmos, LatinoJustice PRLDEF, the New York Civil Liberties Union, and the Prison Policy Initiative, to defend New York’s Part XX legislation to end prison-based gerrymandering).

See also Letter from Leah C. Aden, Assistant Counsel, LDF, to Cale P. Keable, Chairperson, Rhode Island House Committee on the Judiciary, Apr. 13, 2015, <http://www.naacpldf.org/document/letter-urges-rhode-island-house-committee-judiciary-pass-pending-legislation-ending-prison-> (urging the Rhode Island legislature to pass legislation to end prison-based gerrymandering in the state); *Hearing Regarding HB 6679 Before the Connecticut General Assembly Joint Committee on Judiciary*, Apr. 1, 2013, <http://www.cga.ct.gov/2013/JUDdata/Tmy/2013HB-06679-R000401-Leah%20Aden%20-%20NAACP%20Legal%20Defense%20and%20Educational%20Fund-TMY.PDF> (urging the Connecticut legislature to pass legislation to end prison-based gerrymandering in the state); *Hearing Before the Kentucky General Assembly Task Force on Elections, Constitutional Amendments, and Intergovernmental Affairs*, Aug. 23, 2011, <http://www.naacpldf.org/document/dale-ho-testimony-kentucky-prison-based-gerrymandering> (urging the Kentucky legislature to pass legislation to end prison-based gerrymandering in the state); *Hearing Regarding AB 420 Before the California State Senate Committee on Elections and Constitutional Amendments*, June 21, 2011, <http://www.naacpldf.org/document/dale-ho-california-testimony> (urging the California legislature to pass legislation to end prison-based gerrymandering in the state).

³ While there is no requirement that states and localities rely exclusively on Census data during redistricting, states and localities commonly do. *See, e.g., Bethel Park v. Stans*, 449 F.2d 575, 583 (3rd Cir. 1971) (“Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature.”).

⁴ NAACP LDF, CAPTIVE CONSTITUENTS: PRISON-BASED GERRYMANDERING AND THE DISTORTION OF OUR DEMOCRACY at 2, *available at* http://www.naacpldf.org/files/case_issue/captive_constituents.pdf (last visited Jun. 23, 2015) [hereinafter *Captive Constituents*].

On previous occasions, LDF has called upon the Census Bureau to change its Rule⁵ to count incarcerated people at their last known pre-arrest home address, not where they are incarcerated, to: (1) conform with legal principles on residence; (2) conform with the ordinary definition of resident; (3) avoid inflating the political power of more rural and suburban areas where prisons tend to be located and where white residents predominantly live, at the expense of urban areas where there are fewer prisons and minority communities predominantly live; and, (4) provide a more accurate picture of the nation.

First, the current Rule, which counts incarcerated people as residents of the facilities wherein they are incarcerated, contravenes basic legal principles on residence. Nearly every state has a constitutional provision or statute providing that a person does not gain or lose residence in a place by virtue of being incarcerated. Rather, an incarcerated person typically “retains the legal residence that he or she had prior to arrest, and continues to maintain residence in that county for a variety of purposes, such as court and tax filings.”⁶ For example, under Connecticut state law, a person does not gain or lose legal residence by virtue of being incarcerated,⁷ and, similarly, under Rhode Island state law, a person’s domicile shall not be lost based on confinement in a correctional facility.⁸

Second, incarcerated people are not residents, in the ordinary sense of the word, of the areas in which they are confined. Most fundamentally, in the overwhelming majority of states, incarcerated people cannot vote as residents of the places where they are confined.⁹ And, in the limited places where incarcerated people are permitted to vote, as in Maine and Vermont, they

⁵ See, e.g., Letter From Stakeholders to Thomas Mesenbourg, Acting Director, U.S. Census Bureau (Feb. 14, 2013) (<http://www.prisonersofthecensus.org/letters/feb2013.html>).

⁶ *Captive Constituents*, *supra* n.4 at 2.

⁷ Gen. Stat. Conn. 9-14 (“Electors residing in state institutions. No person shall be deemed to have lost his residence in any town by reason of his absence there from in any institution maintained by the state. No person who resides in any institution maintained by the state shall be admitted as an elector in the town in which such institution is located, unless he proves to the satisfaction of the admitting official that he is a bona die resident of such institution.”).

⁸ Rhode Island General Laws § 17-1-3.1 Residence for voting purposes (“(a) A person’s residence for voting purposes is his or her fixed and established domicile. The determinant of one’s domicile is that person’s factual physical presence in the voting district on a regular basis incorporating an intention to reside for an indefinite period. This domicile is the place to which, upon temporary absence, he or she has the intention of returning. Once acquired, this domicile continues until another domicile is established. A person can have only one domicile, and the domicile shall not be considered lost solely by reason of absence for any of the following reasons: . . . (2) confinement in a correctional facility . . .”)

⁹ Peter Wagner & Christian de Ocejó, Prison Policy Initiative, *Imported Constituents: Incarcerated People and Political Clout in Connecticut* (Mar. 25, 2010), available at <http://www.prisonersofthecensus.org/ct/report.html> (last visited Mar. 31, 2013)).

do so by absentee ballot in their home communities.¹⁰ Incarcerated people do not choose the places in which they are confined and can be moved at any time at the discretion of prison officials.¹¹ Wherever they are located, incarcerated people do not interact with or develop meaningful and enduring ties to the communities surrounding the prison facilities since, for example, they cannot use local services such as parks, libraries, highways, and roads.

Third, counting incarcerated people as residents of the places in which they are confined artificially inflates the population numbers, and thus, the political influence of the residents in districts where prisoners are located, to the detriment of all other voters who do not live in districts with prisons.¹² Additionally, by counting incarcerated people as residents of the facilities where they are incarcerated, rather than in the place where they lived prior to incarceration, Census data suggests many counties are racially and ethnically diverse, even when this is not the reality.¹³ Subsequently, officials use that flawed data to draw legislative districts, and the districts that gain political clout are often places where diverse populations have little presence, voice, or influence.¹⁴

Indeed, the stark racial and ethnic disparities that exist between those in prison and those living in the surrounding county, due at least in part from the prison construction boom, which took place primarily in rural areas, is distressing. For example, in Martin County, Kentucky, 884 incarcerated Black individuals make up 56 percent of the incarcerated population, but 12 Black residents make up only about 1 percent of the county's non-incarcerated population.¹⁵

Ultimately, artificial inflation of voting power often benefits more rural and suburban areas where prisons tend to be located and where white residents predominantly live.¹⁶

¹⁰ *Captive Constituents*, *supra* n.4.

¹¹ *Legal Defense Fund Applauds Legislation Ending Prison-based Gerrymandering*, NAACP LDF (Aug. 4, 2010), <http://www.naacpldf.org/press-release/legal-defense-fund-applauds-legislation-ending-prison-based-gerrymandering-new-york>.

¹² *See PRISON POLICY INITIATIVE, THE PROBLEM*, [http://www.prisonersof the census.org/impact.html](http://www.prisonersofthe census.org/impact.html) (last visited June 23, 2015).

¹³ In 2010, there existed 161 counties where incarcerated Black individuals outnumber non-incarcerated Black individuals. *See PRISON POLICY INITIATIVE, THE RACIAL GEOGRAPHY OF MASS INCARCERATION*, <http://www.prisonpolicy.org/racialgeography/report.html> (last visited July 16, 2015).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Although non-metropolitan counties contain only 20 percent of the national population, they are host to approximately 60 percent of new prison construction. *Captive Constituents*, *supra* n.4 at 3.

Conversely, this artificial inflation dilutes the voting strength of urban areas where prisons are fewer and, thereby, weakens the political power of minority communities. This contravenes the constitutional principle of one person, one vote, which requires that everyone is represented equally in the political process,¹⁷ as well as the prohibition by the Voting Rights Act, now celebrating its 50th anniversary year, on the dilution of the voting strength of minority communities.¹⁸

For example, after the 2000 Census, while 68 percent of Maryland's incarcerated individuals were from Baltimore, the Census Bureau counted only 17 percent of the state's incarcerated individuals in that City.¹⁹ Maryland responded to this distortion of its legislative districts in 2010 by passing legislation, which requires certain officials to work in tandem to adjust population data so that incarcerated individuals are counted at their last-known residence for Congressional, state, and local redistricting.²⁰

Similarly, after the 2000 Census, in New York, seven state senate districts met minimum population requirements only because the Census counted incarcerated people as if they were upstate residents.²¹ New York responded to this artificial inflation of these legislative districts

¹⁷ The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that electoral representation—other than to the United States Senate—“be apportioned on a population basis.” *See Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

¹⁸ Section 2 of the Voting Rights Act prohibits any “voting ... standard, practice, or procedure...which results in the denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973. Section 2 also prohibits voting practices that deny the right to vote outright on the basis of race, and those practices that have a dilutive effect on minority vote power. *See Bartlett v. Strickland*, 556 U.S. 1 (2009).

¹⁹ *PRISON POLICY INITIATIVE, ENDING PRISON-BASED GERRYMANDERING WOULD AID THE AFRICAN-AMERICAN VOTE IN MARYLAND* (January 22, 2010), <http://www.prisonersofthecensus.org/factsheets/md/africanamericans.pdf>.

²⁰ H.B. 496, 2015 Reg. Sess. (Md. 2010) (Entitled “No Representation Without Population Act of 2010”)(stating “[t]he population count ...shall count individuals incarcerated in the state or federal correctional facilities, as determined by the decennial census, at their last known residence before incarceration if the individuals were residents of the state.”)

The U.S. Supreme Court subsequently denied a request to consider a challenge to the constitutionality of Maryland's landmark legislation. NAACP LDF, *United States Supreme Court Affirms Landmark Law Ending Prison Based Gerrymandering*, <http://www.naacpldf.org/update/united-states-supreme-court-affirms-maryland%E2%80%99s-landmark-law-ending-prison-based-gerrymanderin>

²¹ *PRISON POLICY INSTITUTE, Gerrymandering and Relying on the Miscalculation of Prisoners Combine to Violate the U.S. Constitution in New York* (last visited July 6, 2015), <http://www.prisonersofthecensus.org/nygerrymander.html>.

by passing legislation to adjust the population data after the 2010 Census to count incarcerated people at their respective homes for redistricting purposes.²²

Maryland and New York are not the only leading jurisdictions to take action statewide to end the problem of prison-based gerrymandering. Other states, like California and Delaware have passed similar laws,²³ and over 200 local counties and municipalities, have all individually adjusted population data to avoid prison-based gerrymandering when drawing their districts.²⁴ Notably, the democracy-distorting effects of prison-based gerrymandering are felt most keenly at the local level where total population numbers are smaller and the presence of large prison facilities can have a greater skewing effect.

Meanwhile, other states, like Illinois, where, for example, 60 percent of incarcerated people have their home residences in Cook County (Chicago), yet 99 percent of them were counted in the 2010 Census as if they resided outside of Cook County,²⁵ have considered legislation to respond to such artificial inflation.²⁶

²² A. 9710/ S. 6610-C, 233rd Leg., 2010 N.Y. Sess. Laws 57 (McKinney) (“...For such purposes, no person shall be deemed to have gained or lost a residence, or to have become a resident of a local government, as defined in subdivision eight of section two of this chapter, by reason of being subject to the jurisdiction of the department of correctional services and present in a state correctional facility pursuant to such jurisdiction.”).

²³ An Act to Add Section 21003 to the Elections Code, Relating to Redistricting, AB 420, 2011-12 Reg. Sess. Ch. 548 (Cal. 2012) (“...the Legislature hereby requests the Citizens Redistricting Commission to deem each incarcerated person as residing at his or her last known place of residence, rather than at the institution of his or her incarceration, and to utilize the information furnished to it ... in carrying out its redistricting responsibilities.”); An Act to Amend Title 29 of the Delaware Code Relating to State Government, H.B. 384, 145th Gen. Ass. (Del. 2010) (“The Act provides that the General Assembly may not count as part of the population in a given district boundary any incarcerated individual who was not a resident of the State prior to the individual’s incarceration. In addition, the Act requires that an individual who was a resident of the State of Delaware prior to incarceration be counted at the individual’s last known residence prior to incarceration, as opposed to at the address of the correctional facility.”)

²⁴ PRISON POLICY INITIATIVE, *Local Governments That Avoid Prison-based Gerrymandering*, <http://www.prisonersofthecensus.org/local/> (last updated July 3, 2015).

²⁵ Rose Heyer & Peter Wagner, *Too Big to Ignore: How Counting People in Prisons Distorted Census 2000*, PRISONERS OF THE CENSUS (Apr. 2004), <http://www.prisonersofthecensus.org/toobig/toobig.html#ftnref3>.

²⁶ During the 2014 and 2015 legislative sessions, the Illinois Legislature has considered legislation to end prison-based gerrymandering. PRISON POLICY INITIATIVE, Illinois, <http://www.prisonersofthecensus.org/illinois.html>.

During multiple legislative sessions, the Connecticut legislature also has considering legislation to address the practice of prison-based gerrymandering. See LDF Testimony before Connecticut General Assembly, Joint Committee on Judiciary, at 2, <http://www.cga.ct.gov/2013/JUDdata/Tmy/2013HB->

Despite progress on these fronts, this ad hoc—state by state and locality by locality—approach to addressing prison-based gerrymandering is neither efficient nor universally implementable. The Massachusetts Legislature, for example, concluded that the state constitution did not permit legislation to eliminate the practice of prison-based gerrymandering; though, in recognizing the need to address the problematic practice, the Legislature sent the Census Bureau a resolution in 2014 urging the Bureau to tabulate incarcerated persons at their home addresses.²⁷ The Bureau should heed these calls to update the Rule.

Consistent with the Bureau’s notice inviting comments on the Rule, and the Census Bureau’s agreement in 2010 to make prisoner population numbers available to states and localities in time for those figures to be taken into account in the redistricting process, LDF recognizes that the Census Bureau continues to strive to count everyone in the right place in keeping with changes in society and population realities. And, indeed, society has changed with the incarcerated population in the U.S. exploding from less than half a million in the 1980s to over two million people today.²⁸ This incarcerated population is disproportionately male and Black and Brown.²⁹ Accordingly, the current Rule should be updated to count incarcerated people at their last known pre-arrest address rather than the prison facility where they are confined on Census day.

By changing the current Rule, the Census Bureau will support state and localities’ efforts to ensure compliance with the one-person, one vote constitutional principle and the Voting Rights Act’s protection of minority communities’ voting strength. Ultimately then, an updated and more accurate Rule that counts incarcerated people at their pre-arrest address, rather than at the prison facilities where they are incarcerated, will help ensure a more robust democracy for the benefit of all Americans.

06679-R000401-Leah%20Aden%20-%20NAACP%20Legal%20Defense%20and%20Educational%20Fund-TMY.PDF; *See also supra* n.2 (reflecting consideration by Kentucky and Illinois to end prison-based gerrymandering).

²⁷ 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); *see also* PRISON POLICY INITIATIVE, *Massachusetts Legislature Calls on U.S. Census Bureau: Support Fair Redistricting, End Prison Gerrymandering* (Sept. 30, 2014), <http://www.prisonersofthecensus.org/news/2014/09/30/mass-fair-redistricting/>.

²⁸ *See* U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008, at 8 (Dec. 2009), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763> (tabulating the total incarcerated population at 2,304,115).

²⁹ PRISON POPULATION Initiative, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity* (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html>; *see also* Bruce Drake, *Incarceration Gap Widens Between Whites and Blacks*, PEW RESEARCH CENTER (Sept. 6, 2013), <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/>.

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Thank you for this opportunity to comment on the Rule. If you have any questions or concerns, please do not hesitate to contact Leah C. Aden, Assistant Counsel, at laden@naacpldf.org or me.

Sincerely,



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