

September 1, 2016

Karen Humes
Chief, Population Division
U.S. Census Bureau
Room 5H174
Washington, DC 20233

Via email: POP.2020.Residence.Rule@census.gov

Re: June 30, 2016 Federal Register notice regarding the Residence Rule and Residence Situations, 81 FR 42577

Dear Chief Humes:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”)¹ submits this comment letter in response to the Census Bureau’s (the “Bureau”) June 30, 2016 Federal Register notice regarding the Residence Rule and Residence Situations, 81 FR 42577 (“Residence Rule”). With the Residence Rule, the Census Bureau proposes to continue its unacceptable practice of counting the “usual residence” of *more than two million incarcerated people*, who are disproportionately Black and Latino, as the location of the prisons where they are involuntarily confined on Census Day. The Bureau plans to maintain the status quo with respect to the counting of incarcerated individuals despite that:

- over a year ago, LDF, along with nearly 150 other stakeholders, opposed this approach of counting incarcerated people and urged the Bureau, beginning with the 2020 Census, to accurately count incarcerated people at their last known, pre-arrest home address where, among many other reasons, they often remain residents under state law and maintain “enduring tie[s]” to their home communities;² and

¹ LDF—founded over 75 years ago under the direction of Thurgood Marshall—is the nation’s first civil rights and racial justice organization. An integral component of LDF’s mission continues to be the attainment of unfettered participation in political and civic life for all Americans, including Black Americans. As explained in this letter and previous communications with the Bureau, Black Americans’ political participation is impeded by redistricting and other policy decisions that are based on the Census Bureau’s inaccurate count of the “usual residence” of incarcerated people.

² *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992); *see also*, Letter from Leah C. Aden, Assistant Counsel, LDF, to Karen Humes, Chief, Population Division, U.S. Census Bureau, July 19, 2015, http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Re%20Residence%20Rule.pdf (LDF incorporates its July 2015 comments herein); Prison Pol’y Initiative, *A sample of the comment letters submitted in 2015 to the Census Bureau calling for an end to prison gerrymandering*, <http://www.prisonersofthecensus.org/letters/FRN2015.html> (last visited Sept. 1, 2016).

Notably, the demand that the Bureau change the way that it counts incarcerated people did not begin only a year ago. For many years, LDF and other stakeholders have advocated for a change to the Bureau’s residence criteria for incarcerated people to no avail. *See, e.g.*, Letter from Stakeholders to Thomas

- with this Residence Rule, the Bureau proposes to *change* how it counts deployed military personnel, a largely white groups of individuals, as “residents” of their home communities, under the assumption that that is where they usually eat and sleep “most of the time” even if they do not happen to be at their homes on Census Day.

Thus, that the Bureau proposes to treat the deployed military’s largely white population different from the incarcerated population, who are largely Black and Latino, raises significant concerns regarding the racial and other impacts of the Residence Rule.

LDF and various stakeholders have made the Bureau aware of the following multiple, fundamental flaws with continuing to count incarcerated people as “residents” of prison facilities where they are detained. We reiterate some of these concerns below.

The Bureau’s flawed count of incarcerated people negatively impacts racial minorities.

First, there are more than two million people incarcerated nationwide who would be affected by the proposed Residence Rule. This is nearly equivalent to the entire population of the state of New Mexico.³ Because of the failed “war on drugs,” and other laws, policies, and practices effectuating mass incarceration, Black and Latino individuals are disproportionately represented in the incarcerated population. Nationwide, Black people make up 13.3% of the general population, but 37.7% of the federal and state prison population.⁴ And Black men are more than six times as likely as white men to be incarcerated nationwide.⁵

Mesenbourg, Acting Director, U.S. Census Bureau, Feb. 14, 2013, <http://www.prisonersofthecensus.org/letters/feb2013.html>.

³ See also Lauren E. Glaze & Danielle Kaeble, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Correctional Populations in the United States, 2013* (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>; U.S. Census Bureau, *Quick Facts*, <https://www.census.gov/quickfacts/table/PST045215/35,00> (last visited Sept. 1, 2016).

⁴ U.S. Census Bureau, *Quick Facts*, <https://www.census.gov/quickfacts/table/PST045215/00> (last visited Sept. 1, 2016); Federal Bureau of Prisons, Inmate Race (last updated Feb. 21, 2015), http://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

Latino people, who are 17.6% of the U.S. population, are nearly twice as likely to be imprisoned as are white people. U.S. Census Bureau, *Quick Facts*, <https://www.census.gov/quickfacts/table/PST045215/00> (last visited Sept. 1, 2016); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, Prison Pol’y Initiative (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html>.

⁵ Bruce Drake, *Incarceration gap widens between whites and blacks*, Pew Research Ctr. (Sept. 6, 2013), <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/>.

Black and Latino people often are imprisoned in white, rural areas, even though they typically are from urban communities of color.⁶ When imprisoned, incarcerated people do not freely reside there. Rather they are segregated from the people living in the communities where prisons are located. They cannot attend the community's schools, use the parks and libraries, or freely seek gainful employment in those areas where prisons are located. Most fundamentally, the population incarcerated for or with felony convictions, which is disproportionately Black, cannot vote for the representatives of the areas where prisons are located.⁷ Felon disenfranchisement laws collectively prevent 1.5 million Black males from voting, "stripp[ing] one in every 13 black persons of the right to vote—a rate four times that of nonblacks nationally."⁸ In the few states where imprisoned people can vote while incarcerated, like in Maine and Vermont, they do so by absentee ballot *in their home communities*.⁹

Incarcerated people, thus, have no meaningful way to hold accountable the officials who purportedly represent them as "residents" of prisons and constituents of districts containing prisons. And representatives of the districts with prisons often do not consider themselves accountable to the imprisoned population.¹⁰ Instead, incarcerated individuals are more accurately

⁶ See Kenneth Johnson, *Demographic Trends in Rural and Small Town America*, Carsey Inst., Univ. of New Hampshire, at 24, fig. 17 (2006), <http://scholars.unh.edu/cgi/viewcontent.cgi?article=1004&context=carsey>, ("[T]he proportion of the rural population that is non-Hispanic white (82[%]) is higher than in metropolitan areas (66[%])."); see also David Hamsher, *Comment, Counted Out Twice—Power, Representation, & the "Usual Residence Rule" in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 J. Crim. L. & Criminology 299, 311 (2005) (Between 1995 and 2005—during the heyday of the "war on drugs" and the era of burgeoning mass incarceration—"a new rural prison ... opened on average every [15] days in the United States.") ("Counted Out Twice"); Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 Stan. L. & Pol'y Rev. 355 (2011) (Only about 20% of the U.S. population resides in rural communities, yet approximately 40% of incarcerated persons nationwide are imprisoned rurally) ("Captive Constituents"); Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote"*, 11 Va. J. Soc. Pol'y & L. 229, 272 (2004) (similar).

⁷ LDF, *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, <http://www.naacpldf.org/files/publications/Free%20the%20Vote.pdf> (last visited Sept. 1, 2016).

⁸ Brent Staples, *The Racist Origins of Felon Disenfranchisement*, N.Y. Times (Nov. 18, 2014), <http://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html>; Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, The Sentencing Project, 1 (July 2012), http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

⁹ See Voting While Incarcerated: A Tool Kit for Advocates Seeking to Register, and Facilitate Voting by Eligible People in Jail, Am. Civ. Liberties Union & Right to Vote (Sept. 2005), http://www.aclu.org/pdfs/votingrights/votingwhileincarc_20051123.pdf; The Sentencing Project, *Fact Sheet: Felony Disenfranchisement Laws* (2015), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Felony-Disenfranchisement-Laws-in-the-US.pdf>.

and fairly represented by leaders in the communities of their pre-arrest home residence, where they are likely to return following incarceration and have meaningful and longstanding ties.¹¹ Thus, in many significant ways, imprisoned people are not “residents” of prison facilities or constituents of the representatives that serve districts with prisons.

The inaccurate Census counting of incarcerated people results in redistricting that diminishes racial minorities’ representational and voting power.

Second, states and local jurisdictions typically rely on the Bureau’s data to redistrict and apportion representatives among districts, although they are not required to do so. While a few states and an increasing number of local jurisdictions have attempted to reallocate incarcerated people to their home communities during redistricting,¹² the overwhelming majority of state and local jurisdictions rely on the Bureau’s flawed count of incarcerated people as “residents” of prisons. Because of the demographics of incarcerated people and the locations of prisons, as discussed above, white rural communities with prisons, but few actual residents, receive the same number of representatives as urban communities of color with more actual residents. Put another way, the populations of white rural communities are inflated by the bodies of imprisoned people,

¹⁰ For example, a representative of a district with a prison population in Anamosa, Iowa, when asked whether he considered incarcerated people to be his constituents, said: “They don’t vote, so, I guess, not really.” Sam Roberts, *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>. And, a New York legislator representing a district containing thousands of incarcerated individuals asserted: “given a choice between the district’s cows and the district’s prisoners, he would ‘take his chances’ with the cows, because [t]hey would be more likely to vote for me.” Letter from Justin Levitt, Professor, Loyola Law School, to Karen Humes, Chief, Population Division, U.S. Census Bureau, at 4 (July 20, 2015), <http://redistricting.ils.edu/other/2015%20census%20residence%20comment.pdf> (“Levitt Letter”); *see also* Todd A. Breitbart, Comment, 2020 Decennial Census Residence Rule and Residence Situations, Docket No. 150409353-5353-01, at 2 (July 18, 2015), http://www.prisonersofthecensus.org/letters/Todd_Breitbart_comment_letter.pdf (legislators “do not offer the prisoners the ‘constituent services’ that they provide to permanent residents of their districts”).

¹¹ For example, virtually all of Maryland’s legislators reported that “they would be more likely to consider persons from their district who are incarcerated elsewhere to be their constituents.” Representative-Inmate Survey, Senate Education, Health, and Environmental Affairs Committee, Bill File: 2010 Md. S.B. 400, at 22-28; *see also*, Levitt Letter, *supra* n.10, at 4.

¹² Fortunately, in recognition of the problems with how the Bureau counts incarcerated people, four states—California, Delaware, New York, and Maryland—and over 200 local jurisdictions have adjusted the Bureau’s flawed data to prevent prison-based gerrymandering. *Local Governments That Avoid Prison-Based Gerrymandering*, Prison Pol’y Initiative (last updated May 13, 2016), <http://www.prisonersofthecensus.org/local/>; Erika L. Wood, *Implementing Reform: How Maryland & New York Ended Prison Gerrymandering*, Demos at 7 (2014), <http://www.demos.org/publication/implementing-reform-how-maryland-new-york-ended-prison-gerrymandering>. Fourteen other states—Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Minnesota, New Jersey, Oregon, Rhode Island, Tennessee, Texas, and Wisconsin—have considered legislation to end prison gerrymandering statewide, with some of those bills passing one chamber. *See* Prison Gerrymandering Project, Legislation, Prison Pol’y Initiative, <http://www.prisonersofthecensus.org/legislation.html> (listing the various bills).

weakening the voting and representational power of the communities where imprisoned people actually reside.

This practice, known as prison-based gerrymandering, which is made possible and is fostered by flawed Census data, potentially violates the: (1) one-person, one-vote principle, which, in requiring roughly equal numbers of people among legislative districts, ensures representational equality and prohibits vote dilution based on where a person lives;¹³ (2) the Voting Rights Act, which prohibits practices like prison based gerrymandering that dilute the voting strength of the minority communities where incarcerated people are from;¹⁴ and (3) state constitutions, which often provide that people do not lose their residence by virtue of being incarcerated.¹⁵

Given the transient and temporary nature of imprisonment, incarcerated people eat and sleep in their home communities for most of the decennial period.

Third, the Bureau purports to count the “usual residence” of incarcerated people at their prison facilities because that is where they eat and sleep “most of the time.” Contrary to the Bureau’s rationale, it simply is not the case that imprisoned people usually eat and sleep “most of the time” in their prison facilities. The Census Day count has implications over the course of an entire decade, but typically state prison sentences are two to three years, and incarcerated people “are frequently shuffled between facilities at the discretion of [prison] administrators.”¹⁶ As of 2008 in New York, for example, the median time that an incarcerated individual remained at a particular facility was only 7.1 months.¹⁷ In Georgia, the average incarcerated individual has been transferred four times and will stay at any one facility, on average, only nine months.¹⁸

¹³ The Equal Protection Clause of the U.S. Constitution is violated when the weight of a citizen’s vote and his access to representation is “made to depend on where he lives.” *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). Indeed, the one-person, one-vote principle is meant to “prevent debasement of voting power and diminution of access to elected representatives.” *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

¹⁴ 52 U.S.C. § 10301; *see also* *Bartlett v. Strickland*, 556 U.S. 1, 10-11 (2009).

¹⁵ *See, e.g.*, Levitt Letter, *supra* n.10 (referencing 28 state laws, that “explicitly provid[e] that incarceration does not itself” change legal or electoral residence).

¹⁶ Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Karen Humes, Chief, Population Division, U.S. Census Bureau, at 3 (July 20, 2015), http://www.prisonersofthecensus.org/letters/prison_policy_fm_census_july_20_2015.pdf.

¹⁷ Letter from Juan Cartagena, President & General Counsel, LatinoJustice PRLDEF, *et al.*, to Karen Humes, Chief, Population Division, U.S. Census Bureau (Aug. 22, 2016), http://preview.latinojustice.org/briefing_room/press_releases/LatinoJustice_PRLDEF_Reply_Comment_Letter_to_US_Census_Proposed_2020_Decennial_Residence_Rule_and_Residence_Situations_81_Fed_Reg_42_577.pdf (“LJP Letter”).

¹⁸ *Id.*; *see also* Letter from the Vera Institute of Justice to Karen Humes, Chief, Population Division, U.S. Census Bureau (Aug. 31, 2016) (reporting for three other states—Washington, Oregon, and

The experiences of imprisoned people also demonstrate the transitory nature of prison life. Nick Medvecky, for example, was incarcerated in federal prison for twenty years, and in that time, he “was incarcerated in over a dozen different prisons in seven different states,” and “[a]ll of these sites were chosen by the prison system, not [him]self.”¹⁹ Only one address remained consistent throughout Mr. Medvecky’s incarceration: his *home* address.²⁰

Given the involuntary and often temporary nature of incarceration, it is not surprising that “[u]pon release the vast majority [of incarcerated people] return to the community in which they lived prior to incarceration” and will eat and sleep there.²¹

The Bureau’s proposed Residence Rule treats the disproportionately Black and Latino incarcerated population differently from other groups of people, who are predominately white.

Like most incarcerated people, deployed military personnel are away from their homes temporarily on Census Day. But, under the proposed Residence Rule, deployed military personnel would receive the benefits of being counted by the Bureau as residents of their home address (rather than their temporary overseas address). Indeed, the Bureau proposes in this Residence Rule to *change* how it counts military deployed personnel, a majority-white population.²² One of its

Nebraska—that, as of April 1, 2015, the median length of stay for a person at a prison facility was 9 months and that, in 2013, the estimated national average length of jail stays was only 23 days).

¹⁹ Alison Walsh, “Over a dozen prisons in several different states”: Letter to Census Bureau describes temporary nature of incarceration, Prison Pol’y Initiative (Aug. 5, 2016), http://www.prisonersofthecensus.org/news/2016/08/05/comment_15/.

²⁰ *Id.*

²¹ Kenneth Prewitt, *Forward, Accuracy Counts: Incarcerated People & The Census*, Brennan Ctr. for Justice (April 8, 2004), http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf.

For a thorough review of the fact that most incarcerated people do not eat and sleep “most of the time” at the correctional facility where they happen to be on Census Day, *see* the Letter from Peter Wagner, Executive Director, Prison Policy Initiative, and Brenda Wright, Demos, Vice President of Policy and Legal Strategies, to Karen Humes, Chief, Population Division, U.S. Census Bureau (Sept. 1, 2016) (“Wagner & Wright Letter”).

²² War and Sacrifice in the Post-9/11 Era: Chapter 6: A Profile of the Modern Military, Pew ResearchCenter: Social Demographic Trends, Oct. 5, 2011, <http://www.pewsocialtrends.org/2011/10/05/chapter-6-a-profile-of-the-modern-military/> (reporting that “Whites still comprise the bulk of America’s fighting forces”)

reasons for doing so is the Bureau's concern for accurate data to support funding, planning, and services in military communities.²³

Incarcerated people, who are disproportionately Black and Latino, are entitled to similar consideration by the Bureau. Inaccurately counting incarcerated individuals as "residents" of prisons negatively impacts their access to funding, planning, services, and other critical resources and support systems. Representatives of districts with imprisoned populations are incentivized to oppose criminal justice reforms, such as measures to end mass incarceration and felon disfranchisement laws, or the provision of resources for drug treatment or other rehabilitation programs.²⁴

In short, the Bureau's disparate treatment of deployed military personnel, a largely white population, and of incarcerated people, who are disproportionately racial minorities, even though both populations are temporarily away from their homes on Census Day and share the same need for access to funding, planning, and services, is irrational and unwarranted.²⁵

For these and other reasons that LDF set forth in its June 2015 comment letter, we strongly urge you to interpret the Residence Rule to count incarcerated people as residents of their last known, pre-arrest home address and treat them like other groups of people who may be away from their homes on Census Day, but remain true residents of their communities.

²³ U.S. Census Bureau, 81 Fed. Reg. 42,577 at 42579 (proposed June 30, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-30/pdf/2016-15372.pdf> (referencing comments the Census Bureau received on its proposed Residence Criteria for the military overseas).

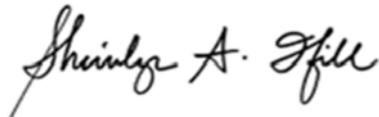
²⁴ Ho, *Captive Constituents*, *supra* n.6, at 356 (Prison-based gerrymandering "incentiviz[es] opposition to criminal justice reforms that would decrease reliance on mass incarceration"); *id.* at 364-64 (Since the political power of areas where prison facilities are located "depends in some measure on a continuing influx of prisoners, legislators from prison districts have a strong incentive to oppose criminal justice reforms that might decrease incarceration rates."); Hamsher, *Counted Out Twice*, *supra* n.6, at 310 (Due to prison-based gerrymandering, "political power is shifted from those communities most afflicted by crime to those communities most interested in gaining from incarceration—potentially at the expense of any alternative means of retribution, crime prevention, drug treatment, or rehabilitation."); Andréa L. Maddan, *Enslavement to Imprisonment: How the Usual Residence Rule Resurrects the Three-Fifths Clause and Challenges the Fourteenth Amendment*, 15 Rutgers Race & L. Rev. 310, 326 (2014) ("Since apportionment is also about resources, the repercussions of moving money and power away from the hometown of the prisoner means less resources to foster the societal re-integration that he or she deserves.")

²⁵ See *supra* n.17. The LJP Letter (at 2-6) adeptly explain various other populations, like boarding students and members of Congress—who are largely white and wealthy—whom the Bureau counts as residents of their home communities, unlike its treatment of incarcerated people, despite that boarding students and Congressional members *choose* to be away from their homes on Census Day. See also *supra* n.21. The Wagner and Wright Letter, in addition to boarding students and Congressional members, critically explains how the Bureau counts visitors, newborn babies, and truck drivers at their homes on Census Day, despite that they, like incarcerated people, happen to be away temporarily on that day.

Ltr. to Humes
U.S. Census Bureau
September 1, 2016
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Thank you for this opportunity to comment on the proposed Residence Rule. If you have any questions or concerns, please do not hesitate to contact Leah C. Aden, Senior Counsel, at laden@naacpldf.org or me.

Sincerely,



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