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Submitted via email to POP.2020.Residence.Rule@census.gov

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Re: ACLU Comments on 2020 Census Residence Rule Supporting the Counting of Incarcerated People at Their Home Address

Dear Ms. Humes,

The American Civil Liberties Union submits this comment in response to the Census Bureau's federal register notice regarding the Residence Rule and Residence Situations, specifically Section 13, "People in Correctional Facilities with Adults."¹ We urge you to count incarcerated people at their home address, rather than at the particular facility at which they happen to be located on Census day.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

I. Background on the Need to Change the Current Residence Rule to Count Incarcerated People at their Home Address

Under Article I, Section 2 of the Constitution, every inhabitant of the United States must be counted in the Census – but they must be counted in the correct place.²

¹ 2020 Decennial Census Residence Rule and Residence Situations, 80 Fed. Reg. 28, 950 (May 20, 2015).

² ACLU, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT REDISTRICTING BUT WERE AFRAID TO ASK 10, 28 (2010), available at <https://www.aclu.org/report/everything-you-always-wanted-know-about-redistricting-were-afraid-ask>.

American demographics and living situations have changed drastically in the 225 years since the first Census, and the Census has evolved in response to many of these changes in order to continue to provide an accurate picture of the nation. In the 1980s, the incarcerated population in the U.S. totaled less than half a million, but since then, the nation's incarcerated population has more than quadrupled to over two million people.³ The significant growth in the nation's prison population over the past 30 years requires the Census Bureau to update its methodology again, by changing the "usual residence" rule.

By designating a prison cell as a residence in the 2010 Census, the Census Bureau concentrated a normally city-based population that is disproportionately male and African-American or Latino into just 5,393 Census blocks that are located far from their actual homes and often in rural areas. In Illinois, for example, 60 percent of incarcerated people have their home residences in Cook County (Chicago), yet the Bureau counted 99 percent of them as if they resided outside Cook County.⁴

When this data is used for redistricting, the political power of the areas where the prisons are located is artificially inflated. In New York after the 2000 Census, for example, seven state Senate districts only met population requirements because the Census counted incarcerated people as if they were residents of upstate New York, though most of the state's prisoners are residents of New York City.⁵ For this reason, New York State passed legislation to adjust the population data after the 2010 Census to count incarcerated people at home for state redistricting purposes.⁶

New York State is not the only jurisdiction taking action. Three other states, California, Delaware, and Maryland, are taking a similar state-wide approach, and more than 200 counties and municipalities each individually adjust population data to avoid prison-based gerrymandering when drawing their local government districts.⁷

But this ad hoc approach is neither efficient nor universally implementable. The Massachusetts legislature, for example, concluded that the state constitution did not allow it to pass similar legislation, so it sent the Bureau a resolution in 2014 urging the Bureau to tabulate incarcerated persons at their home addresses.⁸ A universal process by the Census Bureau is necessary to provide clarity and accuracy in representing our nation's communities nationwide.

II. ACLU Efforts Nationwide to Ensure Fair and Accurate Representation

Until Bureau practice changes, the ACLU will work across the country to mitigate problems created by the current Census approach.

³ SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2015), available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

⁴ PRISON POLICY INITIATIVE, PRISON-BASED GERRYMANDERING IN ILLINOIS (2010), available at http://www.prisonersofthecensus.org/factsheets/il/IL_state.pdf.

⁵ Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 1243, 1241-1260 (2012), available at <http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1471&context=wmlr>; PRISON POLICY INITIATIVE, NEW YORK'S CENSUS ADJUSTMENT ACT (2010), available at http://www.prisonersofthecensus.org/factsheets/ny/NY_census_adjustment_act.pdf.

⁶ N.Y. CORRECT. LAW § 71(8) (2012).

⁷ Prison Policy Initiative, Prison Gerrymandering Project: Solutions, <http://www.prisonersofthecensus.org/solutions.html> (last visited July 20, 2015).

⁸ See The 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).

1. Maryland

In Maryland, the ACLU partnered with the NAACP and other community leaders to raise concerns about local redistricting practices in Somerset County, an area with a long, sad history of racial segregation and violence. Although the county is 42 percent African-American and includes the historically black University of Maryland, Eastern Shore, no black person had ever been elected or appointed to a top county office as of 2009. Prison-based gerrymandering was part of the reason. When the county had drawn new voting districts in the 1980s, to resolve a federal challenge to minority vote dilution, it included in its remedial “majority-minority” district the Eastern Correctional Institution (ECI), where prisoners were counted as residents for redistricting. The inmate population was large in comparison with the rest of the district, and mostly made up of people of color, while the rest of the district was mostly white. Because the inmate population was ineligible to vote in Somerset elections, the white, non-inmate population was overrepresented, and the district’s voting power was distorted in comparison to the county’s other districts.

As a result, the district did not function as a true remedial district and consistently elected white officials over the course of two decades. The ACLU and NAACP advocated for exclusion of the prison population from Somerset’s local redistricting database, and in 2010, the Maryland legislature responded by passing a law mandating that prisoners throughout Maryland be counted at their place of last residence, rather than their place of incarceration. Shortly thereafter, Somerset County’s first black County Commissioner, Rev. Craig Mathies, was elected.⁹

2. New York

In New York, the ACLU defended the constitutionality of New York State’s practice of counting incarcerated individuals at home. In 2010, the New York legislature passed a law, “Part XX,” that requires that incarcerated persons be allocated to their home communities for redistricting and reapportionment of state and local legislative districts. The NYCLU, Brennan Center for Justice, the Center for Law and Social Justice, Dēmos, LatinoJustice PRLDEF, NAACP Legal Defense and Educational Fund, and Prison Policy Initiative, representing 15 rural and urban voters as intervenors, defended the law against a legal challenge brought by a state senator whose district included 12,000 incarcerated persons and was therefore significantly impacted by the law. In December 2011, a New York court ruled that the law was constitutional, and Part XX remains in effect today.

3. South Carolina

In South Carolina, the ACLU was victorious in a recent reapportionment case for the Jasper County School District that would have improperly counted the correctional population when creating school board districts.¹⁰ Jasper County’s population in 2010 was 24,777. Located in that county is the Ridgeland Correctional Institution, with an average population of 1,163. The prisoners sent to that institution come from all counties in the state. The school board has 9 single-member districts. If the population calculations included the prisoners, each district would have needed to have 2,753 people, but one of the districts would have comprised over 40 percent prisoner population – unable to vote, resulting in unequal representation for voters in that district. Following a remedial order, all parties to the lawsuit agreed to remove the prison population from the calculations.¹¹

⁹ For additional information on the successful reform achieved in Maryland, please see comments jointly submitted by the ACLU of Maryland and the Maryland State Conference of the NAACP.

¹⁰ *Fraser v. Jasper County, South Carolina, School District*, No. 9:14-2578 (D. S.C. Apr. 30, 2015).

¹¹ *Id.* (Remedial Order), available at http://www.aclusouthcarolina.org/files/9314/3162/5709/2015-04-30_JasperCtyRemedialOrder.pdf.

4. Florida

In Florida, the ACLU and the Florida Justice Institute filed a lawsuit challenging the redistricting plan that the Jefferson County Board of Commissioners and the Jefferson County School Board adopted in 2013, as a violation of the plaintiffs' Fourteenth Amendment right to equal representation under the "one person, one vote" principle of the Equal Protection Clause. The complaint, filed in March 2015, alleges that the defendants' decision to include the inmate population at Jefferson Correctional Institution ("JCI") unlawfully inflates the political strength of non-inmate residents in the district that houses the prison (District 3) and dilutes the voting strength of those living in all of the other districts in the county. The incarcerated population at JCI constitutes 43.2 percent of the voting-age population in the district. The ACLU argues that, the total population deviation when the prison is excluded at 42.63%, is far outside the constitutional limits on population deviation under the "one person, one vote" principle.¹² As a result, every four non-inmate residents of District 3 have as much political influence in county and school affairs as seven residents in any other district. Moreover, Jefferson County's decision to count non-resident inmates also underrepresents minority voting strength in the community as a whole. When the prison is excluded from the total population count, the Black voting age population decreases from 47.62 percent to 32.73 percent, and the Hispanic voting age population decreases from 7.35 percent to 2.80 percent.

5. Rhode Island

In Rhode Island, the ACLU has been working to address this issue through litigation and legislation. The problem is especially acute in Rhode Island because of the state's small size and the fact that its entire prison system is concentrated in one city, Cranston. Because everybody incarcerated at the prison is counted as a resident of Cranston, but barred from voting there, three voters in the City Council district where the prison is located have as much voting power as four voters in every other City Council district. In February 2014, the ACLU filed a lawsuit challenging this malapportionment, and in September 2014, a federal judge denied the City's motion to dismiss the case.¹³ In addition, for the last three years, the ACLU has promoted legislation that would require all prisoners to be counted, for redistricting purposes only, at their last known address. In 2015 and 2014, the bill passed the Rhode Island Senate with bipartisan support, only to die in the House.¹⁴

6. New Hampshire

In New Hampshire, the ACLU has been advocating against the prison-based gerrymandering engaged in by the City of Concord. The Concord population according to the 2010 census is 42,695. Concord consists of 10 voting wards, each of which elects a representative to the local City Council. The goal behind the city's 2010 Redistricting Plan, which is currently in effect, is to have each of the City's 10 wards contain approximately 4,270 residents with a target deviation of +/-5%. However, Concord's 2010 Redistricting Plan, relying on Census Bureau data, specifically includes in the population of Ward 3 the Concord State Prison for Men, which houses 1,531 inmates.¹⁵ Thus, these inmates represent 34 percent of Concord's Ward 3's 4,459 population, though its prisoners are unable to

¹² Calvin et al. v. Jefferson County (N.D. Fla. filed Mar. 9, 2015) (Complaint), *available at* <https://aclufl.org/resources/calvin-et-al-v-jefferson-county-prison-gerrymandering-complaint/>.

¹³ Davidson v. City of Cranston, 42 F.Supp. 3d 325 (D. R.I. 2014).

¹⁴ Press Release, Prison Policy Initiative, Rhode Island Senate votes to end prison gerrymandering (Mar. 5, 2015), *available at* <http://www.prisonersofthecensus.org/news/2015/03/05/risenate-s0239/>.

¹⁵ However, under New Hampshire law, inmates are not deemed to be domiciled in Ward 3 by virtue of their imprisonment. *See* N.H. RSA 654:2-a.

vote.¹⁶ As a result of the inclusion of the prison population in Ward 3, the voting power of Ward 3's approximately 3,000 voting residents—who represent 66 percent of Ward 3's population—is strengthened, while the voting power of residents of the other nine wards is significantly diluted. The voting population size of Ward 3 represents an approximately 30 percent deviation from the target 4,270-per-ward population size.

7. Connecticut

In Connecticut, the ACLU continues to work towards a districting system that accurately reflects “one person one vote” principle by counting prisoners in their home communities rather than the location where they are incarcerated. The majority of Connecticut's prison beds are located in five small towns. Connecticut currently counts the people incarcerated in those prisons as residents of the towns in which the prisons are located. As a result, seven legislative districts are counted as having more than 1,000 additional residents than have actually chosen to live in those districts willingly. Earlier this year, the ACLU supported Senate Bill 980, which had a public hearing before the state Senate's judiciary committee. If passed, Senate Bill 980 would have made clear that the population of a prison should not be included as part of the population of the legislative district in which the prison is located.

8. New Jersey

In New Jersey, the ACLU has supported legislation to end prison-based gerrymandering in the last several legislative sessions. New Jersey's demographic realities illustrate how the current system unfairly inflates or deflates the voting power of certain communities. Camden County, a largely urban county, has only six percent of the state's population, but its residents account for 12 percent of the state's prisoners. Essex County, too, sends a disproportionate number of people to prison: It is home to less than nine percent of New Jerseyans, but its residents account for 16 percent of its incarcerated population. On the other hand, rural Cumberland County is home to three large prisons, which account for almost five percent of the total county population. This means the voting power of residents living in Cumberland County is artificially inflated by a significant amount as a result of the prisoners being counted there, and voting power in Camden and Essex counties is likewise diminished.

9. Wisconsin

In Wisconsin, a state prison population of fewer than 5,000 persons in 1978 has, by 2014, grown to more than 22,000 persons. Wisconsin has, by far, the highest rate of incarceration of African-American men in the United States, with about 1 in 8 working-age African-American men behind bars. Wisconsin similarly leads the nation in incarceration of Native American men, with about 1 in 13 working-age Native American men behind bars. These individuals are routinely incarcerated far from their home communities, they cannot and do not vote while incarcerated, and their interests are seldom represented in the communities in which they are counted for census purposes. Meanwhile, the communities from which these prisoners come, to which they are likely to return, and with whose other residents they share policy interests are deprived of political representation. The disparity is so stark that, planning maps for the Milwaukee metropolitan area make special note of the fact that minority population concentrations outside the central city are due to incarcerated populations.¹⁷

¹⁶ See N.H. RSA 607-A:2, I(a).

¹⁷ For additional information on the impact in Wisconsin, please see comments submitted by the ACLU of Wisconsin, the Benedict Center, the Justice Initiatives Institute (JII), the NAACP-Milwaukee Branch, and WISDOM.

Additionally, at the federal level, the ACLU has met with Director John H. Thompson to call on the Census Bureau to change the “usual residence” rule as it relates to people in prison.

Thank you for this opportunity to comment on the Residence Rule and Residence Situations. Because the ACLU believes in a population count that accurately represents communities, we urge you to count incarcerated people as residents of their home address. Please contact Ruthie Epstein, Legislative Policy Analyst, at repstein@aclu.org, if we can provide further information.

Sincerely,



Michael W. Macleod-Ball
Acting Director, Washington Legislative Office



Ruthie Epstein
Legislative Policy Analyst