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SUBMITTED VIA EMAIL

Karen Humes
Chief, Population Division
United States Census Bureau
POP.2020.Residence.Rule@census.gov

Re: Proposed 2020 Census Residence Rule and Residence Situations

Dear Ms. Humes:

The Pennsylvania Institutional Law Project (the “Project”), by and through its undersigned counsel, submits this comment in response to the Census Bureau’s Federal Register notice regarding the Residence Rule and Residence Situations, 81 Fed. Reg. 42,577 (June 30, 2016); *see also* 81 Fed. Reg. 48,365 (July 25, 2016) (extending the deadline for public comments).

The Project delivers civil legal services to the institutional population of Pennsylvania. The Project was created and designed to meet the needs of low income residents of Pennsylvania’s prisons, jails, state hospitals, and state centers. The goal of the Project is to ensure equal access to justice for indigent institutionalized persons.

The Bureau’s proposal to continue counting incarcerated people at the particular facility that they happen to be located at on Census Day ignores the transience of incarceration. If made final, this proposal will mean another decade of decisions in many states based on a Census that counts incarcerated people in the wrong place. The Bureau’s proposal also will jeopardize the right of certain groups to equal participation in our democracy, and will promote distortion of

districts for local, state, and federal elections. And as detailed below, the Bureau's proposal is inconsistent with Pennsylvania laws relating to redistricting and to voting by people incarcerated for misdemeanors or while awaiting trial. For all of these reasons, the Project opposes this proposal and requests that the Census Bureau reconsider its proposed Residency Rule.

An Incarcerated Person's "Usual Residence" Is Not His Cell

The Census Bureau defines "usual residence" as the place where a person "eats and sleeps most of the time," but fails to follow that rule when counting incarcerated people. The proposal's comments explain that "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." This overlooks the fact that a large percentage of inmates are pretrial detainees or misdemeanants who are incarcerated only for a matter of days or weeks. In Pennsylvania's jails, this category of inmates numbers about 38,000 on any given day, with an expected average length of stay of 67 days.¹ Nationally, the period of incarceration for such inmates is even shorter, averaging just 23 days.² By lumping in these inmates with prisoners serving long sentences, the proposal would unjustifiably treat them differently from "people who travel seasonally between residences (for example, snowbirds)," whom the Bureau will count at their primary residences. The Bureau's failure to update its rules regarding incarcerated persons is particularly misguided given that the Bureau decided that other populations – deployed overseas military and juveniles staying in residential treatment centers – should be counted in their home location even if they are sleeping elsewhere on Census Day.

Even as applied to inmates serving terms longer than a few weeks, counting incarcerated people as if they were residents of the facility where they happen to be located on Census Day does not reflect the reality of our communities. First, such inmates may be frequently and involuntarily transferred from facility to facility, and thus do not have any one prison as their "usual residence." Second, the Bureau already counts students in boarding schools at their home address even if they spend most of their time at the school, and the Bureau proposes to count juveniles in residential treatment centers at their home address regardless of the length of their stay in such facilities. The same approach should be taken when counting incarcerated people.

¹ U.S. Department of Justice, Bureau of Justice Statistics, *Census of Jails: Population Changes, 1999–2013*, at 15, available at <http://www.bjs.gov/content/pub/pdf/cjpc9913.pdf>.

² *Id.*

On a state level, the Bureau's proposal is directly at odds with the Pennsylvania statute regarding the "residence of electors." The statute provides that "no individual who is confined in a penal institution shall be deemed a resident of the election district where the institution is located. The individual shall be deemed to reside where the individual was last registered before being confined in the penal institution, or if there was no registration prior to confinement, the individual shall be deemed to reside at the last known address before confinement." 25 Pa. C.S. § 1302(3). Pennsylvania failed to make adjustments to the 2010 Census data to account for inmates' residences as part of its most recent decennial redistricting, and if the Bureau makes final its proposed rule, there is a risk that Pennsylvania will again rely on Census data that are incompatible with this state statute. The proposed rule is also incompatible with Pennsylvania's elections laws insofar as Pennsylvanians incarcerated for misdemeanors or while awaiting trial do not lose their right to vote; such inmates must register to vote at their home addresses and vote in elections for their home districts.³

Counting Inmates As Residents Of Their Cells Promotes Illegal Gerrymandering

In addition to creating an inconsistency with Pennsylvania law, the Bureau's failure to update its residence rules is particularly disturbing because federal courts around the country have begun to recognize that the Bureau's prison count can result in constitutional violations of one-person, one-vote requirements. Counting incarcerated people at the location of the facility may violate equal representation requirements, and it will ensure legal challenges to the constitutionality of redistricting plans at the state and local level. There have already been successful federal constitutional challenges to prison gerrymandering in Jefferson County, Florida and Cranston, Rhode Island. *See Calvin v. Jefferson Cnty. Bd. of Comm'rs*, No. 4:15-cv-131, 2016 U.S. Dist. LEXIS 36121 (N.D. Fla. Mar. 19, 2016); *Davidson v. City of Cranston*, No. 14-cv-91, 2016 U.S. Dist. LEXIS 67674 (D.R.I. May 24, 2016). In each case, the court found that a county or city had violated the Fourteenth Amendment by treating inmates as residents of their cells, resulting in a map in which a sizable percentage of the "constituents" of one district consisted of inmates, thus exaggerating the district's overall population in violation of the one-

³ Commonwealth of Pennsylvania, Department of State, *Voting Rights of Convicted Felons, Convicted Misdemeanants and Pretrial Detainees*, available at http://www.votespa.com/en-us/Documents/Convicted_felon_brochure.pdf.

person, one-vote requirement. The Bureau's failure to change the way it counts incarcerated populations will ensure that these constitutional challenges accelerate in the coming decade, burdening taxpayers and injecting uncertainty into the redistricting process.

These challenges are being raised in no small part because the Bureau's 2010 Census practice of designating a prison cell as a residence concentrated a population that is disproportionately male, urban, and black or Latino into just a few thousand Census blocks, which typically are located far from the actual homes of the incarcerated individuals. For example, 35.7% of Pennsylvania's state prison population comes from just two counties: Philadelphia County and Allegheny County (the core of the greater Pittsburgh area),⁴ but these prisoners are nearly all housed in rural areas of the state that are demographically very distinct from these two large cities. When unadjusted Census data are used for redistricting, the resulting maps illegally inflate the political power of the areas where the prisons are located and dilute the political power of all other urban, suburban, and rural areas without large prisons.

American demographics and living situations have changed drastically in the two centuries 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's population. The country's exploding prison population requires the Bureau to adapt once again. As a result, what made sense in 1790, or even 1950, no longer makes sense. Nationally, the incarcerated population totaled less than 326,000 in 1970 but now is nearly 2 million. Pennsylvania's rate of incarceration has mirrored the national average: the number of state prisoners in Pennsylvania grew from 8,112 in 1980 to 49,914 in 2015, more than a six-fold increase.

Because of this explosion in the incarcerated population, counting incarcerated people at the location of the facility measurably distorts legislative representation on the basis of race and ethnicity. In Pennsylvania, Hispanic and black residents make up 61% of the total incarcerated population, but only 17% of the statewide population. Inversely, white residents make up 79% of the total Pennsylvania population but account for only 39% of the incarcerated population. Furthermore, state prison inmates are 48% black, 41% white, 11% Hispanic, and 1% other.⁵ As a result, the 2020 Census data, if not adjusted to comply with 25 Pa. C.S. § 1302(3), would lead

⁴ Inmate Statistics, available at <http://www.cor.pa.gov/About%20Us/Statistics/Documents/Year%20End%20-%20Calendar%20-%20Inmate%20Statistics.pdf>

⁵ *Id.*

to distorted district maps for Pennsylvania at the federal, state, and local levels. Specifically, such maps would include some rural districts with significantly fewer true residents than some urban districts. This would not only present a classic violation of the one-person, one-vote requirement, as in *Calvin* and *Davidson*, but would also result in racially distorted maps that give overrepresentation to predominantly white constituencies.

Such a post-2020 map would repeat a persistent problem in Pennsylvania. For example, after the 2010 Census, Pennsylvania’s Legislative Reapportionment Commission failed to adjust Census data to account for inmates’ home addresses when it drew state legislative maps. As a result, there are now three state House districts—House Districts 69, 76, and 123—in which over 6.5% of the population consists of inmates in state and federal prisons, virtually all of whom are disenfranchised. The inflated representation for these districts has come at the expense of representation for residents of other parts of the state, most notably in the Philadelphia and Pittsburgh urban cores.

Thank you for this opportunity to comment on the Residence Rule and Residence Situations as the Bureau strives to follow the residence rule to count everyone in the right place. The Project believes that in order to produce an accurate and legally compliant 2020 Census, the Bureau must count incarcerated people at their homes.

Respectfully,

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