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FOR JUSTICE

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*at New York University School of Law*

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July 20, 2015

Karen Humes  
Chief, Population Division  
U.S. Census Bureau  
6H185  
Washington, DC 20233

RE: 2020 Decennial Census Residence Rule and Residence Situations

Dear Ms. Humes,

The Brennan Center for Justice at New York University School of Law submits this comment in response to the Census Bureau's federal register notice regarding the 2020 Decennial Census Residence Rule and Residence Situations, 80 FR 28950 (May 20, 2015). For the reasons set forth below, we respectfully ask the Census Bureau build on the changes it made in conjunction with the 2010 Census and update the usual residence rule for the 2020 Census so that all incarcerated persons are counted at their home address rather than the prison facility where they are located on Census Day.

Founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr., the Brennan Center is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve systems of democracy and justice. Based on the findings of our research, we have long expressed concerns about the negative societal impact of counting prisoners where they are incarcerated and urged that they be enumerated at their pre-incarceration home addresses instead. In New York, we participated heavily in the drafting of a landmark law passed by the legislature in 2010 which required that the state's redistricting agency reallocate prisoners to their home communities for purposes of apportionment. We subsequently successfully defended the law from legal challenges.<sup>1</sup>

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<sup>1</sup> *Little v. LATFOR*, No. 2310/2011 (N.Y. Sup. Ct., Albany Cnty Dec. 1, 2011).

*Mass incarceration distorts representation.*

The high rate of mass incarceration in the United States continues to exacerbate the urgency of counting incarcerated people at their home address. The number of people incarcerated in state and federal prisons has dramatically risen from approximately 200,000 in 1970 to more than 1.5 million in 2013.<sup>2</sup> Although some states have begun to enact criminal justice reforms to reduce the high rate of incarceration, the likelihood is that a high number of people still will be imprisoned on Census Day in 2020.

This high rate of incarceration creates a significant distortive effect when it comes to apportionment, particularly at the state legislative level. This is because most incarcerated persons are being held in facilities located far away from their home communities, often in rural communities. For example, ten years ago about 91% of people incarcerated in New York were held in upstate New York facilities despite the fact that 66% of the inmates were from New York City. This meant that communities in New York City were unrepresented in the state's legislature. Similar sorts of distortions are common across the United States. While New York's state legislature addressed the imbalance through legislation in 2010, many states continue to count inmates where prisons are located because they are not able for a variety of reasons to make adjustments on their own.

*Prisoners lack ties to the communities where they are incarcerated.*

As detailed in our 2004 report, *Accuracy Counts: Incarcerated People and the Census*, statistics, legal precedent, and historical context all make changing the way incarcerated persons are counted a matter of pressing public policy.<sup>3</sup> In the forward to the report, Dr. Kenneth Prewitt, Director of the U.S. Bureau from 1998 to 2001, powerfully argued that, "Counting people in prison as residents of their home communities offers a more accurate picture of the size, demographics, and needs of our nation's communities." Dr. Prewitt went on to emphasize two themes that continue to be relevant today: "Incarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration." A decade later, those concerns remain pressing.

Counting incarcerated persons where they are imprisoned, as Dr. Prewitt said in his forward, "ignores the reality of prison life." Prisoners have only tenuous connection at best to the communities where prisons are located. They are unable to vote, utilize local parks, enroll in schools, or visit libraries in the communities where they are being held. They have no connection to civic life outside of the prison facility. By contrast, prisoners maintain much stronger ties to their home communities. In fact, the U.S. Department of Justice estimated in 1999 that 55% and 63% of state and federal prisoners, respectively, had children that were minors, a high percentage of whom reside in prisoners' home communities. It is not surprising then that the vast majority

<sup>2</sup> E. ANN CARSON, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, *available at* <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

<sup>3</sup> PATRICIA ALLARD AND KIRSTEN D. LEVINGSTON, BRENNAN CTR. FOR JUSTICE, *ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS* (2004), *available at* [http://www.brennancenter.org/sites/default/files/legacy/d/RV4\\_AccuracyCounts.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf).



of the more than 680,000 persons released from prison each year return to the communities they resided in prior to their incarceration.

*Counting prisoners in their home communities would be more consistent with how prisoners are treated for other purposes*

Finally, considering incarcerated individuals as residents of the area where their prison facility is located is at odds with how most jurisdictions define the residency of prisoners. For instance, over 100 years ago, the New York Court of Appeals held in *New York v. Cady* (1894)<sup>4</sup> that a prisoner's legal residence is where he or she chooses to live as opposed to where that person is incarcerated. Likewise, the Sixth Circuit in *Stifel v. Hopkins* (1973)<sup>5</sup> determined that there is a rebuttable presumption that a person's residence prior to incarceration remains his or her residence unless that person intends to change it. Many states have similar residence rules that govern residency, venue in judicial proceedings, and voting.<sup>6</sup> Changing the usual residence rule to be consistent with practice of the majority of states would bring the federal rule in line with what states have long recognized: prisoners are not part of the communities where prisons are located.

Thank you again for the opportunity to comment on the 2020 Decennial Census Residence Rule and Residence Situations as the Census Bureau strives to count each person in his or her correct location. Because of the importance of a population count that accurately portrays communities throughout the United States, we ask that you update the usual residence rule to count incarcerated individuals as residents at their home addresses. We are happy to answer any questions.

Sincerely,



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<sup>4</sup> *New York v. Cady*, 143 N.Y. 100 (1894).

<sup>5</sup> *Stifel v. Hopkins*, 477 F.2d 1116, 1124 (6th Cir. 1973).

<sup>6</sup> PATRICIA ALLARD AND KIRSTEN D. LEVINGSTON, BRENNAN CTR. FOR JUSTICE, ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS 12 n.65-67 (2004), available at [http://www.brennancenter.org/sites/default/files/legacy/d/RV4\\_AccuracyCounts.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf).