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Ms. Karen Humes, Chief, Population Division
Assistant Division Chief for Special Population Statistics
U.S. Census Bureau
4700 Silver Hill Road
Washington, D.C. 20233

Dear Ms. Humes:

The Civil Rights Committee of the New York City Bar Association submits this comment in response to the Census Bureau's Federal Register notice regarding the Residence Rule and Residence Situations, 80 FR 28950 (May 20, 2015). We urge that you change the proposed rule from counting incarcerated people at the facility in which they are housed and use their last permanent residence or "usual residence" as defined by the prisoner instead.

The New York City Bar Association is among the nation's oldest and largest bar association. Through its more than 160 committees, the Association promotes reforms in the law and seeks to improve the administration of justice. The Civil Rights Committee is directly concerned with how communities of color may be impacted by current Census Residence Rules and Residence Situations, particularly where population counts based on Census Residence Rules are employed by elected and appointed officials in redistricting and apportionment schemes. We believe that ensuring equal representation is imperative to the health of the nation because it allows for a just democratic system and avoids any racially discriminatory effects of prison gerrymandering.

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. Today, the growth in the prison population requires the Census to update its methodology again.

The need for change in the "usual residence" rule, as it relates to incarcerated persons, has been growing over the last few decades. As recently as the 1980s, the incarcerated population in the U.S. totaled less than half a million. But since then, the number of incarcerated people has more

than quadrupled, to over two million people behind bars. The manner in which this population is counted now has huge implications for the accuracy of the Census.

By designating a prison cell as a residence in the 2010 Census, the Census Bureau concentrated a population that is disproportionately male, urban, and African-American or Latino¹ into just 5,393 Census blocks that are located far from the actual homes of incarcerated people.² In New York, in particular, after the 2000 Census, seven state senate districts met population requirements in state apportionment only because the Census counted detained people as if they were upstate residents.³ For example, each Senate district in New York should have had 306,072 residents after the 2000 Census. District 45, which claimed the populations of thirteen large prisons, however, had only 286,614 actual residents.⁴

Because of the distortions in political representation caused relying on the Census count of prisoners for the purposes of redistricting, New York State passed legislation to adjust the population data after the 2010 Census, to count incarcerated people at their home addresses in state legislative apportionment and redistricting.⁵ In *Little v. LATFOR*, the Supreme Court of the State of New York in Albany upheld this state law.⁶ The Court reasoned that the incarcerated people lacked any permanency in the locations of the facilities nor did they intend to remain there after their release.⁷ The court found that the Department of Corrections and Community Supervision decided when and where incarcerated people would be transferred, not the incarcerated people themselves.⁸ There were no records that indicated that the incarcerated people had ties to the communities where they were incarcerated, where they were “involuntarily and temporarily located.”⁹

Given the logic of the ruling in *Little*, it would be incongruous at best, and erroneous at worst, for the U.S. Census Bureau to count incarcerated people living in the communities where prison and criminal detention facilities are located, when incarcerated people are both *de jure* and *de facto* excluded from participating in the civic life of these communities. Detained people cannot purchase homes, become employed, or make a living while they are incarcerated.¹⁰

¹ As used in this Comment, the terms “Hispanic” or “Latino” are used interchangeably as defined by the U.S. Census Bureau and “refer to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.” Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, 2010 Census Briefs, 1, 2 (March, 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br02.pdf>.

² See *2010 Group Quarters Shapefile*, Prison Policy Initiative, www.prisonersofthecensus.org/data/2010/groupquartersshapefile.html (last visited Jul. 13, 2015).

³ PETER WAGNER, ALEKS KAJSTURA, ELENA LAVARREDA, CHRISTIAN DE OCEJO & SHEILA VENNEL O'ROURKE, *50 STATE GUIDE: FIXING PRISON-BASED GERRYMANDERING AFTER THE 2010 CENSUS: NEW YORK*, PRISON POLICY INITIATIVE (MARCH 2010) (HEREINAFTER “50 STATE GUIDE”), [HTTP://WWW.PRISONERSOFTHECENSUS.ORG/50STATES/NY.HTML](http://www.prisonersofthecensus.org/50STATES/NY.HTML).

⁴ *Id.*

⁵ Wagner et al., *50 State Guide*, *supra* note 3.

⁶ *Little v. LATFOR*, No. 2310/2011 at 7 (N.Y. Sup. Ct., Albany Cnty. Dec. 1, 2011).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Peter Wagner, Eric Lotke & Andrew Beveridge, *Why the Census Bureau can and must start collecting the home addresses of incarcerated people*, Prison Policy Initiative Report submitted to the U.S. Census Bureau on February 10, 2006, in advance of the Bureau's report to the Appropriations Committee on using incarcerated people's homes of

In 2010 there were 161 counties in 31 states where the incarcerated African-American population outnumbered the number of free African-Americans, and 20 counties in 10 states where the incarcerated Latino population outnumbered the number of free Latinos in those same counties.¹¹ In states as populous as New York, Pennsylvania, Illinois, Georgia, Florida and Texas, African-Americans and Latinos are more likely to be locked up in prisons in communities that remain largely white, non-diverse, and miles apart, both literally and figuratively, from communities in their home counties.¹²

African-Americans and Latinos in New York are overincarcerated. Even though African Americans comprise 16% and Latinos 18% of the general population in New York State, African-Americans comprise 53% and Latinos 22% of the incarcerated state population.¹³ New York is also more likely to incarcerate African-Americans and Latinos outside their communities of usual residence.¹⁴ In 2000, only 25% of New York's state population lived upstate, yet 91% of detained people in state prisons were incarcerated there.¹⁵

When the Census Bureau counts detainees where they are temporarily incarcerated, it appears to contradict the Bureau's goal of accuracy in enumeration, because the Bureau is recognizing a temporary, involuntary stay as a "usual residence".¹⁶ In New York, the median time served in a facility in 2007 was seven months, a statistic that further reflects that the place of incarceration is not the permanent residence of the incarcerated individual.¹⁷ Counting detained people in their prior residence serves not only the ideals of equity and equal protection in democracy, but is also rooted in common sense -- people who are detained are transferred often and incarcerated temporarily.

Currently, California, Delaware, Maryland, and New York are taking a state-wide approach to adjust the Census' population totals to count incarcerated people at their actual homes, and over 200 counties and municipalities all individually adjust population data to avoid prison gerrymandering when drawing their local government districts. The U.S. Census should follow suit by changing its policy to achieve a more accurate population count that serves the goals of fairness, equity, and equality in enumeration.

record in the Census, <http://www.prisonpolicy.org/homeaddresses/report.html>. (February 2006) (*hereinafter* "Why the Census").

¹³ See Peter Wagner & Daniel Kopf, *The racial geography of mass incarceration*, Prison Policy Initiative (July 2015), <http://www.prisonpolicy.org/racialgeography/report.html>.

¹⁴ *Id.*

¹⁵ *50 State Incarceration Profiles: New York*, Prison Policy Initiative, <http://www.prisonpolicy.org/profiles/NY.html> (last visited Jul. 13, 2015).

¹⁶ Wagner & Kopf, *The racial geography of mass incarceration*, *supra* note 13.

¹⁷ Rose Heyer & Peter Wagner, *Too big to ignore: How counting people in prisons distorted Census 2000*, Prison Policy Initiative (April 2004), <http://www.prisonersofthecensus.org/toobig/size.html>.

¹⁶ Wagner et al., *Why the Census*, *supra* note 12.

¹⁷ New York State Department of Correctional Services, HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2008, at 11, *available at* http://www.doccs.ny.gov/Research/Reports/2008/Hub_Report_2008.pdf.

Finally, when state legislatures used this flawed data to draw or apportion legislative districts, they impute African-American and Latino political clout and political participation to districts where African-American and Latino communities in actuality have little to no civic voice.¹⁸ These outcomes do not appear to comport with the Supreme Court’s Fourteenth Amendment equal protection jurisprudence “one person one vote” standard.¹⁹

Thank you for this opportunity to comment on the Residence Rule and Residence Situations as the Bureau strives to count everyone in the right place in keeping with changes in society and population realities. Because The Civil Rights Committee of the New York City Bar Association supports a population count that accurately represents communities, we urge you to count incarcerated people as residents of their home address.

Sincerely,



Sebastian Riccardi
Chair, Civil Rights Committee

Cc: Maria Cilenti, Legislative Director, New York City Bar Association
(mcilenti@nycbar.org / 212-382-6655)

¹⁸ Wagner & Kopf, *The racial geography of mass incarceration*, *supra* note 13

¹⁹ See, e.g., [Gray v. Sanders, 372 U.S. 368, 379 \(1963\)](#) (“How then can one person be given twice or ten times the voting power of another person in a state-wide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote [. . .]. This is required by the Equal Protection Clause of the Fourteenth Amendment”); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).