

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 16-1692

**KAREN DAVIDSON; DEBBIE FLITTMAN; EUGENE PERRY;
SYLVIA WEBER; AMERICAN CIVIL LIBERTIES
UNION OF RHODE ISLAND, INC.,**

Plaintiffs-Appellees,

v.

CITY OF CRANSTON, RHODE ISLAND

Defendant-Appellant.

*On Appeal from the United States District Court
for the District of Rhode Island*

**BRIEF OF FORMER DIRECTORS OF THE U.S.
CENSUS BUREAU AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES**

ADERSON B. FRANCOIS
PATRICK LLEWELLYN
Yael BROMBERG
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC, 20001
(202) 661-6701

Counsel for Amici Curiae

August 31, 2016

CORPORATE DISCLOSURE STATEMENT

Amici are not nongovernmental corporate parties to whom Rule 26.1 of the Federal Rules of Appellate Procedure applies.

TABLE OF CONTENTS

| | |
|--|----|
| CORPORATE DISCLOSURE STATEMENT | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES | iv |
| INTERESTS OF <i>AMICI</i> | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 4 |
| I. The Usual Residence Rule Is Not Intended to Determine Where Incarcerated Persons Should Count for Redistricting Purposes..... | 4 |
| A. The purpose of the decennial census is to produce accurate population data for use by other entities | 6 |
| B. The usual residence rule was developed to aid the Census Bureau in producing an accurate population count..... | 7 |
| C. The application of the usual residence rule to count prisoners at their place of incarceration is not intended to establish prisoners as residents of that district for redistricting purposes | 10 |
| II. <i>Evenwel</i> Dealt With The Distinct Question of Who Should Be Counted, Not Where They Should Be Counted | 14 |
| A. <i>Evenwel</i> dealt with what count of the population should be used for redistricting purposes and correctly concluded the Census Bureau’s total population count was an accurate and permissible metric | 15 |
| B. The data and accuracy problems that existed with requiring redistricting based on voters instead of total population are not implicated by states and localities determining, within | |

| | |
|--|----|
| constitutional constraints, where incarcerated persons should count for redistricting purposes..... | 17 |
| CONCLUSION..... | 19 |
| CERTIFICATE OF COMPLIANCE..... | 20 |
| CERTIFICATE OF SERVICE | 20 |

TABLE OF AUTHORITIES

Cases

| | |
|---|-------------------|
| <i>Dep't of Commerce v. U.S. House of Representatives</i> 525 U.S. 316 (1999)..... | 6, 7 |
| <i>Evenwel v. Abbott</i> 136 S. Ct. 1120 (2016)..... | 4, 14, 15, 16, 17 |
| <i>Karcher v. Daggett</i> 462 U.S. 725 (1983)..... | 7 |
| <i>Kirkpatrick v. Preisler</i> 394 U.S. 526 (1969)..... | 7 |

Constitution & Statutes

| | |
|-------------------------------------|-------|
| U.S. Const. art. I, § 2, cl. 3..... | 6 |
| 13 U.S.C. § 131..... | 6 |
| 13 U.S.C. § 141..... | 6, 12 |

Legislative History

| | |
|---------------------------------------|---|
| Act of Mar. 1, 1790, 1 Stat. 101..... | 8 |
|---------------------------------------|---|

Administrative Materials

| | |
|---|--------------|
| 2020 Decennial Census Residence Rule and Residence Situations 80 Fed. Reg. 28950 (May 20, 2015)..... | 8, 9, 10, 11 |
| Proposed 2020 Census Residence Criteria and Residence Situations 81 Fed. Reg. 42577 (June 30, 2016)..... | 10–11, 14 |

Other Authorities

| | |
|---|--------|
| Dale E. Ho, <i>Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle</i> , 22 Stan. L. & Pol’y Rev. 355 (2011)..... | 11, 12 |
|---|--------|

Henry S. Shryrock, Jr., *The Concept of “Usual Residence” in the Census of Population*, in Am. Statistical Ass’n, *Proceedings of the Social Statistics Section 1960 98* (1960)8

How Census Data Affects Your Community, The Leadership Conference on Civil & Human Rights, <http://www.civilrights.org/census/your-community/>7

Kenneth Prewitt, *Foreword* to Patricia Allard & Kirsten D. Levingston, Brennan Center for Justice, *Accuracy Counts: Incarcerated People & the Census* (2004)17

Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *Cardozo L. Rev.* 755 (2011).....6, 16

Our Mission, United States Census Bureau, <https://www.census.gov/about/what.html>5

Patricia Allard & Kirsten D. Levingston, Brennan Center for Justice, *Accuracy Counts: Incarcerated People & the Census* (2004)9, 10

Peter Wagner, *Using the Census Bureau’s Advanced Group Quarters Table*, Prison Policy Initiative, <http://www.prisonersofthecensus.org/technicalsolutions.html>12–13, 18

Residence Rule and Residence Situations for the 2010 Census, U.S. Census Bureau, http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html8–9

Robert Groves, *So, How Do You Handle Prisons?*, Director’s Blog, U.S. Census Bureau (Mar. 1, 2010), <http://directorsblog.blogs.census.gov/2010/03/01/so-how-do-you-handle-prisons/>12

Taren Stinebrickner-Kauffman, Comment, *Counting Matters: Prison Inmates, Population Bases, and “One Person, One Vote”*, 11 *Va. J. Soc. Pol’y & L.* 229 (2004)7, 17

The Council of Econ. Advisers, *The Uses of Census Data: An Analytical Review* (2000)7, 11

U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File* (2011)13

U.S. Census Bureau, *2010 Census Summary File 1* (2012)12

U.S. Census Bureau, *U.S. Census Bureau Strategic Plan FY 2013–2017* (2013).....5, 10

INTERESTS OF *AMICI*

Amici curiae are former directors of the U.S. Census Bureau. As former directors responsible for administering the U.S. Census, *amici* have a unique and valuable perspective on the design of the decennial census and the purposes of the rules applied by the Census Bureau in completing the decennial census. In *amici*'s view, the usual residence rule and the Census Bureau's determination of where to count persons for census purposes are not designed to answer the question of where those persons should be counted for redistricting purposes. To rely on the census data in this manner would contort the census into providing answers to political questions when the census should instead be viewed as providing political bodies with accurate information to enable those bodies to then make the proper determinations based on that data.

Amicus curiae Dr. Kenneth Prewitt was the Director of the U.S. Census Bureau from 1998 to 2001. In that capacity, he oversaw the execution of the 2000 Census and development of the American Community Survey. Currently, Dr. Prewitt serves as the Carnegie Professor of Public Affairs and Special Advisor to the President at Columbia University, where he teaches and writes on issues related to the intersection of the Census, politics, and statistics. Prior to servicing as Director of the Census, Dr. Prewitt served as Director of the National Opinion Research Center, President of the Social Science Research Council, and Senior

Vice President of the Rockefeller Foundation. Dr. Prewitt has considerable knowledge and experience with the use and limitations of census data and their effect on the political system.

Amicus curiae Dr. Martha Farnsworth Riche was the Director of the U.S. Census Bureau from 1994 to 1998. In that capacity, she oversaw the design of the 2000 Census, as well as the new American Community Survey. Currently, Dr. Riche is affiliated with the Cornell Population Center at Cornell University and participates in research projects with various Washington-based organizations, most recently on issues of demographic concern to the U.S. military. Prior to serving as Director of the Census Bureau, Dr. Riche directed policy studies for the Population Reference Bureau and was a founding editor of American Demographics magazine. Dr. Riche has considerable knowledge and experience with the use and limitations of census data across the public, private, for-profit, and not-for-profit sectors.

Amicus curiae Vincent P. Barabba was the Director of the U.S. Census Bureau from 1973 to 1976 and from 1979 to 1980—the only director to be appointed by presidents of both political parties. After serving as Director of the Census Bureau, Dr. Barabba was appointed by Presidents Reagan and George H.W. Bush to be the U.S. Representative to the Population Commission of the United Nations. He has also served on the board of directors for the Marketing

Science Institute, the American Institutes for Research, and the National Opinion Research Center of the University of Chicago. In recognition of his performance in the private and public sectors he has received: An Honorary Doctorate of Laws from the Trustees of the California State University, been inducted into the Market Research Council Hall of Fame, and was awarded the Certificate of Distinguished Service for Contribution to the Federal Statistical System from the Office of Management and Budget. Currently, Dr. Barabba is a member of the California Citizens Redistricting Commission. He has a demonstrated interest in both accurate population statistics and redistricting.

Amici file this brief pursuant to the Court's order inviting *amicus* briefs.¹

SUMMARY OF ARGUMENT

In its appeal to this Court, the City of Cranston argues that the City could rely on the location of where incarcerated persons are counted for purposes of the decennial census's total population tabulation. However, the residence rules applied by the Census Bureau were not designed to determine where incarcerated persons should or must be counted in drawing legislative districts that comply with the constitution. Redistricting decisions are made by political bodies, and the

¹ Under Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made a monetary contribution for its preparation or submission.

census's role in those decisions is simply to provide those bodies with reliable and useful data to make those decisions. The Census Bureau's explicit decision to provide an advance release of the data concerning incarcerated persons so that states and localities may move them in redistricting illustrates that the Census Bureau does not intend for its decisions about where to count these persons to dictate redistricting decisions.

Additionally, the Supreme Court's decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), dealt with a separate issue of *who* should count for redistricting purposes, not *where* those persons should count. In a brief in that case, *amici* expressed concern with using metrics other than the decennial census's total population tabulation to determine *who* should count based on the problems associated with the data underlying those other metrics. However, those problems do not exist when states or localities do not count incarcerated persons in the place of incarceration for purposes of redistricting.

ARGUMENT

I. The Usual Residence Rule Is Not Intended to Determine Where Incarcerated Persons Should Count for Redistricting Purposes.

Over time, from the first decennial census in 1790 to the upcoming 2020 Census, the methods and scope of the census have changed and evolved. Along the way, the Census Bureau has developed a number of rules and guidelines for determining how and where to count people in the census. One such rule is the

“usual residence” rule, which generally determines where a person is counted for purposes of the census. While the usual residence rule is used by the census to effectuate an accurate enumeration of the population, the usual residence rule is not intended to determine where persons must be counted for redistricting purposes.

For all of the changes that have occurred with the census, its mission has ultimately remained the same: “to serve as the leading source of quality data about the nation’s people and its economy.” *Our Mission*, United States Census Bureau, <https://www.census.gov/about/what.html> (last visited Aug. 31, 2016 at 1:40 p.m.); *see also* U.S. Census Bureau, *U.S. Census Bureau Strategic Plan FY 2013–2017 1* (2013), *available at* <http://www.census.gov/content/dam/Census/about/about-the-bureau/PlansAndBudget/strategicplan.pdf> (last visited Aug. 31, 2016 at 1:42 p.m.) (“[The Census Bureau’s] vision is to be the leading source of high quality, timely, relevant, and cost-effective statistical information supporting the nation’s decision-makers.”) The Census Bureau thus aims to collect and provide reliable data to the federal government, states, localities, and other interested parties for myriad purposes. Accordingly, the Court should not conclude the Census Bureau’s usual residence rule answers, or even attempts to answer, the question of where incarcerated persons should or must count for redistricting purposes.

A. *The purpose of the decennial census is to produce accurate population data for use by other entities.*

The Census Bureau’s authority to conduct the decennial census stems from the Census Clause of the Constitution, which states that “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers” and that “[t]he actual Enumeration shall be made . . . within every subsequent term of ten Years.” U.S. Const. art. I, § 2, cl. 3. To enforce these constitutional requirements, Congress has regularly passed statutes to guide the administration of the census. *See Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 335–36 & n.5 (1999) (citing history of census statutes from 1790 through 1999). In its current form, it remains true that the only statutorily required data point the Census Bureau must obtain is a “tabulation of total population by states.” 13 U.S.C. § 141(b). Beyond that, the Secretary of Commerce, acting through the Census Bureau, has much discretion in how to conduct the census and obtain other information. *See* 13 U.S.C. § 131(a); *see also* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *Cardozo L. Rev.* 755, 759 (2011) (explaining the Actual Enumeration Clause applies only to the apportionment numbers provided by the census to the President). Given that the Census Bureau is not required to provide data for redistricting, the Census Bureau’s rules governing how and where to enumerate the population cannot be

said to govern redistricting. *See* Taren Stinebrickner-Kauffman, Comment, *Counting Matters: Prison Inmates, Population Bases, and “One Person, One Vote”*, 11 Va. J. Soc. Pol’y & L. 229, 251–53 (2004).

Because the census data “represents the ‘best population data available,’” *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969)), the federal government, states, localities, and other interested parties utilize census data in a variety of ways. *See, e.g.*, The Council of Econ. Advisers, *The Uses of Census Data: An Analytical Review* (2000), available at <https://clinton4.nara.gov/media/pdf/censusreview.pdf> (listing a number of the uses of census data, including allocation of funding for federal education programs, state and local infrastructure, and disaster relief); *How Census Data Affects Your Community*, The Leadership Conference on Civil & Human Rights, <http://www.civilrights.org/census/your-community/> (last visited Aug. 31, 2016 at 1:50 p.m.). As the Supreme Court has recognized, the census “serves as a linchpin of the federal statistical system.” *Dep’t of Commerce*, 525 U.S. at 341 (internal quotation marks omitted). Thus, collecting an accurate count of the total population remains as the key function of the census.

B. The usual residence rule was developed to aid the Census Bureau in producing an accurate population count.

Beginning with the Census Act of 1790, the census has been undertaken to produce an accurate count of the total population by counting persons at their

“usual residence.” *See* Act of Mar. 1, 1790, § 5, 1 Stat. 101, 103 (requiring that persons be counted at their “usual place of abode” and that an absent person be counted at the “place in which he usually resides in the United States”). Prior to 1850, no definition was provided and no instructions were given regarding the meaning of “usual place of abode” as “it is likely that few questions of interpretation would arise in an essentially agricultural society with relatively little physical mobility except for the migration of entire families.” Henry S. Shryrock, Jr., *The Concept of “Usual Residence” in the Census of Population*, in Am. Statistical Ass’n, Proceedings of the Social Statistics Section 1960 98, 98 (1960). Beginning in 1850, the U.S. marshals then conducting the census were instructed that the term meant “the house or usual lodging place of a person,” along with special instructions for how to count those “temporarily absent on a journey” and students. *Id.*

Since that point, the “usual residence” rule has continued to develop and to specifically consider a variety of different circumstances. For the 2010 Census, the rule defined a person’s “usual residence” as “the place where they live and sleep most of the time. 2020 Decennial Census Residence Rule and Residence Situations, 80 Fed. Reg. 28950, 28950 (May 20, 2015); *Residence Rule and Residence Situations for the 2010 Census*, U.S. Census Bureau, http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html (last

visited Aug. 31, 2016 1:54 p.m.). The Census Bureau also provided specific instructions for applying the rule in twenty-one different residential scenarios. 2020 Decennial Census Residence Rule, 80 Fed. Reg. at 28950–28952. The development of these guidelines for specific situations is necessary to ensure that the same rules are applied uniformly to similar populations across the country, thus ensuring a reliable and consistent count of the population.

As this brief overview of the history of the usual residence rule shows, the rule has changed over time and will likely continue to change. Each decade, prior to the decennial census, the Census Bureau reviews the residence rule and its applications in order to both ensure the rule is being applied appropriately and to identify new or changing living situations that are in need of new or revised consideration under the rule. 2020 Decennial Census Residence Rule, 80 Fed. Reg. at 28950. For example, both boarding school and college students were once enumerated at the addresses their parents reported. Patricia Allard & Kirsten D. Levingston, Brennan Center for Justice, *Accuracy Counts: Incarcerated People & the Census* 10 (2004). However, a 1948 study conducted by the Census Bureau’s Technical Advisory Committee on general Population Statistics recommended that students be counted at their college addresses. *Id.* “The Census Bureau sought to eliminate the inconsistency caused by not counting college students at a place where they usually ate, slept and worked, the standard uniformly applied to other

major groups.” *Id.* Ultimately, the goal of this review, and its accompanying adjustment in consideration of evolving circumstances, is to provide an accurate count of the total population to the various stakeholders that rely on census data to make decisions. *See U.S. Census Bureau Strategic Plan FY 2013–2017, supra*, at 2 (“The world we are measuring is changing at a rapid pace, even as expectations continue to grow from census data users and other stakeholders who depend on us for timely, accurate, and trusted information about our nation’s people and economy.”).

C. The application of the usual residence rule to count prisoners at their place of incarceration is not intended to establish prisoners as residents of that district for redistricting purposes.

As the Census Bureau recognizes, “[d]etermining the usual residence is straightforward for most people.” 2020 Decennial Census Residence Rule, 80 Fed. Reg. at 28950. However, among the “wide diversity in types of living arrangements,” some present more complicated issues for determining a person’s usual residence. *Id.* Some obvious examples include persons experiencing homelessness, military personnel living on vessels or overseas, and—as is relevant to this case—incarcerated persons at jails, prisons, and other detention facilities. For purposes of the 2010 Census—and currently in place for the 2020 Census—the residence rule is applied to incarcerated persons by counting them at the facility of incarceration. *Id.* at 28952; Proposed 2020 Census Residence Criteria and

Residence Situations, 81 Fed. Reg. 42577, 42578 (June 30, 2016). This has not always been the case; in the 1900 Census, for example, prisons were directed to use, if available, a prisoner's "other permanent place of residence," and prior to the 1990 Census, prisoners were not expressly excluded from being counted at another residence. Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 Stan. L. & Pol'y Rev. 355, 372 (2011). Further, that the census enumerates prisoners at the facility of incarceration does not answer the question in this case of where those persons should or must count for redistricting purposes. It is not difficult to imagine situations in which it is useful and necessary to have an accurate enumeration of incarcerated persons at a particular institution; for example, should a disaster strike a particular area, "[a]ccurate census information helps local government predict transportation needs in disaster recovery and contingency planning initiatives." *The Uses of Census Data, supra*, at 3. However, that does not mean that incarcerated persons must be counted at the institution of incarceration for every purpose.

The Census Bureau has long acknowledged that a person's "usual residence" for purposes of the census "is not necessarily the same as the person's voting residence or legal residence." *See, e.g.*, 2020 Decennial Census Residence Rule, 80 Fed. Reg. at 28950. In recognition of the fact that many states and localities use census data for redistricting, the current statute governing the census provides that

states may submit to the Census Bureau the geographic boundaries for which they would like census data to aid them in making redistricting decisions.² See 13 U.S.C. § 141(c). To enable states and localities to more precisely use the census data on incarcerated persons in redistricting, the Census Bureau began releasing data on “group quarters” in advance with the 2010 Census.³ Robert Groves, *So, How Do You Handle Prisons?*, Director’s Blog, U.S. Census Bureau (Mar. 1, 2010), <http://directorsblog.blogs.census.gov/2010/03/01/so-how-do-you-handle-prisons/>; see also Ho, *Captive Constituents*, 22 Stan. L. & Pol’y Rev. at 359–60. Further, the advance release data on group quarters is broken down by facility type at the census block level, i.e. the smallest geographic level of the census and the one ordinarily used for redistricting purposes. See Peter Wagner, *Using the Census Bureau’s Advanced Group Quarters Table*, Prison Policy Initiative, <http://www.prisonersofthecensus.org/technicalolutions.html> (last updated May 2,

² This statutory requirement itself shows that the Census Bureau’s role in redistricting is limited to producing reliable data to allow states and localities to make redistricting decisions, and does not include dictating how states and localities are to make those redistricting decisions.

³ “Group quarters” are defined as “places where people live or stay in a group living arrangement, which are not owned or managed by an entity or organization providing housing and/or services for the residents” and including “correctional facilities.” U.S. Census Bureau, *2010 Census Summary File 1* B-14 (2012), available at <http://www.census.gov/prod/cen2010/doc/sf1.pdf> (last visited Aug. 30, 2016 3:02 p.m.). “Correctional facilities” are then defined to include federal detention centers, federal prisons, state prisons, local jails and other municipal confinement facilities, correctional residential facilities, and military disciplinary barracks and jails. *Id.* at B-14 to B-15.

2016). As the Census Bureau stated in the release of this advance group quarters data, “[t]his early release of data on the group quarters population may be beneficial to many data users including those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries.”⁴ U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File* 1-1 (2011), available at <https://www.census.gov/prod/cen2010/doc/gqsf.pdf> (last visited Aug. 31, 2016, 2:10 p.m.).

In making the initial determination to keep the current application of the residence rule with respect to incarcerated persons for the 2020 Census, the Census Bureau again reinforced the principle that its method for counting population is not done for the purpose of redistricting:

States are responsible for legislative redistricting. The Census Bureau works closely with states and recognizes that some states have decided, or may decide in the future, to “move” their prisoner population back to the prisoners’ pre-incarceration addresses for redistricting and for other purposes. Therefore, following the 2020 Census, the Census Bureau plans to offer a product that states can request, in order to assist them in their goals of reallocating their own prisoner population.

⁴ As the release noted, the advance release not only helps jurisdictions that deal separately with incarcerated persons, but also those that make changes for other populations, such as military personnel or college students. *2010 Census Advance Group Quarters Summary File*, *supra*, at 1-1.

Proposed 2020 Census Residence Criteria, 81 Fed. Reg. at 42578. Both this upcoming product and the Census Bureau's decision to again offer an advanced release of the group quarters data illustrate that the census is not designed or intended to be an authoritative dictation of where certain populations must be counted for redistricting purposes. Instead, the decennial census should be viewed as producing a raw material—population data—that states and localities then use as the building blocks to construct a new product—legislative districts. The Census Bureau and its residence rules are designed only to aid in the creation of the best raw material possible; once that is delivered to the states and localities, though, the decision about how to use that material is left to them, in consideration with, of course, their constitutional obligations.

II. *Evenwel* Dealt With The Distinct Question of Who Should Be Counted, Not Where They Should Be Counted.

Throughout its brief, Cranston argues that the Supreme Court's decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)—and its reliance on total population from the Census—answers whether prisoners should be counted at their place of incarceration for redistricting purposes. *See, e.g.*, Appellee Br. at 9, 11, 14. It does not. At issue in *Evenwel* was *who* should count for redistricting purposes, whereas the issue in this case is *where* should the persons included in the *who* be counted. As *amici* explained in their brief in *Evenwel*, several problems existed with requiring metrics other than total population be used for redistricting purposes. *See*

Brief of Former Directors of the U.S. Census Bureau as Amici Curiae in Support of Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) (Former Census Directors *Evenwel* Brief). None of the problems identified there, however, exist with regards to removing the populations of incarcerated persons from the population count of a particular area for redistricting purposes.

A. *Evenwel* dealt with what count of the population should be used for redistricting purposes and correctly concluded the Census Bureau's total population count was an accurate and permissible metric.

In *Evenwel*, the question presented for the Court was “whether the ‘one-person, one-vote’ principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.” Question Presented, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940), available at <https://www.supremecourt.gov/qp/14-00940qp.pdf>. Specifically, the plaintiffs in that case argued “the ‘population’ States must equalize for one-person, one-vote purposes is the population of eligible voters,” such that states must use “demographic data” other than the census’s total population data to redistrict. Appellants’ Brief at 15, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

As experts on what measures the census and American Community Survey (ACS) are able to accurately count and the purposes for which that information is collected, amici filed an *amici curiae* brief explaining the serious accuracy

problems of requiring states to disregard the census's total population data and rely on other sources of data for voter populations. *See* Former Census Directors *Evenwel* Brief. In particular, the other data sets identified by the *Evenwel* plaintiffs as alternatives to counting total population for redistricting purposes—citizens, voting-age citizens, registered voters—are not collected in the decennial census. *See* Persily, 32 Cardozo L. Rev. at 770 (noting the decennial census does not request citizenship information). While the ACS does collect citizenship data, *amici* noted a number of reasons why that data should not be relied on for redistricting purposes. First, the collection and release of ACS data does not align with the timing of redistricting; while the decennial census numbers provide “a single, consistent snapshot in time,” the relevant ACS data is an accumulation of information collected over a period of the previous five years. *See* Former Census Directors *Evenwel* Brief at 14–17. Second, ACS estimates are not available at the smallest geographical level—the census block—which is often used for redistricting. *See* Former Census Directors *Evenwel* Brief at 17–19; Persily, *The Law of the Census*, 32 Cardozo L. Rev. at 776. Third, as the ACS requires the use of sampling, the margin of error for small areas and small populations is great enough to significantly affect district line-drawing. *See* Former Census Directors *Evenwel* Brief at 19–22. Finally, *amici* explained that redesigning the census to provide the necessary information to accurately redistrict based on voters would

reduce Census response rates and increase inaccurate responses, thus undermining the census's mission. *See* Former Census Directors *Evenwel* Brief at 23–26.

Accordingly, with regards to the proper use of Census data, *Evenwel* simply dealt with the reliability and accuracy of total population data from the census, and the Supreme Court held that states could constitutionally use this data to redistrict. *See Evenwel*, 136 S. Ct. at 1123. However, because it was not at issue in that case, *Evenwel* does not dictate how states should or must use the total population data provided by the census. In other words, answering the question of *who* counts for redistricting purposes does not answer the question of *where* those persons should count for redistricting purposes. *See* Kenneth Prewitt, *Foreword* to Patricia Allard & Kirsten D. Levingston, Brennan Center for Justice, *Accuracy Counts: Incarcerated People & the Census* (2004) (“Accuracy has two meanings—correctly counting and correctly locating every American resident.”); *see also* Stinebrickner-Kauffman, *Counting Matters*, 11 Va. J. Soc. Pol’y & L. at 240–41.

B. The data and accuracy problems that existed with requiring redistricting based on voters instead of total population are not implicated by states and localities determining, within constitutional constraints, where incarcerated persons should count for redistricting purposes.

In addition to *Evenwel* addressing a different question, the data accuracy and practical issues that concerned *amici* in relying on metrics other than total population are not present in the context of states and localities determining where populations of incarcerated persons should be counted for redistricting purposes in

order to meet their constitutional responsibilities. To begin with, as previously noted and unlike the alternative measures proposed in *Evenwel*, the census counts the populations of incarcerated persons, their population totals are included with the “group quarters” tabulation, and this information is released in advance to states in order to permit them to use it in the manner they choose in redistricting. *See supra* Part I.C.

Additionally, the specific practical concerns that counseled against requiring states to use metrics other than the census’s enumeration of total population in determining *who* to count for redistricting purposes are not implicated by states and localities deciding *where* to properly count incarcerated persons. First, the timing of data collected on incarcerated persons will, obviously, match up with the timing of redistricting as it is released as part of the decennial census data. Second, unlike ACS data, the census data on incarcerated persons is collected at the census block level, *see Wagner, Using the Census Bureau’s Advanced Group Quarters Table*; thus, the data is collected at the level often utilized for redistricting, and there are not concerns with the data being unreliable for small populations as it is no different than other census population figures. Finally, the Census Bureau already releases this data ahead of time to provide states and localities with additional time to determine how to use the data on prisoners for redistricting. *See supra* Part I.C.

In short, the census provides reliable total population data, including counts of incarcerated persons. What states and localities do with this data is up to the states, the localities, and the court to determine; the matter of *where* to count these incarcerated persons in redistricting is not answered by the census or the Census Bureau's residence rules.

CONCLUSION

For the foregoing, *amici* respectfully request that the Court reject the City's argument that the Census Bureau's decision regarding where to count incarcerated persons for the decennial census determines where those persons should count for redistricting purposes and affirm the district court's decision.

August 31, 2016

Respectfully submitted,

s/ Patrick Llewellyn

Patrick Llewellyn (#1176243)

Aderson B. Francois

Yael Bromberg

Institute for Public Representation

Georgetown University Law Center

600 New Jersey Avenue NW, Suite 312

Washington, DC 20001

(202) 661-6701

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The type face is fourteen-point Times New Roman font, and there are 4,495 words.

s/ Patrick Llewellyn
Patrick Llewellyn (#1176243)

CERTIFICATE OF SERVICE

I certify that on August 31, 2016, I filed the foregoing using the Court's Electronic Case Filing (ECF) system, which causes copies to be transmitted electronically to all counsel, as follows:

Normand G. Benoit, Esq., djp@psh.com
David J. Pellegrino, Esq., ngb@psh.com
Robert K. Taylor, Esq., rkt@psh.com

Counsel for Appellant

Lynette J. Labinger, Esq., labinger@ronney-labinger.com
Adam Lioz, Esq., alioz@demos.org
Brenda Wright, Esq., bwright@demos.org
Sean J. Young, Esq., syoung@aclu.org
Dale E. Ho, Esq., dale.ho@aclu.org

Counsel for Appellees

s/ Patrick Llewellyn
Patrick Llewellyn (#1176243)