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do social justice.

“Social justice should be the underlying goal of all humanity.”

-Alan V. Lowenstein, Institute Founder

August 16, 2021

New Jersey Apportionment Commission

Dear Commissioners:

We write on behalf of the New Jersey Institute for Social Justice and the League of Women Voters of New Jersey to share our analysis about the “trigger date,” or when the Commission can officially begin conducting its business, such as convening to vote on by-laws, holding public hearings and providing information to the public. Due to new constitutional language and an unprecedented census cycle, there is no precedent or guidance regarding this question in light of the Census Bureau providing the official census data in two different formats. We understand and appreciate that everyone on the Commission, along with the Governor, the Census Bureau and all others involved in this part of the process, have been acting in good faith. We provide our analysis to assist in the process.

As described in further detail below, based on our research and analysis, the trigger date for the Commission to begin conducting its business was August 12.

I. Relevant Constitutional and Statutory Language

As you know, the relevant portion of the New Jersey Constitution reads:

The commission shall begin conducting its business upon the receipt by the Governor of the official decennial census of the United States for New Jersey, and the eleventh member of the Commission shall be appointed by the Chief Justice of the Supreme Court of New Jersey within one month of the Governor's receipt of that census data.

[N.J. Const. art. IV, § 3, ¶ 4.]

Because of difficulties stemming from the COVID-19 pandemic, this year the Census Bureau (“the Census”) will release decennial census data twice – in August and September. This decision by the Census has led to questions in New Jersey about when the Commission can “officially begin conducting its business.”

Additionally, New Jersey’s new law banning prison gerrymandering for legislative redistricting requires the Secretary of State to provide the

appropriate geographic unit for individuals who are incarcerated “not later than the seventh day after the Governor receives the data pursuant to Pub.L.94-171 (13 U.S.C. s.141).” N.J.S.A. 52:4-1.4, 5. This statutory language has created additional questions about the timing.

As discussed below, based on our analysis, N.J. Const. art. IV, § 3, ¶ 4 was triggered on this month’s (i.e., August) release of data by the Census, allowing the Commission to begin its work immediately. The law barring prison gerrymandering, N.J.S.A. 52:4-1.4, 5, does not factor into when the Commission can convene and begin conducting public hearings, nor does it factor into the appointment of the independent member.

While we believe the constitutional language here is sufficiently clear, we understand that some may feel that it is ambiguous. When faced with genuine ambiguity when interpreting law, legislative intent is considered and, per case law, the constitutional provision should be interpreted in a way that best serves public policy. In this case, increased public participation, time for deliberation and transparency that would be furthered by the Commission beginning its work today is in the public interest and what the framers of the provision intended.

The August and September deliveries will both contain identical data, just in different formats. The Census considers “both releases to be official.” Redistricting Data Product Frequently Asked Questions (FAQs), UNITED STATES CENSUS BUREAU (Aug. 6, 2020) <https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/release/redistricting-data-product-faqs.html>. Thus, the question is which release will trigger the constitutional requirement in Article IV that the Commission “begin conducting its business.”

A. Which release is the “official decennial census”?

The first key question is which release, August or September, counts as the “official decennial census?” According to the Census, both are the official data.

In the absence of a statute speaking clearly on which of two identical releases of census data should be considered “official,” we look to the Census’ own interpretation for guidance as New Jersey courts follow federal agency interpretation of federal law. See In the Matter of the Alleged Noncompliance by RCN New York, 186 N.J. 83, 93 (2006).

On August 5, 2021, the Census released “Redistricting Data Product Frequently Asked Questions,” where they posed the question “Which is the Census Bureau's official redistricting data, the August delivery or the September delivery?” See Redistricting Data Product Frequently Asked Questions (FAQs). The Census’s answer was:

The data included in the August and September deliveries will be identical. States can use either the August delivery or the September delivery as appropriate, taking their own statutes and constitutional requirements into account. The Census Bureau considers both releases to be official and fit for use.

[Id. (emphasis added).]

As both releases are the official decennial census, then the August data satisfies the requirements of N.J. Const. art. IV, § 3, ¶ 4.

B. What counts as “receipt by the Governor”?

On August 12, 2021, the Census sent an email which cc’ed Governor Murphy and a number of other state officials informing them that the official Census data in legacy format was posted to the Census file transfer protocol server and providing a link to the data. (See Exh. A). The email noted that link was to the “official data.”

As the email was sent to the Governor, this satisfies the constitutional requirement that the “Governor” receive the official decennial census. N.J. Const. art. IV, § 3, ¶ 4.

The question then is whether email receipt is sufficient to meet the requirements of the constitution. Based on case law, it is clear that this email regarding the August release of data should be considered proper “receipt.”

In past agency action, the New Jersey Supreme Court has noted that “in absence of any rule or regulation to the contrary” a preponderance of the evidence standard is appropriate to determine whether there arises a presumption of mailing and receipt. See SSI Med. Servs., Inc. v. State Dep’t of Human Servs., Div. of Med. Assistance & Health Servs., 146 N.J. 614, 624 (1996). Because here the Census delivery was made to New Jersey, a similar standard should apply. The Court has also recognized in the past that electronic mail can give rise to a presumption of mailing and receipt. Id. at 624. A formal return receipt is not necessary – other evidence, for example downloading the data or printing the information, may give rise to a presumption of receipt. Id.

There is ample evidence that the Governor’s office took receipt of the data sent to him by the Census. First, the Governor is listed by the Census as a recipient of the August release email (Exh. A). And second, at 4:15 p.m. August 12, about three hours after the Census’s email of the official data, Acting Governor Sheila Oliver¹ tweeted:

Thanks to a robust count, New Jersey’s population growth beat 2020 Census estimates by more than any other state.

And with our gain of nearly half a million residents, we’ve further cemented our status as the best state in the nation to live, work, and raise a family.

¹ Governor Murphy left New Jersey, and the country, on August 10, 2021 to join his family on vacation. Gov. Murphy departing NJ for vacation to Italy, AP (Aug. 10, 2021), <https://apnews.com/article/lifestyle-europe-travel-italy-5f646ee7e20c075582e231b354626fef>. “In the event of...the absence from the State of a Governor in office,...the functions, powers, duties and emoluments of the office shall devolve upon the Lieutenant Governor, until...the Governor in office returns to the State[.]” N.J. Const. art. V, 1, ¶ 7.

[@LtGovOliver, Twitter (Aug. 12, 2021, 4:15 PM), <https://twitter.com/LtGovOliver/status/1425913921999884292>.²]

Further, the relevant portion of the N.J. Constitution reads that the Commission’s work shall begin “upon the receipt by the Governor of the official decennial census.” There is no reference to the format of that data, or the type of delivery by which it is made, or whether that receipt satisfies the Census’ totally separate requirements under federal law. The provision simply refers to when the Governor has taken receipt of the official Census information itself. Accordingly, sufficient evidence shows that the Governor “received” the official decennial census data when the Census emailed the Governor and other state officials about the data release along with a link to access it. As such, the trigger date to begin the apportionment process was August 12.

II. No conflict with N.J.S.A. 52:4-1.1–5

Under N.J.S.A. 52:4-1.4 the Secretary of State is required to “re-allocate all relevant population counts reported in the census to reflect residential address” and ensure that the individual is not represented in any applicable population counts reported in the federal decennial census for the geographic units that include “the facility at which the person was incarcerated.” She must then share this updated information to the Commission “not later than the seventh day after the Governor receives the data provided pursuant to Pub.L.94-171 (13 U.S.C. s.141).” N.J.S.A. 52:4-1.4.

N.J.S.A. 52:4-1.4 and N.J. Const. art. IV, § 3, ¶ 4 are legally quite different. For example, the former references the federal statute Pub.L.94-171 (13 U.S.C. s.141), which directs the Census to provide data to the states, whereas the latter does not. The date of “receipt by the Governor of the official decennial census” referenced in N.J. Const. art. IV, § 3, ¶ 4 and the date the Governor “receives the data provided pursuant to Pub.L.94-171 (13 U.S.C. s.141)” need not refer to the same date because they could refer to different sets of data. The Constitution requires the Governor to receive “official decennial census” data. The Census has said that both the August and September data releases count as “official decennial census,” which implies the Governor will have taken “receipt” as soon as their office receives the earlier data.

Additionally, regardless of when the federal statutory language is satisfied, N.J.S.A. 52:4-1.4 states that the Secretary of State shall provide the data “no later than” (emphasis added) the seventh day after the Governor receives the data. It can be provided prior to that. Moreover, the provision only creates a requirement for the Secretary of the State. The Commission must use the data provided for the map it ultimately certifies, see N.J.S.A. 52:4-1.4, but this statute does not create any timing obligations for the Commission itself.

Beyond the language about the official receipt of data, the other language in N.J. Const. art. IV, § 3, ¶ 4 is also relevant and implies that the official business of the Commission goes beyond drawing

² See also @PhilMurphyNJ, Twitter (Aug. 13, 2021, 1:31 PM), <https://twitter.com/PhilMurphyNJ/status/1426235068717191174?s=19> (“Our diversity is our state’s greatest strength” regarding new census data).

and certifying a map. “[W]ith two relevant provisions, the true rule of construction is not to consider one provision of the Constitution alone, but to contemplate all in order to give effect to the purpose of the Constitution as a whole.” New Jersey Republican State Comm. v. Murphy, 243 N.J. 574, 593 (2020). The Constitution is clear that the Commission “shall begin conducting its business upon receipt of the official decennial census” without any contemplation of a gap time. The Commission’s official business must begin at this time; however, the Commission cannot certify the map until after the November election. See N.J. Const. art. IV, § 3, ¶ 4 (“[T]he commission shall certify the establishment of Senate and Assembly districts and the apportionment of Senators and members of the General Assembly to the Secretary of State after the November general election of that year ending in one” (emphasis added)). This reinforces the idea that the Commission’s business goes beyond the drawing and certification of a final map. For example, the Commission can convene, decide by-laws, conduct public hearings, set up a website, provide information to the public – this is all business separate from actual map-drawing.

Similarly, the Constitution requires the Commission to begin conducting its business upon receipt of the data, but New Jersey law allows the Secretary of State seven days to provide the readjusted data. Again, this contemplates that the Commission has “business” beyond certifying a new map. The appointment of an independent member is also not tied to certifying a map or to when the Secretary of State provides the readjusted data.

Ultimately, the trigger for “conducting the business” of the Commission and the appointment of the independent member are bound by the New Jersey Constitution, and only the New Jersey Constitution. There is no good legal or practical reason why the Commission could not use the August data release to begin their work, even if the Secretary of State's office must wait to finalize re-allocation of incarcerated individuals.

III. Legislative intent and public policy considerations support beginning in August

While we believe that the clear reading of the text of N.J. Const. art. IV, § 3, ¶ 4 supports the commission beginning work after the August release of census data, we fully recognize this is an unprecedented situation with some legal ambiguity. The Census has never made two official data releases on two different dates in the history of the United States. It is reasonable to assume that neither the drafters of the New Jersey Constitution, nor the drafters of New Jersey laws referencing the census release, ever contemplated this possibility.

While the plain text of the constitution is paramount – and sufficiently clear here – when faced with possible ambiguity, “resort may be had to pertinent constitutional and legislative history to help determine the true sense and meaning of the language used.” New Jersey Republican State Comm., 243 N.J. at 592 (internal quotation marks omitted). Here, legislators who drafted the constitutional language³ stated, during a public hearing regarding the language, that one of the

³ In order for an amendment to be added to the New Jersey Constitution, the State Senate or Assembly must introduce the language, a public hearing must be held and the Legislature must pass the language at least once before the language is placed on a ballot for New Jersey voters to approve or reject. N.J. Const. art. IX, ¶ 1. N.J. Const. art. IV, § 3, ¶ 4 originated in the Assembly

reasons the provision was crafted was because it would allow for “more time....more time for meetings, more public input.” Pub. Hearing Before A. Judiciary Comm., A.C.R. 188 9 (Jul. 9, 2020) (statement of Asm. John F. McKeon), <https://www.njleg.state.nj.us/legislativepub/pubhear/aju07092020.pdf>.⁴ The intent of the framers of this constitutional provision, i.e. more time for a public process, favors treating the August data release as the trigger date.

Additionally, when faced with legal ambiguity, the interpretation that best serves public policy should be the one that the state chooses to follow. State v. Tischio, 107 N.J. 504, 519 (1987) (“[C]onsiderations of public policy are highly relevant in confirming the proper understanding to be accorded” law).

There is no question which date best serves public policy. The Commission is drawing new maps which will impact the lives of New Jersey residents for a decade. This process is the very foundation of our democracy. Waiting an additional month would further limit the time the Commission would be able to deliberate, review the official census data, and, crucially, hear from New Jersey residents. Nobody knows New Jersey communities better than the people who live in them, and the more time the Commission has to hear from the people of New Jersey the better both the process and final maps will be.

We ask that you respond to this letter by Monday, August 23, 2021 with a plan of action.

Respectfully,

League of Women Voters of New Jersey
New Jersey Institute for Social Justice

cc: Governor Phil Murphy

as A.C.R.188 in July 2020 before the language was approved the by the voters in November 2020 and added to the Constitution. A.C.R. 188 (2020).

⁴ Pub. Hearing Before A. Judiciary Comm., A.C.R. 188 45 (Jul. 9, 2020) (statement of Asm. Raj Mukherji), <https://www.njleg.state.nj.us/legislativepub/pubhear/aju07092020.pdf> (“We think that more time...creates a more deliberative process, a more transparent process.”).

Exh. A

Henal Patel

From: James Whitehorne (CENSUS/ADDC FED) <James.Whitehorne@census.gov>
Sent: Thursday, August 12, 2021 3:05 PM
To: Henal Patel
Cc: [REDACTED]
Subject: Copy of email and CC list you requested
Attachments: NJ.pdf

Good afternoon Henal -

Below is a copy of the text we sent to all official liaisons at around 1:15pm today. The purpose of this email was to alert them to the availability of the legacy format summary files, support products, and access tools. The CC list for the state is attached.

Best Regards

James

On behalf of the U.S. Census Bureau Acting Director, Dr. Ron Jarmin, I am writing this email to inform you that the 2020 Census State Redistricting Data (Public Law 94-171) Summary Files in the Legacy Format are now available for download on the Census Bureau's File Transfer Protocol (FTP) website. You can access the files directly via the following link: https://www2.census.gov/programs-surveys/decennial/2020/data/01-Redistricting_File--PL_94-171/.

As a reminder, the Census Bureau has produced and released redistricting data in the legacy format for at least the past two decennial census cycles (2000 and 2010). The 2020 Census Legacy Format Summary Files:

- Contain identical data to the files we will deliver in September.
- Have been fully reviewed and subject to the same quality assurance processes.
- Require additional handling and software to properly extract the data of interest.
- Are comprised of four pipe-delimited text files, including a geoheader and three data segment files (featuring the six P.L. 94-171 tables).

We have published support materials, including header record fields and definitions, a Microsoft Access table shell, instructions on how to use the table shells, SAS and R data import scripts, and a video tutorial on how to import and query the data. You can now access the official data, the support materials, and the geographic support products all from the same webpage. To access the data, click on the following link - [Decennial Census P.L. 94-171 Redistricting Data Summary Files](#) and scroll down to the "2020" tab."

We will provide the redistricting data on removable media (DVDs and flash drives) with easier-to-use data extraction tools to the official state recipients and release the data on the Census Data Explorer platform (data.census.gov) by September 30, 2021.

Please direct questions on the redistricting data files to the Census Redistricting and Voting Rights Data Office at 301-763-4039 or rdo@census.gov.

Sincerely,

James Whitehorne

Chief, Census Redistricting and Voting Rights Data Office
<http://www.census.gov/rdo>

cc:

The Honorable Phil Murphy, Governor of New Jersey

The Honorable Sheila Oliver, Lieutenant Governor, Chief State Elections Official

The Honorable Stephen M. Sweeney, President of the Senate

The Honorable M. Teresa Ruiz, Senate President Pro Tem

The Honorable Loretta Weinberg, Senate Majority Leader

The Honorable Thomas H. Kean Jr., Senate Minority Leader

The Honorable Craig J. Coughlin, Speaker of the House

The Honorable Gordon M. Johnson, Speaker Pro Tem

The Honorable Louis D. Greenwald, House Majority Leader

The Honorable Jon M. Bramnick, House Republican Leader

Mr. John J. Farmer Jr., Chair - NJ Redistricting Commission

Mr. Kevin Drennan, Executive Director

Mr. Leonard Preston, Director of Labor Mkt & Demo. Research, Governor's Liaison, State Data Center