



October 16, 2018

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Christopher Piper
Commissioner of Elections
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VIA E-MAIL

Re: Absentee Ballot Access for Incarcerated Eligible Voters

Dear Board of Elections Members and Commissioner Piper:

Campaign Legal Center (“CLC”) writes to inform you that Virginia’s implementation of its absentee ballot laws violates the First and Fourteenth Amendments of the United States Constitution with respect to: (1) first-time voters who have registered by mail but are confined either awaiting trial or for a misdemeanor conviction, and (2) those whose date of arrest prevents them from submitting an absentee ballot request by the statutory deadline.

With respect to the first category of voters, the Board has interpreted Virginia law to preclude incarcerated first-time voters who have registered by mail from voting absentee, even though that interpretation leaves these eligible voters with *no* way to exercise their fundamental right to vote given that their confinement prevents them from voting in-person; we are not aware

of accommodations allowing confined detainees to vote in-person. With respect to the second category of voters, it appears the Board has provided no guidance to general registrars to inform them that eligible voters incarcerated shortly before or after the deadline for submitting an absentee ballot application must be permitted to request an emergency absentee ballot.

We believe that both issues can be remedied consistent with existing Virginia law, and request the opportunity to discuss these issues. If we cannot agree on a speedy remedy, we will consider all appropriate legal action, including potential injunctive relief for the November 2018 election.

I. Eligible Voters Who Are Incarcerated Must Be Permitted to Vote Absentee Regardless of Whether They Are First-Time Voters Who Registered by Mail.

Eligible voters who are incarcerated may not be denied the ability to vote absentee merely because they are first-time voters who registered by mail. The United States Supreme Court has held that denying access to the ballot for qualified electors who are incarcerated violates the Equal Protection Clause. *O'Brien v. Skinner*, 414 U.S. 524 (1974); *Goosby v. Osser*, 409 U.S. 512 (1973). State and local officials may not take actions that prohibit or burden these electors' fundamental right to vote.

Under Virginia law, incarcerated persons awaiting trial or those convicted of only a misdemeanor are eligible to vote absentee. See Va. Code Ann. § 24.2-700(5). But another provision of the Virginia Code requires *in-person* voting for those who register by mail and have not previously voted in their county or city. *Id.* § 24.2-416.1(B). That provision contains several exceptions, however, including for military and overseas voters, voters with disabilities, voters attending college, and those "entitled to vote otherwise than in person under other federal law." *Id.*

It appears that the Board has interpreted this statute to prohibit absentee voting by eligible, incarcerated voters who have registered by mail and have not previously voted in their county or city. The absentee ballot application form distributed by the Board informs those voters—whose "reason codes" are 3A and 3B—that they may not vote through an absentee ballot.¹ The

¹ Va. Dep't of Elections, *Virginia Absentee Ballot Application Form* (2018), <https://www.elections.virginia.gov/Files/Forms/VoterForms/VirginiaAbsenteeBallotApplication.pdf>.

Board’s website,² elections handbook,³ and other publications contain the same instructions. Yet absentee voting is the *only* means of voting available to such voters, whose confinement necessarily prevents them from voting early in-person or at the polls on election day.⁴

We do not believe the Virginia Code compels this unconstitutional interpretation of Section 24.2-416.1(B). The Code excepts from its “in-person” requirement those “entitled to vote otherwise than in person under other federal law.” Va. Code Ann. § 24.2-416.1(B). Under federal constitutional law, eligible incarcerated voters must be permitted to vote, *see, e.g., O’Brien*, 414 U.S. 524, but the only mechanism provided by Virginia law for this population is an absentee ballot. The First and Fourteenth Amendments plainly constitute “other federal law” that *require* Virginia to permit eligible incarcerated voters to vote—and that requirement extends to absentee balloting to the extent the Commonwealth chooses not to make in-person voting available to incarcerated voters.⁵

Section 24.2-416.1(B) therefore requires that first-time voters who have registered by mail, but are confined awaiting trial or for a misdemeanor conviction, be permitted to vote absentee. Even if the statute were ambiguous and its text permitted the Board’s current interpretation, that interpretation plainly violates the First and Fourteenth Amendments because it forecloses the ability to vote for a distinct and insular population of eligible voters. *See Immigration & Naturalization Serv. v. St. Cyr.*, 533 U.S. 289, 299-300 (2001) (“If an otherwise acceptable construction of a statute would raise serious

² See Va. Dep’t of Elections, *Absentee Voting*, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/index.html> (last visited Oct. 12, 2018).

³ See Va. Dep’t of Election, *The Handbook*, ch. 7, p. 17; <https://www.elections.virginia.gov/GREBHandbook/Files/GREB%202018.pdf>.

⁴ The Virginia Code contains a provision permitting incarcerated voters whose trial date is postponed beyond election day to request to be taken to the polls to vote in-person, but that provision appears limited to that scenario and only to those who are confined in the same county or city in which they are registered.

⁵ This is so notwithstanding the provision of the National Voter Registration Act (“NVRA”) authorizing states to require in-person voting for first-time voters who registered by mail. *See* 52 U.S.C. § 20505(c). That provision does not permit states to require in-person voting for a class of voters the state simultaneously restrains from voting in-person. The Commonwealth’s current practice would only be constitutional if it offered in-person voting to eligible, confined voters.

constitutional problems, and where an alternative interpretation of the statute is fairly possible, . . . we are obligated to construe the statute to avoid such problems.” (quotations marks and citation omitted)). The Board should adopt an interpretation of the statute that does not violate the federal Constitution.

We request that the Board promptly correct the absentee ballot application form, website, and other materials to reflect the eligibility of such voters—whose “reason codes” are 3A and 3B—to vote absentee. Likewise, we request that the Board provide guidance to Virginia’s general registrars to alert them to this interpretation and ensure that no eligible, incarcerated voter is denied the right to vote in the November 2018 election merely because s/he is a first-time voter who registered by mail. *See* Va. Code Ann. § 24.2-103(A) (authorizing Board to supervise and coordinate work of registrars to “obtain uniformity in their practices” and “make rules and regulations and issue instructions and provide information . . . to promote the proper administration of election laws”). Finally, we request that the Board conduct outreach to the Department of Corrections, sheriffs’ offices, and the regional and local jails to ensure that systems are in place so eligible incarcerated voters can exercise their right to vote absentee.

II. Eligible Voters Whose Arrest Date Prevents Timely Submission of an Absentee Ballot Application Must Be Permitted to Vote By Emergency Absentee Ballot.

We are likewise concerned that eligible voters whose date of arrest prevents them from submitting a timely absentee ballot application may be disenfranchised if the Board does not provide general registrars with guidance that such voters should be permitted to vote by emergency absentee ballot. Under Virginia law, absentee ballot applications submitted electronically, by mail, or by fax must be received by registrars by 5:00 p.m. on the Tuesday prior to the election. Va. Code Ann. § 24.2-701(B)(2). But those who are arrested after that deadline (or, as a practical matter, several days prior to that deadline), will not be able to request an absentee ballot *or* vote in-person, due to their confinement. Virginia law permits emergency applications for absentee ballots up to 2:00 p.m. on the Monday before the next election day for those who are incapacitated or hospitalized. In particular, the emergency provision applies to those who are “hospitalized, ill and confined to [their] residence, bereaved by the death of a spouse, child, or parent, or otherwise incapacitated by an emergency which is found by the general registrar to justify providing an emergency ballot application.” *Id.* § 24.2-705.

It appears that the Board has not provided guidance to the registrars regarding the types of scenarios covered by the general catchall clause of the statute. Confinement in jail shortly before and after the regular absentee ballot

deadline has passed plainly constitutes an emergency justifying an emergency ballot application. Indeed, it appears to be the only mechanism under Virginia law that would physically permit affected persons to vote. We request that the Board promptly exercise its authority under Section 24.2-103 to provide guidance and instructions to registrars that emergency absentee ballot applications should be approved for voters who have been arrested shortly before and after the regular absentee ballot application deadline. Likewise, we request that the Board work with the registrars, the Department of Corrections, sheriffs' offices, and regional and local jails to facilitate access to these voters' "designated representatives," Va. Code Ann. § 24.2-705, to effectuate their rights to cast an emergency absentee ballot.

* * *

As indicated, we believe that existing Virginia law should not and does not provide any impediment to eligible, incarcerated voters exercising their right to vote, and that there is no basis to disenfranchise such voters merely because they are first-time voters who registered by mail, or because they were arrested shortly before or after the regular absentee ballot deadline. We are hopeful that we can work together to remedy these issues promptly to avoid potential legal action. Please contact us as soon as possible to discuss a resolution.

Respectfully submitted,



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