



June 16, 2021

Justin Levitt
Senior Policy Advisor to the President for Democracy and Voting Rights
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Kristen Clarke
Assistant Attorney General for the Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Mr. Levitt and Assistant Attorney General Clarke:

On March 7, 2021, President Biden issued an Executive Order on promoting access to the right to vote, directing federal agencies, by September 23, 2021, to assist in expanding citizens' opportunities to register to vote and to obtain information about, and participate in, the electoral process. Exec. Order No.14019, 86 Fed. Reg. 13623 (Mar. 7, 2021). As we reach the halfway point toward that deadline, the Campaign Legal Center (CLC) writes to offer suggestions regarding implementation of the directives in the Order.

CLC is a nonpartisan, nonprofit organization that works to advance democracy through law at the federal, state, and local levels, fighting for every American's right to responsive government and a fair opportunity to participate in and affect the democratic process. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive and accountable government. Through its long involvement in litigation and policy debates regarding voting rights, CLC has developed substantial expertise in the issues addressed by President Biden's Executive Order.

Specifically, the Executive Order instructs the head of each agency to provide the Assistant to the President for Domestic Policy a strategic plan outlining how the agency can promote voter registration and participation. In the attached letters to the Bureau of Prisons, Department of Education, General Services Administration,

Executive Office of the U.S. Attorneys, Department of Housing and Urban Development, and U.S. Marshals, CLC identifies ways those agencies can promote access to voting. Additionally, in this letter, CLC offers a recommendation applicable to multiple agencies across the government.

AGENCY LETTERS

Department of Education

CLC's letter offers recommendations to the Department of Education for engaging with educational institutions and their students to help students register to vote, request a ballot, and vote. For example, the Department could develop guidance consistent with state and federal laws outlining the authority of educational institutions to provide voter registration, vote by mail, and in-person voting information. The Department also could provide voter registration materials to educational institutions, as well as resources for registration drives and information on the acceptability of student IDs as identification for voting in particular states. The Department can encourage schools to make Election Day a holiday. And it can offer resources that the institution can use to inspire students to volunteer as poll workers.

Election Assistance Commission/General Services Administration

Executive Order 14019 directs the General Services Administration, in coordination with the Election Assistance Commission (EAC), to modernize Vote.gov. CLC recommends that the modernized website include an easy-to-use, accurate, and authoritative source on disenfranchisement and rights restoration for individuals previously convicted of felonies, on the model of RestoreYourVote.org. Specifically, the site should have a tool that answers questions of those individuals regarding the details of their convictions and that provides instructions on how to vote based on the voting laws of their state of residence. In addition, a revamped Vote.gov should verify the information that the EAC is required to collect from every state on voter registration requirements and turn it into a user-friendly interface. Vote.gov can provide an authoritative breakdown of each states' laws that will be a key resource for people with felony convictions seeking to determine their eligibility to vote. Finally, Vote.gov should be accessible to persons with disabilities.

Department of Housing and Urban Development

The Department of Housing and Urban Development (HUD) is uniquely positioned to disseminate resources and provide support to low-income and unhoused voters who may otherwise lack the resources and information necessary to register and vote. HUD should encourage state and local public housing authorities to make available voter registration forms and vote-by-mail ballot applications in their offices and facilities where available and consistent with State law. Because of HUD's connections to low-income individuals, persons of color, and the homeless or underhoused, who are frequently underrepresented among registered voters, the Department can facilitate voter registration drives and get-out-the-vote efforts conducted in partnership with state and local election officials, civic organizations,

religious groups, and other nonpartisan, nonprofit organizations that seek to encourage and increase voter participation. HUD also can ensure that voters without permanent addresses not only are able to register to vote as an initial matter, but also are able to remain on the rolls notwithstanding voter purges. And HUD can make sure that homeless shelters facilitate the use of their addresses to distribute election materials.

Executive Office of U.S. Attorneys

CLC encourages the U.S. Attorneys to consider a uniform policy across U.S. Attorneys' offices of ensuring that individuals who are prosecuted under federal law receive, at the time of plea negotiation, both written and oral explanations of the impact of any such pleas on their right to vote. Although this suggestion departs from the traditional role of U.S. Attorneys in the adversarial process and goes beyond their constitutional obligations, such a policy would go a long way to combatting the widespread and often erroneous belief that a felony conviction means a person can never vote again.

Bureau of Prisons

In its letter to the Bureau of Prisons, CLC recommends five reforms that the Bureau could undertake to become a national leader in fighting incarceration-based disenfranchisement and show that facilitating elections in prisons can and should be a routine part of corrections management. These reforms include developing and publishing policies and procedures to govern voter registration and voting across the agency at-large and for each prison; promulgating a routine usage exception to allow for collaboration between BOP and state and local governments to facilitate voter registration and voting in federal correctional facilities; regularly collecting and publishing voter registration and participation data; designating officials responsible for civic engagement and enhancing its infrastructure to improve transparency and accountability; and maintaining centralized resources and best practice guidelines both to facilitate voter registration and voting in BOP and to serve as a resource for state and local prisons and jails seeking to affect similar reforms.

U.S. Marshals

EO 14019 requires that the Attorney General create policies and procedures to ensure the Marshals Service "includes language in intergovernmental agreements and jail contracts to require the jails to provide educational materials related to voter registration and voting, and to facilitate voting by mail, to the extent practicable and appropriate." *Id.* (9)(b). To fulfill this mandate, CLC urges the Marshals Service in its new contracts to require that jails create voting policies and procedures addressing (a) voter education, (b) voter registration, (c) absentee voting, (d) Election Day voting and voting for late-jailed detainees, (e) collaboration with local officials and groups, and (f) accountability. Further, CLC recommends that the Marshals Service create and disseminate guidance and best practices to assist jails in facilitating voting and elections for incarcerated voters. And CLC urges the Marshals Service to collaborate with partners and advocates to drive innovation and further efforts to support the enfranchisement of incarcerated eligible voters.

GOVERNMENT-WIDE MEASURES TO PROMOTE ACCESS TO VOTING

President Biden's Executive Order requires the Director of the Office of Personnel Management to work with executive agencies to expand the Federal Government's policy of granting employees time off to vote and to support Federal employees who wish to volunteer as non-partisan poll workers or observers. With a modest policy change, the Federal Government can dramatically extend the reach of these policies encouraging voter participation.

The Federal Government spends around \$500 billion annually on federal contractors, and the top contractors have millions of employees. The President should issue an executive order requiring new contracts with the Federal Government to give employees paid time off to vote and to support employees who wish to volunteer as poll workers or observers. The President has authority to issue such an order. On April 27, 2021, he promulgated Executive Order 14026, putting in motion the requirement that certain federal contractors raise their minimum wage to \$15. By issuing a similar order related to time off for voting, the President could make it easier for millions of workers to cast their ballots or to assist others in doing so.

* * *

President Biden's Executive Order recognizes that, "The right to vote is the foundation of American democracy." The Order mobilizes the Federal Government to protect and extend that right. The Attorney General has committed the Department of Justice to protecting voting rights. The suggestions here and in the attached letters can help federal agencies implement the Order and secure this most fundamental right for millions of Americans.

If you have any questions or if CLC can be of any assistance, please contact Rob Weiner at rweiner@campaignlegalcenter.org.

Sincerely,

A handwritten signature in dark ink, appearing to read "Trevor Potter", with a long, sweeping horizontal line extending from the end of the signature.

Trevor Potter
President, Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20005

Cc: Ron Klain
Chief of Staff, White House

The Honorable Susan Rice
Director, United States Domestic Policy Council, White House
Pamela Karlan
Deputy Assistant Attorney General, U.S. Department of Justice, Civil Rights
Division



June 16, 2021

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Mr. Secretary:

On March 7, 2021, President Biden issued Executive Order on Promoting Access to Voting, Exec. Order No.14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021), directing federal agencies, by September 23, 2021, to submit plans for promoting and facilitating the right to vote.¹ As we reach the halfway point toward the deadline in the Executive Order, the Campaign Legal Center (“CLC”) writes to provide suggestions and expertise to assist you in fulfilling the mandate in the Order. The Department of Education is uniquely positioned to disseminate resources to some of our youngest voters—students attending secondary and postsecondary institutions.

According to estimates, young people aged 18-29 voted in record numbers in the 2020 election, at a turnout rate of 55 percent.² However, this age group—largely comprised of the high school and college students under your Department’s purview—consistently face access barriers to the polls, which has historically made them among the groups with the lowest turnout in the country. Furthermore, this year marks the fiftieth anniversary of the ratification of the Twenty-Sixth Amendment of the Constitution, which granted the right to vote to citizens over 18 years old.

Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization that works to advance democracy through law at the federal, state, and local levels, fighting for every American’s rights to responsive government and a fair opportunity to participate in and affect the democratic process. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative,

¹ Executive Order on Promoting Access to Voting, Sec. 3(a).

² CTR FOR INFO. AND RSCH. ON CIVIC LEARNING AND ENGAGEMENT, *Youth Voter Turnout Increased in 2020* (Nov. 25, 2020), <https://circle.tufts.edu/latest-research/election-week-2020#youth-voter-turnout-increased-in-2020>.

responsive and accountable government. Consistent with that mission and the Executive Order, we respectfully recommend several ways that the Department of Education can promote access to voting for students in secondary education and in institutes of higher learning.

Recommendations for Engaging with the Public on How to Register to Vote, Request a Ballot, and Cast a Ballot

The Executive Order calls for agencies, by September 23, 2021, to identify “ways to provide relevant information in the course of activities or services that directly engage with the public about how to register to vote, how to request a vote-by-mail ballot, and how to cast a ballot in upcoming elections.”³ To facilitate the Department’s response, the Campaign Legal Center offers the following recommendations:

1. *Encourage high schools and federally funded institutions of higher learning to provide voter registration, vote by mail, and other voter education resources.* The Department of Education frequently publishes guidance for secondary and postsecondary institutions. The Department should develop guidance consistent with state and federal law outlining the authority of educational institutions to provide voter registration, vote by mail, and in-person voting information. Many nonprofit organizations that focus on voting rights on college campuses already provide this guidance.⁴ The Department of Education can rely on these organizations as resources and disseminate educational materials to institutions to promote voter registration and voting.
2. *Provide voter registration materials on campus at colleges, universities, and community colleges.* The Department of Education can provide schools the materials necessary for students to register to vote. The federal form, provided by the Elections Assistance Commission, conforms to the National Voter Registration Act and can be used to register to vote in all states that require voter registration.⁵ Furthermore, the Department of Education could provide information to college students studying abroad about their rights to vote while overseas pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301, *et seq.* This information is available through the Federal Voter Assistance Program.⁶

³ *Id.* at 3(a)(i). The executive order requires federal agencies to present a plan to implement the policies within 200 days of the March 7 order, which places the deadline at September 23, 2021. *See id.* at 3(a)(v)(b).

⁴ *See, e.g.,* Students Learn Students Vote Coalition, *Our Partners*, <https://slsvcoalition.org/partners/> (listing a coalition of nonpartisan, nonprofit organizations that focus on student voting rights on college campuses).

⁵ *See* ELECTION ASSISTANCE COMM’N, National Voter Registration Form (last visited May 6, 2021), <https://www.eac.gov/voters/national-mail-voter-registration-form>.

⁶ *See* FED. VOTER ASSISTANCE PROGRAM, The Uniformed and Overseas Citizens Absentee Voting Act Overview (last visited May 6, 2021), <https://www.fvap.gov/info/laws/uocava>.

3. *Provide resources to colleges and universities to facilitate vote by mail and absentee voting.* Students who are attending college or university away from their primary residence can vote by mail in the state of their primary residence. Many students, however, are unaware of their right to vote by mail as students.⁷ The Department of Education should provide guidance—such as literature or posters—to institutions of higher learning about the right of students to vote absentee in the state of their primary residence.

Recommendations for Providing Access to Voter Registration and Vote-By-Mail Applications

The Executive Order calls for agencies to provide information relevant to “ways to provide access to voter registration services and vote-by-mail ballot applications in the course of activities or services that directly engage with the public.”⁸ The following guidance recommendations could fulfill this mandate under the Executive Order:

1. *In states that allow pre-registration of 16- and 17-year-olds, provide the federal voter registration form as well as resources and recommendations for pre-registration drives in the state.* Twenty-four states allow minors aged 16 or 17 to pre-register to vote so that they are already registered by the time they turn 18.⁹ The federal form provided by the Elections Assistance Commission lists the instructions for every state which allows minors to pre-register to vote. The Department of Education should leverage this resource to provide guidance to secondary education institutions about minors’ rights to pre-register in the states where this option is available. The Department of Education could also provide instruction on best practices for hosting voter registration drives at these institutions.¹⁰
2. *Provide guidance to schools in states where student ID can be used as voter ID.* In most states, students enrolled in colleges and universities are allowed to use their college student identification as voter identification when registering to vote and voting in person. The ability to use student identification as voter identification has been shown to facilitate voting by college students in the

⁷ See, e.g., CTR FOR INFO. AND RSCH. ON CIVIC LEARNING AND ENGAGEMENT, *Youth Who Learned about Voting in High School More Likely to Become Informed and Engaged Voters* (Aug. 31, 2020), <https://circle.tufts.edu/latest-research/youth-who-learned-about-voting-high-school-more-likely-become-informed-and-engaged> (discussing young people’s knowledge about voting and interest in civic engagement).

⁸ *Id.* at 3(a)(ii).

⁹ See NAT’L CONFERENCE OF STATE LEGISLATURES, *Pre-Registration for Young Voters* (Feb. 12, 2019), <https://www.ncsl.org/research/elections-and-campaigns/preregistration-for-young-voters.aspx>

¹⁰ Nonpartisan resources like National Voter Registration Day provide free information about hosting voter registration drives on campus. See National Voter Registration Day, <https://nationalvoterregistrationday.org/>.

states where this is allowed.¹¹ The Department of Education should provide guidance to institutions of higher learning about their students' rights to vote using their student ID in the states where this is permitted. In certain states, a student ID may be accepted as voter identification provided that the student ID meets certain specifications. The Department should provide guidance to institutions of higher learning about how to ensure that their students' school-provided IDs meet the requirements of voter identification in their states.

Other Recommendations

The Biden Administration promulgated the Executive Order on the anniversary of Bloody Sunday, a somber day which reminds the American people of importance of the right to vote. In the spirit of the Executive Order, we also make the following recommendations:

1. *Provide resources to encourage students attending institutions of higher learning to volunteer as poll workers.* In general, poll workers tend to be aged 61 and above.¹² In the 2020 election, many states suffered from a poll worker shortage, because the typical poll workers, who are often elderly people, could not serve for fear of contracting COVID-19.¹³ In states like Georgia, college students rose to the occasion by recruiting fellow students as poll workers.¹⁴ Additionally, there was a national movement to recruit young people as poll workers on Election Day to mitigate the shortage.¹⁵ While the Executive Order does not discuss poll worker recruitment, it falls squarely in line with the Executive Order's goals of improving access to the vote. As such, the Department of Education should recommend to post-secondary institutions that they encourage students to volunteer as poll workers.
2. *Support efforts by students at institutions of higher learning to make Election Day a holiday on campuses.* Many students cite the timing of Election Day and

¹¹ See CTR FOR INFO. AND RSCH. ON CIVIC LEARNING AND ENGAGEMENT, *Growing Voters: Engaging Youth Before they Reach Voting Age to Strengthen Democracy* (Aug. 14, 2019), <https://circle.tufts.edu/latest-research/growing-voters-engaging-youth-they-reach-voting-age-strengthen-democracy> (showing a negative correlation between strict voter ID laws and youth voter turnout).

¹² Michael Barthel and Galen Stocking, *Older People Account for Large Shares of Poll Workers and Voters in U.S. General Elections*, PEW (Apr. 6, 2020), <https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/>.

¹³ *Id.*

¹⁴ See *The Georgia Youth Poll Workers Project Is Recruiting Election Day Workers*, WSB-TV (Aug. 18, 2020), <https://www.wsbtv.com/news/local/atlanta/georgia-youth-poll-workers-project-is-recruiting-election-day-workers/BGAO3CU36NA5XHDXDIZ5RY2UM/>; see also Georgia Youth Poll Workers Project, <https://www.thegeorgiayouthpollworkerproject.org/>.

¹⁵ See Maxine Wally, *The Organizations Recruiting 700,000+ Poll Workers on Instagram*, W MAG. (Oct. 27, 2020), <https://www.wmagazine.com/story/power-the-polls-young-poll-workers-project-instagram-interview>.

the location of the polls as reasons why they did not vote.¹⁶ To deal with this problem, many students have sought to make Election Day a holiday on their college campuses, so that students are not forced to choose between exercising their right to vote and attending classes.¹⁷ In the spirit of the Executive Order, the Department of Education should issue a formal statement urging post-secondary institutions to make Election Day a holiday for students, faculty and staff. This statement would send a strong message to colleges and universities that they should prioritize the civic education of not only their students, but all members of their academic communities.

In conclusion, the Department of Education can implement this Executive Order and reach voters who face some of the strictest barriers to the polls—particularly young people of color.¹⁸ The recommendations here would implement the Executive Order and serve the Department’s mission to “to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.”¹⁹

We urge you to consider our recommendations for implementation of the Executive Order on Promoting Access to Voting. If you have any questions, you may contact Valencia Richardson at vrichardson@campaignlegalcenter.org.

Sincerely,

Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20002

Cc: Suzanne Goldberg
Acting Assistant Secretary for Civil Rights, U.S. Department of Education
Office for Civil Rights
Kristen Clarke
Assistant Attorney General, U.S. Department of Justice Civil Rights Division
Justin Levitt
Domestic Policy Council

¹⁶ See Alexandria Symonds, *Why Don’t Young People Vote, and What Can Be Done About It?*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/upshot/youth-voting-2020-election.html>; *infra*, note 17.

¹⁷ See Greta Anderson, *Students Push for Canceled Classes on Election Day*, INSIDE HIGHER ED. (Oct. 22, 2020), <https://www.insidehighered.com/news/2020/10/22/movement-no-class-election-day-gains-steam>.

¹⁸ See, e.g., Alex Ura, *Texas’ Oldest Black University Was Built on a Former Plantation. Its Students Still Fight a Legacy of Voter Suppression*, TEXAS TRIBUNE (Feb 25, 2021), <https://www.texastribune.org/2021/02/25/waller-county-texas-voter-suppression/>.

¹⁹ DEPT. OF EDUCATION, *Overview and Mission Statement*, available at <https://www2.ed.gov/about/landing.jhtml#:~:text=ED's%20mission%20is%20to%20promote,excellence%20and%20ensuring%20equal%20access>.



June 16, 2021

General Services Administration
Katy Kale, Acting Administrator
1800 F. St. NW
Washington, DC 20006

U.S. Election Assistance Commission
Chair Donald L. Palmer
633 3rd Street NW, Suite 200
Washington, DC 20001

Dear Acting Administrator Kale and Chair Palmer:

On March 7, 2021, President Biden issued Executive Order 14019 on Promoting Access to Voting, directing the General Services Administration (“GSA”), by September 23, 2021, to submit a strategic plan as to how it would modernize and improve the user experience on Vote.gov.¹ The Campaign Legal Center (“CLC”) writes to encourage you, in fulfilling that mandate, to include a tool to help people with past felony convictions exercise their right to vote.

¹ Exec. Order No. 14019, 86 C.F.R. 13623, 13624 (May 7, 2021) (“Sec. 5. Modernizing Vote.gov.”). The General Services Administration (GSA) shall take steps to modernize and improve the user experience of Vote.gov. In determining how to do so, GSA shall coordinate with the Election Assistance Commission and other agencies as appropriate, and seek the input of affected stakeholders, including election administrators, civil rights and disability rights advocates, Tribal Nations, and nonprofit groups that study best practices for using technology to promote civic engagement.

(a) GSA’s efforts to modernize and improve Vote.gov shall include:

- (i) ensuring that Vote.gov complies, at minimum, with sections 504 and 508 of the Rehabilitation Act of 1973;
- (ii) ensuring that Vote.gov is translated into languages spoken by any of the language groups covered under section 203 of the Voting Rights Act anywhere in the United States; and
- (iii) implementing relevant provisions of the 21st Century Integrated Digital Experience Act (Public Law 115-336).

(b) Within 200 days of the date of this order, GSA shall submit to the Assistant to the President for Domestic Policy a strategic plan outlining the steps to modernize and improve the user experience of Vote.gov.”)

CLC is a nonpartisan, nonprofit organization working to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis and public education. Our Restore Your Vote Campaign helps restore voting rights to people with past convictions by providing direct rights restoration services, empowering community leaders to understand rights restoration laws, and breaking down the false notion that a felony conviction always means you cannot vote. Since 2017, more than 230,000 people have used our online rights restoration webtools at RestoreYourVote.org and RecupereSuVoto.org. We have directly provided voting rights restoration information to over 12,000 people one-on-one. Through this work, we have gained expertise in the use of technology to promote civic engagement.

Likely more than 24 million Americans have been convicted of felonies,² resulting in almost every state in at least the temporary suspension of voting rights.³ Across the country, the disproportionate impact of these felony disenfranchisement laws on Black, Indigenous, and People of Color is overwhelming.⁴ But the vast majority of those individuals have already met their state's requirements for restoration of voting rights and could be voting if they were aware of the rules. In fact, only around five million of those more than twenty-four million are actually disenfranchised under law.⁵ Confusion around voting rights after a felony conviction is rampant, compounded by the patchwork of varying laws across the states, misinformation, and lack of access to authoritative legal information and services. As a result, especially in states with complex disenfranchisement and re-enfranchisement laws, many people with past convictions wrongly believe they cannot vote even when they are eligible. Stories of rare instances where people have been prosecuted for unknowingly voting while ineligible exacerbate this misconception and intimidate eligible voters. This is *de facto* disenfranchisement, and it suppresses the votes of millions of Americans. It is feasible to break this cycle and significantly increase participation in elections.

Executive Order 14019 directs the GSA, in coordination with the EAC, to modernize Vote.gov. According to the 21st Century Integrated Digital Experience Act, “modernizing” a public-facing government website means ensuring that it is accessible, consistent, authoritative, searchable, secure, user-centered, customization, and mobile-friendly. 44 U.S.C. 3501 § 3 (2018). If the modernized Vote.Gov includes an easy-to-use, accurate, and authoritative source on disenfranchisement and rights restoration, following the model of RestoreYourVote.org, it will be well on the way to

² Nicholas Eberstadt, “America’s Invisible Felon Population: A Blind Spot in US National Statistics,” American Enterprise Institute at 4 (May 22, 2019) available at <https://www.iec.senate.gov/public/cache/files/b23fea23-8e98-4bcd-aeed-edcc061a4bc0/testimony-eberstadt-final.pdf>

³ Only Maine, Vermont, the District of Columbia, and Puerto Rico do not at least temporarily suspend voting rights when a person is convicted of a felony and sentenced to incarceration.

⁴ Chris Uggen, et al., “Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction,” The Sentencing Project at 11 (Oct. 30, 2020) available at <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>

⁵ *Id.* at 16.

meeting those standards, fulfilling the mandate of the Executive Order, and extending the franchise to potentially millions of eligible voters.

User-centered, searchable, and customizable: Combatting misinformation and de facto disenfranchisement requires individualized information that is specific to the person seeking to understand their voting rights. This can be accomplished at scale by building a tool that allows individuals to find answers to their questions about the details of their convictions and receive instructions based on the voting laws of their state of residence. At RestoreYourVote.org, we begin with the question of where the individual resides, then have built out a logic tree of questions based on the law of that state. When the individual reaches the end of the questions, if they are eligible to vote, the tool directs them to a website to register to vote online. If they are not yet eligible, the site provides an explanation of what they must do to become eligible in their state. For people who have more complicated cases, or are unsure of the answers to certain questions, we provide a hotline and email address to request individual, one-on-one assistance. Vote.gov should also provide all of these features.

Authoritative: The EAC is already required to collect information from every state on their voter registration eligibility requirements.⁶ A revamped Vote.gov should take that information, verify it, and turn it into a user-friendly interface. It can provide an authoritative break down of each states' laws that will give people with felony convictions the confidence they need to overcome misconceptions around their eligibility so that they can register to vote.

Currently, the EAC aggregates state-by-state eligibility information on the National Voter Registration Form.⁷ It is the duty of the individual Secretaries of State to provide the language and to update the EAC when the laws change.⁸ However, over the last several years, CLC has alerted the EAC to inaccuracies in the felony disenfranchisement language provided by several states.⁹ Felony disenfranchisement laws have changed frequently in recent years; more than half of states have reformed their disenfranchisement and rights restoration laws in the last 25 years.¹⁰ To ensure the authority of the National Voter Registration form and revamped Vote.gov, the EAC must take the initiative to verify the information being sent by the states and stay apprised of changes in state laws.

⁶ Under the NVRA, the Federal Form must accurately “specif[y] each eligibility requirement” for applicants. 52 U.S.C § 20508(b)(2)(A). This requirement governs the Federal Form as well as any state-issued mail-in voter registration form used to register voters for federal elections. 52 U.S.C. § 20505(a)(2).

⁷ *Id.*

⁸ To ensure the Federal Form’s accuracy, a state’s chief election official must notify the EAC of any changes in the state’s voter eligibility requirements within 30 days. 11 C.F.R. § 9428.6.

⁹ See e.g., “CLC Letter to EAC Regarding NVRA Non-Compliance” (Aug. 24, 2018) <https://campaignlegal.org/document/clc-letter-eac-regarding-nvra-non-compliance-nevada-tennessee-and-arizona>; see also, <https://campaignlegal.org/cases-actions/advocating-state-voter-registration-forms-comply-nvra> (cataloguing letters to states regarding inaccurate statements of eligibility requirements on the federal registration form).

¹⁰ Uggen, et al., at 4.

Accessible: Plainly, Vote.gov should add accessible features for users with disabilities. But accessibility in this context also means using plain, understandable language to describe laws. The eligibility requirements as sent by the states not only need to be verified, but also need to be translated from verbose Legalese to simple English (and the many other common languages.)

CLC has had gained valuable insight on using technology to fight de facto disenfranchisement from building and running RestoreYourVote.org. We would be very glad for the opportunity to provide input as you work to modernize Vote.gov.

Please contact Blair Bowie if we can provide any assistance in this important endeavor by email at bbowie@campaignlegal.org or by phone at 202-736-2201. Thank you for your time and consideration of this matter.

Sincerely,

Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20002

Cc: Robin Carnahan
Administrator-Designate, General Services Administration
Thomas Hicks
Vice Chair, U.S. Election Assistance Commission
Christy McCormick
Commissioner, U.S. Election Assistance Commission
Benjamin W. Hovland
Commissioner, U.S. Election Assistance Commission
Kristen Clarke
Assistant Attorney General, U.S. Department of Justice, Civil Rights Division
Justin Levitt
Domestic Policy Council



June 16, 2021

The Honorable Marcia L. Fudge
Secretary of Housing and Urban Development
U.S. Department of Housing and Urban Development
451 7th Street S.W.,
Washington, D.C. 20410

Dear Madam Secretary:

On March 7, 2021, President Biden issued Executive Order on Promoting Access to Voting, Exec. Order No.14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021), directing federal agencies, by September 23, 2021, to submit plans for promoting and facilitating the right to vote. As we reach the halfway point toward the deadline in the Executive Order, the Campaign Legal Center (“CLC”) writes to provide suggestions and expertise to assist you in fulfilling the mandate in the Order. The Department of Housing and Urban Development (HUD) is uniquely positioned to disseminate resources and provide support to low-income and unhoused voters who may otherwise lack the resources and information necessary to register and vote.

CLC is a nonpartisan, nonprofit organization that works to advance democracy through law at the federal, state, and local levels, fighting for every American’s right to responsive government and a fair opportunity to participate in and affect the democratic process. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive and accountable government. Consistent with that mission and the Executive Order, we respectfully recommend several ways that HUD can promote access to voting for the communities it serves.

Recommendations for Expanding Access to Voter Registration and Election Information

Section 3 of the Executive Order directs federal agencies, including HUD, to “consider ways to expand citizens’ opportunities to register to vote and to obtain information about, and participate in, the electoral process.”¹

In particular, the Order directs agencies to consider:

ways to provide access to voter registration services and vote-by-mail ballot applications in the course of activities or services that directly engage with the public, including:

(A) distributing voter registration and vote-by-mail ballot application forms, and providing access to applicable State online systems for individuals who can take advantage of those systems;

(B) assisting applicants in completing voter registration and vote-by-mail ballot application forms in a manner consistent with all relevant State laws; and

(C) soliciting and facilitating approved, nonpartisan third-party organizations and State officials to provide voter registration services on agency premises;²

HUD should encourage state and local public housing authorities (PHAs) with which it works to make available voter registration forms and vote-by-mail ballot application forms in their offices and facilities where available and consistent with State law. At a minimum, HUD and PHAs should endeavor to make available the federal voter registration form promulgated by the Election Assistance Commission,³ which is acceptable in all 50 States and the District of Columbia. HUD and PHAs should also work with state and local election officials to disseminate state-specific resources on voter registration, vote-by-mail, and in-person voting to their constituents across the country.

As an agency focused on fairness and non-discrimination in housing, HUD serves segments of the American population who are traditionally not covered by traditional voter outreach efforts, including those who may be low-income, persons of color, or homeless or underhoused. Because of its connections to these communities, HUD is especially well-positioned to facilitate voter registration drives and get-out-the-vote efforts conducted in partnership with state and local election officials, civic organizations, religious groups, and other nonpartisan, nonprofit organizations that seek to encourage and increase voter participation. CLC encourages HUD to engage with such organizations to ensure that the constituencies it serves have meaningful access to the ballot.

HUD’s work gathering data on unhoused Americans can also be critical for ensuring that voters without permanent addresses are not only able to register to vote as an

¹ Executive Order on Promoting Access to Voting, Exec. Order No. 14, 019, 86 Fed. Reg. 13623 (Mar. 7, 2021), Sec. 3.

² *Id.* at Sec. 3(iii).

³ National Voter Registration Application for U.S. Citizens, Election Assistance Commission, *available at*

https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf.

initial matter, but also able to remain on the rolls notwithstanding voter purges. Uniform data collection by PHAs and HUD-affiliated entities that engage in a point-in-time count of unhoused or homeless individuals can help local election officials seeking to determine whether voters no longer reside in their jurisdictions. We also strongly encourage HUD to engage with homeless shelters to ensure that, consistent with applicable state laws, they are facilitating the use of their addresses for voter registration and vote-by-mail requests by unhoused voters, whether they are currently residing in the shelter or not.

The Executive Order also tasks federal agencies to consider:

- (v) whether, consistent with applicable law, any identity documents issued by the agency to members of the public can be issued in a form that satisfies State voter identification laws.⁴

Although HUD and the PHAs with which it works do not typically issue photo identification, housing agencies are uniquely positioned to provide voters who reside in federally-administered housing with easy access to proof of residence documents that are sometimes required for voter registration (or, depending on state law, may be otherwise accepted in lieu of photo ID). HUD should ensure that proof-of-residence documents are easily accessible to residents of federally-administered housing and that they are produced in a form that complies with state requirements.

Recommendations on Increasing Opportunities for Employees to Vote

Section 6 of the Executive Order directs federal government agencies to “serve[] as model employer[s] by encouraging and facilitating Federal employees’ civic participation.” In particular, the Executive Order encourages federal agencies to develop “strategies to expand the Federal Government’s policy of granting employees time off to vote in . . . elections” and “strategies to better support Federal employees who wish to volunteer to serve as non-partisan poll workers or non-partisan observers, particularly during early or extended voting periods.”⁵

As an agency with a significant staff presence not only in Washington, D.C., but also in eight regional offices and numerous local offices across the United States, volunteer HUD employees can provide critical support to elections administrators who may lack a sufficient number of well-trained volunteers to work the polls, particularly during early voting periods. Regional and local HUD offices should engage early with state and local election offices in their jurisdictions to coordinate efforts.

Recommendations on Ensuring Equal Access for Voters with Disabilities

Finally, Section 7 of the Executive Order instructs federal agencies to “analyze barriers to private and independent voting for people with disabilities, including

⁴ Executive Order on Promoting Access to Voting, Exec. Order No. 14, 019, 86 Fed. Reg. 13623 (Mar. 7, 2021), Sec. 3(v).

⁵ *Id.* at Sec. 6(a)-(b).

access to voter registration, voting technology, voting by mail, polling locations, and poll worker training.”⁶ For many voters with disabilities, access to voting relies on in-person delivery and collection of ballots by election officials or other authorized family members or volunteers. HUD and the PHAs with which it works should ensure that election officials and other persons authorized to deliver and/or collect ballots are able to access federally-administered buildings so that voters with disabilities can utilize existing accessibility measures provided under state law.

In conclusion, the Department of Housing and Urban Development has a unique opportunity to achieve the goals of the Executive Order by reaching voters traditionally excluded from voter registration and ballot access efforts, particularly low-income voters, voters of color, and un- or underhoused voters. These recommendations would satisfy the Executive Order’s goals and be consistent with HUD’s mission to “create strong, sustainable, inclusive communities[.]”⁷

Campaign Legal Center stands ready to assist HUD with implementing the Executive Order, and we urge you to consider our recommendations. If you have any questions, you may contact Jonathan Diaz at jdiaz@campaignlegalcenter.org.

Sincerely,

Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20005

Cc: Kristen Clarke
Assistant Attorney General, U.S. Department of Justice, Civil Rights Division
Justin Levitt
Domestic Policy Council
Damon Smith
Principal Deputy General Counsel, U.S. Department of Housing and Urban Development

⁶ *Id.* at Sec. 7.

⁷ “Mission,” U.S. Department of Housing and Urban Development, hud.gov/about/mission.



June 16, 2021

Monty Wilkinson, Executive Director
Executive Office of United States Attorneys
United States Department of Justice
950 Pennsylvania Avenue, NW, Room 2242
Washington, DC 20530-0001

Dear Director Wilkinson:

On March 7, 2021, President Biden issued an Executive Order on promoting access to the right to vote, directing federal agencies, by September 23, 2021, to assist in expanding citizens' opportunities to register to vote and to obtain information about, and participate in, the electoral process. Exec. Order No.14019, 86 Fed. Reg. 13623 (Mar. 7, 2021).¹ As we reach the halfway point toward that deadline, the Campaign Legal Center (CLC) writes to offer suggestions and expertise on how to fulfill the order's mandate.

Specifically, we encourage you to consider a uniform policy across the U.S. Attorneys' offices of ensuring that individuals who are prosecuted under federal law receive at the time of plea negotiation both written and oral explanations of the impact of any such pleas on their right to vote. This explanation could include not just a specific instruction on whether their guilty plea will cause the loss of the right to vote under their state's laws, but also clarification of how and when they will be able to regain

¹ Exec. Order No. 14019, 86 C.F.R. 13623, 13624 (May 7, 2021) ("Sec. 3. Expanding Access to Voter Registration and Election Information. Agencies shall consider ways to expand citizens' opportunities to register to vote and to obtain information about, and participate in, the electoral process. (a) The head of each agency shall evaluate ways in which the agency can, as appropriate and consistent with applicable law, promote voter registration and voter participation. This effort shall include consideration of: (i) ways to provide relevant information in the course of activities or services that directly engage with the public — including through agency materials, websites, online forms, social media platforms, and other points of public access — about how to register to vote, how to request a vote-by-mail ballot, and how to cast a ballot in upcoming elections;... (b) Within 200 days of the date of this order, the head of each agency shall submit to the Assistant to the President for Domestic Policy a strategic plan outlining the ways identified under this review that the agency can promote voter registration and voter participation.")

that right. Additionally, each U.S. Attorney's office could designate a contact to assist individuals who received convictions after prosecutions by their office who are attempting to understand how they can regain their voting rights. We recognize that this suggestion departs from the traditional role of U.S. Attorneys in the adversarial process and goes beyond their constitutional obligations. But these two policies would go a long way to combatting the widespread and almost always erroneous belief that a felony conviction means a person can never vote again.

CLC is a nonpartisan, nonprofit organization working to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis and public education. Our Restore Your Vote Campaign helps restore voting rights to people with past convictions by providing direct rights restoration services, empowering community leaders to understand rights restoration laws, and breaking down the false notion that a felony conviction always means you cannot vote. Since 2017, more than 230,000 people have used our online rights restoration webtools at RestoreYourVote.org and RecupereSuVoto.org. We have directly provided voting rights restoration information to over 12,000 people one-on-one. Through this work, we have gained expertise in the use of technology to promote civic engagement.

Likely more than 24 million Americans have been convicted of felonies,² resulting in almost every state in at least the temporary suspension of voting rights.³ Across the country, the disproportionate impact of these felony disenfranchisement laws on Black people, Indigenous people, and, indeed, all People of Color is overwhelming.⁴ But the vast majority of those individuals have already met their state's requirements for restoration of voting rights and could be voting if they were aware of the rules. In fact, only around five million of those more than twenty-four million are actually disenfranchised under law.⁵ Confusion around voting rights after a felony conviction is rampant, compounded by the patchwork of varying laws across the states, misinformation, and lack of access to authoritative legal information and services. As a result, especially in states with complex disenfranchisement and re-enfranchisement laws, many people with past convictions wrongly believe they cannot vote even when they are eligible. Stories of rare instances where people have been prosecuted for unknowingly voting while ineligible exacerbate this misconception and intimidate eligible voters. This is *de facto* disenfranchisement, and it suppresses the votes of millions of Americans. It is feasible to break this cycle and significantly increase participation in elections.

² Nicholas Eberstadt, "America's Invisible Felon Population: A Blind Spot in US National Statistics," American Enterprise Institute at 4 (May 22, 2019) available at <https://www.iec.senate.gov/public/cache/files/b23fea23-8e98-4bcd-aeed-edcc061a4bc0/testimony-eberstadt-final.pdf>

³ Only Maine, Vermont, the District of Columbia, and Puerto Rico do not at least temporarily suspend voting rights when a person is convicted of a felony and sentenced to incarceration. However, Federal convictions *never* result in a suspension of voting rights in Mississippi.

⁴ Chris Uggen, et al., "Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction," The Sentencing Project at 11 (Oct. 30, 2020) available at <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>

⁵ *Id.* at 16.

Executive Order 14019 directs all agencies to consider how to facilitate and increase voter participation. The Executive Office of United States Attorneys is in a unique position to do so. In many states, Federal convictions have a different impact on the right to vote than state court convictions. For example, in Mississippi, Federal felony convictions never result in a loss of the right to vote, whereas certain state-level convictions do. See Miss. Const. Art, 12, § 241; WL 2517257 Op. MS Att'y Gen. (2009). But many Mississippians with federal felony convictions sit out elections nonetheless because they wrongly believe they are ineligible. In Alabama, federal convictions only strip a person of the right to vote if the federal crime is the categorical equivalent of one of the “felonies of moral turpitude.” Ala. Code §17-3-30.1(c)(47). The people who are convicted of those felonies, however, are generally not equipped to make that legal determination about whether their conviction is or is not disqualifying; U.S. Attorneys are.

Furthermore, even in states where both federal and in-state convictions result in at least a temporary suspension of the right to vote, the process to regain that right may vary. In Tennessee, a person who has lost the right to vote for a federal felony may regain that right after completing certain terms of his or her sentence, but not unless that individual is able to secure a “Certificate of Restoration” completed by a federal authority. Tenn. Code Ann. § 40-29-203. U.S. Attorneys or their designees may be able to complete those Certificates for individuals with federal convictions, or at least assess their records for eligibility and direct them to an official who can complete the certificate. *Id.* Even in states where the rights restoration process for federal convictions mirrors the process for in-state convictions, relevant state-level officials do not always have access to the records that would allow a person to verify whether they can register to vote or not. For example, in Arkansas, a person who has completed all terms of his or her sentence, including payment of legal financial obligations, is eligible to register to vote but in order to do so must present documentary proof of the completion of those terms. Ark. Const. Amend. LI, § 11 (d)(2)(A). The Arkansas Department of Corrections and county clerks are required under Arkansas law to provide such proof; federal authorities are not. *Id.* at (d)(2)(B)-(C). The U.S. Attorney’s office could provide these documents or at least direct individuals convicted of federal felonies to the offices that can provide them.

If they were voluntarily to assume these duties, the U.S. Attorneys could play a significant role in the effort to combat low turnout rates of individuals with federal felony convictions. The U.S. Attorneys could as a policy provide both written and oral explanations of how plea agreement impacts the loss and restoration of voting rights, with specificity to the convictions and sentences on the table. Additionally, the U.S. Attorney’s offices could designate and publicize a contact to provide individualized assistance to people who are seeking to regain their voting rights after a federal conviction. We hope that you will consider this innovative approach.

CLC has gained valuable insight on how each state’s laws treat federal convictions and how individual assistance is necessary to combat de facto disenfranchisement. We would be very glad for the opportunity to provide input as you develop policies and to assist with the creation of reference guides for the impact of federal convictions on the right to vote under each state’s laws.

Please contact Blair Bowie if we can provide any assistance in this important endeavor by email at bbowie@campaignlegal.org or by phone at 202-736-2201.

Sincerely,

Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20002

Cc: Kristen Clarke
Assistant Attorney General, U.S. Department of Justice, Civil Rights Division
Justin Levitt
Domestic Policy Council



June 16, 2021

Hon. Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Michael Carvajal, Director
Federal Bureau of Prisons
320 First St., NW
Washington, DC 20534

Dear Attorney General Garland and Director Carvajal:

On March 7, 2021, President Biden issued an Executive Order on Promoting Access to Voting, Exec. Order No.14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021), directing federal agencies, by September 23, 2021, to submit plans for promoting and facilitating the right to vote. As we reach the halfway point toward the deadline in the Executive Order, Campaign Legal Center (“CLC”) writes to provide suggestions and expertise to assist you in fulfilling its mandate.

CLC is a non-partisan, non-profit organization dedicated to supporting and advancing American democracy through the practice of law. CLC has developed a particular expertise in identifying and removing barriers to the ballot for justice-involved voters, including by working directly with jurisdictions across the country to make democracy accessible to eligible incarcerated voters. Our Restore Your Vote program also helps restore voting rights to people with past convictions by providing direct rights restoration services and empowering community leaders to understand and monitor implementation of rights restoration laws.

EO 14019 was signed on March 7, 2021, and its aim is to ensure federal agencies are leveraging their power, directing their programming, and adopting positions to promote and support civic engagement. EO 14019 (1). Within this broad mandate, there are two provisions that directly impact BOP. First, section 3 of the Executive Order requires all federal agencies—including BOP—to engage in a self-evaluation to better understand how they can expand voter registration and voting opportunities,

id. (3)(a), and, within 200 days, publish a strategic plan outlining how they will do so, *id.* (3)(b). EO 14019 also specifically requires that “[t]he Attorney General shall establish procedures[] to provide educational materials related to voter registration and voting and, to the extent practicable, to facilitate voter registration, for all eligible individuals in the custody of the Federal Bureau of Prisons.” *Id.* (9)(a). In particular, it specifies that some of these voter education materials must “notify individuals leaving Federal custody of the restrictions, if any, on their ability to vote under the laws of the State where the individual resides and, if any such restrictions exist, the point at which the individual’s rights will be restored under applicable State law,” and that these materials must be included in the reentry planning procedures mandated by statute. *Id.*

By giving BOP this mandate, EO 14019 creates a unique opportunity for this agency to provide national leadership on a long-overlooked democracy issue: prison disenfranchisement.¹ To address that issue, this letter first will offer general background on the problem of prison-based disenfranchisement to help your agency understand the barriers to the ballot box that incarcerated and justice-involved voters face. Then, the letter will outline an analytical framework to assist you in identifying best practices for facilitating voting and elections in correctional settings. Finally, the letter will offer specific suggestions for BOP to consider as it implements the mandates of EO 14019.

In particular, we urge BOP to consider:

- Developing and publishing jail voting policies and procedures to govern the agency at-large and each prison, addressing the five factors for facilitating elections and voting in correctional settings discussed below;
- Promulgating a routine usage exception to allow for federal and state/local collaboration in facilitating voter registration and voting in BOP facilities;
- Building out infrastructure to improve transparency and accountability, specifically by improving data tracking, regularly publishing policies, procedures, and participation data, and designating officials responsible for civic engagement programming; and
- Maintaining centralized resources and best practice guidelines to assist facilities in facilitating voter registration and voting in BOP facilities.

¹ Most commonly, this phenomenon is known as jail-based disenfranchisement. This term of art reflects the reality that most of the work that has been done in this space has been focused on jails, simply because that is where most incarcerated voters are. Because BOP operates prisons, we will use the term “prison-based disenfranchisement.” But the issue regarding disenfranchisement of incarcerated individuals is largely the same for jails and prisons--how to empower these voters and facilitate democracy in correctional settings; the lessons learned and strategies developed as part of that work and cited in the literature are relevant in a prison setting. We hope you consider reaching out to jails and advocates working on jail-based disenfranchisement, too, as you engage in the process of implementing EO 14019.

We appreciate your time and attention to this important issue, and we hope you find this letter helpful. Please do not hesitate to reach out to us if you have any questions or if could be of any further help as you move forward implementing EO 14019.

I. Prison-Based Disenfranchisement

Few people realize that, in every state in the United States, at least some segment of the incarcerated population retains their rights to vote. This population is largely, though not entirely, incarcerated in jails. This is because jail populations are largely comprised of people being held pretrial—which never impacts voter eligibility—or for low-level misdemeanor convictions—which only impacts voter eligibility in a small handful of states. Prisons, on the other hand, largely incarcerate people post-conviction. Because every jurisdiction other than Maine, Vermont, and Washington D.C. disenfranchises incarcerated individuals who have been convicted of felonies, prison populations are less likely to include large numbers of eligible voters.

Regardless of where an eligible voter is incarcerated, the law is clear that the government cannot deprive them of their right to vote simply because they are incarcerated. In 1974, the Supreme Court affirmed the right to vote for incarcerated people in *O'Brien v. Skinner*, when it found that the state was required to provide incarcerated eligible voters with a means by which they could request and cast a ballot. 414 U.S. 524, 531 (1974).

Although many incarcerated voters are eligible to vote, few can exercise that right because the realities of incarceration make doing so difficult or, in some circumstances, impossible. This is commonly known as jail-based disenfranchisement²—but in this context we understand it to be prison-based disenfranchisement—and it occurs for a number of reasons.

First, many incarcerated voters do not know that they retain their right to vote. While many justice-involved voters know that contact with the criminal justice system can impact voter eligibility, they do not know exactly how felony disenfranchisement laws do (or do not) apply to them.³ Ascertaining eligibility can also be more complicated for incarcerated people with previous convictions, who may be unable to obtain information about their criminal record or the additional paperwork required to understand the law and register to vote. Voters can also feel high-risk in this circumstance. Because voting while ineligible is illegal, incarcerated voters who must navigate this maze behind prison or jail walls risk criminal consequences if they make mistakes.

Second, election and corrections officials often do not realize that incarcerated individuals retain their voting rights.⁴ Incarcerated voters must rely on these

² Dana Paikowsky, *Jails As Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829 (2019).

³ Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 Mo. L. Rev. 1037, 1040 (2019).

⁴ Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, ACLU and Brennan Center for Justice (2008); Julia Rentsch, *Advocates Push to Enfranchise Jailed Colorado Voters*,

individuals to provide them with the information, resources, and assistance they need in order to cast their ballots. If these institutional actors are misinformed, they can make mistakes or, worse, refuse to assist an incarcerated voter, leading to that voter's disenfranchisement.⁵

Finally, even if incarcerated voters and institutional actors know incarcerated voters can vote, casting a ballot while incarcerated is enormously difficult. Prison walls are built to restrict access to information and visitation, deprive individuals of their autonomy, and separate people from the outside community, while election infrastructure is not designed to overcome these barriers. For a person in prison, accessing even the most basic things one might need in order to request a ballot—a pen, an envelope, the request form, information about where and how to submit that form—can be time consuming and costly. Delay prone prison-mail systems impede timely submission of voter registrations, ballot request forms, and absentee ballots, and few states provide any means of voting to people who are incarcerated after the state's absentee deadline passes. Officials can deny requests and spread misinformation, and strict ID laws and restrictions on third-party voter assistance can complicate the task even further.

In most jurisdictions, incarcerated voters have no support and no safety net. Unsurprisingly, the participation rate in most jails is close to 0%.⁶ Because people of color and low-income people are disproportionately incarcerated, they are also disproportionately impacted by prison-based disenfranchisement.

Prison-based disenfranchisement is not only widespread, but predictable. The government does not stop incarcerating people in the lead up to elections. Thus, every Election Day eligible voters *will be incarcerated* in prisons and jails all across the country. Even though the government can and should be prepared to serve this population of voters, they almost uniformly fail to make election infrastructure accessible to the eligible voters they incarcerate. It is time for the government to begin addressing this solvable problem.

II. Addressing the Problem: Best Practices for Prison Policy

After working with jurisdictions across the country to address the problem of disenfranchisement of incarcerated people, we have seen firsthand that there is no one-size-fits-all solution. Every state (and even locality) may have different election

Reporter-Herald (Aug. 25, 2018), http://www.reporterherald.com/news/election/ci_32095057/advocates-push-enfranchise-jailed-colorado-voters,

⁵ *Lewis v. San Mateo County*, No. C 96-4168 FMS, 1996 WL 708594, at *1 (N.D. Cal. Dec. 5, 1996) (describing the case of a man who was disenfranchised because a jail official failed to provide him with election materials).

⁶ *Unlock the Vote Arizona: Procedures for Jail-based Voting by County, July 2020*, The Arizona Coalition to End Jail-based Disenfranchisement (July 2020) <https://www.votefromjail.org/wp-content/uploads/2020/07/July-JBV-Report.pdf>; *Ballots for All: Ensuring Eligible Wisconsin Voters in Jail Have Equal Access to Voting*, ACLU of Wisconsin and All Voting is Local (July 2020) https://allvotingislocal.org/wp-content/uploads/2020/07/ACLU-AVL-2020_Jail-Voting-Access-Report-FINAL-07012020.pdf.

laws, policies, and procedures governing how voter registration and voting occurs. Every prison, too, will have its own individualized needs and challenges. BOP has the challenge of building infrastructure that can support voters from many different states—and who seek to register and vote in many different states—housed within one facility.

Addressing these complicated challenges requires nothing less than comprehensive solutions. To that end, at a minimum, every facility and BOP itself should have a voting policy and infrastructure that provides for five things:

- i. Voter education: This requires BOP to consider how to make information about voting and elections accessible to incarcerated people. Different facilities may use multiple different kinds of outreach, including engaging in individualized outreach (which is a best practice), providing materials at intake and/or upon release, hanging posters, making announcements, canvassing the prison, sending out notices, and hosting civic engagement classes or events.
- ii. Voter registration: This requires BOP to consider how to provide incarcerated voters with meaningful opportunities to register to vote during incarceration or upon release. Similar to above, these efforts could require different kinds of outreach and support. While some of these efforts can be more passive (*i.e.*, distributing registration forms), prisons can provide more affirmative assistance, including identifying those who are eligible to register, providing them with information about their eligibility, and working with them to prepare and submit registration paperwork.
- iii. Absentee voting: This requires BOP to consider how to provide incarcerated voters with meaningful opportunities to vote absentee. In addition to requiring much of the same outreach as described above, BOP facilities should also consider means of securing the privacy of the ballot, ensuring prison mail policies (and prison bureaucracy) does not unduly delay voting, and ensuring the availability of the necessary instrumentalities of voting (pens, pencils, stamps, IDs, etc.).
- iv. Collaboration: The most successful voting programs in correctional settings rely on collaboration. BOP should work to establish partnerships with states to coordinate voter registration and voting (if applicable) for the citizens of that state incarcerated in BOP facilities. BOP should also work to partner with community groups who can support the development of civic engagement programming. Election officials and community groups can also aid BOP in doing this work more directly, for example by running programming in BOP facilities, assisting voting at BOP facilities, training the BOP staff, and creating voter education materials for dissemination within BOP.
- v. Accountability: In order to ensure that a BOP's policies and practices actually do provide incarcerated voters with access to the franchise, BOP must commit to transparency and accountability on these issues. Specifically, BOP should publish their voting policies and practices both internally and externally (*i.e.*, in inmate handbooks and on BOP websites) and include provisions that require it to track and publish data on civic participation in its facilities. BOP's policies should also designate

employees nationally and in each facility to be accountable for coordinating this programming and who can act as a liaison between the BOP, its facilities, voters, election officials, and the community.

Facilitating elections in prisons can and should be a routine part of prison management. Because this has not been the norm in America thus far, our challenge is to find effective ways to merge elections and corrections infrastructure. This project will take time, creativity, and innovation. By addressing each of these five criteria in their agency-wide and prison-specific voting policies, though, BOP can begin this work with a strong foundation that will safeguard the rights of incarcerated voters.

Encouraging and facilitating civic participation in this setting can have long term benefits. Formerly incarcerated individuals who vote are less likely to recidivate.⁷ On the other hand, however, even short terms of incarceration have been shown to lead to decreased future civic participation.⁸ Prisons already incarcerate people who are most often left out of our democracy, specifically people of color, low-income individuals, people with disabilities—all populations that have long been targeted by vote suppression. In America, the two factors that correlate most with regular civic participation are education and income.⁹ In a word, individuals who are most likely to be incarcerated are the same ones who are most likely to feel (and be) excluded from the democratic process.

By supporting civic engagement and civic learning inside prisons, corrections officials can begin to disrupt this damaging cycle of disempowerment. They can not only think about how to encourage and support community engagement for those who are currently incarcerated, but also those who are being released. They can develop programming to assist individuals who need IDs (not only to vote, but to access benefits and community support), to inform people about rights restoration upon their release or after convictions, and to build knowledge about the voting process. In this way, supporting incarcerated individuals in exercising their constitutional rights can contribute to our much longer-term project of building a more robust and inclusive democracy.

III. Recommendations

While the barriers to the ballot box that incarcerated voter face are great, they can be overcome, especially if correctional and elections officials take an active role in

⁷ Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407 (2012); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205 (2004).

⁸ Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. (2019), <https://www.cambridge.org/core/journals/american-political-science-review/article/misdemeanor-disenfranchisement-the-demobilizing-effects-of-brief-jail-spells-on-potential-voters/2FEDEE197EA55768312586DA2FEFB8F9>.

⁹ *Voter Turnout*, MIT Election + Data Science Lab, Massachusetts Institute of Technology, <https://electionlab.mit.edu/research/voter-turnout>.

providing incarcerated voters with the support and resources they need to register to vote and vote.

BOP is also uniquely positioned to prompt large-scale reform in this space. EO 14019 articulates a clear mandate to find new and creative ways bring democracy behind prison walls. To fulfill that mandate, we recommend BOP take the following five actions¹⁰:

1. Formalize and publish voting policies and procedures to govern the agency at-large and each prison: These policies should, at a minimum, address the five factors discussed above, build institutional infrastructure to provide voter registration and voter support to people incarcerated in BOP, and commit BOP to assess, revise, and improve its voting and elections policies and procedures. These policies should specify both how voting and registration will be facilitated in each specific prison, as well as how the national agency plans to oversee, support, and improve that programming.
2. Promulgate a new elections/voting routine usage exception: Because of the restrictions of the Privacy Act, BOP cannot share information with election officials who hope to send voter information, registration forms, or ballots to their residents within BOP. BOP can address this problem—and create space for collaborative partnerships—by promulgating a new routine usage exception that would allow BOP to share data for this purpose.¹¹
3. Build out infrastructure to improve transparency and accountability: In crafting its agency-wide and institution-specific voting policies, BOP should be mindful that this represents a first step in what should be a continuing project of building out infrastructure to ensure individuals incarcerated in BOP can register to vote and vote. In order to assess its programming (and improve it in the future), BOP should consider improving data tracking to allow BOP to identify eligible voters and report on civic engagement in its facilities and publish its agency-wide and institution-specific voting policies, procedures, and participation data. BOP should also consider designating staff people, both in individual facilities and BOP-wide, with responsibility for civic engagement programming in each facility or BOP-wide.
4. Maintain a centralized resource bank: Because BOP covers so many facilities, it is well-positioned to collect, develop, and maintain resources for those who seek to facilitate voting in correctional facilities. That could include developing best practice guidelines, creating voter educational materials, collecting resources on felony disenfranchisement and rights

¹⁰ To the extent that BOP contracts with any private entities to house federal prisoners, provide reentry services, or supply any other supervision or prisoner support services, BOP should also consider whether and how these reforms can be provided for in those contracts.

¹¹ See Letter Re: Routine Usage Exception to Allow for Implementation of Universal Enfranchisement and Abolition of Prison Gerrymandering, from CLC, the Washington Lawyers' Committee for Civil Rights Under Law, and the League of Women Voters to Attorney General Merrick Garland (March 30, 2021), *appended here* as Appendix A and *available at* <https://campaignlegal.org/document/letter-doj-routine-usage-exception-allow-implementation-universal-enfranchisement-and>.

restoration in each state, and sample jail and prison voting policies. This resource bank could be made available not only internally, but also externally so that other stakeholders could benefit from it as well.

5. Commit to continuing efforts and collaboration: As a general matter, little has been done to serve eligible incarcerated voters and provide them with civic engagement opportunities. BOP should commit to longer term collaboration with partners, including state and local governments, formerly incarcerated advocates and others who have been directly impacted by incarceration, civil society groups, and democracy advocates to drive innovation and further efforts to support the enfranchisement of incarcerated eligible voters.

As the primary federal agency in charge of corrections, BOP will set a national example in how it addresses this often-overlooked civil rights issue. Because correctional officials exercise direct control over the activities, movements, and information available to incarcerated voters, they have an outsized ability to make a real difference in this space, including modeling procedures for local and state institutions. Your involvement and leadership, then, will be instrumental to this nascent effort to removing the barriers that prevent incarcerated people from exercising their right to vote.

IV. Conclusion

Our democracy works best when all eligible voters can participate. By impeding access to the ballot box for incarcerated eligible voters, prison-based disenfranchisement represents a profound democratic failure. EO 14019, however, has created an important opportunity for BOP to serve as a leader in remedying this longstanding problem.

As an organization that is deeply involved in efforts to address prison-based disenfranchisement across the country, CLC has worked hard to understand the challenges of facilitating democracy in correctional settings, and we would welcome the opportunity to work with as your agency to implement the terms of EO 14019 or in any future work it does on this topic. If you have any questions, please do not hesitate to reach out to Dana Paikowsky by email at dpaikowsky@campaignlegalcenter.org or by phone at 480-648-7705 or Blair Bowie at bbowie@campaignlegalcenter.org. Thank you for your time and consideration of this matter.

Sincerely,

Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20002

Cc: Kristen Clarke
Assistant Attorney General, U.S. Department of Justice, Civil Rights Division
Justin Levitt

Domestic Policy Council
Chiraag Bains
United States Domestic Policy Council, White House



WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

March 30, 2021

Hon. Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Routine Usage Exception to Allow for Implementation of Universal Enfranchisement and Abolition of Prison Gerrymandering

Dear Attorney General Garland,

We write to urge you to adopt a new routine use exception under the Privacy Act that would enable the Federal Bureau of Prisons (BOP) to share the data necessary to allow states and localities to implement two pro-democracy reforms: enacting universal enfranchisement and abolishing prison gerrymandering. These crucial efforts seek to safeguard the fundamental rights of people incarcerated within the BOP by providing them with representation and the right to vote.

The Department of Justice (DOJ) should act swiftly to enable the BOP to share this data with state, local, tribal, and territorial governments and community groups before the 2021 redistricting cycle. Currently, the BOP has interpreted the Privacy Act to bar it from sharing population data with jurisdictions seeking to abolish prison gerrymandering or adopt universal enfranchisement, including for those serving prison sentences within the BOP. This has seriously hindered jurisdictions' efforts to implement these crucial reforms. As this letter explains, there is a simple, low-cost fix that would remedy this problem: DOJ can adopt a new routine use exception under the Privacy Act to allow the BOP to share this data.

DOJ must act quickly to enable the BOP to facilitate, rather than impede, these state and local reforms for the 2021 redistricting cycle. As organizations deeply committed to democracy reform—and particularly equity in democracy access for historically disenfranchised justice-involved populations—we urge you to take action now.

I. Background

Jurisdictions that have embraced universal enfranchisement or abolished prison gerrymandering require data on the BOP's incarcerated population in order to fully implement their reforms. For example, Washington D.C.'s universal enfranchisement law requires its Board

of Elections to send ballots automatically to all D.C. voters housed in the BOP;¹ because the BOP has denied D.C. access to population data showing who within the BOP is a D.C. resident and where those residents are located within the BOP, D.C. cannot execute any targeted outreach, voter registration, or voting assistance efforts to voters in the BOP facilities. The same is true for Maine and Vermont, both states that do not disenfranchise citizens for felony convictions.

Jurisdictions that have abolished prison gerrymandering also require data from the BOP in order to fully carry out their laws. The nine states and more than 200 jurisdictions that seek to count incarcerated people at their pre-incarceration residences for the purposes of redistricting need population data about the BOP prisoners if they are to include these individuals in their adjusted apportionment data. However, the BOP has historically refused to provide this data—despite repeated efforts from Maryland, one of the first states to end the practice of prison gerrymandering.²

The information these jurisdictions need to fully implement universal enfranchisement and end prison gerrymandering is currently stored in the Inmate Central Records System, JUSTICE/BOP—005, 84 Fed. Reg. 19808, and can only be shared pursuant to a “routine use” exception noticed in the Federal Register. 5 U.S.C. § 552a (b)(3). The BOP has indicated that it does not believe any of the existing routine usage exceptions apply here. 84 Fed. Reg. 19808.

II. DOJ Can Address this Problem by Creating a New Election Administration Routine Use for the BOP’s Inmate Central Records System.

DOJ can address this problem by creating a new routine use exception to allow state, local, tribal, and territorial officials and community groups to access the information stored in the BOP’s Inmate Central Records System for the purpose of facilitating voting, registering voters, administering elections, or otherwise implementing election laws.

Under the Privacy Act, “‘routine use’ means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.” 5 U.S.C. § 552a(7). The purpose of the BOP’s Inmate Central Records System is to “assist[] the Attorney General and the Bureau of Prisons in meeting statutory responsibilities for the safekeeping, care, and custody of incarcerated persons” and to “serve[] as the primary record system on these individuals[.]” 84 Fed. Reg. 19808. Those statutory responsibilities include “provid[ing] for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise,” 18 U.S.C. § 4042(a)(2), and

¹ 67 D.C. Reg. 13867 (requiring a process to mail all necessary election materials to DC residents in Bureau of Prison facilities).

² Prison Policy Initiative, *Prison Gerrymandering Project: Progress Towards Ending Prison Gerrymandering* (2021), <https://www.prisonersofthecensus.org> (tracking the number of jurisdictions that have ended the practice of prison gerrymandering); Erika Wood, *Implementing Reform: How Maryland and New York Ended Prison Gerrymandering*, Demos (2014), <https://www.demos.org/policy-briefs/implementing-reform-how-maryland-new-york-ended-prison-gerrymandering> (noting that, although Maryland requested population data from the BOP, “BOP would not release the information, citing the Privacy Act of 1974” even after two appeals by the state).

“provid[ing] technical assistance to State, tribal, and local governments in the improvement of their correctional systems,” *id.* § 4042(a)(4).³

The BOP has interpreted this purpose broadly to encompass numerous routine use exceptions for providing data to state and local authorities in order to benefit confined individuals, including to determine “eligibility of these [individuals] for unemployment compensation” and “eligibility of an individual for a license, permit, or similar authorization.” 84 Fed. Reg. 19810.

A routine use exception that enables states and localities to collaborate with the BOP and DOJ to enfranchise and protect the democratic rights of the BOP prisoners is compatible with the purpose of the BOP’s Inmate Central Records System. Specifically, allowing for such collaboration will assist the BOP and the Attorney General in “provid[ing] for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise.” 18 U.S.C. § 4042(a)(2). When the State deprives a person of their liberty, it creates a “special relationship” that imposes a duty of care on the State.⁴ As part of that obligation, the government is obliged to safeguard those who are incarcerated from “deprivations of liberty which are not among those generally authorized by his confinement,” including deprivations of fundamental rights.⁵ Thus, enabling access to the right to vote—a fundamental constitutional right—is certainly consistent with the BOP and Attorney General’s obligation to provide for the care of the BOP’s population. Likewise, ensuring the right to representation for the BOP’s population by enabling representation at their home addresses also fits well within the BOP’s mandate.

Additionally, sharing data with states and localities is in line with the Attorney General and the BOP’s statutory duty to “provide technical assistance to State, tribal, and local governments in the improvement of their correctional systems.” 18 U.S.C. § 4042(a)(4). States and localities that have decided to end prison gerrymandering for correctional systems in their jurisdiction require the BOP’s assistance to count incarcerated individuals at their home addresses. Likewise, jurisdictions that have embraced universal enfranchisement require the BOP’s assistance to determine who within the BOP is a resident of the jurisdiction and where those residents are located within the BOP, in order to implement voter assistance programs. Thus, creating a routine use exception that enables the BOP and DOJ to assist states and localities in implementing these pro-democracy reforms related to correctional systems in their jurisdictions is in line with the purpose of BOP’s Inmate Central Records System.

Further, allowing data sharing with states, localities, and community groups will assist the Attorney General and the BOP in living up to their new mandates—imposed by Executive Order 14019—to ensure eligible incarcerated voters within the BOP and leaving the BOP are able to register to vote and cast ballots. Exec. Order No.14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021).

³ See 84 Fed. Reg. 19809 (citing 18 U.S.C. § 4042, *inter alia*, as the legal source of authority for maintenance of the system).

⁴ *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989); see also *id.* at 199–200 (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility [for his care].”).

⁵ *Id.* at 200 n.8; Dana Paikowsky, *Jails As Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829, 869 (2019) (describing the substantive due process obligations that require the state to provide ballot access to incarcerated voters).

Finally, the Attorney General and the BOP have a statutory mandate to provide education and community resources as reentry support. 18 U.S.C. § 4042(a)(7). Studies show that disenfranchisement *undermines* rehabilitation and hinders re-entry,⁶ while restoring the right to vote *improves* individuals' connection to and engagement with their communities while incarcerated, as well as their transition back into society post-release.⁷

This routine usage exception would also be similar in-kind to many that are already listed in the Federal Register, as noted above. Existing routing usage exceptions allow the BOP to share information from the Inmate Central Records System with, for example:

(d) . . . [To] federal, state, and local licensing agencies or associations which require information concerning the suitability or eligibility of an individual for a license, permit, or similar authorization; . . .

(g) To state agencies and authorities, [] to review eligibility of these inmates for unemployment compensation; . . .

(h) To the Social Security Administration (SSA), [] for the purpose of matching the data against SSA records to enable the SSA to determine the eligibility of Bureau inmates to receive benefits under the Social Security Act . . .

(i) To the United States Department of Veterans Affairs (VA), for the purpose of matching the records against VA records to determine the eligibility or potential eligibility of Bureau inmates to receive veterans' benefits and/or services; . . .

(j) To the Federal Aviation Administration (FAA), [] for the purpose of matching the data against FAA records to determine the eligibility of Bureau inmates to hold and obtain airmen certification and qualification; . . .

(t) To federal, state or community health care agencies and professionals, including physicians, psychiatrists, psychologists, and state and federal medical facility personnel, who are providing treatment for a pre-existing condition to former federal inmates, and to federal, state, or local health care agencies and professionals for the purpose of securing medical or mental health after-care for current federal inmates; . . .

(x) To the Department of Treasury for the purpose of matching federal records on behalf of federal agencies, to determine the eligibility of or validate the entitlement of Bureau inmates to receive federal benefits pursuant to applicable federal law.

⁶ See, e.g., Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407 (2012); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205 (2004).

⁷ See, e.g., Civic Nebraska, *Recidivism & Voting Rights, Case Study: Florida* (Jan. 30, 2019), <https://www.civicnebraska.org/wp-content/uploads/2019/02/2019-Florida-recidivism-case-study.pdf>; Victoria Shineman, *Restoring Rights, Restoring Trust: Evidence that Reversing Felon Disenfranchisement Penalties Increases Both Trust and Cooperation with Government* (Oct. 25, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272694.

84 Fed. Reg. 19808. An election administration routine use exception would similarly allow the BOP to enlist the help of state and local allies to deliver crucial services to incarcerated people and ensure they are included in our democracy.

Establishing an election administration routine use would also be straightforward. In order to create a routine use for information stored in a given system of records, the relevant agency must publish notice of “each routine use of the records contained in the system, including the categories of users and the purpose of such use.” 5 U.S.C. § 552a(e)(4)(D). Agencies may modify routine uses by, “at least 30 days prior to publication . . . publish[ing] in the Federal Register notice of any new use or intended use of the information in the system, and provid[ing] an opportunity for interested persons to submit written data, views, or arguments to the agency.” 5 U.S.C. § 552a(11).

Given the increasing public support for repealing or reforming felony disenfranchisement laws⁸ and ending prison gerrymandering,⁹ we believe a reform that would allow the federal government to cooperate with states enacting these measures would receive significant popular support.

III. DOJ Should Act on this Opportunity Now, Before the 2021 Redistricting Cycle.

The time to make this change is now. In 2021, many states and the federal government will enact structural changes that will directly impact the democratic rights of people incarcerated in the BOP for years to come. At least nine states and more than 200 jurisdictions will move forward with their redistricting processes without being able to count federally incarcerated citizens as residents of their home communities, locking in these malapportioned districts for at least a decade. Washington D.C.’s universal enfranchisement measure, which grants the right to vote to 3,200 District of Columbia citizens incarcerated in the BOP, will take permanent legal effect for the first

⁸ See Will Wilder, *Progress on Restoring Voting Rights*, Brennan Center for Justice (Feb. 25, 2021) (discussing the “growing national momentum on voting rights restoration”) <https://www.brennancenter.org/our-work/analysis-opinion/progress-restoring-voting-rights>. Also, in a 2018 poll conducted by HuffPost/YouGov, for example, 63% of adults reported that they support restoring the vote to individuals with felony convictions who have completed their sentences, while only 20% were opposed. Restoration of Voting Rights, HuffPost & YouGov (Mar. 16-18, 2018), <http://big.assets.huffingtonpost.com/tabsHPRestorationofvotingrights20180316.pdf>.

⁹ See Prison Policy Initiative, *Prison Gerrymandering Project: Progress Towards Ending Prison Gerrymandering* (2021), <https://www.prisonersofthecensus.org>. Since 2010, Maryland, California, Colorado, Delaware, Nevada, New Jersey, New York, Virginia, and Washington State have adopted laws that eliminate prison gerrymandering. *Id.* Other states, such as Michigan and Tennessee, now prohibit or discourage local governments from engaging in prison gerrymandering. *Id.* And hundreds of county and municipal governments across the country have also rejected prison gerrymandering. *Local Governments that Avoid Prison-Based Gerrymandering*, Prison Policy Initiative (Jan. 7, 2019), <https://www.prisonersofthecensus.org/local/>. Recently, over 99% of the comments from the public on the 2020 Census (77,863 out of 77,887) also supported counting prisoners at their last known residence. Final 2020 Census Residence Criteria and Residence Situations, 85 Fed. Reg. 5,526 (Feb. 8, 2018), <https://www.federalregister.gov/documents/2018/02/08/2018-02370/final-2020-census-residence-criteria-and-residence-situations>.

time. And, finally, in the next 200 days, the BOP will begin to assess the ways in which it can better promote voter registration, voter education, and voting access for incarcerated citizens and those being released, and establish policies and procedures that will govern how voting and elections are facilitated in the BOP moving forward. Exec. Order No.14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021).

Allowing BOP to share its population data with election officials and others will, thus, not only ensure that state and local jurisdictions will be able to fully implement their own pro-democracy reforms; it will also equip the BOP with the information it needs to guide its own internal reform efforts. By working with jurisdictions that are already engaging in their own independent voter outreach efforts, the BOP may learn it can work with states and localities to expand enfranchisement as Executive Order 14019 directs—perhaps by improving the BOP’s database, collecting new information, or storing its data in a more accessible way. But, without the possibility of data sharing, this kind of productive collaboration will remain out of reach.

We appreciate your consideration of this important issue and look forward to continuing to work with DOJ and the administration to continue to push for the inclusion of justice-involved citizens in our democracy. If you have any questions or concerns, please do not hesitate to reach out to Dana Paikowsky at dpaikowsky@campaignlegalcenter.org or 480-648-7705 for more information.

Sincerely,

Campaign Legal Center
1101 14th Street NW Suite 400
Washington, DC 20005

League of Women Voters of the
United States
1233 20th St NW, Suite 500,
Washington, DC 20036

Washington Lawyers’ Committee for
Civil Rights and Urban Affairs
700 14th Street, NW, Suite 400
Washington, DC 20005

Cc: Pamela Karlan, Principal Deputy Assistant Attorney General
U.S. Department of Justice, Civil Rights Division
Michael Carvajal, Director, Federal Bureau of Prisons
Ken Hyle, General Counsel, Federal Bureau of Prisons
Chiraag Bains, Special Assistant to the President for Criminal Justice
Domestic Policy Council



June 16, 2021

Hon. Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Director Donald W. Washington, U.S. Marshals Service
U.S. Marshals Headquarters
1215 S Clark Street
Arlington, VA 22202

Dear Attorney General Garland and Director Washington:

On March 7, 2021, President Biden issued an Executive Order on Promoting Access to Voting, directing federal agencies, by September 23, 2021, to provide plans regarding how they will promote and facilitate the right to vote. Exec. Order No. 14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021) (“EO 14019”). As we reach the halfway point toward that deadline, the Campaign Legal Center (“CLC”) writes to assist the Department of Justice and the U.S. Marshals Service in fulfilling that mandate.

CLC is a non-partisan, non-profit organization dedicated to supporting and advancing American democracy through the practice of law. CLC has developed a particular expertise in identifying and removing barriers to the ballot for justice-involved voters, including by working directly with jurisdictions across the country to make democracy accessible to eligible incarcerated voters. Our Restore Your Vote also program helps restore voting rights to people with past convictions by providing direct rights restoration services and empowering community leaders to understand and monitor implementation of rights restoration laws.

The aim of EO 14019 is to ensure that federal agencies leverage their power, direct their programming, and adopt positions to promote and support civic engagement. EO 14019 (1). Within this broad mandate, there are two provisions that directly impact the Marshals Service. First, EO 14019 requires that the Attorney General create policies and procedures to ensure the Marshals Service “includes language in intergovernmental agreements and jail contracts to require the jails to provide educational materials related to voter registration and voting, and to facilitate voting

by mail, to the extent practicable and appropriate.” *Id.* (9)(b). Second, section 3 of the Executive Order requires all federal agencies—including the Marshals Service—to engage in a self-evaluation to better understand how they can expand voter registration and voting opportunities, *id.* (3)(a), and, within 200 days, publish a strategic plan outlining how they will actually do so, *id.* (3)(b).

EO 14019, along with the Justice Department initiative announced by the Attorney General, creates an important opportunity for the Marshals Service to provide national leadership on a long-overlooked democracy issue: jail-based disenfranchisement. To that end, this letter first will offer general background on the problem of jail-based disenfranchisement to help your agency understand the barriers to the ballot box that incarcerated and justice-involved voters face. Then, the letter will outline an analytical framework to assist you in identifying best practices for facilitating voting and elections in correctional settings. Finally, the letter will offer specific suggestions for the Marshals Service to consider as it moves forward implementing the mandates of EO 14019.

In particular, we believe the Marshals Service should consider:

- Requiring that local jails address the 6 factors discussed below for facilitating elections and voting in correctional settings, in their jail policies, and in jail contracts;
- Promulgating guidance and best practices to assist jails in facilitating voting and elections for incarcerated voters; and
- Collaborating with partners and advocates to drive innovation and further efforts to support the enfranchisement of incarcerated eligible voters.

The U.S. Marshals Service in particular is uniquely positioned to prompt large-scale reform in this space. Most jails are decentralized rather than run by a state or federal agency, which means advocates often must go jail-to-jail, working for incremental progress one local institution at a time. Because the U.S. Marshals Service contracts with jails all across the country, though, it can leverage its position to prompt national reform and innovation in this space.

We appreciate your time and attention to this important issue, and we hope you find this letter helpful. Please do not hesitate to reach out to us if you have any questions or if could be of any further help as you move forward implementing EO 14019.

I. Jail-Based Disenfranchisement

The majority of the nearly 700,000 people incarcerated in jails in the United States are eligible to vote. This is because jail populations are largely comprised of people being held pretrial—which never impacts voter eligibility—or for low-level misdemeanor convictions—which only impacts voter eligibility in a small handful of states. In 1974, the Supreme Court affirmed this right in *O’Brien v. Skinner*, when it found that the state could not deprive otherwise eligible voters of their right to vote simply because they are incarcerated. 414 U.S. 524, 531 (1974).

Although many incarcerated voters are eligible to vote, few can exercise that right because the realities of incarceration make doing so difficult or, in some circumstances, impossible. This is known as jail-based disenfranchisement¹; the reasons for it are many and important to understand in order to address the problem.

First, many jailed voters do not know that they retain their right to vote. While many justice-involved voters know that contact with the criminal justice system can impact voter eligibility, they do not know exactly how felony disenfranchisement laws do (or do not) apply to them.² Ascertaining eligibility can also be more complicated for incarcerated people with previous convictions, who may be unable to obtain information about their criminal record or the additional paperwork required to understand the law and register to vote. Voters can also feel at high risk in this circumstance. Because voting while ineligible is illegal, incarcerated voters who must navigate this maze behind jail walls may risk criminal consequences if they make mistakes.

Second, election and corrections officials often do not realize that incarcerated individuals retain their voting rights.³ Jailed voters must rely on these individuals to provide them with the information, resources, and assistance they need in order to cast their ballots. If these institutional actors are misinformed, they can make mistakes or, worse, refuse to assist an incarcerated voter, leading to that voter's disenfranchisement.⁴

Finally, even if incarcerated voters and institutional actors know incarcerated voters can vote, casting a ballot while incarcerated is enormously difficult. Jail walls are built to restrict access to information and visitation, to deprive individuals of their autonomy, and to separate people from the outside community. Election infrastructure is not designed to overcome these barriers. For a person in jail, accessing even the most basic things one might need in order to request a ballot—a pen, an envelope, the request form, information about where and how to submit that form—can be time-consuming and costly. Delay prone jail-mail systems make it challenging to timely submit voter registrations, ballot request forms, and absentee ballots, and few states provide any means of voting to people who are incarcerated after the state's absentee deadline passes. Officials can deny requests and spread misinformation, and strict ID laws as well as restrictions on third-party voter assistance can complicate the task even further.

¹ Dana Paikowsky, *Jails As Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829 (2019).

² Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 Mo. L. Rev. 1037, 1040 (2019).

³ Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, ACLU and Brennan Center for Justice (2008); Julia Rentsch, *Advocates Push to Enfranchise Jailed Colorado Voters*, Reporter-Herald (Aug. 25, 2018), http://www.reporterherald.com/news/election/ci_32095057/advocates-push-enfranchise-jailed-colorado-voters,

⁴ *Lewis v. San Mateo County*, No. C 96-4168 FMS, 1996 WL 708594, at *1 (N.D. Cal. Dec. 5, 1996) (describing the case of a man who was disenfranchised because a jail official failed to provide him with election materials).

In most jurisdictions, incarcerated voters have no support and no safety net. Unsurprisingly, the participation rate in most jails is close to 0%.⁵ Because people of color and low-income people are disproportionately jailed, they are also disproportionately impacted by jail-based disenfranchisement. In many states, too, voters can be prevented from voting only because they cannot pay cash bail. The assessed bail thus functions as poll tax.

Jail-based disenfranchisement is not only widespread, but predictable. States and localities do not stop arresting, arraigning, and incarcerating people in the lead up to elections. Thus, every Election Day, eligible voters *will be incarcerated* in pretrial detention and for misdemeanor convictions. Even though states and localities can and should be prepared to serve this population of voters, they almost uniformly fail to make election infrastructure accessible to the eligible voters they incarcerate. It is time for the government to step up and begin addressing this solvable problem.

II. Addressing the Problem: Best Practices for Jail Policy

After working with jurisdictions across the country to address the problem of jail-based disenfranchisement, we have seen firsthand that there is no one-size-fits-all solution. Every state (and even locality) may have different election laws, policies, and procedures governing voter registration and voting. Every jail, too, will have its own individualized needs and challenges. While erecting a polling place inside a jail might make sense for a large urban jail, for example, this reform may be unnecessary and wasteful for a smaller, more rural jail environment.

No matter what approach a jurisdiction takes to solving these problems, however, these complicated challenges require nothing less than comprehensive solutions. To that end, at a minimum, every jurisdiction should have a jail voting policy and infrastructure that provides for six things:

- i. Voter education: This requires jails consider how to make information about voting and elections accessible to incarcerated people. Jurisdictions may use more than one kind of outreach, including engaging in individualized outreach (which is a best practice), providing materials at intake and/or upon release, hanging posters, making announcements, canvassing the jail, sending out notices, and hosting civic engagement classes or events.
- ii. Voter registration: This requires jails consider how to provide jailed voters with meaningful opportunities to register to vote. Similar to above, these efforts could require different kinds of outreach and support. While some of these efforts can be more passive (*i.e.*, distributing registration forms), jails

⁵ *Unlock the Vote Arizona: Procedures for Jail-based Voting by County, July 2020*, The Arizona Coalition to End Jail-based Disenfranchisement (July 2020) <https://www.votefromjail.org/wp-content/uploads/2020/07/July-JBV-Report.pdf>; *Ballots for All: Ensuring Eligible Wisconsin Voters in Jail Have Equal Access to Voting*, ACLU of Wisconsin and All Voting is Local (July 2020) https://allvotingislocal.org/wp-content/uploads/2020/07/ACLU-AVL-2020_Jail-Voting-Access-Report-FINAL-07012020.pdf.

- can provide more affirmative assistance, including identifying those who are eligible to register, informing them about their eligibility, and working with them to submit registration paperwork.
- iii. Absentee voting: This requires jails consider how to provide jailed voters with meaningful opportunities to vote absentee. In addition to requiring much of the same outreach as described above, jails should also consider means of securing the privacy of the ballot, ensuring that the jail's mail policies (and jail bureaucracy) do not unduly delay voting, and making available the necessary instrumentalities of voting (pens, pencils, stamps, IDs, etc.).
 - iv. Election Day voting and/or voting for late-jailed voters: While the majority of individuals who vote from jail do so by absentee ballot, some voters will be incarcerated after the absentee ballot request deadline has passed. Jails should work with local election officials to ensure these late-jailed voters have access to an alternative means of casting their ballots. This could mean making the jail a vote center or polling place, or providing access using emergency voting or voting via agent.
 - v. Collaboration: The most successful jail voting programs rely on collaboration. Jails should be in communication with local election officials and community groups to coordinate their civic engagement activities. Election officials and community groups can also aid jails in doing this work, for example by coming into the jail to run programming, assist in the facilitation of voting, provide the jail with training, and create voter education materials for dissemination by the jail.
 - vi. Accountability: In order to ensure that a jail's policies and practices actually do provide jailed voters with access to the franchise, jails must commit to transparency and accountability on these issues. Specifically, jails should publish their jail voting policies and practices both internally and externally (*i.e.*, in jail handbooks and on jail websites) and track and publish data on civic participation in the jail. Jails also should designate at least one a staff person who will be accountable for coordinating this programing and who can act as a liaison between the jail, voters, election officials, and the community.

Facilitating elections in jails can and should be a routine part of jail management. Because this has not been the norm in America thus far, our challenge is to find effective ways to merge elections and corrections infrastructure. This project will take time, creativity, and innovation. By addressing each of these six criteria in their jail voting policies, though, jails can begin this work with a strong foundation that will safeguard the rights of incarcerated voters.

Encouraging and facilitating civic participation in this setting can have long term benefits. Formerly incarcerated individuals who vote are less likely to recidivate.⁶ On the other hand, however, even short terms of incarceration have been shown to lead

⁶ Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407 (2012); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205 (2004).

to decreased future civic participation.⁷ Jails already incarcerate the people who are most often left out of our democracy, specifically people of color, low-income individuals, people with disabilities—all populations that have long been targeted by vote suppression. In America, the two of the factors that correlate most with regular civic participation are education and income.⁸ In a word, individuals who are most likely to be incarcerated in jails across the country are the same ones who are most likely to feel (and be) excluded from the democratic process.

By supporting civic engagement and civic learning inside their jails, corrections officials can begin to disrupt this damaging cycle of disempowerment. They can think about how to encourage and support community engagement not only for those who are currently incarcerated, but also for those who are being released. They can develop programming to assist individuals who need IDs (not only to vote, but to access benefits and community support), to inform people about rights restoration upon their release or after convictions, and to build knowledge about the voting process. In this way, supporting incarcerated individuals in exercising their constitutional rights can contribute to our much longer-term project of building a more robust and inclusive democracy.

III. Recommendations

While the barriers to the ballot box that incarcerated voter face are great, they can be overcome, especially if correctional officials take an active role in providing incarcerated voters with the support and resources they need to register to vote and vote.

After the passage of EO 14019, the U.S. Marshals Office has a clear mandate to prompt these powerful officials to do just that. Pursuant to that mandate, we recommend the U.S. Marshals Office take the following three actions:

1. Require in new contracts that jails create jail voting policies and procedures that include each of the six factors outlined above;
2. Create and disseminate guidance and best practices to assist jails in facilitating voting and elections for incarcerated voters; and
3. Collaborate with partners and advocates to drive innovation and further efforts to support the enfranchisement of incarcerated eligible voters.

As a federal law enforcement agency, the U.S. Marshals Office will serve as an example to state and local agencies in how it addresses this often-overlooked civil rights issue. Because correctional officials exercise direct control over the activities, movements, and information available to incarcerated voters, they have an outsized

⁷ Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. (2019), <https://www.cambridge.org/core/journals/american-political-science-review/article/misdemeanor-disenfranchisement-the-demobilizing-effects-of-brief-jail-spells-on-potential-voters/2FEDEE197EA55768312586DA2FEFB8F9>.

⁸ *Voter Turnout*, MIT Election + Data Science Lab, Massachusetts Institute of Technology, <https://electionlab.mit.edu/research/voter-turnout>.

ability to make a real difference in this space. Your involvement and leadership, then, will be instrumental to this nascent effort to removing the barriers to the ballot box that prevent incarcerated people from exercising their right to vote.

IV. Conclusion

Our democracy works best when all eligible voters can participate. By impeding access to the ballot box for incarcerated eligible voters, jail-based disenfranchisement represents a profound democratic failure. EO 14019, however, has created an important opportunity for the U.S. Marshals—and other federal law enforcement agencies—to serve as leaders in remedying this longstanding problem.

As an organization that is deeply involved in efforts to address jail-based disenfranchisement across the country, we have worked hard to understand the challenges that come with facilitating democracy in correctional settings, and we would welcome the opportunity to work with you to implement the terms of EO 14019 or in any future work your agency does on this topic. If you have any questions, please do not hesitate to reach out to Dana Paikowsky by email at dpaikowsky@campaignlegalcenter.org or by phone 480-648-7705 or Blair Bowie at bbowie@campaignlegalcenter.org. Thank you for your time and consideration of this matter.

Sincerely,

Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20002

Cc: Kristen Clarke
Assistant Attorney General, U.S. Department of Justice, Civil Rights Division
Justin Levitt
Domestic Policy Council
Chiraag Bains
United States Domestic Policy Council, White House