



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,

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Cc: Kristen Clarke
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Justin Levitt

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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,

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