



SENT VIA EMAIL

September 14, 2022

Cherryl Litsey
Federal Bureau of Prisons
320 1st Street NW
Washington, DC 20534

Re: The Hatch Act and nonpartisan voter education materials

Dear Ms. Litsey:

We write to support the Bureau of Prisons' (BOP) ongoing effort to facilitate voter registration and participation for incarcerated D.C. residents. In particular, this letter explains why the Hatch Act does not prohibit BOP employees from sharing nonpartisan voter education materials with incarcerated voters.

The nonpartisan Campaign Legal Center (CLC) advances 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. We believe public confidence is earned through the commitment of those in and working with government to uphold the principle that public service is a public trust. That's why CLC proposes solutions for stronger ethics at all levels of government, and serves as a government watchdog, holding elected officials accountable for ethics violations. An important part of this work is filing complaints to enforce the Hatch Act.¹

The League of Women Voters (LWV)² is a nonpartisan, grassroots nonprofit organization dedicated to empowering individuals to fully participate in our

¹ See, e.g., Campaign Legal Center, *Enforcing the Hatch Act* (June 14, 2018), <https://campaignlegal.org/cases-actions/enforcing-hatch-act>

² The LWV is made up of two entities: the League of Women Voters of the United States — a c(4) organization — and the League of Women Voters Education Fund, which operates as a c(3) entity. The League of Women Voters of the US encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. The League of Women Voters

democracy. With active Leagues in all 50 states and the District of Columbia, and with more than 750 Leagues around the country, we engage in advocacy, education, litigation, and civic engagement to protect every American’s freedom to vote. The League is a century seasoned organization that has proudly been a community partner to bring accurate information to voters that support voters in becoming informed constituents who are armed with information to effectively cast their ballot.

Together, CLC, the League of Women Voters of DC (LWVDC) and the League of Women Voters Education Fund (LWVEF) recognize and applaud the BOP for its efforts to increase voter registration and participation among D.C. residents incarcerated in its facilities. One action that would further these efforts would be to allow nonpartisan organizations to facilitate the distribution of voter education materials—including the VOTE411 voter guides published by LWV’s Education Fund—to incarcerated voters ahead of Election Day.

In 2020, more than 6 million voters accessed VOTE411.org, a one-stop online voter information resource to learn about the candidates on their ballot and information about where to vote as well as any local and state rules for casting their ballot. Notably, the VOTE411.org site was updated more regularly than many government sites, providing the most accurate up-to-date information. However, this resource is most effective for those who have internet access. For those without internet access, the VOTE411.org information is converted to printed voter guides for individuals to access the same information.

Because incarcerated persons may not have access to the internet, such printed materials are critical to the informed participation of incarcerated voters in elections. Indeed, in a 2019 study, political scientists examined the effects of various sources of information on public opinion.³ Their findings included the fact that providing voters with nonpartisan “encyclopedic” information about the political process, such as “basic facts about politics and detailed information about candidates’ policy positions” helped the voters choose candidates whose ideological positions were closest to their own.⁴ The effects of such materials were largest for study respondents “with low levels of knowledge about politics, thereby closing the gap in decisions between low- and high-knowledge respondents.” These findings highlight the need for incarcerated voters to be provided not only with the opportunity to vote in elections, but also with the reliable, nonpartisan education materials that will enable them to bring their policy views to bear in those elections.⁵

BOP has expressed concern, however, that distributing this information could violate the Hatch Act’s limitations on federal employees’ participation in certain

Education Fund works to register voters and provide them with election information through voter guides, candidate forums, and debates.

³ See generally Cheryl Boudreau, Christopher S. Elmendorf & Scott A. MacKenzie, *Roadmaps to Representation: An Experimental Study of How Voter Education Tools Affect Citizen Decision Making*, POL. BEHAV. (2019), <https://link.springer.com/article/10.1007/s11109-018-9480-6#Sec4>.

⁴ *Id.*

⁵ *Id.*

political activities. In recent conversation with LWV, the Bureau indicated that because the print versions of the voter guides contain candidate information that their distribution somehow implicated the Hatch Act.

We write to address those concerns. As discussed below, the Hatch Act's prohibition of political activity in the federal workplace does not apply to the facilitation of nonpartisan voter education. Thus, the BOP should not be deterred from sharing nonpartisan VOTE411 voter education materials with incarcerated voters.

I. Background on the Hatch Act

Enacted in 1939, the Hatch Act (“the Act”) reflects the judgment of Congress “that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.⁶ The Act also “reflected the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine.”⁷

To achieve those ends, the Act limits federal executive branch employees from engaging in political activities while on duty.⁸ Under the relevant regulations, “political activity” is defined as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”⁹ A partisan political group, in turn, is defined as “a committee, club, or other organization which is affiliated with a political party or candidate for public office in a partisan election, or organized for a partisan purpose, or which engages in partisan political activity.”¹⁰

The Office of the Special Counsel (OSC)—an independent agency whose “primary mission is to safeguard the civil-service merit system”—investigates alleged violations of the Hatch Act.¹¹ The OSC also regularly issues advisory opinions interpreting the Act.¹²

⁶ U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 564, (1973); *see generally* An Act to Prevent Pernicious Political Activities, Pub. L. No. 76-252, 53 Stat. 1147 (1939); Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (codified in scattered sections of Title 5 of U.S. Code).

⁷ United States v. Nat’l Treasury Emps. Union, 513 U.S. 454, 471 (1995) (quoting *Letter Carriers*, 413 U.S. at 565).

⁸ *Federal Employee Hatch Act Information*, U.S. OFF. SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup12>.

⁹ 5 C.F.R. § 734.101.

¹⁰ *Id.*

¹¹ *Citizens for Resp. & Ethics in Washington v. U.S. Off. of Special Couns.*, No. CV 19-3757 (JEB), 2020 WL 4530647 (D.D.C. Aug. 6, 2020); *see also* 5 U.S.C. § 1211 *et. seq.*

¹² *See Hatch Act Advisory Opinions*, U.S. OFF. SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-AdvisoryOpinion.aspx>.

Taken together, the OSC’s advisory opinions, regulatory definitions, and Congress’ purpose in passing the Hatch Act establish that the “political activity” restricted by the Act is activity designed to bring about a particular electoral result.

II. The Hatch Act’s restrictions on political activity do not apply to nonpartisan voter education.

The Hatch Act does not prohibit federal employees from discussing “current events, policy issues, and matters of public interest while at work or on duty.”¹³ Nor does it prohibit federal employees “from actively participating with organizations that are *not* political groups.”¹⁴ It simply prohibits federal employees from taking part in political activities and advancing the interests of partisan groups in the workplace. Because nonpartisan voter education is not a political activity under the Act, and because groups devoted to nonpartisan voter education are not partisan groups within the meaning of the Act, the Hatch Act’s restrictions on political activity do not apply to the distribution of nonpartisan voter education information like VOTE411 guides in BOP facilities.

A. Nonpartisan voter education is not a political activity under the Act.

As detailed above, the Hatch Act regulations define “political activity” as “an activity directed toward the [1] success or failure of a political party, [2] partisan political group, or [3] candidate for political office.”¹⁵ To assess whether an activity is political under the Hatch Act, the Office of the Special Counsel considers whether the activity falls into any of these three categories.¹⁶

Providing voters with nonpartisan materials to facilitate their informed participation in an election does not fall into any of the three categories deemed “political activity” within the Act. After all, providing voters with nonpartisan education materials in advance of an election is by definition *not* intended to promote a particular political party or outcome.

Indeed, facilitating nonpartisan voter education in a federal workplace is closely analogous to organizing a nonpartisan voter registration drive in a federal workplace. The OSC has explicitly approved of such voter registration drives.¹⁷ In an Advisory Opinion, the OSC distinguished between impermissible *partisan* voter

¹³ *Hatch Act FAQs*, U.S. OFF. SPECIAL COUNS., [HTTPS://OSC.GOV/SERVICES/PAGES/HATCHACT-FAQ.ASPX#TABGROUP25](https://osc.gov/services/pages/hatchact-faq.aspx#TABGROUP25).

¹⁴ What is a Political Group, Op. Off. Special Counsel (2020) <https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/What%20is%20a%20partisan%20political%20group.pdf>.

¹⁵ 5 C.F.R. § 734.101.

¹⁶ *See, e.g.*, What is a Political Group, Op. Off. Special Counsel (2020), <https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/What%20is%20a%20partisan%20political%20group.pdf>.

¹⁷ *See, e.g.*, Nonpartisan Voter Registration Drives in the Workplace, Op. Off. Special Counsel (2020), <https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/Nonpartisan%20Voter%20Registration%20Drives%20in%20the%20Workplace.pdf>.

registration drives (“e.g. a drive aimed at helping a political party succeed”) and permissible *nonpartisan* voter registration drives (“registrants are not solicited on the basis of party or candidate preference and there is no advocacy or display of support for a particular party or candidate during the drive”).¹⁸

Applying these same principles to voter education, it is a permissible nonpartisan activity under the Hatch Act to provide voters with education materials, as long as they do not advocate for a particular party or candidate. VOTE411’s printed guides contain only nonpartisan, factual information on candidates in various federal and local races. They also contain details on the election process, such as election dates and registration deadlines.¹⁹ VOTE411 guides *never* promote specific parties, candidates, or policies, or advocate for any electoral outcome.²⁰ It is thus a permissible nonpartisan activity under the Hatch Act to provide incarcerated voters with VOTE411’s printed voter education guides.

B. Groups devoted primarily or exclusively to nonpartisan voter education are not political groups under the Act.

Pursuant to the Hatch Act regulations, a political group is either (1) “affiliated with a political party or candidate for partisan political office”; or (2) “organized for a partisan purpose.”²¹

In addition to the plain meaning of the definition, the OSC—in determining whether an organization is a political group—relies heavily on the organization’s tax-exempt status under various sections of the Internal Revenue Code (IRC). Indeed, the OSC has advised that “organizations that are tax-exempt under IRC section 501(c)(3) “presumptively are not partisan political groups because of statutory provisions that bar them from engaging in political activity.”²² By contrast, OSC notes that “organizations that are tax-exempt under IRC 527 presumptively are political groups,” and organizations tax-exempt under IRC 501(c)(4) must be analyzed on a case-by-case basis.²³

As a result, any nonpartisan voter education group with 501(c)(3) status is presumptively not a political group within the meaning of the Hatch Act, as any such organization could not have gained 501(c)(3) status if it were organized for a partisan purpose or affiliated with a political candidate or party.

The LWV Education Fund, which publishes VOTE411 Guides, is not a political group under the Act. The group is a 501(c)(3) tax-exempt organization and thus

¹⁸ *Id.*

¹⁹ About Us, VOTE411, <https://www.vote411.org/about>.

²⁰ *Id.*

²¹ 5 C.F.R. § 734.101.

²² What is a Political Group, Op. Off. Special Counsel (2020) <https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/What%20is%20a%20partisan%20political%20group.pdf>.

²³ *Id.*

presumptively not a partisan political group according to OSC guidance.²⁴ True to its tax status, the LWF Education Fund is not affiliated with any candidates or political parties and is organized solely for the nonpartisan purpose of registering voters and providing them with election information through VOTE411 guides and candidate forums. Because it is a nonpartisan 501(c)(3) that does not engage in political activity of any kind, LWV's Education Fund is not a political group within the meaning of the Hatch Act.

III. Conclusion

In sum, the Hatch Act does not prohibit the BOP from distributing VOTE411 guides and other educational materials from nonpartisan voter education groups to voters incarcerated in its facilities. While the Hatch Act does limit federal employees' ability to engage in certain political activities in the workplace, distributing nonpartisan materials is not one of them. Within the meaning of the Hatch Act, nonpartisan voter education is not a political activity and nonpartisan voter education groups are not political organizations. Rather, nonpartisan voter guides provide incarcerated voters with the information they need to participate meaningfully in elections by making informed choices about the candidates who reflect their values and priorities.

Thank you for your time and attention to this important matter. Please do not hesitate to reach out with questions or other ways we can support your efforts going forward.

Sincerely,

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²⁴ *League of Women Voters Education Fund*, INFLUENCEWATCH, [https://www.influencewatch.org/non-profit/league-of-women-voters-education-fund-lwvef/#:~:text=The%20League%20of%20Women%20Voters%20Education%20Fund%20\(LWV%20EF\)%20is%20a,number%20of%20left%20cleaning%20issues](https://www.influencewatch.org/non-profit/league-of-women-voters-education-fund-lwvef/#:~:text=The%20League%20of%20Women%20Voters%20Education%20Fund%20(LWV%20EF)%20is%20a,number%20of%20left%20cleaning%20issues).

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