

JAIL VOTING REPORT



ACLU OF KENTUCKY

EXPANDING PRE-TRIAL CARCERAL VOTING

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This briefing paper is not intended to provide legal advice.

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EVERY VOTER MATTERS

The criminal legal system is too often used as a tool to disenfranchise voters. Conversations about this topic have tended to focus on felony disenfranchisement, but jails also strip the franchise from countless potential voters by preventing people in pre-trial detention from voting. This report discusses voting in pre-trial detention in Kentucky jails and describes how advocates can ensure that people in pre-trial, who are legally permitted to vote, are practically able to do so.¹



¹See KRS 116.025(2) ("Any person charged with or indicted for a crime, whether or not in custody for same, who has not yet been convicted of the offense and who is not otherwise ineligible to vote, may vote for all offices to be elected by the people and on all public questions submitted for determination at that election, in the precinct in which he or she is qualified to vote").

OVERVIEW

The discourse concerning incarceration and voting generally focuses on felony disenfranchisement, which occurs after a defendant has been found guilty of a crime. But incarceration-based disenfranchisement frequently occurs before a trial has even begun.

Because of our cash bail system, many people who cannot afford to pay bail are unfortunately detained pre-trial. As they are incarcerated, those same people are often not able to register or vote while they are in pre-trial detention. These people are effectively disenfranchised because of their wealth, despite having the legal right to vote. States regularly disenfranchise voters

by requiring high bonds then failing to give people in pre-trial detention the information and tools that they need to vote.

And the issue of pre-trial disenfranchisement is growing. Pre-trial detention in the US has exploded by 433% since 1970.² Pre-trial detention in Kentucky has grown by 42% since 2000 alone.³ Local jails across the US now house ~750,000 people annually, 2/3 of whom are in pre-trial and have not been convicted of a crime.⁴ This burden falls

² Vera Institute of Justice, Justice Denied: The Harmful and Lasting Effects of Pretrial Detention 1 (2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

³ Vera Institute of Justice, Kentucky Jail Expansion 2 (2019), <https://www.vera.org/downloads/pdfdownloads/Download-Kentucky-Report.pdf>.

⁴ Voting in Jails, The Sentencing Project (May 7, 2020), <https://www.sentencingproject.org/policy-brief/voting-in-jails/> ("Of the 745,000 individuals incarcerated in jail as of 2017 nearly two-thirds (64.7%), or 482,000, were being held pretrial because they had not been able to post bail. Of the 263,000 who were serving a sentence, the vast majority had been convicted of a misdemeanor offense that does not result in disenfranchisement.")

disproportionately on low income folks, people with disabilities, and people of color.⁵ It goes without saying: mass incarceration is a racial justice issue.

Change, though, is possible. In Chicago, Cook County Jail made voting accessible during the November 2020 presidential election, and 2,200 incarcerated people voted. And Denver, Houston, Los Angeles, Philadelphia, and Washington D.C. have each successfully expanded jail voting.⁶

This work can be done in Kentucky. In fact, local advocates have already established successful grassroots campaigns in many of

⁵ See e.g., Kentucky Profile, Prison Policy Initiative (Mar. 2023), <https://www.prisonpolicy.org/profiles/KY.html>; Disparate Justice: Where Kentuckians Live Determines Whether They Stay in Jail Because They Can't Afford Cash Bail, Kentucky Center for Economic Policy (June 11, 2019).

⁶ Voting in Jails, The Sentencing Project (May 7, 2020), <https://www.sentencingproject.org/policy-brief/voting-in-jails/>

our largest jails. For the past three years, All of Us or None Kentucky has engaged incarcerated individuals in Louisville Metro Detention Center (LMDC) to educate, register, and assist with absentee ballots.⁷ In 2022 alone, local leaders Savvy Shabazz and Shelton McElroy registered 176 voters with 88 successfully casting absentee ballots. This model has been emulated in Fayette County, led by Kentucky Equal Justice Center, and Boyd County Detention Center now operates its own in-house jail voting program.

⁷ All of Us or None Kentucky can be reached at the following page: <https://www.facebook.com/people/All-of-Us-or-None-Kentucky/100075692068664/>

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This model can be rolled out across the state, and access to the ballot can be expanded even further through direct voter engagement programs, policy advocacy, and—in limited instances where ballot access is intentionally restricted—litigation.

Pre-Trial Detention and Voting by the Numbers

More than 400,000 people are in pre-trial detention because of their inability to pay bail.⁸ As of 2015, Kentucky had the 8th highest rate of pre-trial incarceration and the 2nd highest rate of jail admissions in the US.⁹ On any given night, there are around 13,000 Kentuckians in local jails.¹⁰

While many states are reducing their jail populations, the Kentucky pre-trial population is growing, largely driven by rural, smaller county jails.¹¹ As a result, counties outside the top 10 in size are home to 55% of state residents but 62% of the pre-trial population.¹² This is part of a broader trend where small, local jails are relied upon to hold people who have been sentenced to prison. This impacts how local

governments invest in the infrastructure around incarceration. As jail populations grow, local economies will become more reliant on jails and incarcerated people, perpetuating investment in jails and policing that could otherwise be spent on community investments to reduce incarceration.

Pre-trial detention generally occurs because of an inability to pay bail (the payment required to leave jail). Bail is frequently impossibly high for many low-income people. The nationwide median bail bond for a felony is ~\$10,000.¹³ And the average yearly income for a woman charged with a felony who can't afford bail is ~\$11,000, or ~\$16,000 for men.¹⁴ A study in New York found that only 26% of defendants who received a bail sentence under \$500 posted bail at arraignment, while only 7% made bail set at \$5,000.¹⁵ Even the federal government admits that “[l]ongstanding research suggests that money bail has been imposed arbitrarily and can result in unjustified inequalities in the criminal justice system.”¹⁶

Moreover, Black, Latino, and Native American Kentuckians are overrepresented in Kentucky prisons and jails: Black Kentuckians comprise 8% of the state, but 29% of the prison/jail population.¹⁷

⁸ See e.g., supra note 4; Pretrial Detention, Prison Policy Initiative (last visited Mar. 20, 2023), https://www.prisonpolicy.org/research/pretrial_detention/#:~:text=More%20than%20400%2C000%20people%20in%20the%20U.S.%20are,office%20has%20placed%20a%20%22hold%22%20on%20their%20release

⁹ Vera Institute of Justice, Kentucky Jail Expansion 1 (2019), <https://www.vera.org/downloads/pdfdownloads/Download-Kentucky-Report.pdf>

¹⁰ See e.g., Kentucky Profile, Prison Policy Initiative (Mar. 2023), <https://www.prisonpolicy.org/profiles/KY.html>

¹¹ Vera Institute of Justice, Kentucky Jail Expansion 1 (2019), <https://www.vera.org/downloads/pdfdownloads/Download-Kentucky-Report.pdf> (“Since 2000, the pretrial jail population in small counties (fewer than 30,000 residents) has increased 92 percent—compared to a 35 percent increase in mid-sized counties (30,000 to 75,000 residents) and a 15 percent increase in large counties (more than 75,000 residents). [J]ails in small counties account for 59 percent of the growth of the state’s pretrial jail population since 2000.”)

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Mary T. Phillips, A Decade of Bail Research in New York City, New York City Criminal Justice Agency, Inc., 51 tbl. 7 (2012)

¹⁶ U.S. Commission on Civil Rights, Civil Rights Implications of Cash Bail (2022), <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf>

¹⁷ Kentucky Profile, Prison Policy Initiative (Mar. 2023), <https://www.prisonpolicy.org/profiles/KY.html>



By contrast, white Kentuckians are underrepresented: white Kentuckians comprise 86% of the state, but 64% of the prison/jail population.¹⁸

As a result, our ballooning pre-trial populations are filled with people who simply do not have the wealth to buy their way out of debtors’ prison and often come from historically politically marginalized groups. This political disempowerment is further compounded by the fact that pre-trial populations tend to vote at dramatically lower rates than their non-incarcerated peer populations. A 2022 study suggests that only about one in ten pre-trial

detainees will vote.¹⁹ This estimation was borne out in Cook County jail, where voter participation in jails sat at 7% before the facility instituted a jail voting program.²⁰

Fortunately, Kentuckians in pre-trial detention can vote provided they are not otherwise disenfranchised due to a prior felony conviction. The Kentucky Constitution only disenfranchises people who are currently incarcerated for a misdemeanor²¹ and those convicted “of treason, or felony, or bribery in an election, or of such high

¹⁸ Id.

¹⁹ Ariel White and Avery Nguyen, How Often Do People Vote While Incarcerated? Evidence from Maine and Vermont, 84 The Journal of Politics 1 (Jan. 2022), How Often Do People Vote While Incarcerated? Evidence from Maine and Vermont | The Journal of Politics: Vol 84, No 1 (uchicago.edu)

²⁰ Jackie O’Neil, Overcoming Barriers to Voting from Jail, Legal Defense Fund (Sept. 19, 2023), Can People in Jails Vote? Overcoming Barriers to Voting from Jail (naacpldf.org)

²¹ KY Const. § 145 (2) (referring to people “who, at the time of the election, are in confinement under the judgment of a court for some penal offense”).

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misdemeanor as the General Assembly may declare.”²² As a result, people in pre-trial without a prior felony conviction (that hasn’t been pardoned) can vote. Indeed, the Supreme Court has repeatedly affirmed this right.²³ In *O’Brien v. Skinner*, the Court held that voters suffer a Fourteenth Amendment violation if they are “under no legal disability impeding their legal right to register or to vote” but are “simply not allowed to use the absentee ballot, and are denied any alternative means of casting their vote although they are legally qualified to vote.”²⁴

So, if Kentuckians in pre-trial can vote, why do incarcerated people vote so infrequently? Because there are a host of social obstacles and literal physical barriers to voting. For instance, incarceration creates a profound knowledge gap.²⁵ Incarcerated people might not always know that they are legally permitted to vote; they might not know if they’re registered; and they may not be told how to access registration forms or absentee ballot applications. ²⁶In fact, jailers and even election officials may understandably not be knowledgeable about the specifics

of voting in jails given how infrequently carceral voting occurs.²⁷ Despite this clear problem, few states proactively send information into jails.

Moreover, the physical walls of jails make prisoners reliant on staff for nearly everything needed to vote, from information to physical ballots. Prisons are truly paragons of bureaucracy. Campaign Legal Center has aptly identified many of the physical impediments to voting from jail:²⁸

- People arrested close to Election Day may be stuck in a prison during critical deadlines for registration, absentee ballot requests, etc.
- Jails may not have reliable access to the internet, preventing prisoners from even learning voting deadlines.
- The voter may not have access to a reliable phone. If a prisoner needs to call their county clerk to ask a question, the call might be filtered out or the clerk likely won’t be able to call them back.
- Jails often have slower mail systems, with long wait times and specific requirements to send and receive mail.
- Finally, there may not be an expert in the jail who can help a prisoner fill out the paperwork correctly.

²⁷ See *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).

²⁸ See Campaign Legal Center, *Challenging Jail-Based Disenfranchisement: A Resource Guide For Advocates 2* (2019), <https://campaignlegal.org/sites/default/files/2019-12/jail%20Voting%20Advocacy%20Manual.pdf>; Letter from Campaign Legal Center to Attorney General (June 16, 2021), <https://campaignlegal.org/sites/default/files/2021-06/CLC%20Letter%20to%20U.S.%20Marshals.pdf>.



It is worth parking on these notes to acknowledge two realities. First, legislation causing voter confusion is at times intentional. As Professor Emily Rong Zhang at Berkeley phrased it, “modern voter suppression efforts have given special force – and sinister undertone – to the old political adage of ‘if you can’t convince them, confuse them.’... many of these laws also suppress the vote by imposing severe information costs.”²⁹ Second, the tactic of confusion is in furtherance of a project of disenfranchisement that extends well past jail and prison walls. Many prisoners come from communities on the outside that have historically been targeted for disenfranchisement through overly complex

²⁹ Rong Zhang, *supra* note 21 at 1040.

voter ID laws,³⁰ last-minute polling place closures,³¹ and a constellation of other voter suppression tactics. Unfortunately, some jail and election administrators know that “complexity engenders confusion,” but have done little to resolve the confusion.³² This project starts in communities and continues into jails and prisons.

How to Expand Jail Voting in Kentucky

With advocacy, though, we can work to change this problem. Chicago, Denver, Houston, Los Angeles, Philadelphia, and Washington D.C. have each successfully

³⁰ *Id.*

³¹ Democracy Diverted: Polling Place Closures and the Right to Vote, Leadership Conference on Civil and Human Rights (last visited Mar. 22, 2023), <https://civilrights.org/democracy-diverted/>

³² Rong Zhang, *supra* note 21, at 1040.

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expanded jail voting.³³ And their reforms have been overwhelmingly successful. In fact, some jail voting programs report higher voter turnout than the rest of the city. For instance, the Chicago Cook County Department of Corrections holds roughly 100,000 people each year,³⁴ 95% of whom are in pre-trial.³⁵ During the 2020 primary cycle, the Chicago Board of Elections reported 25% turnout among voters in Cook County Jail, relative to only 20% city-wide.³⁶

Advocates in Kentucky and elsewhere can push to expand jail voting through advocacy.

This final section will unpack how that might look in Kentucky.

ADVOCACY

Advocacy is likely the best way to create durable change in jails. For better or worse, the history of civil rights litigation tells us that lawsuits are not the engines of durable, fundamental social transformation. Jail voting advocacy can be broken down further into two discrete categories of work: (1) direct voter engagement; and (2) policy advocacy.

DIRECT VOTER ENGAGEMENT

In Kentucky, jails are locally operated at

a county-wide level. There are roughly 77 jails across the state as of 2022, and voting is handled on a facility-by-facility basis.³⁷

As a result, advocates began establishing programs at their local jails to engage, register, and assist voters with absentee ballots. This work began roughly three years ago when All of Us or None Kentucky stood up the first program in Louisville Metro Detention Center (LMDC), led by Savvy Shabazz and Shelton McElroy.³⁸ In 2022 alone, these local leaders registered 176 voters with 88 successfully casting absentee ballots. This program has continued in LMDC and the model has been emulated in Fayette County, led by Kentucky Equal Justice Center. Boyd County Detention Center has also established its own in-house jail voting program. If you are interested in establishing a program at your local jail, consider contacting All of Us or None Kentucky to learn from their model.

Comparable models have been successful outside of Kentucky as well. During Illinois’ 2020 primary, Injustice Watch, a nonprofit focused on criminal legal system reform, distributed ‘Check Your Judges’ guides to over 3,000 incarcerated people in Cook County Jail.³⁹ Similarly, in 2020, Cathy Brechtelsbauer of the South Dakota League of Women Voters (LWV) launched a solo jail-based voter registration initiative. She ultimately convinced the Minnehaha County Jail to distribute voter registration

packets to all prisoners.⁴⁰

If you choose to stand up a program, be sure to consult the Jail Voting Advocacy Manual or the Advocacy Strategies report.

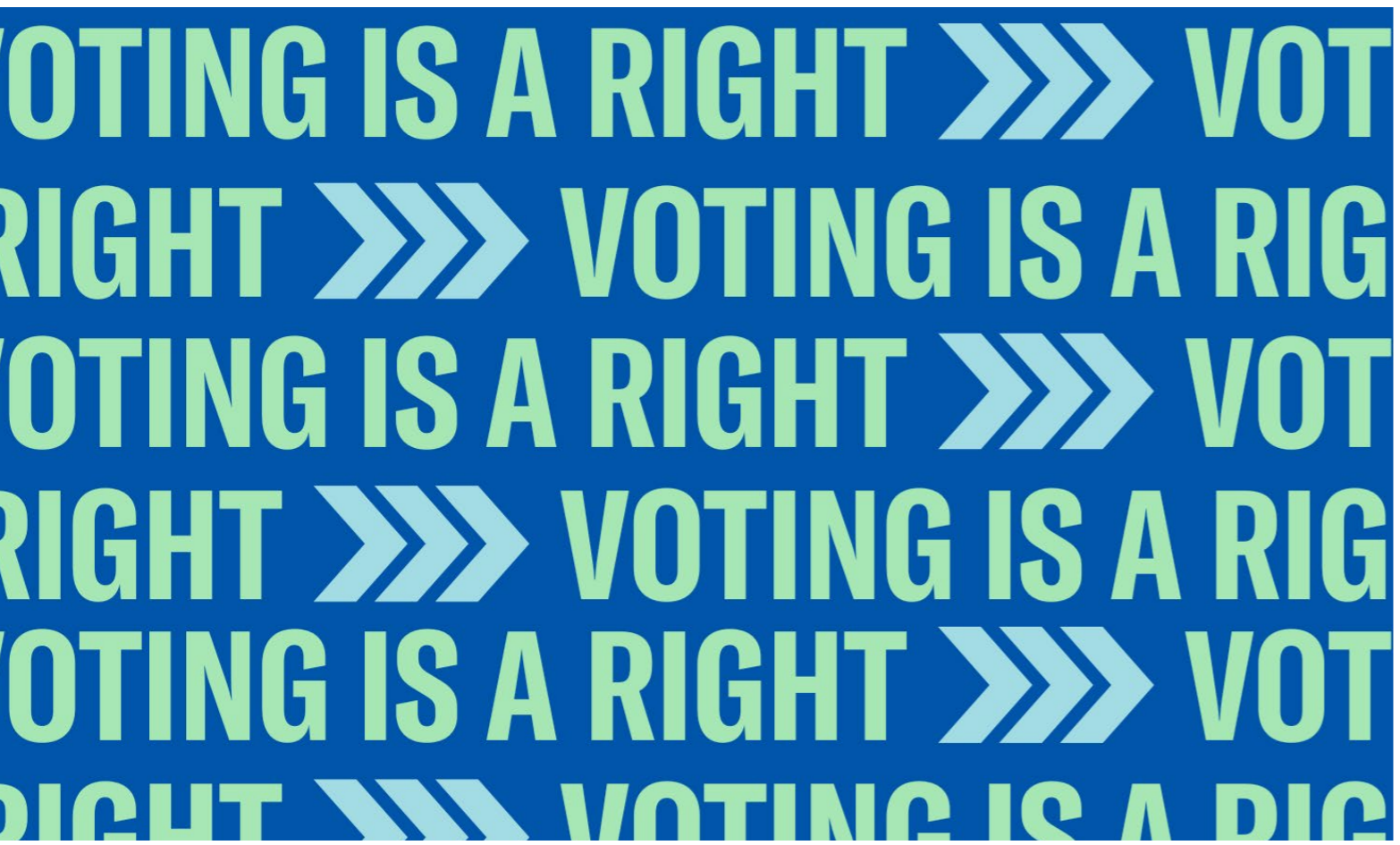
Additionally, if you have a friend or family member in jail, you could help them vote. In Kentucky, registration can be done via the mail and an online portal.⁴¹ Voters will need their social security number (SSN) and driver’s license or personal identification card number (if they have one) for the online application, but only a SSN for the paper application. Note that jails often have specific policies outlining how to contact prisoners, how to share documents, etc., so you may need to begin by familiarizing yourself with local jail policies. If you can’t find the answer to a question, consider calling the jail. Of course, please consider any risks of retaliation before contacting a jail on your loved one’s behalf. After registration is complete, voters may request a mail-in absentee ballot via the online portal⁴² or by calling their county clerk.⁴³ Due to HB580, jails are required to make phones accessible for ballot requests. Similarly, voters will need proof of identification. Voters may receive their ballot at the jail. To reduce mail delays, consider listing your loved one’s inmate number on the mailing address line.

Finally, to make the implicit explicit:

³³ Voting in Jails, The Sentencing Project (May 7, 2020), <https://www.sentencingproject.org/policy-brief/voting-in-jails/>
³⁴ Id.
³⁵ See Shawn Muleahy, Voting behind bars: Cook County’s huge jail becomes a first-time polling precinct, Wash. Post (Mar. 6, 2020), https://www.washingtonpost.com/politics/voting-behind-bars-cook-countys-huge-jail-becomes-a-first-time-polling-precinct/2020/03/05/5b10fc0-581c-11ea-9000-f3effce23036_story.html
³⁶ See Pascal Sabino, Cook County Jail Detainees Had A Higher Voter Turnout In The Primary Than The City As A Whole, Block Club Chi. (July 12, 2022), <https://blockclubchicago.org/2022/07/12/cook-county-jail-voter-turnout/>

³⁷ Jail Classifications, Kentucky Department of Corrections (last visited Aug. 13, 2024), <https://corrections.ky.gov/Facilities/Documents/Local%20Facilities/Jail%20Classifications%20-%209-1-22.pdf>
³⁸ All of Us or None Kentucky can be reached at the following page: <https://www.facebook.com/people/All-of-Us-or-None-Kentucky/100075692066864/>
³⁹ Id.

⁴⁰ Durrel Douglas, The Sentencing Project, Voting in Jails: Advocacy Strategies to #UnlockTheVote 2 (July 2022), <https://www.sentencingproject.org/app/uploads/2022/10/Voting-in-Jails-Advocacy-Strategies-to-Unlock-the-Vote.pdf>
⁴¹ Kentucky Voter Registration Form, Kentucky State Board of Elections (last visited Aug. 13, 2024), <https://elect.ky.gov/register/vote/Documents/SBE%201%20406%20Mail%20In%20Voter%20Registration%20Application.pdf>; Online Registration Portal, Kentucky Voter Information Portal (last visited Aug. 13, 2024), <https://vrsos.ky.gov/orweb/enoteky>
⁴² Online Absentee Request for: 2024 General Election, Kentucky Absentee Ballot Portal (last visited Aug. 13, 2024), <https://vrsos.ky.gov/abtwcb/>
⁴³ County Clerks, Kentucky State Board of Elections (last visited Aug. 13, 2024), <https://elect.ky.gov/About-Us/Pages/County-Clerks.aspx>



LITIGATION

Policy advocacy is the superior method to secure durable voting access for incarcerated people. But litigation is an option under certain conditions.

If a person is incarcerated in Kentucky, and is not otherwise disenfranchised from voting, but their jail prohibits access to make voter registration and/or absentee ballot applications, litigation under the Equal Protection Clause of the Fourteenth Amendment may be viable. The Supreme Court affirmed this general principle during a series of cases in the 1960-70's.⁴⁸ In *O'Brien v. Skinner*, the Court stated outright that voters suffer a Fourteenth Amendment violation if they are “under no legal disability impeding their legal right to register or to vote” but are “simply not allowed to use the absentee ballot, and are denied any alternative means of casting their vote although they are legally qualified to vote.”⁴⁹

However, this right is heavily qualified. Various authors have addressed the practical obstacles to relief under the *McDonald–O'Brien* framework.⁵⁰ A voter would have to request an absentee ballot application, knowing their request will be denied. Then, a voter would have to get in touch with legal counsel, counsel would need to file suit, and a court would need to order relief. All this would have to

⁴⁸ See e.g., *O'Brien v. Skinner*, 414 U.S. 524 (1974). See also *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969);

Goosby v. Osser, 409 U.S. 512, 518–522 (1973).

⁴⁹ *Skinner* at 530-31.

⁵⁰ See e.g., 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, 854-56 (2019) (evaluating *McDonald's* effect on incarcerated voter's ballot access); Grace Wynelle Thomas,

“Better Luck Next Election”: Late-Jailed Voters' Constitutional Right to Vote After *Mays v. LaRose*, 25 SCHOLARRSJ 105

that ballots be mailed. But in carceral settings, there are often complex mail requirements which may increase mail-time. Legislation could permit a representative from the county clerk's office or jail administration to hand-deliver absentee ballots to incarcerated voters (and return the ballot to the clerk's office), reducing the possibility of a voter's ballot being rejected due to mail delays.

- 31 KAR 6:020 §4 lays out the five circumstances under which a voter may cast a provisional ballot, and an incarcerated voter who requests a mail-in ballot but then chooses to vote in person (often because they left jail) doesn't qualify. Legislation could make explicit that this class of voters is permitted to cast provisional ballots.
- New provisions of the law could make explicit that (i) any necessary phone calls to register or request or an absentee ballot are free; and (ii) any necessary postage is free.
- Finally, KRS 117.076 limits absentee ballot access among pregnant voters to those voters in their third trimester. But pregnancies vary from person to person, month to month, and absentee ballots could be expanded to all pregnant voters.

Talking to a government official can feel intimidating. Thankfully, Kentuckians for the Commonwealth has gathered talking points on restoring voting rights. Many of these can be applied to the jail voting context.

117.066(3) permits county boards of elections to petition the State Board of Elections to create a “voting center,” a polling location that can accommodate voters from any precinct in the county (which would be necessary in a jail because incarcerated voters would certainly come from all around the county). Consider writing your county board of jail about establishing a voting center for incarcerated voters and jail staff.

Kentucky state officials (such as the Secretary of State, Governor, and state legislature) are empowered to drastically expand voting rights. In Arizona and Colorado, both Secretaries of State adopted rules requiring county officials to submit plans to ensure ballot access to incarcerated voters.⁴⁷ Kentucky's Secretary of State could do the same. They could also create a new Jail Voting Coordinator position to oversee the transformation.

Finally, the state legislature could establish mandatory voting locations akin to Chicago, Denver, Houston, Los Angeles, Philadelphia, and Washington D.C. But more incremental legislative changes would also be welcome. A few examples include:

- KRS 177.085(1)(c), which requires voters to apply for an absentee ballot by computer or phone. Computer access is limited in jails, but the legislature could require limited access during certain hours. HB580, passed in 2024, helpfully requires phone access, and a subsequent bill could build on this.
- KRS 117.085(3) and (4) both require

⁴⁷ Voting in Jails, The Sentencing Project (May 7, 2020), <https://www.sentencingproject.org/policy-brief/voting-in-jails/>

people who are not justice-impacted must be respectful when engaging people who are justice-impacted. If you have not been incarcerated and are hoping to work in jails or prisons, ask yourself if you're potentially putting a client in harm's way; ask yourself if you're doing what's best for your client, or doing what's best for you; ask yourself if your biases are creeping in. Check yourself at every turn.

POLICY ADVOCACY

Directly engaging incarcerated voters is tremendously impactful work but should be supplemented with policy advocacy, which is potentially more durable. At the local level, advocates could contact local governments and jail administrators, who have immense power to effect change. A good example of city officials effecting positive change occurred in Oklahoma City in 2020.⁴⁴ There, city council member Nikki Nice learned about jail-based voting and convened a group of local officials (including local jail staff, elections administrators, and others) to develop a concrete plan to send notaries to jails to validate absentee ballots.⁴⁵ Similarly, in 2021, Genesee County Jail hosted a candidate forum for residents at the jail.⁴⁶ Residents at the jail were able to directly voice their needs to prospective representatives. Consider contacting your local city council member or introducing an ordinance.

It is also possible to establish a polling location directly inside of a jail. KRS

⁴⁴ Douglas, *supra* note 34, at 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

happen during the limited window of time preceding an election. Moreover, the Sixth Circuit recently ruled that if a person filing such a lawsuit was jailed at a point in time when they could have registered to vote and/or requested an absentee ballot on the outside, their claim is weakened.⁵¹

Because of these obstacles, advocacy is a preferable option.

CONCLUSION

The right to vote is “a fundamental matter in a free and democratic society,” that is “preservative of other basic civil and political rights.” But because of the unrestrained churn of humans through pre-trial detention and poor jail administration, many folks lose this fundamental right. This wrong must be remedied to expand the franchise to the ~750,000 people in pre-trial detention and achieve the process of a multi-racial, inclusive democracy.

⁵¹ Mays v. LaRose, 951 F.3d 775 (6th Cir. 2020).

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This briefing paper is not intended to provide legal advice.

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