



September 23, 2019

Lina Hidalgo, Harris County Judge  
Harris County Commissioners Court  
1001 Preston Street  
Houston, TX 77002

Re: Harris County Plan For In-Person Voting Inside Harris County Jail

Dear Judge Hidalgo,

The Campaign Legal Center (“CLC”) and Dēmos write to respectfully urge the Harris County Commissioners Court to move forward with its approved plan to place voting machines inside of the Harris County Jail and to take any other steps necessary to ensure jailed, eligible voters are not disenfranchised this upcoming Election Day or any election moving forward.

Harris County Jail incarcerates nearly 9,000 people every day, making it one of the largest jails in the nation.<sup>1</sup> Many of those incarcerated are eligible to vote. For the last several years, Harris County has relied on the efforts of community groups like Houston Justice to reach out to incarcerated voters to help them register and vote by mail.<sup>2</sup> These groups, though, must work with limited resources and limited access to the jail. Even if that were not the case, the most robust absentee voting program possible would still be insufficient to protect the constitutional rights of jailed voters in Harris County. Because Texas requires that absentee ballot request forms be received by the Clerk’s Office eleven days before each election<sup>3</sup> and jailed voters are not qualified to cast emergency late absentee ballots,<sup>4</sup> every voter jailed on or after that deadline has no means of accessing the ballot. Voters of color and low-income voters are disproportionately disenfranchised as a result of these practices.


---

<sup>1</sup> See *Jail Population Management*, Harris County Sheriff’s Office: Mental Health and Jail Diversion Bureau, <https://www.harriscountycit.org/diversion/jail-population-management/>.

<sup>2</sup> See *Registering Voters Behind Bars*, Houston Justice: Project Orange, <https://www.houstonjustice.org/inmatejustice>.

<sup>3</sup> See Tex. Elec. Code § 84.007(c).

<sup>4</sup> See Tex. Elec. Code § 102.001; see also Tex. Elec. Code § 103.001.



On August 27, 2019,<sup>5</sup> this body took necessary action when it approved a measure to put a polling location inside Harris County Jail.<sup>6</sup> In response to concerns voiced by Harris County Clerk Diane Trautman, the Commissioners Court approved a working group to consider how such a polling location could work and to explore the feasibility of adding the new polling location in time for the upcoming November 5, 2019 election. Just two weeks later, Dr. Trautman sent a letter to the Court informing it that the working group determined “a polling location in County Correctional Facilities cannot be a workable solution” and the Ballot by Mail program “will remain in effect for the November and all future elections.”<sup>7</sup> Two days after that, Dr. Trautman adopted this position again, testifying to the House Committee on Elections that she determined state election law barred her from putting voting machines inside Harris County Jail.<sup>8</sup>

Dr. Trautman’s determination, however, must be revisited. Harris County should not and cannot simply rely on its existing Ballot by Mail program to facilitate elections in Harris County Jail. While Dr. Trautman’s letter raises some valid concerns about the challenges of serving this vulnerable population of voters, it is nonetheless the County’s responsibility to do so.

## **I. Harris County Has An Obligation To Ensure Jailed Voters Are Not Deprived Of Their Constitutional Right To Vote After Absentee Voting Has Ended.**

In 1974, the United States Supreme Court, in *O’Brien v. Skinner*, affirmed that a state cannot not constitutionally deny jailed, eligible voters access to the ballot.<sup>9</sup> In its reasoning, the Court noted that the plaintiffs—pretrial detainees—suffered “no legal disability impeding their legal right to register or to vote; they 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.”<sup>10</sup> Although a state can determine the means by which jailed voters can access the franchise, it has a constitutional obligation to put processes in place to ensure jailed, eligible voters can exercise their right to vote.<sup>11</sup>

---

<sup>5</sup> We understand that this important first step was the result of significant advocacy by the All Campaign and Johnny Taylor, founder of the All Campaign, co-founder of Smart Yap Foundation, and M.E.T., LLC—in partnership with local officials including the Harris County Sheriff’s Office, the Harris County Clerk’s Office and the Harris County Commissioner’s Court—who supported Item No. 14 for approval of voting booths and voting machines to be placed in the Harris County Jail for the primary purpose of allowing inmates to exercise their constitutionally protected right to vote. We also understand that these advocates build on the progress on this issue made by the Black Heritage Society, the Greater Houston Justice Coalition, the Martin Luther King Center, Team Put Me Up, the South Park Coalition, Artists for Recovery Coalition, State Representative Harold Dutton, Ovide Duncantell (now deceased), Rev. Ed Small, Dwayne Lark, Barry Thompson, and Durrel Douglas.

<sup>6</sup> *Commissioners Court Hearing*, Harris County Commissioners Court, Item I Pt 3 of 3 at 1:31:44 (Aug. 27, 2019) <http://harriscountytexas.swagit.com/play/08272019-1010>.

<sup>7</sup> See Appendix A.

<sup>8</sup> See *Invited Testimony by Diane Trautman*, House Committee on Elections (Sept. 12, 2019) <http://harriscountytexas.swagit.com/play/09122019-1272>.

<sup>9</sup> See *O’Brien v. Skinner*, 414 U.S. 524, 534 (1974).

<sup>10</sup> See *id.* at 530.

<sup>11</sup> See *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 809 (1969) (finding a statute barring jailed voters from accessing absentee ballots constitutional where the state might “furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own”); see also *Goosby v. Osser*, 409 U.S. 512, 522 (1973).

In Texas, pretrial detainees and those serving misdemeanor sentences retain their eligibility to vote.<sup>12</sup> Three quarters of Harris County Jail’s 9,000 person population are in jail awaiting trial and thus retain their eligibility.<sup>13</sup> Harris County has an obligation to ensure these thousands of potential voters have meaningful access to the franchise.

Failing to provide ballot access to these voters also disproportionately disenfranchises voters of color and low-income voters. Black and Latino defendants are grossly overrepresented in Harris County Jail’s pretrial population.<sup>14</sup> Not only are these defendants less likely to be released without bail, they are also less likely to be offered pretrial diversion.<sup>15</sup> Denying ballot access to this population has a disproportionate impact on Harris County’s voters of color, which is not only a matter of constitutional concern, but also may give rise to liability under the Voting Rights Act.<sup>16</sup>

Low-income voters will also suffer without a robust process in place for jail voting. Many pretrial detainees are incarcerated solely because they cannot afford to pay bail. In such instances, bail operates like a poll tax; it is the only thing preventing low-income voters from leaving the jailhouse and entering the polling place. As the Supreme Court clearly stated in *Harper v. Virginia State Bd. Of Elections*, “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”<sup>17</sup> A person’s ability to pay, thus, cannot stand as a barrier to the ballot box. Just as it is unconstitutional to bar low-income people from voting with the imposition of a poll tax,<sup>18</sup> the imposition of bail cannot function to deny anyone of their right to vote.

The right to vote is the cornerstone of our democratic system. While the state has an obligation to facilitate free and unimpaired access to the franchise for any voter,<sup>19</sup> that responsibility is even greater with regard to the voters it incarcerates.<sup>20</sup> Because the state has undertaken the “affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty”—the protections of the Due Process Clause are triggered.<sup>21</sup> Harris County must, therefore, have processes in place to ensure the eligible voters it incarcerates have access to the ballot from the moment they are arraigned through Election Day.

---

<sup>12</sup> See Tex. Elec. Code § 11.002; see also Tex. Elec. Code § 82.004.

<sup>13</sup> See Center for Justice Research, *Racial Disparity in Houston’s Pretrial Population*, Texas Southern University, (2018) available at: <https://www.centerforjusticeresearch.org/wp-content/uploads/2018/09/CJR-Pretrial-Report.pdf>.

<sup>14</sup> See *id.* at 7.

<sup>15</sup> See *id.* at 4–5.

<sup>16</sup> See 52 U.S.C. § 10301.

<sup>17</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

<sup>18</sup> See U.S. Const. amend. XXIV.

<sup>19</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

<sup>20</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (“[W]hen a person is institutionalized—and wholly dependent on the State—. . . a duty to provide certain services and care does exist . . .”).

<sup>21</sup> *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

## **II. Administrative Complexity and Texas Law Do Not Prevent Harris County From Turning Harris County Jail Into A Polling Place And Facilitating Voting In Jail Up Through Election Day.**

Dr. Trautman has adopted the position that practical concerns and the Texas Election Code require that she facilitate elections in a manner that ensures detainees in Harris County Jail will be denied the opportunity to exercise their fundamental, and constitutionally protected, right to vote. In her September 10, 2019 letter to the Commissioners Court, Dr. Trautman lays out a variety of issues that she argues prohibit her from following the Commissioners Court's directive and putting voting machines inside Harris County Jail, including fears about detainees lacking ID, the availability of internet inside the jail, and the mandate to keep polling locations open to the public.<sup>22</sup> In her testimony to the House Committee on Elections on September 12, Dr. Trautman reaffirmed this belief, stating that putting a polling location inside the jail "will not be a possibility at this time unless the election code changes [because] there would be a lot of conflicts there."<sup>23</sup> These concerns, though, are misplaced.

First, Texas courts have long construed Texas Election Code to be mandatory only insofar as it operates to facilitate elections that express the will of Texans, regularly repeating the refrain that the "purpose of the Code is to prohibit error, fraud, mistake, and corruption," and that "it may not be used as an instrument of disfranchisement for irregularities of procedure."<sup>24</sup> Although the time and place regulations in the Election Code are ordinarily understood to be mandatory, Texas courts have liberally construed that mandate where there is no evidence of fraud or corruption and have recognized exceptions to this rule when deviation from the letter of the Election Code is "rendered necessary by some supervening cause."<sup>25</sup>

Also, the Texas Election Code has some built in flexibility in its rules governing polling locations specifically. Although the law does hold that there be only one polling place per precinct,<sup>26</sup> it also provides that "[a] law outside this subchapter supersedes this subchapter to the extent of any conflict."<sup>27</sup> Not only does the constitutional requirement to enfranchise jailed voters qualify as superseding law in this context, so too does Texas state law. Texas courts have routinely held that "the will of the legal voters as expressed at the polls is the matter of paramount concern"<sup>28</sup> and, relatedly, "[i]t is of the essence of a fair election that a time should be fixed and a place

---

<sup>22</sup> See Appendix A.

<sup>23</sup> *Invited Testimony by Diane Trautman*, House Committee on Elections (Sept. 12, 2019) <http://harriscountytexas.swagit.com/play/09122019-1272>.

<sup>24</sup> *Fugate v. Johnston*, 251 S.W.2d 792, 793 (Tex. Civ. App. 1952); see also *Stratton v. Hall*, 90 S.W.2d 865, 867 (Tex. Civ. App. 1936); *Prado v. Johnson*, 625 S.W.2d 368, 369–70 (Tex. Civ. App. 1981); *Honts v. Shaw*, 975 S.W.2d 816, 822 (Tex. App. 1998); *Gonzalez v. Villarreal*, 251 S.W.3d 763, 778 (Tex. App. 2008).

<sup>25</sup> *May v. State*, 43 Tex. Crim. 54, 60, 63 S.W. 132, 133 (1901); see also *Des Champ v. Featherston*, 886 S.W.2d 536, 540 (Tex. App. 1994) (discussing "categories of exceptions in which time and place provisions are not mandatory: . . . [including] the prescription exception, which allows the establishment of a new voting location by prescription"); *Plocek v. Welhausen*, 144 S.W.2d 631, 633 (Tex. Civ. App. 1940) (allowing for deviation from strict adherence to election code where such deviation is necessary given the circumstances).

<sup>26</sup> See Tex. Elec. Code § 43.001.

<sup>27</sup> Tex. Elec. Code § 43.006.

<sup>28</sup> *Prado*, 625 S.W.2d at 369–70.

appointed where each qualified voter may cast his ballot or give his vote.”<sup>29</sup> Here, if the County does not act to put a polling place or other Election Day accommodation inside of the Harris County Jail, there will be no place or time where jailed qualified voters may cast their ballots or give their votes. Thus, the mandate of the Texas Election Code is actually best understood as requiring Harris County to provide these voters with accommodations to vote on Election Day.

Where, as here, the Texas Election Code could plausibly be read to preclude providing ballot access to a subset of voters who have a constitutional right to this access, the state must adopt an alternative reading of the election law. Take for example Dr. Trautman’s assertion about the problems in person voting will cause for jailed voters who may have to vote provisionally. She argues that if jailed voters cast provisional ballots at a polling location in a jail, they will not be able to leave the jail to come to the Election Department to cure defects in their ballots—again, because the state has incarcerated them—which would violate their right to vote. The answer, though, is not to refuse to provide these voters the opportunity to vote provisionally; it is to create accommodations to allow jailed voters a process by which they can cure ballot defects, despite the fact they are incarcerated. Similarly, if jailed voters do not have access to the forms of ID required to vote in person because their IDs were confiscated by the jail, either the jail should furnish voters with their proper IDs or the Clerk’s Office should allow jailed voters to present the IDs they do have—inmate IDs—to cast their ballots. Also, Texas law allows voters who lack compliant ID to vote with alternative ID after they sign a demonstrated reasonable impediment affidavit.<sup>30</sup>

Although facilitating voting in a correctional facility is no doubt complicated, it is necessary. Even if the introduction of polling places into Harris County Jail is not feasible in time for this upcoming election, the County must explore other alternatives—for example, expanding the availability of emergency absentee voting—to ensure these voters are not disenfranchised on Election Day. However, it is our position that Harris County Jail can and should be able to host in person voting on Election Day. We believe that the legal and practical barriers Dr. Trautman outlined in her letter are surmountable and would be happy to work in partnership with the community and county to provide the technical assistance necessary to move this project forward.

In order to exercise their right to vote, jailed voters—individuals who cannot freely contact the outside world, access the internet, or send mail on their own—must know there is an election going on, seek out the information and resources they need to cast a ballot, and find a way to both obtain and return the relevant paperwork before election deadlines. If we expect these voters to overcome steep hurdles in order to exercise their right to vote, Harris County officials should similarly find a way to overcome the administrative barriers they have identified to put a polling location inside of Harris County Jail and make voting easier for the incarcerated voters they serve.

### **III. Conclusion**

Although the task of putting polling booths inside of Harris County Jail may be a challenge, it is certainly possible. The Texas Election Code provides a process that allows for Election Day

---

<sup>29</sup> *Davis v. State*, 75 Tex. 420, 432 (1889).

<sup>30</sup> *See Veasey v. Abbott*, 888 F.3d 792, 802 (5th Cir. 2018).

voting from space<sup>31</sup>; it is time for Harris County to create a system that would similarly enfranchise the thousands of eligible voters incarcerated on Election Day within its own county lines. Not only does state law allow for such action, the Constitution demands it.

Harris County has the opportunity to become a national leader in combatting a long, grievously overlooked civil rights issue: jail-based disenfranchisement. We hope we can assist your County as it rises to that challenge.

Thank you so much for the steps you have already taken on this important issue. Please do not hesitate to reach out if you have any further questions.

Sincerely,



Danielle M. Lang  
Co-Director, Voting Rights & Redistricting  
Campaign Legal Center  
1101 14th Street NW, Suite 400  
Washington, DC 20005  
202-736-2200  
dlang@campaignlegal.org



Naila S. Awan  
Senior Counsel  
Dēmos  
80 Broad Street, 4th Floor  
New York, NY 10037  
212-485-6065  
nawan@demos.org

Cc: Diane Trautman, County Clerk, Harris County Clerk's Office  
Ed Gonzalez, Sheriff, Harris County Sheriff's Office  
Rodney Ellis, Commissioner, Harris County Commissioners Court  
Adrian Garcia, Commissioner, Harris County Commissioners Court  
Steve Radack, Commissioner, Harris County Commissioners Court  
R. Jack Cagle, Commissioner, Harris County Commissioners Court

---

<sup>31</sup> See Tex. Elec. Code § 106.002.