



January 28, 2019

Honorable Gail Chasey  
Chair, House Judiciary Committee  
New Mexico House of Representatives

Sent via E-MAIL

**Re: Support for HB 57 to end felony disenfranchisement in New Mexico**

Dear Chairwoman Chasey,

The undersigned national civil rights organizations are committed to eradicating unnecessary barriers to the right to vote, particularly those that disproportionately exclude people of color and low-income individuals from the democratic process. We write to applaud the introduction of HB 57, which would end felony disenfranchisement and facilitate full political and civic participation for thousands of New Mexicans. We urge the New Mexico House Judiciary Committee to approve the bill as introduced.

New Mexico currently disenfranchises individuals serving a felony sentence of incarceration, probation, or parole.<sup>1</sup> Analysis of 2016 data indicates that 24,286 eligible voters—representing 1.53% of New Mexico’s population—are disenfranchised.<sup>2</sup> Black voters are disproportionately excluded from the electorate: 4.71% of them are disenfranchised by reason of felony conviction.<sup>3</sup> Latinos, too, are overrepresented in the state’s criminal justice system and thus affected by disenfranchisement at greater rates than whites. These state-level figures contribute to a nationwide voting rights crisis in which over 5 million Americans cannot vote due to a felony conviction.<sup>4</sup>

New Mexicans want the state’s suppressive felony disenfranchisement practice to end. If HB 57 is adopted, New Mexico will join the ranks of Maine and Vermont as states that proudly impose no voting restrictions on individuals with felony convictions, thereby permitting citizens to assume civic responsibilities during their incarceration. As Selinda Guerrero, an organizer for Millions for Prisoners New Mexico, has stated, “Voting is a First Amendment right. It’s our

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<sup>1</sup> See N.M. STAT. ANN. §§ 1-4-24, 1-4-27.1 (2017).

<sup>2</sup> The Sentencing Project, *6 Million Voters Lost: State-Level Estimates of Felony Disenfranchisement, 2016*, 15 available at <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

<sup>3</sup> *Id.* at 16.

<sup>4</sup> See *generally id.* (citing a figure of 6.1 million disenfranchised voters nationally, before the recent constitutional amendment in Florida).

voice in decisions that are being made that impact our lives and who represents us. These protections are so vital and important in recognition of just being human.”<sup>5</sup>

With the passage of HB 57, the Land of Enchantment would serve as a model for the remaining 47 states. The time is right for the state to advance this reform—to expand the electorate and build a democracy that represents all individuals and all communities in New Mexico.

### **Felony Disenfranchisement Lacks a Defensible Rationale**

Those who defend felony disenfranchisement typically argue that individuals who have committed felonies have shown themselves morally unworthy of holding the franchise. Alternatively, they warn that these individuals would subvert our criminal laws if given the chance to vote.

The moral argument is exceedingly weak. Society exacts retribution and expresses its moral condemnation of criminal conduct through penal sanctions—the deprivation of liberty involved in a criminal sentence that is tailored to the defendant and the offense—not through collateral consequences.<sup>6</sup> Moreover, it is disproportionate and ill-fitting to judge a person’s moral worth based on a relatively small slice of their life. As civil rights attorney Bryan Stevenson has eloquently written, “Each of us is more than the worse thing we’ve ever done.”<sup>7</sup> In addition, tying deprivation of the vote to criminal conviction is necessarily arbitrary when the majority of crime goes undetected<sup>8</sup> and the criminal system is marred by systemic racial biases.

As for the claim that incarcerated persons will subvert our criminal laws by voting as a bloc to weaken the criminal law, it is completely devoid of evidence. Harvard voting rights historian Alexander Keyssar has described the claim as “conjectural,” “unsubstantiated,” and “divorced from reality.”<sup>9</sup> To the contrary, “research suggests that most convicts *support* the existence of the laws they’ve broken.”<sup>10</sup> At any rate, we do not deprive people of the freedom to vote in America based on their policy preferences. The Supreme Court held over 50 years ago that “[f]encing

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<sup>5</sup> Daniel Nicheanian, *New Mexico Legislation Would Eliminate Felony Disenfranchisement*, THE APPEAL (Jan. 10, 2019), <https://www.appealpolitics.org/2019/new-mexico-legislation-disenfranchisement/>.

<sup>6</sup> Alec Ewald, *Punishing at the Polls*, DEMOS, 29-30 (2003) (“[I]t is very unlikely that the policy has any retributive, punitive effects at all on the many members of the offender population already estranged from political life—particularly when we take away the vote in an invisible, automatic way, as all American disenfranchisement law does.”), available at [https://www.demos.org/sites/default/files/publications/FD\\_-\\_Punishing\\_at\\_the\\_Polls.pdf](https://www.demos.org/sites/default/files/publications/FD_-_Punishing_at_the_Polls.pdf).

<sup>7</sup> BRYAN STEVENSON, JUST MERCY 17-18 (2014).

<sup>8</sup> John Gramlich, *5 Facts About Crime in the U.S.*, PEW RESEARCH CENTER (Jan. 3, 2019), <http://www.pewresearch.org/fact-tank/2019/01/03/5-facts-about-crime-in-the-u-s/> (citing Bureau of Justice Statistics data and summarizing, “[m]ost crimes are not reported to police, and most reported crimes are not solved”).

<sup>9</sup> ALEXANDER KEYSAR, THE RIGHT TO VOTE 163, 303, 308 (2000).

<sup>10</sup> Ewald, *supra* note 6, at 33 (citing study).

out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”<sup>11</sup>

## **Ending Felony Disenfranchisement Would Serve Reentry and Public Safety**

While there is no legitimate justification for felony disenfranchisement, there is ample reason to believe that providing the right to vote would benefit New Mexico.

Scholar Alec Ewald has argued that permitting people to vote while incarcerated would actually strengthen our democracy by expressing “confidence in the robust nature of our elections and the inclusiveness of our political values.”<sup>12</sup> Given that 94% of people serving sentences in New Mexico’s prisons are ultimately released,<sup>13</sup> state law should encourage voting as a means of education, rehabilitation, and reentry. According to Ewald, participating in “elections—our proud, formative civic rituals—could help offenders develop their sense of social responsibility and membership in the political community.”<sup>14</sup>

Enfranchising people convicted of crimes is also a vital step toward ensuring the safety of New Mexico’s communities. Research shows that “former criminal offenders who enter stable work and family relationships are most likely to desist from crime.”<sup>15</sup> This is because once an individual with a criminal record rejoins the community—through gainful employment and resumption of full family duties—he or she becomes accountable to the other members of that community. Any and all duties that help him or her fully reintegrate will motivate that individual to further engage in community-based activity and away from unlawful conduct. Assuming responsibilities of a “voting member of one’s community would appear to be a logical analog to work and family reintegration.”<sup>16</sup>

Academic research supports this idea. A 2004 study controlling for factors like race and gender found that “among former arrestees, about 27% of the non-voters were re-arrested, relative to

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<sup>11</sup> *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

<sup>12</sup> Ewald, *supra* note 6, at 11.

<sup>13</sup> Mary Hudetz, *New Mexico Lawmakers Review Felon-Voting Rights Proposal*, BRISTOL HERALD COURIER (Jan. 23, 2019), [https://www.heraldcourier.com/news/new-mexico-lawmakers-review-felon-voting-rights-proposal/article\\_51800487-b5d2-5f7d-af89-155931e637a6.html](https://www.heraldcourier.com/news/new-mexico-lawmakers-review-felon-voting-rights-proposal/article_51800487-b5d2-5f7d-af89-155931e637a6.html).

<sup>14</sup> Ewald, *supra* note 6, at 11; see also Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “the Purity of the Ballot Box,”* 102 HARV. L. REV. 1300, 1309 (1989) (“[R]epublicanism seeks to nurture civic virtue in its citizens, and is premised on the notion that political participation is the path to moral growth.”).

<sup>15</sup> Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 197 (2004-2005) (citing Robert Sampson & John Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 AM. SOC. REV. 609, 617-618 (1990); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 542 (2000)); John Laub et al., *Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process*, 63 AM. SOC. REV. 225, 237 (1998).

<sup>16</sup> Uggen & Manza, *supra* note 15, at 197.

12% of the voters.”<sup>17</sup> It concluded that “there is at least some correlation between voting and recidivism . . . among people who have had some official contact with the criminal justice system.”<sup>18</sup> Another study found that “individuals who are released in states that permanently disenfranchise are roughly nineteen percent *more likely* to be rearrested than those released in states that restore the franchise post-release. This finding provides initial evidence consistent with the thesis that disenfranchisement is directly related to recidivism.”<sup>19</sup>

Plainly, restricting those with felony convictions from voting does nothing to improve the safety of neighborhoods. Restoring the right to vote to those who are currently serving sentences, however, would help educate and prepare these individuals for full re-entry. Registering to vote and casting a ballot would engage their responsibilities as citizens, ultimately resulting in stronger, safer communities in which members do right by one another. In this way, ending felony disenfranchisement promises to help create law-abiding citizens.

### **Felony Disenfranchisement Perpetuates A Legacy of Racial Bias**

Felony disenfranchisement laws in the United States have troubling race and class dimensions that cannot be reconciled with our shared present-day values of equal citizenship and equal dignity.

Scholar Ward Elliott has observed that the spread of disenfranchisement laws may have been a response to the abolition of property-holding requirements, which “had served a number of indispensable functions, such as holding down the voting strength of free blacks, women, infants, criminals, mental incompetents, unpropertied immigrants, and transients.”<sup>20</sup> After Reconstruction, states in the South began to tailor their disenfranchisement laws to cover crimes for which Black citizens were most frequently prosecuted, “as part of a larger effort to disfranchise African American voters and to restore the Democratic Party to political dominance.”<sup>21</sup> Over time, states stopped distinguishing between kinds of crimes, instead imposing blanket disenfranchisement for all felony convictions.

Although the country has changed and states have repudiated discriminatory barriers to voting such as poll taxes and literacy tests, criminal disenfranchisement laws have persisted. And they

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<sup>17</sup> *Id.* at 205.

<sup>18</sup> *Id.* at 206.

<sup>19</sup> Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 426 (2015) (emphasis added).

<sup>20</sup> WARD E.Y. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY* 43 (1974).

<sup>21</sup> Pippa Holloway, “*A Chicken-Stealer Shall Lose His Vote*”: *Disenfranchisement for Larceny in the South, 1874-1890*, 75 J. S. HIST. 931, 931 (2009); see also Hamilton-Smith & Vogel, *supra* note 19, at 409 (“Disenfranchisement became an important aspect of the Jim Crow laws used in reconstruction-era America to continue to subjugate the newly-freed slaves.”).

continue to have a disproportionate racial impact due to the pervasive racial bias in the criminal justice system.

African Americans and Latinos make up 32% of the U.S. population, but in 2015 they comprised 56% of all incarcerated persons in the country.<sup>22</sup> This is because individuals of color are prosecuted and sentenced at much higher rates than whites for comparable behavior. For example, in a national survey on drug use, it was reported that “African Americans and whites use drugs at similar rates, but the imprisonment rate of African Americans for drug charges is almost 6 times that of whites.”<sup>23</sup> African Americans “represent 12.5% of illicit drug users, but 29% of those arrested for drug offense and 33% of those incarcerated in state facilities for drug offenses.”<sup>24</sup>

New Mexico has not been immune from the national illness of deep racial disparities. The imprisonment rate for Latinos in the state (422 per 100,000) is more than twice that for whites (208 per 100,000).<sup>25</sup> The imprisonment rate is a staggering 1,326 per 100,000 for Black New Mexicans—6.4 times the rate for whites.<sup>26</sup> It is therefore not surprising that although the state’s population is about 2% Black, about 6.5% of its disenfranchised voters are Black.<sup>27</sup>

Troublingly, the prison population has been rising in New Mexico far faster than population growth. In 1980, the prison population sat at just under 1200.<sup>28</sup> Today, the state imprisons over 7,100 people.<sup>29</sup> While nationally the prison population dropped 7% from 2009 to 2016, it rose 14% in New Mexico over that same period.<sup>30</sup>

Because people of color are policed, prosecuted, convicted, and incarcerated for crimes at disproportionately higher rates than whites, they lose their right to vote at disproportionately higher rates too. As a result, the electorate—in the United States as a whole and in New Mexico—is disproportionately white. Communities of color experience reduced political power

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<sup>22</sup> NAACP, Criminal Justice Fact Sheet, available at <https://www.naacp.org/criminal-justice-fact-sheet/> (emphasis added).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> The Sentencing Project, *State-by-State Data*, available at <https://www.sentencingproject.org/the-facts/#map> (last visited on Jan. 27, 2019).

<sup>26</sup> *Id.*

<sup>27</sup> *6 Million Voters Lost*, *supra* note 2, at 15-16.

<sup>28</sup> *State-by-State Data*, *supra* note 25.

<sup>29</sup> New Mexico Corrections Department, <https://cd.nm.gov/> (providing daily prison population) (last visited on Jan. 27, 2019). New Mexico’s prison population increased almost 500% over this period, compared to an increase in the state’s total population of 61%. See U.S. Census Bureau, Population and Housing Unit Estimates, <https://www.census.gov/programs-surveys/popest/data/data-sets.html>.

<sup>30</sup> Patrick Hayes, *New Mexico’s Prison Population Rises, Nationwide Rate Drops*, KOB4.com (Nov. 20, 2018), <https://www.kob.com/albuquerque-news/new-mexicos-quos-prison-population-rises-nationwide-rate-drops/5150587/>.

and the underrepresentation of their interests in government. Ending felony disenfranchisement, therefore, would help restore equality and equity to the democratic process.

### **New Mexico Can Lead the Way**

The right to vote is the core and essence of modern democracy. Per capita, however, no country strips voting rights from more of its citizens than the United States.<sup>31</sup> By contrast, most of Europe allows people to vote while in prison.<sup>32</sup>

Two states in America—Maine and Vermont—do not disenfranchise their citizens for felonies. Both states typically boast voter turnout higher than the national average, with Maine often taking the top spot. Now other states are beginning to recognize the importance of restoring the right to vote. In the 2018 election, almost 65% of Floridians approved a constitutional amendment that has the potential to restore the right to vote to 1.4 million individuals with felony records.

New Mexico can build off that momentum and take it one step further by restoring the right to vote for those still serving prison sentences in addition to those on parole or probation. The state has already taken laudable steps to reduce its disenfranchised population, repealing the lifetime ban on voting for people with felony convictions in 2001 and implementing a notification process for restored voters in 2005. Now is the time to allow all citizens, regardless of felony conviction or incarceration status, to vote.

Three other states have introduced legislation to end felony disenfranchisement: Massachusetts (SD.25, SD.26), New Jersey (S2100, A3456), and Virginia (SJ 261, SJ 262). In this democratizing moment, the state that acts first will instantly become a leader on democracy and set an example of inclusion for the rest of the country. We urge New Mexico to seize its moment of opportunity with HB 57.

If you have any questions or would like to discuss this further, please contact Chiraag Bains, Director of Legal Strategies at Dēmos, at (202) 864-2746 or [cbains@demos.org](mailto:cbains@demos.org).

Sincerely,

Dēmos  
American Civil Liberties Union  
Center for Popular Democracy  
Color of Change

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<sup>31</sup> Hamilton-Smith & Vogel, *supra* note 19, at 411.

<sup>32</sup> ACLU, *Out of Step with the World: An Analysis of Felony Disenfranchisement in the U.S. and Other Democracies* 6 (2006), available at [https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep\\_20060525.pdf](https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf).

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