Locked Out of Democracy: Addressing the Hidden Voter Suppression in Jails

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I. INTRODUCTION

Voting is one of the most fundamental ways American citizens communicate their satisfaction or dissatisfaction with the government, which the Constitution designed to serve "the people."[1] Voting also serves as the medium for "the people" to choose their representatives, whose job is to enact policies on behalf of the desires of their constituents.[2] In recognition of the importance of the political process and constitutional balance of powers, the Supreme Court has been careful in exercising judicial power over decisions reserved to the people through the political process.[3] The Court has also expressed that judicial interference may be necessary where the political process breaks down and to protect American citizens who experience problems forming political coalitions and exercising the political power reserved to them.[4]

Currently, over half a million legally eligible voters held in jails across the country are being effectively disenfranchised due to insufficient access to accurate information about their right to vote and how they can exercise it awaiting trial.[5] This Note proposes that the federal courts should protect pre-trial detainees' fundamental right to vote by recognizing that jail officials may not obstruct their ability to access accurate voting information and have affirmative obligations to provide them access to voting information. It proceeds by first showing how insufficient access to accurate voting information in jails is causing the de facto disenfranchisement of pre-trial detainees.[6] Part II-B will show that access to voting information is protected

1. *See* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y J. 471, 488 (2016) ("The expressive nature of the vote is present whether the vote is for a candidate in a … election or for a ballot proposition, recall, referendum, or anything else called a vote.").

2. *Id.*; *see also* U.S. CONST. art. I, § 2.

3. *See generally* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) (explaining that it may be appropriate for the Court to supply more exacting judicial scrutiny upon "legislation which restricts those political processes which can be ordinarily expected to bring about repeal of undesirable legislation").

4. *See id.* (expressing that more exacting scrutiny may be necessary in addressing instances where "prejudice against discrete and insular minorities," could constitute a "special condition which tends to seriously curtail the operation of those political processes ordinarily relied upon to protect minorities").

5. *See* NICOLE D. PORTER ET AL., OUT OF STEP: U.S. POLICY ON VOTING RIGHTS IN GLOBAL PERSPECTIVE 15 (2024) (explaining that lack of knowledge about the right to vote and insufficient or inaccurate information from jail staff contribute present a significant obstacle to people voting in jail), https://www.sentencingproject.org/app/uploads/2024/08/Out-of-Step-U.S.-Policy-on-Voting-Rights-in-Global-Perspective.pdf [https://perma.cc/3K9F-HMEQ]; *see also* Press Release, Ginger Jackson-Gleich & Rev. Dr. S. Todd Yeary, *Eligible, but excluded: A guide to removing the barriers to jail voting*, Prison Pol'y Initiative (Oct. 2020), https://www.prisonpolicy.org/reports/jail_voting.html [https://perma.cc/2LTA-D2T2]; Nicole D. Porter, *Voting in Jails*, THE SENTENCING PROJECT (May 7, 2020), https://www.sentencingproject.org/policy-brief/voting-in-jails/ [https://perma.cc/JR7R-7F2W].

6. *See infra* Part II.A.

under the First Amendment's broad right to access information.[7] Part II-B will also explain how protecting access to voting information is consistent with the First Amendment's underlying purpose to protect political expression and access to political information as a way to ensure that the people maintain their constitutionally reserved power to hold government officials accountable.[8]

Part II-C will address the First Amendment framework the Supreme Court uses to address claims raised by incarcerated people.[9] This section will highlight how this highly deferential standard may not be sufficient to protect pre-trial detainees' from jail practices that interfere with their ability to access information on voting and effectively cast their ballots.[10] Part II-C will also highlight critiques of the *Turner* standard, specifically, that some dissenting Justices have expressed concerns that under *Turner*'s overly deferential standard courts will be able to disregard incarcerated peoples' constitutional rights.[11]

Part III proposes that the federal courts should recognize that pre-trial detainees have a right to access voting information and find that the government has affirmative obligations to ensure that they maintain adequate access to voting information.[12] This right is modeled after the prisoners' fundamental right of access to the courts.[13] This part will proceed by showing: (1) how the prisoners' right of access to the courts is also rooted in the First Amendment;[14] (2) that creating a pre-trial detainees' right to access voting information will serve the same purpose as the prisoners' right of access to courts; (3) the reasons underlying the Supreme Court's decision to place affirmative obligations on the states to ensure incarcerated people maintain access to the courts, and show why similar obligations should be placed on states to provide pre-trial detainees access to voting information;[15] (4) how the *Turner* standard will pose a less substantial threat to courts being able to meaningfully ensure that pre-trial detainees maintain access to voting information.[16] Part III will conclude by highlighting what voter information necessarily requires protection, including: (1) information on registering to vote in a detainees' state and information about any state voter registration deadlines; (2) information on whether they live in a vote-by-mail state; (3) information on how to vote-by-mail; (4) if they live in a state that has a voter identification law, understanding how to meet its requirements; (5) information about candidates and ballot measures; (6) whether being convicted of the crime which they are accused of will disqualify them from

7. *See infra* Part II.B.
8. *Id.*
9. I attempt to use humanizing language for incarcerated people where possible. At times, this Note will refer to people held awaiting trial as pre-trial detainees.
10. *See infra* Part II.C.
11. *Id.*
12. *See infra* Part III.A.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

voting while incarcerated; and (7) information on how to have their right to vote reinstated in the event they are convicted of a disqualifying crime.[17]

II. BACKGROUND

A. The Disenfranchisement of Pre-Trial Detainees

The United States remains an outlier nation in disenfranchising its citizens due to criminal convictions.[18] Currently, over 4.4 million people who would otherwise be legally eligible to vote are disenfranchised due to a felony conviction.[19] These numbers may not surprise those following criminal justice reform movements focused on mass incarceration. However, many may be surprised to find out that hundreds of thousands of people sitting in jails—detained awaiting trial—maintain the right to vote.[20] Individuals in jails fall into a range of classes,[21] however, many of them commonly share the trait that they are legally eligible to vote.[22]

One class of individuals who maintains the right to vote in all fifty states are people detained awaiting trial.[23] Individuals may be detained before trial for many reasons, which vary across jurisdictions. Pursuant to the Bail Reform Act of 1984, judges in the federal system consider: (1) the type of crime an individual is charged with, (2) whether an individual poses a flight risk, or (3) whether there is a serious risk the individual will obstruct justice or attempt to obstruct justice.[24] After a hearing, judges may detain someone only if they find "that no conditions or combination of conditions exist which will 'reasonably assure the appearance of the person'" and to ensure "the safety of any other person and the community."[25] However, these individuals are only part of the jail population. Approximately sixty percent of individuals detained awaiting trial remain incarcerated solely because they cannot afford

17. *See infra* Part III.B.
18. *See* PORTER ET AL., *supra* note 5, at 4.
19. *Id.*
20. *See* O'Brien v. Skinner, 414 U.S. 524, 530 (1974) (holding that New York's failure to extend an opportunity for New York citizens detained before trial or incarcerated in jail for a misdemeanor an opportunity to vote via absentee ballot to be unconstitutional disenfranchisement because these individuals are not legally disenfranchised due to conviction but are merely "physically disabled" from participating in elections due to being detained or incarcerated in jail); *see also* Porter, *supra* note 5; Press Release, Prison Pol'y Initiative, *supra* note 5; DEP'T OF JUST. C.R. DIV., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION (updated Sep. 2024), https://www.justice.gov/crt/media/1332106/dl?inline= [https://perma.cc/53FZ-FTR8].
21. *See* BUREAU OF JUST. STAT., *Correctional Institutions*, https://bjs.ojp.gov/topics/corrections/correctional-institutions#0-0 (last visited Apr. 7, 2025) [https://perma.cc/2NAY-ZLD5].
22. *See* DEP'T OF JUST. C.R. DIV., *supra* note 20 (providing state-by-state information on voting rules that apply to criminal convictions, including misdemeanor convictions).
23. *Id.*
24. 18 U.S.C. § 3142(f).
25. *Id.* § 3142(e)(1).

the cash bail amount required for their release.[26] Whatever the reason these individuals are detained in jail before trial, the Supreme Court has clearly recognized that pre-trial detainees maintain the right to vote.[27]

Despite retaining their right to vote, pre-trial detainees face significant obstacles which effectively disenfranchise them.[28] The risk of disenfranchisement arises because people in jails often do not know that they maintain their right to vote and do not receive accurate information from jail officials about their right to vote.[29] This leaves people in jail without knowledge about how to: (1) register to vote, (2) confirm their voter registration status during election cycles, and (3) effectively cast their ballots. Even where information is available, the Sentencing Project has identified additional hurdles, including a lack of in-person voting opportunities, being unable to keep their registration address up to date, and getting an ID where states require one to vote.[30] Moreover, laws in certain states criminalize ballot return by non-family members, which prevents willing jail staff from assisting detainees with returning their ballots.[31] Additionally, individuals held in pre-trial detention centers with previous felony convictions may be deterred from voting due to fear of legal repercussions, since some states impose criminal penalties for attempting to vote after a felony conviction.[32]

To illustrate the impact of these information gaps, logistical hurdles, and collateral consequences, consider the state of Delaware's jails in the November 2020 general election. In 2020, Delaware's Department of Corrections ("DDOC") instituted a new mail policy to prevent people in pretrial custody from receiving physical mail unless it was marked "official mail."[33] According to DDOC, its new mail policy was implemented to minimize the flow of contraband through corrections facilities.[34] Under the policy, DDOC redirected physical mail to a third-party company that photocopies the mail and that photocopy is delivered to people held in DDOC custody.[35] The policy exempts "official mail," but did not specify that

26. *See* Tara Watford, *Unlocking the Truth: A Closer Look at Cash Bail Data*, THE BAIL PROJECT (Sep. 25, 2023), https://bailproject.org/data/unlocking-the-truth/#:~:text=Of%20those%20in%20jail%20on,a%20year%2C%20awaiting%20their%20trials [https://perma.cc/Q5R2-V6K2].

27. *See O'Brien*, 414 U.S. at 530. While most states also do not disenfranchise people due to a misdemeanor conviction, the scope of this Note will focus on pre-trial detainees being held in jails before trial.

28. *See* PORTER ET AL., *supra* note 5, at 15–16.

29. *See id.* at 16.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See* Paul Kiefer, *DOC clarifies rules for absentee ballots, considers offer of voter registration volunteers*, DEL. PUB. MEDIA (Aug. 21, 2022, 8:35 PM), https://www.delawarepublic.org/politics-government/2022-08-21/doc-clarifies-rules-for-absentee-ballots-considers-offer-of-voter-registration-volunteers [https://perma.cc/Q69S-7MKC];PORTER ET AL., *supra* note 5, at 16 ("[I]n Delaware, evidence shows that *not one single voter* living in a jail voted in the November 2020 election").

34. *Id.*

35. *Id.*

absentee ballots qualified for exemption.[36] As a result, pre-trial detainees that remained eligible to vote were universally disenfranchised in the 2020 general election.[37]

In response, the ACLU of Delaware and the Prisoners' Legal Advocacy Network met with the Delaware Department of Elections Commissioner, Delaware state legislators, and representatives from DDOC.[38] At the meeting, it became clear that many "startling" practices, in addition to the Department of Corrections' mail policy led to the universal disenfranchisement of individuals in pre-trial detention.[39] These practices included: (1) inaccuracies about voter registration deadlines posted in every facility, (2) that DDOC mailroom staff had not been trained on how to process absentee ballots and remained confused over whether absentee ballot envelopes constituted contraband based on DDOC's general mailroom policies, (3) no eligible voter in solitary confinement was provided with an opportunity to register to vote or request or return an absentee ballot, (4) DDOC characterized eligible voters' constitutional right to vote as a "privilege."[40] These deficiencies underscore the reality that pretrial detainees' ability to exercise their right to vote depends on correctional facilities actively informing them of their rights and providing them with a pathway to cast a ballot.

B. The First Amendment Protects a Right to Access Voting Information.

This section first examines the origins of the First Amendment right to access information despite the word "information" not being explicitly included in the text. It then shows that voting-related information is a form of political expression/information protected by the First Amendment. It will show that voting-related information receives First Amendment protection and that pre-trial detainees, by being legally eligible voters, maintain a right to access voting-related information.

1. The First Amendment Right to Access Information

The Supreme Court has long recognized that the First Amendment protects the freedom to speak and the right to receive information.[41] The right to access information is closely related to the freedom of the press and the role that the Framers imagined the press to play in America's democracy. In

36. *See* Kiefer, *supra* note 33.

37. *Id.*

38. Letter from Dwayne J. Bensing, Legal Director, ACLU to Commissioner Hudson, Del. Dep't of Corr. (Sep. 12, 2022), https://www.aclu.org/cases/prisoners-legal-advocacy-network-v-carney?document=Demand-Letter-to-Department-of-Corrections#legal-documents[https://perma.cc/3J2A-7FNY]; *see also* PORTER ET AL., *supra* note 5, at 16.

39. *Id.*

40. *Id.*

41. *See generally* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (collecting cases outlining the scope of the right to receive information and ideas protected under the First Amendment).

Near v. Minnesota, the Court struck down a state statute that punished newspaper, magazine, and other periodical publishers who published literature found to be "malicious, scandalous, and defamatory."[42] In striking down the law, the Supreme Court cited to the Framers' intention to include a freedom of the press into the First Amendment:

> "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more [honorable] and just modes of conducting affairs."[43]

According to this quote by the members of the Continental Congress, preserving the Press' role to function would preserve the People's freedom.[44] With this in mind, the Court closely scrutinized the government's attempts to regulate the publication and distribution of information and ideas.[45] It has expanded the First Amendment's press protection to "every sort of publication which affords a vehicle of information and opinion."[46]

The Supreme Court subsequently realized that the First Amendment's protection to speech would be useless without protecting people's ability to receive information and opinions.[47] In *Martin v. Struthers*, the Court explained the necessity of protecting access to information.[48] There, a city ordinance that made it unlawful for any person to distribute "handbills, circulars, or other advertisements" by approaching someone's home and ringing their doorbell.[49] Ms. Martin, a Jehovah's witness, was convicted after knocking on people's doors to distribute leaflets that advertised a religious meeting.[50] In holding that the City ordinance violated the First Amendment, Court explained that the freedom of the press and speech "necessarily protects the right to receive … novel and unconventional ideas," because "the freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society."[51] According to the Court,

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42. *See generally* Near v. Minnesota, 283 U.S. 697 (1931).
43. *See id.* at 717 (citing J. of the Cont'l Cong. (1904 Ed.) vol. I, pp. 104-08).
44. *Id.*
45. *See* Martin v. Struthers, 319 U.S. 141, 144 (1943) ("In considering legislation which thus limits the dissemination of knowledge, we must be astute to examine the effect of the challenged legislation and must weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation.").
46. *See* Lovell v. Griffin, 303 U.S. 444, 452 (1938).
47. *See Martin*, 319 U.S. at 143 (explaining that the First Amendment necessarily protects the right to receive information to ensure that Framers' goals in drafting the First Amendment are upheld).
48. *Id.*
49. *See id.* at 142.
50. *Id.*
51. *See id.* at 146.

any "naked restriction of the dissemination of ideas … can serve no purpose but that forbidden by the Constitution."[52] Therefore, the Court closely monitors the government's attempts to regulate individual's access to information.

Since *Martin*, the Supreme Court has also held that the First Amendment protects workers interested in hearing about labor unions because "discussion concerning the industry and the causes of labor disputes [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[53] These conversations are protected under both the First Amendment's speech and assembly clauses.[54] In *Red Lion Broadcasting Co. v. FCC*, broadcasters challenged the FCC's fairness doctrine.[55] Specifically, broadcasters alleged that the First Amendment protected their "desire to use their allotted frequencies continuously to broadcast whatever they choose, and exclude whomever they choose from ever using that frequency."[56] According to the broadcasters, under the First Amendment "[N]o man may be prevented from saying or publishing what he thinks, or from refusing in his speech … to give equal weight to the views of his opponents."[57] The Supreme Court disagreed, stating that in the context of broadcast media, "[I]t is the right of the viewers and listeners, not the right of the broadcasters which is paramount … [a]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences that is crucial here."[58] According to the Court, this was so because "speech concerning public affairs is more than self-expression; it is the essence of self-government."[59] Although *Red Lion* was a First Amendment decision made in the context of broadcasting, its principle that the First Amendment protects "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences …" has been acknowledged by the Court outside of the broadcast medium.[60]

52. *See id.* at 147.
53. *See* Thomas v. Collins, 323 U.S. 516, 532 (1945).
54. *Id.*
55. *See* 395 U.S. 367, 373-74 (1969). The Fairness Doctrine required broadcasters to allot equal time for all qualified candidates for public office. *See* 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical). In 1967, the FCC codified regulations pursuant to the Telecommunications Act which required broadcast licensees to provide an opportunity for legally qualified political candidates to respond to personal attacks or political editorials. *See Red Lion*, 395 U.S. at 374-75 (explaining the FCC's regulations).
56. *See Red Lion*, 395 U.S. at 386.
57. *Id.*
58. *See id.* at 390.
59. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).
60. *See Kleindienst*, 408 U.S. at 763 (citing *Red Lion* to highlight the general principle that the First Amendment protects the right to receive information and ideas).

2. Pre-Trial Detainees' Access to Voting Information is Protected Under the First Amendment.

As *Red Lion* makes clear, the Supreme Court has held that people have a right to access political information.[61] This is so because, according to the Court, free speech "is the essence of self-government."[62] Alexander Meiklejohn's self-government theory of the First Amendment helps explain why. Meiklejohn's interpretation of the First Amendment comes from looking at surrounding constitutional provisions: the Preamble, Article I, § 2, and the Tenth Amendment.[63]

The Preamble states, "We the People … establish this Constitution for the United States of America."[64] Through the Constitution, "We the People," grant limited powers to the federal government, which are carried out by representatives acting as agents of the people.[65] However, as demonstrated by the Tenth Amendment, the people did not delegate all of their power to the federal government, "any powers not given to the federal government are reserved to the states or to *the people*."[66] Article I, § 2 supports the notion that one of the sovereign powers reserved to the people is the power to choose their representatives.[67]

According to Meiklejohn, Article I, § 2's express acknowledgement of the people's voting power subordinates the federal government's power to interfere with the people's ability to participate in the electoral process.[68] Reading these provisions together, Meiklejohn declares that the First Amendment's speech clause "protects the freedom of those activities of thought and communication by which we 'govern.'"[69] Since voting is the ultimate activity by which we govern, it follows that if voting falls within one of the categories protected under the First Amendment—speech, peaceable assembly, or a form of petition to the government for redress of grievances—it should receive protection under the First Amendment.[70]

The Supreme Court, however, has never expressly recognized voting as protected expression under the First Amendment,[71] even though there is theoretical support for the conclusion that voting is a form of protected

61. *See Red Lion*, 395 U.S. at 390.
62. *See Garrison*, 379 U.S. at 74-75.
63. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253 (1961).
64. U.S. CONST. pmbl.
65. *See* Meiklejohn, *supra* note 63, at 254.
66. U.S. CONST. amen. X (emphasis added).
67. *See* Meiklejohn, *supra* note 63, at 254.
68. *Id.*; *see also* U.S. CONST. art. I, § 2.
69. *See* Meiklejohn, *supra* note 63, at 254.
70. *Cf.* U.S. CONST. amend. I.
71. *See* Armand Derfner & J. Gerald Hebert, *supra* note 1, at 486 ("Despite the Court's current jurisprudential confusion, the Supreme Court has never explicitly considered, much less rejected the argument that voting is speech fully protected by the First Amendment.").

expression under the First Amendment.[72] Regardless, even without recognizing voting as protected First Amendment expression, access to information on voting is still protected. It is the type of political information that the Court has already afforded broad protection to under the First Amendment.[73] Moreover, this will preserve the balance of power which the framers divided among the federal government, the states, and the people.[74] After the Court announced in *O'Brien v. Skinner* that pre-trial detainees maintain the right to vote so long as they meet a state's voter eligibility requirements, this First Amendment right to information on voting must extend to them too.[75]

C. The Unfortunate Reality of the First Amendment in Jail

The obstacle faced in this Note is not that people in jails do not maintain the right to vote, nor is it challenging to see how the First Amendment would protect people from governmental interference with their ability to access voting information.[76] Rather, the difficulty comes from the way that the Supreme Court balances the government's interests against those of incarcerated individuals when determining the scope of First Amendment protections inside of prisons and jails.[77] Although Meiklejohn argued that the First Amendment entirely "subordinates the power of the [Government]," the Supreme Court has held that the First Amendment is not absolute and, therefore, balances the government's interests against an individual's interest in protected speech to determine the constitutionality of government regulations on speech or affecting speech.[78] Under the First Amendment framework applied to claims made by incarcerated people, the Court applies far more deference to the government's interest than it would outside of the setting of a jail or prison.[79] This balancing of interests makes it extremely challenging for incarcerated people to succeed on First Amendment claims.

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72. *See id.* at 488–89 (discussing how the act of voting serves sufficient communicative functions for the Supreme Court to find that it is a form of protected expression under the First Amendment).

73. *Cf. Red Lion*, 395 U.S. at 389-90 (explaining that individuals have the right to receive access to political ideas consistent with the purpose of the First Amendment to preserve an "uninhibited marketplace of ideas."); *see also Garrison*, 379 U.S. at 74-75 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

74. *See* Meiklejohn, *supra* note 63, at 253–54; *see also* U.S. CONST. pmbl.; *see also* U.S. CONST. amen. X; U.S. CONST. art . I, § 2.

75. *See O'Brien*, 414 U.S. at 530 (explicitly stating that appellants—a group of pre-trial detainees and people convicted of misdemeanors in the State of New York—maintain the right to register to vote and vote because they are not legally disabled from doing so).

76. *See supra* Part II.A.

77. *See* Turner v. Safley 482 U.S. 78, 89–91 (1987) (creating the legal standard of review for constitutional challenges in the area of incarcerated people's rights).

78. *See* Konigsberg v. State Bar, 366 U.S. 36, 49-50 ("At the outset we reject the view that freedom of speech and association …, as protected by the First … Amendment [is] absolute.").

79. *See Turner*, 482 U.S. at 84-85 ("Prison administration is … a task that has been committed to the responsibility of [the legislative and executive branches], and separation of powers concerns counsel a policy of judicial restraint.").

This Part will first discuss the *Turner* standard utilized by the Supreme Court to assess incarcerated people's constitutional claims. It gives an example of incarcerated people who prevailed under *Turner* because the government could not show that its regulation limiting access to a newsletter was rationally related to a legitimate penological interest, in violation of the First Amendment. That example, however, will be followed by a discussion on common critiques to *Turner*'s heavily deferential standard. Mainly that courts do not adequately balance incarcerated people's fundamental rights against the government's interest in prison administration. To these critics, *Turner* allows incarcerated people's constitutional rights to be disregarded rather than upheld. Finally, it will end with an illustration of how *Turner*'s standard makes it uncertain whether pre-trial detainees could successfully raise a First Amendment challenge to jail practices and policies, such as the Delaware jail's mail policy, which effectively disenfranchise them.

1. The *Turner* Standard

The Supreme Court's *Turner* standard governs whether prison and jail regulations violate incarcerated peoples' First Amendment rights.[80] *Turner* challenged Missouri Division of Corrections' regulations prohibiting correspondence between incarcerated people housed at different correctional institutions.[81] The first challenged regulation prohibited correspondence between inmates unless it concerned "legal matters," or where "the classification/treatment team of each inmate deems it in the best interest of the parties involved."[82] The trial court found that, in practice, these regulations prohibited incarcerated people from writing to "non-family inmates."[83] The district court applied the standard articulated by the Supreme Court in *Procunier v. Martinez*, an earlier case.[84] Under the *Martinez* standard, the district court found that the regulation was unconstitutional because it was "unnecessarily broad … [since] prison officials could effectively cope with security problems raised by inmate-to-inmate

80. *See id.* at 84-89 (discussing the proper standard of review when a prison regulation impinges an [incarcerated person's] constitutional rights).

81. *See id.* at 82.

82. *See id.* at 81.

83. *See id.* at 82.

84. In *Martinez*, the Supreme Court addressed California corrections regulations that censored certain categories of mail correspondence between incarcerated people and "any person that was not a licensed attorney or holder of public office." *See* Procunier v. Martinez, 416 U.S. 396, 398-99 (1974). The Court held that under these circumstances, the Court did not need to establish the proper standard of review for prison regulations that restrict the freedom of speech because California's regulations implicate "more than the right of prisoners." *See id.* at 408. It then fashioned a standard of review that balanced interests in a similar way that the Court balances interests where there is a restriction on First Amendment expression imposed in furtherance of legitimate governmental activities. *See id.* at 411-12. The Court held that the proper analysis considered whether (1) the regulation or practice furthers an important or substantial governmental interest unrelated to the suppression of expression and (2) the restriction must be narrowly tailored. *See id.* at 413-14. In this context, a regulation will be upheld if it furthers "a substantial interest of penal administration—security, order, and rehabilitation and does not "sweep unnecessarily broad." *Id.*

communication through less restrictive means."[85] The Eighth Circuit affirmed, finding that it was proper for the district court to apply the *Martinez* standard under these circumstances and that the "correspondence did not satisfy [*Martinez*] because it was not the least restrictive means of achieving the security goals of the regulation."[86]

The Supreme Court disagreed with the lower courts' application of *Martinez* to the Missouri regulation.[87] The Court pointed out that the *Martinez* Court fashioned its standard around the fact that the California regulation challenged in that case implicated the First Amendment rights of people that are not incarcerated.[88] Therefore, according to the Court, *Martinez* did not answer the question of what the proper standard of review is for analyzing cases "involving questions of prisoners' rights."[89] The Court went on to formulate a standard based on four cases following *Martinez*, that in the Court's eyes, addressed "questions of prisoners' rights."[90] After reviewing these cases, the Court concluded that, with respect to prisoners' rights, a regulation will be upheld so long as it is "reasonably related to legitimate penological interests."[91] According to the Court, a reasonableness standard was more appropriate to address constitutional claims raised by incarcerated people because "prison administrators … and not the courts, [are] to make the difficult judgments concerning institutional operations."[92] Applying anything stricter than this "would seriously hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[93] It would also result in the courts rather than prison officials determining "the best solution to every [prison] administrative problem" and "unnecessarily perpetuate the involvement of the federal courts in affairs of prison administration."[94]

The Court determined that federal courts must undertake a four-factor balancing analysis in determining whether challenged prison regulations are "reasonably related to legitimate penological interests."[95] The first factor in the reasonableness analysis considers whether there is a "valid, rational connection between the prison regulation and the legitimate government interest" advanced to justify it.[96] To satisfy the first factor, the government must show that it has a neutral legitimate interest and a "logical connection between the regulation and the asserted goal."[97] Courts must strike down regulations where the "connection between the regulation and asserted goal

85. *See Turner*, 482 U.S. at 83.
86. *Id.*
87. *See id.* at 86.
88. *Id.*
89. *Id.*
90. *Id.*
91. *See Turner*, 482 U.S. at 89.
92. *Id.*
93. *Id.*
94. *Id.*
95. *See id.* at 89-91 (identifying several factors relevant to determining the reasonableness of a regulation).
96. *Id.*
97. *See Turner*, 482 U.S. at 89.

is so remote as to render the policy arbitrary or irrational."[98] This is the threshold inquiry under *Turner*.[99] The second factor considers "whether there are alternative means of exercising the right that remain open to prison inmates."[100] The third factor is "the impact of accommodation of the asserted constitutional right … on guards and other inmates, and on the allocation of prison resources generally."[101] Under this factor, where the "accommodation of an asserted right will have a significant ripple effect on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of corrections officials."[102] Fourth and finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[103]

a. An Example of Success Under *Turner*

Incarcerated people have been most successful under *Turner* when they can show that a prison regulation has no "valid, rational connection," to the prison's asserted interest. A good illustration of this is *Prison Legal News v. Cook*, where incarcerated people and Prison Legal News—the publisher of a non-profit newsletter—brought a civil rights action against corrections officials to challenge the Oregon Department of Corrections (Department) policy prohibiting receipt of standard rate mail, including subscriptions to the non-profit organization's mail.[104] Although many Department employees found that the non-profit organization's mail did not contain objectionable content, they rejected its newsletters because the Prison Legal News used a non-profit organization postage rate to circulate its publications.[105]

The Ninth Circuit began by rejecting the prison officials' argument that its policy did not implicate Prison Legal News and the incarcerated petitioners' First Amendment rights.[106] Instead, the court found that the policy's effect of prohibiting incarcerated subscribers access to Prison Legal News' newsletters affected "core protected speech."[107] Moreover, the Court noted that incarcerated people receiving "unobjectionable mail," does not interfere with penological interests.[108]

The Ninth Circuit then proceeded with its *Turner* analysis. It first addressed how it applies *Turner*, stating that where incarcerated challengers "present sufficient … evidence to refute a common-sense connection between a legitimate objective and a prison regulation … the state must present enough counter-evidence to show that the connection is not so remote as to render the policy arbitrary or irrational."[109] The court assessed each asserted penological

98. *See id.* at 89-90.
99. *Id.*
100. *See id.* at 90.
101. *Id.*
102. *Id.*
103. *Turner*, 482 U.S. at 90.
104. *See* Prison Legal News v. Cook, 238 F.3d 1145, 1146 (9th Cir. 2001).
105. *See id.* at 1148.
106. *See id.* at 1149.
107. *Id.*
108. *Id.*
109. *Id*. at 1150. (citing Frost v. Symington, 197 F.3d 348, 357 (9th Cir. 1999)).

interest in turn to determine whether a common-sense connection existed between its ban of standard rate mail and the Department's asserted interests.

First, the court found that no common sense connection existed between the Department's standard-rate mail ban and reducing contraband from entering its corrections facilities.[110] Under its current policies, incarcerated people would have been able to receive the Prison Legal News' newsletters if they sent them using first class postage.[111] According to the court, the Department provided "no evidence supporting a rational distinction between the risk of contraband in subscription non-profit organization standard mail and first class or periodicals mail."[112]

Second, the Department offered that the ban "helps reduce fire hazards by limiting the quantity of flammable material in inmates' cells."[113] However, the court noted that the Department already had property regulations that "limit the amount of material an inmate can possess," which refuted the "common sense connection between refusal to deliver subscription standard mail and the reduction of fire hazards."[114] Furthermore, it found it "irrational to believe that delivering the small amount of subscription non-profit organization standard mail that comes into Oregon prisons would significantly contribute to paper accumulation and increased fire hazards …."[115]

The court also was not convinced by the Department's third asserted interest, "that the regulation increases the efficiency with which random cell inspections can be conducted … the fewer materials in a cell, the better a correction officer can conduct a search."[116] The Ninth Circuit found that the property regulations outlined above sufficiently served these interests and therefore, found that it was not rationally related to "rendering efficient cell searches."[117]

Finally, the court rejected the Department's contention that the regulation enhanced prison security because it "allows mailroom staff to concentrate its efforts on timely processing acceptable mail and thoroughly inspecting mail for content and contraband."[118] Instead, it agreed with the petitioners' argument that processing Prison Legal News' subscription mail would not "substantially deplete prison resources and would not add significantly to the mailroom staff's workload."[119]

Since the Department failed to make the threshold showing that its regulation is rationally related to a legitimate penological objective, the court

110. *See Prison Legal News*, 238 F.3d at 1150.
111. *See id.* at 1148 ("the newsletter is rejected strictly because of the [non-profit organization] postage rate.").
112. *Id.* at 1150.
113. *Id.*
114. *Id.*
115. *Id.*
116. *See Prison Legal News*, 238 F.3d at 1150-1151.
117. *See id.* at 1151.
118. *Id.*
119. *Id.*

did not consider the other *Turner* factors and found itself required to reverse.[120]

2. *Turner*'s Critics Find the Standard to be Too Deferential

In *Turner*, Justice Stevens—joined by Justices Brennan, Marshall, and Blackmun—dissented as to the standard of review that the Court announced.[121] Justice Stevens expressed concern with the fact that a mere reasonableness standard will result in upholding regulations by "nothing more than logical connection."[122] According to Justice Stevens, this would result in courts restricting "prisoners' First Amendment rights on the basis of administrative concerns and speculation about *possible security risks* rather than on the basis of evidence that the restrictions are [necessary] to further an important governmental interest."[123] Ultimately, Justice Stevens saw this to mean that incarcerated people's constitutional rights would be disregarded by overly deferential courts.[124]

To demonstrate that his fears about the *Turner* standard were real, in a handful of dissents—including his separate opinion in *Turner*—Justice Stevens engaged in close evidentiary analyses of the records to show that the majority's application of *Turner*'s deferential standard contradicted incarcerated people's First Amendment interests.[125] In each analysis, Justice Stevens found that there was insufficient evidence provided by the government to show that a challenged regulation was reasonably related to legitimate penological interests.[126]

Justice Brennan also expressed policy concerns about the level of deference courts accord to prison officials under *Turner*.[127] In *O'Lone v. Estate of Shabazz*, decided eight days after *Turner*, Justice Brennan began his

120. *Id.*

121. *See Turner*, 482 U.S. at 100-116 (Stevens, J., concurring in part).

122. *See id.* at 100.

123. *See id.* at 101 n.1.

124. *See id.* at 100-101 (so long as "the imagination of the warden produces a plausible security concern, and a deferential trial court is able to discern a logical connection between that and the challenged regulation.").

125. *See, e.g.*, *Turner*, 482 U.S. at 105-12 (Stevens, J., concurring in part) (after reviewing the record before the trial court, finding that the blanket prohibition enforced at Renz to be "not only an 'excessive response' to any legitimate security concern; it is inconsistent with a consensus of expert opinion that is far more reliable than the speculation to which this Court accords deference."); *see also* Thornburgh v. Abbott, 490 U.S. 401, 429-31(1989) (Stevens, J., concurring in part) ("I am concerned that the Court today too readily substitutes the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting … the record convinces me that under either *Martinez* or the more deferential 'reasonableness' standard these regulations are an impermissibly exaggerated response to security concerns."); Beard v. Banks, 548 U.S. 521, 548 (2006) (Stevens, J., dissenting) ("As with regard to the current state of the record concerning the connection between the challenged regulation and its effect on prison security, the record is insufficient to conclude, as a matter of law, that petitioner has established a reasonable relationship between his valid interest in inmate rehabilitation and the prohibition on newspapers, magazines, and personal photographs . . .").

126. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 354-69 (1987) (Brennan, J., dissenting).

127. *See id.*

dissent by reminding us that, whether we like it or not, people that have committed crimes and are serving sentences of incarceration in prisons remain members of our society.[128] Although they are "banished from everyday sight," they do not exist in a "separate netherworld" governed by different demands and customs.[129] He emphasized that incarcerated people raise constitutional claims resting on the same set of principles and the same language of the Constitution "upon which all of us rely to hold official power accountable."[130]

Although Justice Brennan acknowledged that analyzing constitutional claims must account for the unique demands of prison administration, he made clear that it is not the Supreme Court's duty to construct a standard of review for incarcerated people's constitutional claims that instructs courts to defer to prison official's decisions.[131] Rather, the courts must construct a standard of review that honors the philosophy behind the Constitution as "a bulwark against infringements that might otherwise be justified as necessary expedients of governing."[132] Under the Constitution, it is the judiciary's duty to ensure that "fundamental restraints on [those in power] are enforced."[133] Therefore, Justice Brennan was skeptical about whether *Turner*'s standard aligned with the judiciary's duty to uphold the Constitution's commands. He also provided an important reminder in *O'Lone*: "Mere assertions of exigency have a way of providing a colorable defense to governmental deprivation, and we should be especially wary of expansive delegations of power to those who wield it on the margins of society."[134]

3. Can Pre-Trial Detainees Successfully Utilize *Turner* to Access Voting Information?

The ongoing de facto disenfranchisement of people awaiting trial represents the exact type of unconstitutional conditions that Justices Stevens and Brennan feared *Turner* would permit to exist.[135] Take the Delaware county jail example highlighted in Part II-A.[136] There, corrections officials cited the need to restrict drug contraband to justify its mail policy that resulted in the universal disenfranchisement of the Delaware corrections population.[137] If the pre-trial detainees in Delaware attempt to raise a constitutional challenge, under *Turner*, the Court would have to accord Delaware officials

128. *See id.* at 354-55.
129. *See id*.
130. *Id.* at 355.
131. *See id.* at 355–56 ("Our objective in selecting a standard of review is therefore *not*, as the Court declares, to ensure that courts afford appropriate deference to prison officials. The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs.") (internal quotations omitted).
132. *See O'Lone,* 482 U.S. at 355-56.
133. *See id.* at 356.
134. *See id.* at 358.
135. *See supra* Part II.C.
136. *See supra* Part I.A.
137. *See* Kiefer, *supra* note 33.

deference.[138] It is possible that this type of claim could end up before a court like the District Court in *Prison Legal News*, that is a part of a Circuit that requires corrections officials to show some evidence that their regulation is rationally related to legitimate penological interests and objectives.[139] But, it is just as likely that this sort of claim could go before a court that is willing to accord significantly more deference to corrections officials without any strong evidence that this mail regulation actually prevented drug contraband from entering Delaware correctional facilities.[140]

III. ANALYSIS

A. The Federal Courts Should Recognize that Pre-Trial Detainees Have the Right to Access Voting Information

As the previous section demonstrates, it will be incredibly challenging for eligible pre-trial detainee voters to bring a successful constitutional challenge to the current practices of jails that effectively disenfranchise them.[141] Instead, this Note proposes that the federal courts recognize a pre-trial detainee's right to access voting information. This right will look like the prisoner's right of access to the courts and would prohibit states from obstructing pre-trial detainees from accessing voter information and requiring states to affirmatively ensure that eligible pre-trial detainee voters have a reasonable opportunity to access voting information.

It is appropriate for the courts to adopt this right of access to voting information for many of the same reasons that the Supreme Court recognized the prisoners' right of access to the courts. First, both rights are supported by the First Amendment.[142] Second, both rights serve as a pathway to protect incarcerated people's ability to exercise other constitutionally guaranteed fundamental rights.[143] Third, the courts should feel comfortable placing obligations on states to ensure that pre-trial detainees have access to voting information because states already shoulder obligations to ensure that voting information is disseminated to its electorate.[144] Fourth, the *Turner* standard provides a less substantial threat in this context.[145]

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138. *See Turner*, 482 U.S. at 84-85, 89 (discussing the need for judicial restraint and deference to judgments of prison administrators when analyzing constitutional claims that arise concerning institutional operations of corrections facilities).

139. *See Prison Legal News*, 238 F.3d at 1149 (explaining the Ninth Circuit's application of *Turner*).

140. *See Turner*, 482 U.S. at 105-12 (Stevens, J., concurring in part) (criticizing the majority's failure to evaluate the evidentiary record closely and therefore rely on speculative evidence that the prison regulation had a logical connection to the interests it was purported to serve).

141. *See supra* Part II.C.

142. *See supra* Part II.B; *see also* infra Part III.A.1.a.

143. *See infra* Part III.A.2.

144. *See infra* Part III.A.3.

145. *See infra* Part III.A.4.

1. Prisoners' Right of Access to the Courts

There are three leading cases that created the prisoners' right to access the courts, *Ex parte Hull*,[146] *Johnson v. Avery*,[147] and *Bounds v. Smith*.[148] In *Ex parte Hull* and *Avery*, the Court held that prison officials may not obstruct incarcerated people from accessing the courts to challenge their convictions by filing for a writ of habeas corpus.[149] In *Bounds*, the Supreme Court found that states additionally have affirmative obligations to ensure that incarcerated people maintain access to the courts.[150] In *Bounds*, the Supreme Court encouraged "local experimentation," by states in creating a method for ensuring meaningful access to the courts but noted some acceptable methods include providing an adequate law library or offering access to assistance from people with legal training.[151] In *Lewis v. Casey*, the Supreme Court reaffirmed *Bounds* central holding that states have a duty to ensure incarcerated people maintain adequate access to the courts.[152] However, in *Lewis*, the Court explained that this does not mean that states must "enable the prisoner to discover grievances, and to litigate effectively once in court."[153]

a. The Link Between the Right of Access to the Courts and the First Amendment

The Supreme Court has never definitively said which part of the Constitution serves as the source for the prisoner's right to access the courts.[154] However, the Court has stated that an incarcerated individual's First Amendment right to petition the government for redress of grievances,

146. *See generally* 312 U.S. 546 (1941).
147. *See generally* 393 U.S. 483 (1969).
148. *See generally* Bounds v. Smith, 430 U.S. 817 (1977).
149. *See Ex parte Hull*, 312 U.S. at 549; *see also Avery*, 393 U.S. at 486-487.
150. *See Bounds*, 430 U.S. 817 at 824-25.
151. *See id.* at 830-31.
152. *See* 518 U.S. 343, 356 (1996).
153. *See id.* at 354.
154. The fact that the Court did not assert where in the Constitution the right of access to the courts comes from received sharp criticism from Justice Rehnquist in the *Bounds* dissent. *See Bounds*, 430 U.S. at 837 (Rehnquist, J., dissenting) ("There is nothing in the United States Constitution which requires that [an incarcerated person] serving a term of imprisonment in a state penal institution pursuant to a final judgment of a court of competent jurisdiction have a "right of access" to the federal courts in order to attack his sentence."). In *Borough of Duryea, Pa. v. Guarnieri*, Justice Scalia penned a dissent claiming that no Supreme Court decision has explicitly held that lawsuits fall within the word "Petition" in the Petition Clause. *See* 564 U.S. 379, 387, 403-04 (Scalia, J. dissenting). He also observed that historically laws regarding petitions in Colonial America did not discuss petitions directed to the judicial branch. *See id.* at 403; *but see* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 648 (1999) (explaining that laws regarding petitions may not have been directed to petitions toward the judicial branch because "[t]he English Parliament and colonial legislative assemblies performed judicial roles and resolved individual grievances that today would constitute civil actions.").

includes their right to access the courts.[155] Moreover, the Supreme Court has protected court access for group and individual litigation outside of the prison context through the First Amendment.[156] Lower federal courts addressing prisoners' right of access to courts claims have also cited to the First Amendment as the source of the right.[157]

In *Cruz v. Beto*, the Supreme Court expressly acknowledged that an incarcerated person's right of access to the courts is included in their right to petition the government for redress of grievances.[158] Outside the context of prisons, the Supreme Court in *NAACP v. Button* held that the NAACP's litigation efforts to "vindicate the legal rights of the [African American] community," was a form of protected political expression and association under the First Amendment.[159] The NAACP's litigation efforts are similar to the litigation efforts that the Supreme Court was attempting to protect by creating their right of access to the courts. The courts created the right of access to the courts to prevent prisons from interfering with incarcerated people's ability to file petitions seeking a writ of habeas corpus.[160] In *Wolff v. McDonnell*, the Supreme Court extended the right to protect incarcerated people's ability to file civil rights actions under 42 U.S.C. § 1983.[161] A habeas corpus petition provides an incarcerated with an opportunity to challenge the legal basis for his confinement.[162] A civil rights action allows incarcerated people to raise claims challenging the constitutionality of their conditions of confinement.[163] Therefore, the nature of the allegations raised by incarcerated people in this context is nearly identical to the rights that the NAACP was seeking to vindicate in the litigation the Court protected in *Button*.

Additionally, the circumstances which drove the Supreme Court in *Button* to recognize the NAACP's litigation efforts on behalf of the African American community as protected political expression and association are present here. As the Court observed in *Button*, the NAACP's efforts to litigate

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155. *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) ("[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'") (citing *Avery*, 393 U.S. at 485); *Ex parte Hull*, 312 U.S. at 549).

156. *See* Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415 (1963); *see also* California Motor Transp. v. Trucking Unlimited, 404 U.S. 508 (1972); Bill Johnson's Rests, Inc. v. NLRB, 461 U.S. 731 (1983); *see also* Andrews, *infra* note 168 (arguing that all individuals have a narrow right to access the courts grounded in the Petition Clause of the First Amendment).

157. *See, e.g.*, Thomas v. Evans, 880 F.2d 1235, 1241-42 (11th Cir. 1989) (stating that the source of the right of access to courts is the First Amendment); Adams v. James, 784 F.2d 1077, 1081 (11th Cir. 1986) ("Litigation undertaken in good faith by a prisoner motivated to bring about social change and protect constitutional rights in prison is a "'form of political expression' and 'political association.'") (citing *Button*, 371 U.S. at 419, 431; *In re Primus*, 436 U.S. 412, 428 (1978)).

158. *See* 405 U.S. at 321 ("[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances, which of course, includes access of prisoners to the courts.").

159. *See* 371 U.S. at 431.

160. *See Ex parte Hull*, 312 U.S. at 549; *see also Avery*, 393 U.S. at 486-87.

161. *See* 418 U.S. 539, 579-80 (1974).

162. *See* 28 U.S.C. § 2241; *see also* 28 U.S.C. §§ 2254, 2255.

163. *See* 42 U.S.C. § 1983.

on behalf of the African American community may well have been "the sole practicable avenue open to a minority to petition for redress of grievance."[164] Additionally, litigation was the way that the NAACP "makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society."[165] This is equally true for incarcerated people who are, as Justice Brennan noted, "banished from everyday sight."[166] Since incarcerated people are shut off from the rest of society while held in confinement, their right of access to courts provides them with "the sole practicable avenue" to seek redress for constitutional violations.[167] Their litigation efforts also bring public awareness to unconstitutional circumstances. Therefore, the litigation efforts by incarcerated people similarly make possible their distinctive contribution to the ideas and beliefs of our society.

The purpose of the prisoners' right of access to the courts is also consistent with the purpose of the Petition Clause. The Petition Clause's purpose is to protect people's targeted speech to the government to seek redress of their grievances.[168] The Petition Clause also gives the people "a chance at a peaceful and lawful alternative to self-help and force [and] a feeling of justice and order in their government."[169] By providing incarcerated people with access to the courts, it ensures them to access to the government and offers the opportunity to resolve disputes peacefully. This access to courts is essential for people incarcerated in prisons who are likely convicted of felony offenses and therefore who the state can legally disqualify from voting.

These reasons demonstrate that the prisoners' fundamental right of access to the courts is protected under the First Amendment, just like this Note's proposed pre-trial detainees' right to access voting information.

2. The Pre-Trial Detainees' Right to Access Voting Information Serves as a Pathway to Protect Their Constitutional Right to Vote

The Supreme Court decided that people incarcerated in prison have a right of access to the courts to ensure that they can bring legal claims that allow them to vindicate other federal constitutional and statutory rights.[170] In *Avery*, the Supreme Court emphasized that incarcerated people must maintain access to the writ of habeas corpus because its purpose is to protect unlawfully incarcerated people from wrongful convictions or illegal sentences.[171] In *Wolff*, the Supreme Court reasoned that the Court's guarantee to incarcerated

164. *See Button*, 371 U.S. at 429-30.
165. *See id.* at 431.
166. *See O'Lone*, 482 U.S. at 354 (Brennan, J., dissenting).
167. *See Button*, 371 U.S. at 429-30.
168. *See* Andrews, *supra* note 154, at 624 ("Madison, and likely most of his contemporaries, understood the right to petition as part of the system by which the First Amendment would guard the people's right to communicate their will to their government.").
169. *See id.* at 624.
170. *See Avery,* 393 U.S. at 485; *see also Wolff*, 418 U.S. at 479.
171. *See id.* at 485.

people that they do maintain constitutional rights would be "diluted" if the Court did not permit them to present constitutional claims to the judiciary.[172]

By recognizing that pre-trial detainees maintain a right to access voting information, the courts can create a pathway to ensure they can exercise their fundamental right to vote. In *O'Brien v. Skinner*, the Supreme Court recognized that the Equal Protection Clause protects pre-trial detainees' right to vote.[173] In *O'Brien*, the Court explicitly recognized that pre-trial detainees are "under no legal disability impeding their legal right to register or to vote … they are legally qualified to vote."[174] Yet, it is well-documented that current jail practices are not amenable to pre-trial detainees exercising their right to vote.[175] Therefore, by recognizing that pre-trial detainees have a right to access voting information it will serve as a pathway, in the same way the prisoners right of access to the courts does, to ensure that pre-trial detainees can exercise a fundamental right.

3. Placing Obligations on States is Appropriate

The courts should also require that states must ensure pre-trial detainees maintain access to necessary voter information, in the same way it has held that states have obligations under the prisoners' right of access to the courts. In *Bounds*, the Supreme Court reaffirmed that states have an affirmative obligation to provide incarcerated people with law libraries or adequate legal assistance under the prisoners' right of access to courts.[176] However, as noted by the Court, prior to *Bounds*, in a *per curium* opinion, the Court affirmed the holding of a California district court opinion which ruled that under *Avery*, "some provision must be made to ensure that prisoners have the assistance necessary to file petitions and complaints," to be considered by the courts.[177] The Court also noted that in prior cases it had previously required that states take remedial measures to ensure that incarcerated people's access to the courts was "adequate, effective, and meaningful," after finding that incarcerated people's right of access to courts was violated.[178] Therefore, *Bounds*' holding was not a far departure from the Court's other prisoners right of access to the courts cases.

As further support for its holding, the Court highlighted that states already have obligations to provide resources that protect criminal

172. *See Wolff*, 418 U.S. at 579.

173. *See O'Brien*, 414 U.S. at 531.

174. *See id.* at 530-31.

175. *See* Porter, et al., *supra* note 5, at 15-16; Press Release, Prison Pol'y Initiative, *supra* note 6.

176. *See Bounds*, 430 U.S. at 829 (reaffirming *Younger v. Gilmore*'s principle that "state[s] have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries, or, alternatively, to provide inmates with [legal assistance]").

177. *See* Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd*, Younger v. Gilmore, 404 U.S. 15 (1971).

178. *See Bounds*, 430 U.S. at 822-25 (highlighting previous decisions where states were required to institute remedial measures after incarcerated people raised meritorious access to courts claims).

defendants' rights and indigent incarcerated people's rights.[179] These existing financial obligations rebutted the State of North Carolina's contention in *Bounds* that under *Avery*, states had no further obligation to provide funding to implement incarcerated people's right of access to courts.[180] The Court also pointed out that the federal government and states which had been successful in implementing prison legal services programs were able to receive funding from the federal government and non-profit organizations.[181]

Like in *Bounds*, states already shoulder affirmative obligations when administering elections and ensuring that eligible voters receive information to help them participate in elections. Although states remain free to come up with procedures for administering their elections, in 1993, Congress passed the National Voter Registration Act (NVRA), which required states to meet minimum federal standards for establishing voting registration requirements for federal elections.[182] Additionally, Congress and others provide funding to states and local jurisdictions so they can put on national federal elections.[183] In 2002, Congress passed the Help America Vote Act (HAVA) providing states with about three billion dollars to improve voting systems, voter access, and maintain compliance with the NVRA.[184] The law also created the Election Assistance Commission (EAC) to administer HAVA grant programs.[185] According to the EAC, it "has administered more than $4.35 billion in HAVA formula funding to states and [U.S.] territories."[186] Between 2018-2024 alone, EAC administered $1.4 billion in funding.[187]

Therefore, placing obligations on states in this context is like placing obligations on states to ensure people incarcerated in prison maintain adequate access to courts in two main ways: (1) states are already legally required to provide eligible voters with information to assist them with voting, and (2) there is funding available for states for them to provide these resources.

4. *Turner*'s Deferential Standard Does Not Pose a Threat to a Pre-Trial-Detainee's Right to Access Voting Information

As discussed in Part II-C, the highly deferential *Turner* standard stands in the way of pre-trial detainees who may want to raise a constitutional claim

179. *Id.*
180. *Id.*
181. *See id.* at 830.
182. *See* Pub. L. No. 103-31, 107 Stat. 77 (1993).
183. *See* Election Administration at State and Local Levels, NCSL, https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels (last updated Jan. 13, 2026).
184. *See* Pub. L. No. 107-252.
185. Hava Grant Programs, U.S. ELECTION ASSISTANCE COMM'N (Feb. 23, 2026) https://www.eac.gov/grants/hava-grant-programs#:~:text=The%20Election%20Assistance%20Commission%20(EAC)%20administers%20HAVA,based%20on%20predetermined%20formulas%20and%20eligibility%20requirements [https://perma.cc/2S9Y-RCDK].
186. *Id.*
187. *Id.*

challenging the current way that jails regulate information, which is adversely affecting pre-trial detainees' ability to access constitutionally protected voting information.[188] The Supreme Court addressed the interplay between *Bounds* and *Turner* when it decided *Lewis*.[189] In *Lewis* the Supreme Court expressed that in reading *Bounds* and *Turner* together, that the lower court had not accorded "adequate deference" to the prison authorities decisions.[190] Yet when the Court provided a model of deference for courts to follow, it pointed back to the remedial procedures ordered by the lower court in *Bounds*, which placed the Department of Correction with the responsibility of devising a constitutionally sound access to courts program.[191]

After *Bounds*, the state of North Carolina came up with a plan to establish law libraries in its prisons, develop procedures for use of the law libraries, and would train people incarcerated in the prisons to serve as paralegals.[192] The plan was litigated for 13 years and ultimately led to the Fourth Circuit affirming the district court's decision to order the implementation of a legal assistance plan after North Carolina had failed to present evidence that the state's law libraries were constitutionally sufficient under *Bounds*.[193] The Fourth Circuit highlighted that district courts enjoy "wide discretionary authority in formulating remedies for constitutional violations," and where a court finds "systemic constitutional violations," it may "order necessary changes in the structures or procedures of a state institution to alleviate those violations."[194] Based on the district court's findings, the court found that its remedy was "a reasonable choice among its alternatives to deal with the constitutional violation that it found."[195]

If the aftermath from *Bounds* is the model, it teaches that although states are accorded deference under *Turner* in creating the methods they will use to satisfy their duties under the right of access to courts, those plans are still subject to review by courts for constitutional compliance. Where states engage in patterns of behavior that rise to systemic constitutional violations of the right of access to courts, district courts are empowered to use their broad discretion to afford appropriate relief.

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188. *See supra* Part II.C; *see also* Part II.A.

189. *See Lewis*, 518 U.S. at 361-62.

190. *Id.*

191. *See id.* at 362 ("For an illustration of the proper procedure in a case such as this, we need look no further than *Bounds* itself. There, after granting summary judgment for the [incarcerated plaintiffs], the District Court refrained from 'dictating precisely what course the States should follow.'"); *see also Bounds*, 430 U.S. at 818.

192. *See* Smith v. Bounds, 610 F. Supp. 597, 601-02 (E.D. N.C. 1985) (finding (1) that the state's regulation was constitutionally sufficient to ensure that people confined in disciplinary segregation will have the same access to law libraries as the rest of its incarcerated population; (2) that the state's provisions covering copying did not meet the state's obligations because it did not allow indigent incarcerated people free copies of all required filings).

193. *See id.* at 606 (directing the state to require some form of assistance of counsel to ensure its incarcerated population receive meaningful access to the courts); *see also* Smith v. Bounds, 813 F.2d 1299, 1300-01 (4th Cir. 1987), *aff'd*, 841 F.2d 77 (4th Cir. 1988) (finding that the district court did not abuse its discretion when it ordered North Carolina to implement a legal assistance plan to provide incarcerated people with attorney assistance).

194. *See Smith*, 813 F.2d at 1301.

195. *Id.* at 1302.

Therefore, under *Turner*, jails will be given deference in creating plans to ensure that pre-trial detainees have access to voting information. However, the plans would still be subject to review for compliance with their constitutional obligations. Like under *Bounds*, states must ensure that pre-trial detainees have meaningful and adequate access to voting information.

B. Voter Information that Must be Accessible to Pre-trial Detainees

As detailed in Part I.A, the risk of disenfranchisement arises because people in jails often do not know that they maintain their right to vote and do not receive accurate information from jail officials about their right to vote.[196] People in jails are left without knowledge about how to: (1) register to vote, (2) confirm their voter registration status during election cycles, and (3) effectively cast their ballots.[197] Therefore, shaping a right to access voting information like the prisoners' right of access to courts, the states may not unlawfully obstruct a pre-trial detainee from accessing voting information[198] and would have a duty to ensure that pre-trial detainees maintain adequate access.[199] However, as explained by the Supreme Court in *Lewis*, states will be given deference to come up with methods that will provide pre-trial detainees to access this information.[200]

There are several key informational elements to the act of voting. Vote.gov's webpage informing people who are 18 and under is provides most of the necessary information Americans must have to exercise their right to vote.[201] First, individuals must register to vote.[202] To register to vote, people need access to information on registering to vote in their state and information about any state voter registration deadlines.[203] Most pre-trial detainees will have a special interest in a state's vote-by-mail requirements, therefore eligibility and identification requirements should be made available.[204] Individuals also need to learn about their ballot, including information about candidates and ballot measures.[205] Pre-trial detainees should also be made aware of whether the state will legally disqualify them if they are convicted for the offense which they are accused of and how to reinstate their right to vote after a conviction.[206] Since each of these criteria must be met for someone to exercise their right to vote, information on these subjects must remain accessible to pre-trial detainees.

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196. *See supra* Part II.A.
197. *Id.*
198. *See supra* Part III.A.
199. *Id.*
200. *See supra* Part III.A.4.
201. *See Preparing to vote: age 18 and under*, VOTE.GOV, https://vote.gov/guide-to-voting/preparing-age-18-and-under (last visited Mar. 2, 2025).
202. *Id.*
203. *Id.*
204. *Id.*; *see also* Press Release, Prison Pol'y Initative, *supra* note 5 (providing suggestions for remedying disenfranchisement in jails).
205. *Id.*
206. *See* DEP'T OF JUST. CIV. RIGHTS DIV., *supra* note 20.

Although states will have the discretion to choose methods to adequately provide voting information, there are some current examples to guide them. In the federal system, people incarcerated in federal custody who are residents of the District of Columbia, Maine, and Vermont all maintain the right to vote even after felony convictions.[207] A current example of how jails can implement this right of access to information is based on the way that the federal Bureau of Prisons (BOP) had updated its policies, under President Biden's Executive Order to promote access to voting to inform, eligible voters in federal detention of their right to vote.[208] The Inmate Admission & Orientation Handbook contains a section dedicated to voting rights.[209] It contains information for pre-trial detainees, people convicted of misdemeanors, and people convicted of felonies.[210] According to the manual, additional voting materials are available through TRULINCS,[211] the reentry resource library, or people can discuss voting rights with their reentry affairs coordinator (RAC).[212] Under the BOP's policy, election mail is also put through a less vigorous review process than ordinary mail.[213] A mail policy like the BOP's will also still allow jails to prevent contraband from entering without resulting in universal disenfranchisement, therefore, it would serve as a reasonable alternative to jails that have policies like the Delaware Department of Corrections.[214]

Using the former BOP manual as a model, jails could (1) include voting information in admission materials, (2) provide access to physical materials in a resource library, (3) place election mail through a less restrictive review process, (4) train people, like the BOP's RACs, to assist pre-trial detainees access voting information and materials, and (5) for jails that have the ability to provide a limited computer-type of system like TRULINCS, it could provide pre-trial detainees to the myriad of online PDF materials outlining the

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207. *Id.*

208. *See* Voting Resources, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/voting_resources.jsp [https://web.archive.org/web/20250306085902/https://www.bop.gov/inmates/custody_and_care/voting_resources.jsp]. This resource was removed once President Donald Trump rescinded President Joe Biden's Executive Order No. 14019 which specifically ordered the Attorney General to take appropriate steps to ensure "Access to Voter Registration for Eligible Individuals in Federal Custody." *See* Exec. Order No. 14019, 86 Fed Reg. 13623 (Mar. 7, 2021); *see also Initial Rescissions of Harmful Executive Orders*, THE WHITE HOUSE, https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/ [https://perma.cc/3EE6-UL3Q] (last visited Mar 2. 2025).

209. *See* U.S. DEP'T OF JUST., Inmate Admission & Orientation Handbook, Voting Rights for Incarcerated Individuals 58-61 (Jan. 20, 2023), https://www.bop.gov/locations/institutions/bry/bry_ao_handbook.pdf?v=1.0.0 [https://web.archive.org/web/20250204002723/https://www.bop.gov/locations/institutions/bry/bry_ao_handbook.pdf?v=1.0.0] [https://perma.cc/Q666-98N6]. This resource was also removed from the BOP's website after President Trump's Executive Order.

210. *Id.* at 58.

211. *Id.* at 60. TRULINCS is the "Trust Fund Limited Computer System," a computer network for incarcerated people; however, there is no access to the Internet. *Id.* at 12.

212. *Id.*

213. *See id.* at 60 (explaining that mail labeled "Official Election Mail," "Official Election Ballot," "Ballot Enclosed," will be treated like legal mail).

214. *See supra* Part II.A.

voting process. There are also many organizations that have made suggestions available to local governments.[215]

IV. CONCLUSION

There is an ongoing voter suppression crisis happening across our nation's jails. Although pre-trial detainees maintain the right to vote and although access to voting information should be available to them through the First Amendment. The reality is that it would be challenging to predict with certainty that pre-trial detainees can vindicate these First Amendment rights under *Turner*'s highly deferential framework. This situation is reminiscent of *Button* and the other prisoners right of access to courts cases, where litigation and legal court remedies may be the only practicable avenue available to protect the fundamental constitutional rights of another minority population with little political will. By recognizing that states have an obligation to ensure that pre-trial detainees maintain adequate access to voting information appears to be a plausible way for the courts to create a pathway and protect pre-trial detainees' fundamental right to vote. Creating this pathway to voting can create a lasting impact. Take the words of one woman who regained her right to vote after Minnesota restored voting rights for people with felony convictions, "Voting helps cast the divide between rich and poor, Black and white. The moment we cast our ballot, we are taking part in something much bigger than ourselves … It's especially important for people who have been incarcerated … Voting makes us feel like we belong."[216]

215. *See, e.g.*, Press Release, Prison Pol'y Initiative, *supra* note 5.

216. Jennifer Schroeder, *My Conviction Meant 40 More Years Without A Vote. Not Anymore*, ACLU (Mar. 21, 2023), https://www.aclu.org/news/voting-rights/my-conviction-meant-40-years-without-a-vote-not-anymore [https://perma.cc/796V-C7D7].