

LEGAL SERVICES CENTERS AS VOTER REGISTRATION CENTERS: A STOP-GAP SOLUTION TO SUPPORT CLIENTS' CIVIC ENGAGEMENT¹

By Jacob Carrel²

- I. INTRODUCTION.....59
- II. ACCESS TO THE VOTE IS ESSENTIAL TO A HEALTHY DEMOCRACY60
 - A. *Despite its importance to democracy, voter registration is needlessly politicized*
 - B. *Legal services clients are among the population most affected by restrictive ballot laws*
- III. THE BARRIERS PREVENTING THE LEGAL SERVICES CORPORATION FROM OFFERING VOTER REGISTRATION STEMS FROM ITS COMPLICATED HISTORY AS A SOURCE OF POLITICAL IRE FROM CONSERVATIVES....64
 - A. *Since the inception of federal subsidies for legal services, the federal government's goals have included structural reforms as well as direct services.*
 - B. *Despite Republican opposition, back-up centers prevailed through the 1990s with the support of bipartisan compromise*
 - C. *Unflinching conservative radicalism following the 1994 Republican takeover of the House of Representatives led to the elimination of backup centers*
 - D. *The short-term political benefit for elected Republicans led to long-term losses for low-income Americans in need of legal services*
- IV. WITH ONE CHANGE IN INTERPRETATION FROM A SCANT, DECADES-OLD ADVISORY OPINION, NON-ATTORNEY EMPLOYEES OF LSC-FUNDED CENTERS COULD REGISTER CLIENTS TO VOTE.....68
 - A. *LSC attorneys are prohibited by statute from participating in "any voter registration activity."*
 - B. *The LSC has promulgated an ambiguous regulation apparently prohibiting non-attorney employees from registering*

1 I would like to thank Professor Jeanne Charn for her thoughtful and helpful comments on this paper. My views expressed here are mine alone and do not reflect the views of my employer.

2 EJW Voting Rights Fellow at the National Redistricting Foundation, Sponsored by the Selbin Family Foundation and Anonymous. J.D., Harvard Law School, 2021.

clients to vote as well.

C. *When a statute governing a particular agency contains ambiguity, courts generally must defer to the respective agency’s interpretation.*

D. *Although the ambiguity within 45 CFR Part 1608 has been addressed by the LSC before, its previous interpretation is ripe for reevaluation.*

V. IN THE MEANTIME, VOTER REGISTRATION AT LSC-FUNDED CENTERS CAN LIKELY BE CONDUCTED BY NON-ATTORNEY VOLUNTEERS.....73

VI. SHOULD VOLUNTEERS – OR, IN THE FUTURE, NON- ATTORNEY EMPLOYEES – ENGAGE IN VOTER REGISTRATION, CERTAIN PRACTICES SHOULD BE FOLLOWED TO REMAIN COMPLIANT WITH THE LSC’S REGULATIONS.....74

VII. CONCLUSION.....75

APPENDIX I

I. INTRODUCTION

“The vote is precious. It is almost sacred. It is the most powerful non-violent tool we have in a democracy. . . We must have the capacity and the ability to redeem the soul of this nation and set it on the right course. We must do all we can to make this a nation where justice and the voice of the people prevails.”

– Congressman John Lewis, June 2019³

The Legal Services Corporation (“LSC”), administered nationally, provides funding to local legal services centers to provide free or low-cost, subsidized civil legal aid. The program successfully supports well over a million vulnerable Americans each year⁴ in judicial proceedings, but due to politicized skepticism rooted in the program’s history, LSC attorneys are barred from registering their clients to vote. This voter registration ban,⁵ codified in 1978, is on surprisingly shaky footing. As it currently stands, voter registra-

3 John Lewis, *Rep. John Lewis on The Mandate to Restore Voting Rights in America*, The United State House of Representatives (June 25, 2019), <https://web.archive.org/web/20200226095521/https://johnlewis.house.gov/media-center/press-releases/rep-john-lewis-mandate-restore-voting-rights-america>.

4 LEGAL SERVICES CORPORATION, *Grantee Client Demographics*, <https://www.lsc.gov/state-data-grantee-client-characteristics>.

5 43 Fed. Reg. 32,772 – 32,774 (July 28, 1978)

tion could likely occur if done exclusively by pro bono volunteers. Furthermore, changing one agency advisory opinion could transform voter registration practices within LSC-funded centers. This minor change could make significant progress towards the LSC's mission of "promot[ing] equal access to justice"⁶ by empowering clients to access more civic engagement opportunities without violating any other restrictions.

This paper explains the history behind the registration ban and the possibility for Legal Services Corporation-sponsored civil legal aid centers to allow pro-bono law students or other non-attorney volunteers register interested clients to vote. The paper begins by highlighting the importance and urgency of voter registration for LSC clients. Section III summarizes the history behind the Legal Services Corporation's political and civic engagement restrictions and concludes with an explanation of why voter registration, while limited, can be a step forward. Sections IV and V describe a key opportunity arising from the surprisingly shaky footing upon which the current voter registration ban sits. The section advocates for a change in LSC's Advisory Opinion 98-47, which interprets 45 C.F.R. 1608 to restrict LSC attorneys from registering clients to vote. Finally, Section VI provides best-practices for voter registration and a step-by-step checklist of shovel-ready steps LSC-funded civil legal aid centers could employ when the advisory opinion is amended to properly and effectively register clients to vote.

II. ACCESS TO THE VOTE IS ESSENTIAL TO DEMOCRACY

Registering to vote is often the first step to casting a ballot in a U.S. election. A total of 49 states and the District of Columbia require all voters be registered to cast a ballot.⁷ Barriers to voter registration vary by state. Some states have lowered barriers to registering, including offering same-day voter registration,⁸ registering people to vote at DMVs,⁹ and most-recently,

6 LEGAL SERVICES CORP., [HTTPS://WWW.LSC.GOV/ABOUT-LSC](https://www.lsc.gov/about-lsc) (last visited Apr. 8, 2022).

7 See *Voter Registration*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct 11, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration.aspx> ("In 49 states, an eligible citizen must be registered to vote."); see also Vote.org, *Voter Registration Rules*, <https://www.vote.org/voter-registration-rules/> (providing state-by-state breakdown of rules for voter registration in each state). North Dakota is the exception and does not require voter registration. *Id.*

8 24 states offer this in some capacity. See VOTING RIGHTS LAB: STATE VOTING RIGHTS TRACKER (2020), <https://tracker.votingrightslab.org/issues/SameDayRegistration>.

9 This was made possible by the passage of the National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77, 42 U.S.C. ch. 20, subch. I-H § 1973gg et seq., transferred to 52 U.S.C. §§ 20501–20511; see also *Automatic Voter Registration*, NATIONAL CONFERENCE OF STATE LEGISLATURES (April 14, 2020), <https://www.ncsl.org/research/>

enacting so-called “automatic voter registration” laws that register residents to vote automatically whenever they interact with various state agencies.¹⁰ Conversely, many other states employ strict rules to make voter registration complicated and challenging, such as cumbersome and inconsistent voter identification requirements or waiting periods between registration and eligibility to vote.¹¹

A. Despite its importance to democracy, voter registration is needlessly politicized.

Attempting to manipulate who has access to the ballot is not a new phenomenon. Voter registration remains critical to advancing many social justice causes, but voter registration has long been subject to attacks by incumbent elected officials and others fearful of losing power.¹²

Unfortunately, access to the vote has become increasingly politicized over the past five years. The increased waiting times at polling locations is just one particularly egregious example of the recent political impact on voting. Throughout the nation, long lines left voters waiting in some cases for over six hours¹³ after a number of polling places closed due to COVID-19.¹⁴

[elections-and-campaigns/automatic-voter-registration.aspx](#).

10 See National Conference of State Legislatures, *supra* note 7.

11 *State Voter Suppression Effort Is Highly Partisan*, BRENNAN CENTER FOR JUSTICE (June 11, 2021), <https://www.brennancenter.org/our-work/research-reports/state-voter-suppression-effort-highly-partisan> (hereinafter, *Partisan Suppression*).

12 See, e.g., Jaweed Kaleem, *They dared to register blacks to vote, and the KKK killed them: A 52-year-old case is closed & unsolved*, LA TIMES, (June 21, 2016), <https://www.latimes.com/nation/la-na-doj-civil-rights-20160621-snap-story.html> (describing the story of James Chaney, Andrew Goodman, and Michael Schwerner in Mississippi in 1968); Greg Palast, *Georgia Voter Roll Purge Errors*, PALAST INV. F. 6 (Sept. 1, 2020), https://www.acluga.org/sites/default/files/georgia_voter_roll_purge_errors_report.pdf (news investigation conducted for the ACLU in 2020, finding that 198,351 Georgia voters’ registrations were purged from voter rolls, and that the purged registrations were “concentrated among younger citizens and citizens of color”).

13 Tim Carman, *New limits on food and water at Georgia’s polls could hinder Black and low-income voters, advocates say*, WASHINGTON POST (April 9, 2021, 9:00AM), <https://www.washingtonpost.com/food/2021/04/09/georgia-voting-laws-food/>.

14 In April 2020, Wisconsin’s largest city could only open five polling places on Election day, instead of the typical 180 polling places, because of a poll worker shortage statewide election. For example, for a statewide election held in Wisconsin in April 2020, the state’s largest city, Milwaukee, had only five polling places open on Election Day, instead of the typical 180 polling places, because of a shortage of poll workers. Alison Dirr & Mary Spicuzza, *What we know so far about why Milwaukee only had 5 voting sites for Tuesday’s election while Madison had 66*, MILWAUKEE J. SENTINEL (April 9, 2020 6:36PM), <https://www.jsonline.com/story/news/politics/elections/2020/04/09/wisconsin-election-milwaukee>

Rather than appropriating funding to hire more poll workers and prevent these barriers to voting, some state legislatures responded by creating additional restrictions on what could be provided to people in line to vote, including banning nonpartisan civic engagement organizations from providing bottles of water.¹⁵ Similarly influenced by this growing politicization, Republicans broke with longstanding election norms by refusing to accept the 2020 results and alleging widespread “voter fraud” without evidence in an effort to justify increasingly restrictive measures.¹⁶

These trends are bimodal across the nation. Some states and municipalities, spurred by a pandemic, came up with creative solutions to promote access to the ballot, such as expanding vote-by-mail opportunities¹⁷ and providing additional ballot drop boxes¹⁸ and early vote sites.¹⁹ Others, unfortunately, did just the opposite, by restricting access and attacking positive reforms.²⁰ The result is that “access to the right to vote increasingly depends on the state in which a voter happens to reside.”²¹ States either embrace voter registration and access to the ballot, or make registration harder and less obtainable. This needless politicization of critical institutions for short-term political gain has long-term negative consequences that disproportionately affect many vulnerable Americans, particularly those who are of lower income.²²

[kee-had-5-voting-sites-while-madison-had-66/2970587001/](https://www.foxnews.com/politics/oregon-vote-by-mail-2020-presidential-election).

15 Carman, *supra*, note 13.

16 See *Partisan Suppression*, *supra* note 11. Examples are numerous of recent attempts to suppress votes. Common examples include closing polling locations, limiting early voting or creating statewide limits on early voting that disproportionately affect cities, or bans on ballot drop boxes or mail-in absentee voting. See *id.* FN2.

17 Jen Kirby, *Oregon already votes by mail. Here's what it can teach us in 2020*, Vox (Sep 28, 2020, 10:30AM), <https://www.vox.com/21401321/oregon-vote-by-mail-2020-presidential-election>; see also OREGON SECRETARY OF STATE, OREGON VOTE BY MAIL, <https://sos.oregon.gov/elections/Documents/statistics/vote-by-mail-timeline.pdf>.

18 Kaanita Iyer, *Some states have tried to limit ballot drop-off locations, but the voters keep coming*, CAPITOL NEWS SERVICE (Oct 22, 2020), <https://cnsmaryland.org/2020/10/22/some-states-have-tried-to-limit-ballot-drop-off-locations-but-the-voters-keep-coming/>.

19 See, e.g., Va. Code § 24.2-701.1 (as amended in the 2021 Special Session I of the General Assembly) (new Virginia law, effective July 1, 2021, that allows for in-person absentee voting on Sundays).

20 See, e.g., Miles Parks, *The Use of Ballot Drop Boxes May Change Due To Republican Pushback*, NPR (Sept 21, 2021, 4:58PM), <https://www.npr.org/2021/09/21/1038395191/the-use-of-ballot-drop-boxes-may-change-due-to-republican-pushback> quoting Florida Governor Ron DeSantis as stating “We need to address these drop boxes. I think they’re a big problem.”).

21 See *Partisan Suppression*, *supra* note 11; see also *Voting Laws Roundup: October 2021*, BRENNAN CENTER FOR JUSTICE (Oct 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

22 See Carman, *supra*, note 13 (noting that voter protection organizations have

B. Legal services clients are among the population most affected by restrictive ballot laws.

Conducting voter registration at legal services centers follows the logic of the landmark Motor Voter Law,²³ which encourages states to provide voter registration opportunities when they interact with various state services, such as Departments of Motor Vehicles. While legal services centers are not direct state services,²⁴ they nonetheless provide an opportunity for people to interact with informed advocates who can encourage and empower them to be civically engaged.

Nonpartisan voter registration opportunities are critical to expanding citizens' access to the ballot. Providing these opportunities empowers clients with an additional path to enacting change and addressing their needs. This is particularly impactful for legal services clients. At least 21.4% of the U.S. voting-eligible population is not registered to vote.²⁵ Lower-income Americans are disproportionately less likely to be registered. For example, only 52% of Americans making less than \$50,000 per year voted in 2016.²⁶ Lower-income citizens are also more likely to use free or subsidized legal services; in fact, LSC grantees specifically serve households with annual incomes at or below 125% of the federal poverty guidelines.²⁷

Bringing voter registration to individuals seeking subsidized community services can improve long-term civic engagement. Vanessa Williamson, a fellow at the Brookings Institution, conducted a voter registration experi-

indicated the bottled water ban would most “hurt low-income voters who stand in line with their children as the dinner hour comes and, sometimes, goes.”)

23 National Voter Registration Act of 1993, Pub. L 103-31, 107 Stat. 77, 42 U.S.C. ch. 20, subch. I-H § 1973gg et seq., transferred to 52 U.S.C. §§ 20501–20511.

24 *How We Work*, LEGAL SERVICES CORP. <https://www.lsc.gov/about-lsc/what-legal-aid/how-we-work> (identifying LSC as “a grant-making organization” that distributes the funding it receives from the federal government to “independent” nonprofit organizations).

25 *Why Are Millions of Citizens Not Registered to Vote?*, PEW CHARITABLE TRUSTS (Jun 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote>.

26 Vanessa Williamson, *The Filer Voter experiment: How effective is voter registration at tax time?* BROOKINGS INST. (April 2, 2019), <https://www.brookings.edu/research/the-filer-voter-experiment-how-effective-is-voter-registration-at-tax-time/>; see also Danielle Root & Liz Kennedy, *Increasing Voter Participation in America: Policies to Drive Participation and Make Voting More Convenient*, CENTER FOR AMERICAN PROGRESS (July 11, 2018), <https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/>.

27 *What is Legal Aid?*, LEGAL SERVICES CORP., [HTTPS://WWW.LSC.GOV/ABOUT-LSC/WHAT-LEGAL-AID](https://www.lsc.gov/about-lsc/what-legal-aid) (“LSC-funded programs help people who live in households with annual incomes at or below 125% of the federal poverty guidelines – in 2021, that is \$16,100 for an individual, \$33,125 for a family of four.”).

ment at seven Volunteer Income Tax Assistance (“VITA”) centers in Cleveland, OH, and Dallas, TX in 2018.²⁸ VITA centers are coordinated by local nonprofits and provide free tax return preparation assistance to Americans making less than \$55,000 per year.²⁹ Williamson’s experiment found that the mere presence of voter registration volunteers at these clinics more than doubled the likelihood that an eligible person would register to vote. Further, those who registered also voted in the next Ohio primary election at a higher rate than the state’s overall turnout rate,³⁰ a fantastic achievement. Thus, voter registration opportunities for legal services clients may be similarly impactful.

In addition to receiving legal support, potential LSC clients can seek structural change from their elected officials once the barrier to participating in the democratic process no longer remains. Providing voter registration opportunities to potential legal services clients meets them where they are, expands their ability to affect change, and equips them with a trusted messenger who can explain the benefits of voting. This trusted messenger can also support them (without providing legal advice) through what can be a confusing and cumbersome process.

III. THE BARRIERS PREVENTING THE LEGAL SERVICES CORPORATION FROM OFFERING VOTER REGISTRATION STEMS FROM ITS COMPLICATED HISTORY AS A SOURCE OF POLITICAL IRE FROM CONSERVATIVES.

All nonprofit work conducted by local legal services centers is nonpartisan. Despite their nonpartisan nature, local centers receiving any funding from the LSC are subject to significant restrictions beyond those imposed on typical nonprofits. These restrictions stem in part from the LSC’s history as a political pin-cushion.

Subsidized legal services have long been a hot-button issue for conservative activists.³¹ Consequently, volunteers engaged in voter registration must be aware of past partisan criticism surrounding the Legal Services Corporation to ensure that their important work is not needlessly politicized. This remains the case even though much of the partisan critiques and fears were unsubstantiated and motivated by short-term political gain.

28 Williamson, *supra* note 26.

29 *Id.*

30 *Id.*

31 Despite requiring a meager degree of funding, legal aid has received a disproportionate amount of criticism from skeptics. *See infra*.

- A. *Since the inception of federal subsidies for legal services, the federal government's goals have included structural reforms as well as direct services.*

In 1964, as part of President Johnson's War on Poverty, the Economic Opportunity Act created the Office of Economic Opportunity ("OEO").³² The OEO was the first opportunity for Americans to receive civil legal services funded by the federal government.³³ It established legal aid centers to provide low-income Americans full-service legal support from qualified attorneys in nearly every state.³⁴

Additionally, impact litigation-focused "back-up centers" supported the regional legal aid centers in high-profile litigation, training, and research.³⁵ These back-up centers, alongside local OEO centers, brought many successful challenges to protect the poor;³⁶ however, they also received political backlash, in part because of their successful advocacy for the poor.³⁷

- B. *Despite Republican opposition, back-up centers prevailed through the 1990s with the support of bipartisan compromise.*

In 1969, President Richard Nixon appointed then-Republican Congressman Donald Rumsfeld as OEO Director.³⁸ Rumsfeld promptly fired OEO's then-heads of legal services and restructured the organization in a manner advocates at the time referred to as "dismantling" it.³⁹ These moves

32 Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508.

33 Alan Houseman & Linda E. Perle, *Securing Equal Justice for All A Brief History of Civil Legal Assistance in the United States*, CENT. LAW & SOC. POL'Y (May 2018), 11, https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf.

34 Alan W. Houseman, *To Establish Justice for All: The Past and Future of Civil Legal Aid in the United States*, 23 GEO. J. ON POVERTY L & POL'Y 325, 330–32 (2016) (hereinafter, Houseman).

35 *Id.* at 332–33.

36 *Id.* at 333. Challenges included high-profile cases such as *Goldberg v. Kelly*, 397 U.S. 254 (1970). See also SUSAN LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING*, 77 (2014).

37 See Houseman, *supra*, note 33, at 334 ("The Murphy Amendment was widely viewed as an attempt to give Governor Reagan the power to veto the grant to California Rural Legal Assistance (CRLA). CLRA was a particularly aggressive legal services program that had gained notoriety for its successful efforts to stop certain draconian welfare and Medicaid policies in California").

38 Paul Delaney, *Man in the News*, NY TIMES (Nov. 12, 1971), <https://www.nytimes.com/1971/11/13/archives/pragmatic-aide-to-nixon-donald-rumsfeld.html>.

39 *Id.*

were largely political: conservatives, including Rumsfeld, were skeptical of the broader role backup centers held in affirmative litigation.⁴⁰ Consequently, conservatives sought to eliminate back-up centers through limits on centralization and coordination.⁴¹

Despite some conservative legislative opposition, staff of subsidized legal services resisted changes, and the programs persevered. In 1974, President Nixon signed compromise legislation that continued subsidized legal work under the newly formed Legal Services Corporation.⁴² Funding steadily increased under President Carter in spite of continued harsh conservative opposition.⁴³ When President Reagan attempted to eliminate the program, the private bar advocated for its continued existence.⁴⁴ Although it remained a constant target of outright hostility by conservatives, the LSC survived this political turmoil⁴⁵ and continued through President H.W. Bush's tenure and the election of President Clinton, as well.⁴⁶

C. Unflinching conservative radicalism following the 1994 Republican takeover of the House of Representatives led to the elimination of backup centers.

In 1994, Republicans swept into the House of Representatives. Perhaps threatened by the prospect of advancing the rights of the poor, conservatives proposed to eliminate the LSC.⁴⁷ A compromise was ultimately reached, but at the cost of significant reductions in funding and the elimination of backup centers.⁴⁸ Much of the work conducted by these backup centers included ensuring that lower-income Americans received the benefits to which they were constitutionally entitled from the government or back pay that they

40 *Id.*

41 *Id.* at 334–36.

42 Houseman, *supra* note 33, at 338.

43 *Id.* at 339.

44 *Id.*

45 *Id.* at 339–41; *see also* Jeanne Charn, *Forward*, 7 HARV. L. AND POL'Y REV. 1, 6 (2013) (“[F]rom 1980 until the late 1990s were a period of crisis that threatened the very existence of the program. First, during the Reagan Administration, and then again in the mid-1990s after the Republicans gained majorities in both houses of Congress, federal funds were slashed, and Congress restricted both the type of clients the legal services lawyers could represent and the permissible modes of representation. The restriction that barred legal aid lawyers from filing class actions was an unmistakable repudiation of the law reform agenda that had defined the program in the OEO years”).

46 *Id.* at 341–42.

47 *Id.* at 342.

48 Earl Johnson, Jr., *To Establish Justice For All: The Past And Future Of Civil Legal Aid In The United States*, 269 (2014).

were legally entitled from their employers. Rather than viewing these cases as appropriate functions to ensure institutions and workplaces treat people fairly, conservatives found these causes to be “social engineering.”⁴⁹ This was not because the programs failed to advance the rights of the poor, but because of their *success*. Deeming the program’s work “left wing,” legislators pounced on the program, which was coincidentally unpopular with major donors to the Republican Party.⁵⁰

D. The short-term political benefit for elected Republicans led to long-term losses for low-income Americans in need of legal services.

Along with the elimination of back-up centers came a series of additional restrictions on the previously less controversial local LSC-funded centers: class actions,⁵¹ affirmative lobbying activity,⁵² attorney voter registration,⁵³ and other nonpartisan activities that Republicans nonetheless deemed “too partisan” were banned.⁵⁴ These restrictions continue to apply not only to activity directly funded by the LSC, but to *all* activities by *any* recipient of LSC funding, even if the local entity receives local support for such efforts.⁵⁵ In response to these restrictions, many previously-LSC-funded local centers refused LSC support altogether and sought alternative funding from state bar associations and local philanthropies.⁵⁶

Conservative opposition to support for the poor appeared to stem at least in part from a broader ideological disagreement with the LSC mission, rather than secondary disagreements about logistics. There is some evidence that this sentiment continues today.⁵⁷ Thus, regardless of the ideological basis

49 *Id.*

50 *Id.*

51 Houseman, *supra* note 33, at 343.

52 *Id.*

53 45 C.F.R. § 1608.6.

54 45 C.F.R. § 1608.6.

55 Houseman, *supra* note 334, at 343.

56 *See, e.g., Significant Events In GBLS' History*, GREATER BOSTON LEGAL SERVICES, [HTTPS://WWW.GBBS.ORG/ABOUT/HISTORY](https://www.gbbs.org/about/history) (noting that in 1996, “GBLS relinquish[ed] \$1,400,000 in federal funding due to major restrictions imposed by Congress.”).

57 In a 2008 speech before the Federalist Society, Federal Circuit Judge Dennis Jacobs criticized significant portions of pro-bono work, claiming it has an ideological basis and is self-serving: according to Jacobs, “[l]awyers use public interest litigation to promote their own agendas, social and political--and (on a wider plane) to promote the power and the role of the legal profession itself.” *Speech by Judge Dennis G. Jacobs*, THE FEDERALIST SOC. (Oct. 6, 2008) <https://fedsoc.org/commentary/publications/speech-by-judge-dennis-g-jacobs> This acknowledgement alone indicates a conservative apprehension towards pro-bono work, as well as a willingness among attorneys speaking to the Federalist Society to

for the opposition, LSC-funded centers remain under intense scrutiny.

IV. WITH ONE CHANGE IN INTERPRETATION FROM A SCANT, DECADES-OLD ADVISORY OPINION, NON-ATTORNEY EMPLOYEES OF LSC-FUNDED CENTERS COULD REGISTER CLIENTS TO VOTE.

Due to these politically-charged and longstanding restrictions, attorneys at LSC-funded local centers are prohibited from registering their clients to vote; however, the current restriction specifically preventing non-attorney employees from engaging in this nonpartisan activity stems from an advisory opinion that is overdue for review.

A. *LSC attorneys are prohibited by statute from participating in “any voter registration activity.”*

42 U.S.C. § 2996f(6)(C) provides restrictions to attorneys at LSC-funded entities. Under the law, the grantee agency is required to “insure that all attorneys engaged in legal assistance activities supported in whole or in part by the Corporation refrain, while so engaged, from [] any political activity, or . . . any voter registration activity (other than legal advice and representation).”⁵⁸ Although voter registration is non-partisan and catego-

heavily criticize pro-bono work for ideological reasons. Judge Jacobs has strong ties to the organization as well: the judge, who was appointed by President H.W. Bush to the United States Court of Appeals for the Second Circuit in 1992, noted in his official court biography that he was the recipient of the James Madison Award from the Federalist Society. “Hon. Dennis Jacobs,” UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, <https://www.ca2.uscourts.gov/judges/bios/dj.html>.

Further, Judge Jacobs’ speech laid the groundwork for a far more controversial push, perhaps best summed-up in a letter by Harvard Federalist Society students that implied that clinics for law students *should* have an ideological basis, and that the school’s offerings were insufficiently conservative. The letter, which claimed that “the clinical opportunities for students with right-of-center viewpoints are lacking” requested various clinics the letter writers believed had an ideologically conservative bent, including a “Religious Liberty Clinic,” a “Conservative Appellate Advocacy Clinic,” a “Pro-Life Clinic,” and others. *See Letter from Harvard Law School Federalist Society* (on file with the author).; *see also* Elie Mystal, *Harvard FedSoc Demands Right-Wing Clinics, ‘Cause I Guess Helping Poor People Is Liberal?*, ABOVE THE LAW (Oct 28, 2019, 3:15 PM), <https://abovethelaw.com/2019/10/harvard-fedsoc-demands-right-wing-clinics-cause-i-guess-helping-poor-people-is-liberal/?rf=1> (noting that conservative law students continue to be against pro bono support to the poor for apparently ideological reasons); Jacob Carrel, *Purpose: What the Federalist Society Got Wrong About Clinics, and How Students Can Learn From Their Mistake*, HARV. C.R.-C.L. AMICUS, Nov 19, 2019, <https://harvardcrcl.org/purpose-what-fedsoc-got-wrong-about-clinics-and-how-students-can-learn-from-their-mistake/>.

rized as so in other contexts,⁵⁹ this statute specifically extends its prohibition to encompass “voter registration activity.” Thus, under the current law, attorneys at local centers receiving LSC funding are prohibited from directly registering their clients to vote.

B. When a statute governing a particular agency contains ambiguity, courts generally must defer to the respective agency’s interpretation.

In many circumstances, courts must defer to an agency’s interpretation of its own regulations.⁶⁰ Before granting such deference, courts must first find the regulation to be “genuinely ambiguous” after using all available tools of statutory construction in an attempt to resolve the ambiguity.⁶¹ If genuinely ambiguous, the agency’s interpretation of the regulation will be provided deference so long as it (a) is reasonable,⁶² (b) is authoritative, such as a formal letter declaring the agency’s policy,⁶³ (c) implicates the agency’s substantive expertise,⁶⁴ and (d) reflects “fair and considered judgment.”⁶⁵ Critically, this deference remains even if the agency, drawing on its expertise in the area, decides to reevaluate the ambiguity and reinterpret its intended meaning.⁶⁶

Although the LSC is considered a private corporation, courts have applied similar standards to LSC decisions as they would to administrative agencies. This is sensible; many of the rules the LSC applies to grantees function similarly to agency regulations. “Although the administrative decisions of such entities are not literally subject to the requirements of the Administrative Procedure Act . . . , analogous standards have been applied to district court review of LSC decisions.”⁶⁷ Thus, just as courts should defer to

117-70, approved December 3, 2021, with a gap of Public Law 117-58).

59 See, e.g., *Political Campaign Intervention by 501(c)(3) Organizations: Get-Out-the-Vote Activities*, INTERNAL REVENUE SERV., [HTTPS://WWW.IRS.GOV/CHARITIES-NON-PROFITS/CHARITABLE-ORGANIZATIONS/FREQUENTLY-ASKED-QUESTIONS-ABOUT-THE-BAN-ON-POLITICAL-CAMPAIGN-INTERVENTION-BY-501C3-ORGANIZATIONS-GET-OUT-THE-VOTE-ACTIVITIES](https://www.irs.gov/charities-non-profits/charitable-organizations/frequently-asked-questions-about-the-ban-on-political-campaign-intervention-by-501c3-organizations-get-out-the-vote-activities) (noting that non-profits organized under 501(c)(3) of the Internal Revenue Code can conduct neutral, non-partisan get-out-the-vote drives).

60 *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

61 *Kisor*, 139 S. Ct. at 2415.

62 *Id.*

63 *Id.* at 2416.

64 *Id.* at 2417.

65 *Id.*

66 *Perez*, 135 S. Ct. at 1199.

67 *W. Ctr. on Law & Poverty v. Legal Servs. Corp.*, 592 F. Supp. 338, 342 (1984);

an agency's interpretation of its own statutes, courts should similarly defer to the LSC's interpretation of its own statutes as well.

C. *The LSC has promulgated an ambiguous regulation apparently prohibiting non-attorney employees from registering clients to vote as well.*

The LSC promulgated 45 C.F.R. Part 1608 after interpreting the restrictions under 42 U.S.C. § 2996f(6)(C). This interpretation specifically states that, “[w]hile engaged in legal assistance activities supported under the act, no attorney shall engage in (a) Any political activity, (b) Any activity to provide voters with transportation to the polls, or to provide similar assistance in connection with an election, or (c) Any voter registration activity.”⁶⁸ Further, “[n]o employee shall use any Corporation funds for activities prohibited to attorneys under § 1608.6; nor shall an employee intentionally identify or encourage others to identify the Corporation or a recipient with such activities.”⁶⁹ By the plain language of this regulation, no Corporation funds can be expended by any employee for purposes of voter registration,⁷⁰ nor may any attorney engage in voter registration activity.⁷¹ But the particular phrase, “nor shall an employee intentionally identify or encourage others to identify the Corporation or a recipient with such activities[,]” leaves a degree of ambiguity.⁷²

The LSC narrowly interpreted the term “intentionally identify” in 2002, when the Deputy Director of Passaic County Legal Aid Society, an LSC grantee, ran in a local election. At issue was whether the Deputy's campaign literature stating he “manages a multi-million dollar budget as the Deputy Director of Passaic County Legal Aid” violated 45 C.F.R. 1608.4(a), a similar section of the regulation banning employees from “intentionally identifying” the LSC with any political activity.⁷³ In its advisory opinion, the LSC

see also *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp. (Texas Rural Legal Aid II)*, 940 F.2d 685, 689 (D.C. Cir. 1991) (internal citation omitted) (“We conclude that the basic principles of *Chevron* apply to the statutory scheme created by the Act and the role contemplated for LSC under it.”).

68 45 C.F.R. § 1608.6.

69 45 C.F.R. § 1608.4(b).

70 *Id.* § 1608.4(b).

71 *Id.* § 1608.4(b).

72 *Id.*

73 *See* 45 C.F.R. § 1608.4(a) (Lexis Advance through the Dec. 14, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 70751) (“No employee shall intentionally identify the Corporation or a recipient with any partis[an] or nonpartisan political activity, or with the campaign of any candidate for public or party of-

narrowly interpreted the phrase “intentionally identify,” and found that the campaign literature’s language regarding Passaic County Legal Aid did not violate the Act’s ban on intentionally identifying the LSC with political activity. The advisory opinion noted that “the longstanding OLA interpretation of section 1608.4(a) has been that it is intended to refer to such actions which would make it appear that the program itself was engaged in political activities (partisan or non-partisan) or that the program supported or endorsed any candidate for public office.”⁷⁴ Based on this narrow interpretation, a violation of the regulation may be found if (1) an individual engages in a willful act that (2) would lead a reasonable person to believe that the program itself was associated with the individual’s activity.

The inclusion of “the Corporation or a recipient” includes both the LSC-funded center as well as the LSC itself. But merely registering clients to vote, regardless of the registrar’s relationship to the agency, is distinguishable from intentionally identifying the activity with the LSC-funded center. There is no express requirement within the regulation that activities by outside volunteers must be prohibited; rather, their *association* with the LSC may not be “encourage[d].”⁷⁵ Thus, voter registration can be accomplished if orchestrated entirely by non-employees who expressly state that the activity is not associated with the center.

The LSC itself has acknowledged the need to address certain gaps within this regulation: A 2017 advisory opinion issued by the LSC interpreted the same regulation to allow LSC-funded centers to provide legal guidance related to re-enfranchisement of previously convicted individuals under Alabama’s re-enfranchisement laws.⁷⁶ While the reasoning centered on interpretations of a different provision and did not address voter registration activity itself, the opinion acknowledges that there are gaps in this regulation.

Additionally, other ambiguities in the statute have been addressed before. In *Western Center on Law and Poverty, Inc., v. Legal Services Corporation*,⁷⁷ an LSC grantee had its funding revoked after allegedly taking part in a campaign to defeat a ballot initiative; however, the grantee’s funding was restored in federal court. The case centered on the ambiguity in the exception to the statute that prohibited voter registration by attorneys

fi ce.”).

74 *Meaning of “intentionally identify” in 45 CFR 1608.4(a)*, External Opinion 2006-1005 (October 05, 2006), <https://www.lsc.gov/sites/default/files/LSC/pdfs/EX-2006-1005.PDF>.

75 *Id.* § 1608.4(b).

76 *Legal Information and Assistance Involving Voting Rights*, Advisory Opinion 2017-08 (Dec. 1, 2017), <https://www.lsc.gov/ao-2017-008>.

77 592 F. Supp. 338 (1984).

“other than legal advice and representation.” The president of the LSC at the time interpreted the exception “narrow[ly]”⁷⁸ to include only a specific scope of representation, and not a more general definition of legal advice and representation. The court found that the exceedingly narrow interpretation of the exception was “unsupported by the statutory language and interpreting regulations.”⁷⁹ Moreover, the court found that the funding decision was arbitrary and capricious and consequently in violation of the Administrative Procedure Act.⁸⁰

Further, in 1990 the LSC promulgated a regulation prohibiting LSC-funded grantees from engaging in redistricting litigation. Interpreting the statute’s ban on political activity broadly, the LSC reasoned that redistricting decisions are “not related to the delivery of basic day-to-day legal services to the poor and are intertwined with impermissible political activity.”⁸¹ This broad interpretation was challenged in court and initially struck down,⁸² but the D.C. Circuit upheld the regulation on appeal, finding that the LSC’s interpretation was entitled to deference.⁸³

D. Although the ambiguity within 45 C.F.R. Part 1608 has been addressed by the LSC before, its previous interpretation is ripe for re-evaluation.

In response to an inquiry as to “whether 45 C.F.R. Part 1608 prohibits voter registration activities by non-attorney personnel in LSC-funded legal services programs” in a 1998 advisory opinion, the LSC interpreted the phrase “identifying the recipient” broadly. In a meager, three-paragraph explanation, it stated:

“Section 1608.4 extends this prohibition to all recipient employees. It provides that: ‘No employee shall use any Corporation funds for activities prohibited to attorneys under Section 1608.6; nor shall an employee intentionally identify or encourage others to identify the Corporation or a recipient with such activities.’

78 *Id.* at 344.

79 *Id.*

80 *Id.* at 348.

81 54 F.R. 10569

82 *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp. (Tex. Rural Legal Aid I)*, 740 F. Supp. 880, 888 (1990).

83 *Tex. Rural Legal Aid II*, 940 F.2d at 689 (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).

The second clause of this provision prohibits identifying the recipient with any voter registration activity. Thus, even if non-LSC funds or no funds supported the activity, no recipient can be identified with voter registration activity.”⁸⁴

Thus, as it currently stands, the advisory opinion prohibits voter registration by non-attorney *employees*. Nevertheless, given its ambiguous nature and limited analysis or explanation, this advisory opinion is ripe for review.

E. Upon renewed review, an alternative interpretation could distinguish between merely allowing an activity to occur and formally identifying with the activity.

The meager guidance issued in 1998 fails to fully address the ambiguity of Part 1608, but it need not be permanent, because agencies – and by extension, the LSC – are empowered to reconsider their previous guidance at any time. Thus, the LSC may draw on its expertise in the field of legal services and appropriately revisit and reconsider its opinion. Such reinterpretation would be entitled to considerable weight.⁸⁵

A new interpretation could allow local LSC-funded entities to permit non-attorney staff to register voters, provided that the staff do not “identify the Corporation or a recipient with such activities,”⁸⁶ presumably by expressly stating that they are not acting in affiliation with or encouragement by the center.⁸⁷ Further, the Corporation could even provide grantees guidance for compliance recommending that they follow particular steps when conducting voter registration.

84 *Whether 45 CFR Part 1608 Prohibits Voter Registration Activities by Non-Attorney Personnel in LSC-Funded Legal Services Programs*, External Opinion 1998-47, <https://www.lsc.gov/whether-45-cfr-part-1608-prohibits-voter-registration-activities-non-attorney-personnel-lsc-funded>.

85 *Perez*, 135 S. Ct. at 1199.

86 45 C.F.R. § 1608.4.

87 An interpretation that “identify the Corporation. . . with” could be defined to mean “approach the activity in such a way that a reasonable person would believe the activity was endorsed by the Corporation or LSC center.” The guidance accompanying that interpretation could require any such activity to be accompanied by a verbal or written explanation that the activity is *not* endorsed by or intentionally identified with the LSC center, to ensure compliance with the regulation. For an example of language that may fit the regulation’s intended interpretation, see Appendix I, Section 3(B).

V. IN THE MEANTIME, VOTER REGISTRATION AT LSC-FUNDED CENTERS CAN LIKELY BE CONDUCTED BY NON-ATTORNEY VOLUNTEERS

Missing from the 1998 opinion is whether non-employees or non-attorney volunteers (such as law students or other interns) can engage in voter registration; consequently, there may already be existing opportunities to offer LSC clients voter registration opportunities.

Until the LSC revisits its advisory opinion, volunteers may conduct voter registration under the current regulations. Although volunteer-led voter registration may be less effective, it would support the broader goal of empowering citizens to vote and engage in the democratic process. This is an immediately available opportunity that would restore a measure of local control to LSC-funded entities, allowing them to engage in this non-partisan activity once again without resorting to changing regulations or enacting new legislation.

VI. SHOULD VOLUNTEERS – OR, IN THE FUTURE, NON-ATTORNEY EMPLOYEES – ENGAGE IN VOTER REGISTRATION, CERTAIN PRACTICES SHOULD BE FOLLOWED TO REMAIN COMPLIANT WITH THE LSC'S REGULATIONS

Voter registration is not as simple as asking someone to fill out a form. It is even more complicated when considering the serious implications of violating an LSC regulation. With the risk of losing the center's funding in mind, registrars must be strategic and diligent with any voter registration activity to ensure the activity is not expressly affiliated with the center.⁸⁸

First, care should be employed to ensure that voter registration is not disruptive to volunteers' existing high workload. When efficient measures are in place, there should be no notable disruption to the volunteers' workloads. For example, Williamson's results in the tax clinic found "no measurable change in the rate of tax preparation when voter registration was offered."⁸⁹ Ensuring that volunteers are prepared in advance can ease this process.

Second, voter registration must be clearly framed as (1) non-partisan, and (2) separate and distinct from the local center or the LSC itself. This must be as clear as possible so as to avoid confusing clients or violating 45 C.F.R. § 1608. Volunteers can simply identify themselves as such and suggest that potential clients fill out a voter registration form while they are in a waiting

88 See, e.g., *Western Center*, 592 F. Supp. at 340 (requests by LSC center for future funding initially denied based on "significant evidence" the center engaged in prohibited activities).

89 See *Williamson*, *supra* note 26.

room, for example.

Voter registration requires a clear plan and thoughtful implementation, but it is relatively easy to master. It should be non-disruptive, non-coordinated, and non-partisan. At the same time, it should demonstrate how voting is a widespread norm. Because the legal restrictions have implications at a practical level as well, Appendix I provides a checklist to help volunteers implement their own voter registration plan at an LSC-funded center.

VII. CONCLUSION

Democracies require widespread and inclusive access to the ballot. Vulnerable groups, including lower-income Americans, are less likely to be registered voters; outreach and opportunities to register may be particularly impactful in reducing the barrier to vote. Although there are several restrictions on LSC-funded local centers, opportunities to meet LSC clients where they are and register them to vote are on the horizon. By reevaluating one terse advisory opinion from over two decades ago, the LSC could empower non-attorney employees to register clients to vote. In the meantime, volunteers at LSC-funded centers can currently register clients to vote if they do so carefully.

Both current volunteer-led opportunities and future non-attorney staff possibilities would allow LSC-funded centers to reach more individuals and assist them in an essential but complicated process. While some legal services staff may be understandably nervous about volunteers conducting voter registration, it can nonetheless be done effectively and legally.⁹⁰

Most importantly, any voter registration at these centers must remain non-partisan and in compliance with existing guidance. Despite being baselessly attacked for decades as a partisan activity, voter registration by LSC volunteers and non-attorney staff members can be non-disruptive, non-coordinated, and non-partisan. At a time where voter intimidation and disenfranchisement efforts are on the rise, it has never been more critical to expand opportunities for every American to vote.

90 Many legal services entities do not receive LSC funding. *See* Greater Boston Legal Services, *supra* note 41. Thus, voter registration can be immediately implemented by legal services organizations that are not subject to the overbroad LSC restrictions. Furthermore, large-scale opportunities, such as additional causes of action and preclearance opportunities, could be enforced by LSC-oriented entities with additional legislation. *See* Cody Gray, *A New Proposal to Address Local Voting Discrimination*, 50 U. RICH. L. REV. 611 (2016), <https://scholarship.richmond.edu/lawreview/vol50/iss2/6>.

APPENDIX I: VOTER REGISTRATION CHECKLIST

The following checklist can be used by a volunteer interested in registering LSC-funded legal services clients to vote.

1. *Obtain any required local licensures.* Some states require voter registration officials to undergo training or obtain basic licensures to register people to vote.⁹¹ Thus, any volunteers who choose to register voters should obtain any required licensure before registering anyone to vote.
2. *Print all materials at home or at your law school; bring pens.* Because no costs can be borne by LSC-funded entities, no voter registration papers can be printed from the centers' printers. Law-student volunteers should take care to print registration forms ahead of time at their schools, and other volunteers should print forms at home or at a local print center. Similarly, any pens or clipboards to facilitate the activity should be brought from home.
3. *Make one request of clients while they wait in any waiting room.*
 - A. Drawing on Williamson's experience at VITA centers,⁹² the best chance to register a potential client to vote is to give them the form when they first enter. This can be in addition to any other forms given during a basic intake procedure. In the VITA centers, having the clients simply fill out the voter registration form alongside other intake documents saved time and "allowed participants to complete their forms on their own time."⁹³ In doing so, it created no added time to the entire process, thus being non-disruptive to the existing important work going on in the centers.
 - B. To emphasize how it is non-coordinated, the volunteer should provide a verbal explanation, such as "I'm registering people to vote today while you wait. This is entirely separate from the work of [*the name of the local center*]. It is not connected to, supported by, or affiliated with [*the name of the local center*]. Whether you choose to register or

⁹¹ See, e.g., TEX. ELEC. CODE § 13.047 (establishing requirements including an examination for volunteer deputy registrars).

⁹² See Williamson, *supra* note 26 ("When a client enters a VITA site, they are typically greeted by an intake volunteer who provides the client with the IRS-mandated intake form. . . . At the Ohio Filer Voter sites, the intake materials included the IRS form, the experimental consent form, and the voter registration form.").

⁹³ *Id.*

not will not affect any of any legal representation you may receive.”

- C. Drawing on behavioral science research, the volunteer should next ask the potential registrant, “Are you a voter? Have you had a chance to register yet?” Voter registration should be tied to the client’s identity and should “reveal voting to be a widespread norm.”⁹⁴ The question posed should be, “are you a voter? Have you had a chance to register yet?” rather than, “are you registered to vote?” Emphasizing the framing of *being* a voter taps into one’s identity and reinforces descriptive social norms.⁹⁵
 - D. If the client says they are interested in registering, the volunteer should give them the form to register, and specify that the registration form needs to be returned directly to them only. The volunteer could state, “Because I am registering you to vote today in my personal capacity, please return this voter registration form directly to me and do not leave it here or with anyone else.”
4. *Collect all voter registration forms.* It would be a problem if the volunteer were to forget a form, as any other staff potentially handling the form would potentially violate 45 C.F.R. § 1608.
 5. *Return all completed forms promptly.* As some states have timeline restrictions on how quickly a volunteer voter registrar must turn in a completed voter registration form, volunteers should be aware of their own state’s restrictions and return all forms promptly.
 6. *Maintain awareness of strict separation.* Volunteers should always take care to separate any voter registration activity from any LSC work.

94 *Id.* at 19.

95 See Alan S. Gerber and Todd Rogers, *Descriptive Social Norms and Motivation to Vote: Everybody’s Voting and so Should You*, 71 J. OF POLS., 178-191 (2009); see also Christopher J. Bryan, Gregory M. Walton, Todd Rogers, and Carol S. Dweck, *Motivating voter turnout by invoking the self*, 108 PROC. OF THE NAT’L ACAD. OF SCI. 31, 12653 (2011).