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United States Senate

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

Committee on Homeland Security and Governmental Affairs

Jon Ossoff, Chair

Ron Johnson, Ranking Member

**UNCOUNTED DEATHS IN AMERICA'S PRISONS & JAILS:
HOW THE DEPARTMENT OF JUSTICE FAILED
TO IMPLEMENT
THE DEATH AND CUSTODY REPORTING ACT**

STAFF REPORT

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

UNITED STATES SENATE



**RELEASED IN CONJUNCTION WITH THE
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
SEPTEMBER 20, 2022 HEARING**

EMBARGOED UNTIL 5:00 A.M. 9.20.22 EDT

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Uncounted Deaths in America’s Prisons & Jails: How the Department of Justice Failed to Implement the Death in Custody Reporting Act

Executive Summary

Approximately 1.5 million people are incarcerated in state and local correctional facilities throughout the United States.¹ Thousands die every year.² The Death in Custody Reporting Act of 2013 (“DCRA 2013” or “the reauthorization”)—reauthorizing a law that first passed in 2000—requires states that accept certain federal funding to report to the Department of Justice (“DOJ” or “the Department”) about who is dying in prisons and jails.³

Over the course of a ten-month bipartisan investigation into DOJ’s implementation of the law, the Permanent Subcommittee on Investigations (“PSI” or “the Subcommittee”) found that DOJ is failing to effectively implement DCRA 2013. DOJ’s failed implementation of DCRA 2013 undermined the effective, comprehensive, and accurate collection of custodial death data.

This failure in turn undermined transparency and Congressional oversight of deaths in custody. The Subcommittee has found that DOJ will be at least eight years past-due in providing Congress with the DCRA 2013-required 2016 report on how custodial deaths can be reduced. The Subcommittee also highlights the following key facts: in Fiscal Year (“FY”) 2021 alone, DOJ failed to identify at least 990 prison and arrest related deaths; and 70% of the data DOJ collected was incomplete.⁴ DOJ failed to implement effective data collection methodology, despite internal warnings from the DOJ Office of the Inspector General (“OIG”) and the Bureau of Justice Statistics (BJS).⁵ DOJ’s failures were preventable.

* * *

¹ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 1 (GAO-22-106033) (Sept. 20, 2022).

² In FY 2019, for example, a total of 3,853 individuals died in state prisons or private prison facilities under a state contract and a total of 1,200 individuals died in local jails. See Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in State and Federal Prisons 2001-2019—Statistical Tables* (Dec. 2021) (bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf); Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Local Jails 2000-2019—Statistical Tables* (Dec. 2021) (bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf).

³ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242; Death in Custody Reporting Act of 2000, Pub. L. No. 106-297. DCRA 2013, which became law in 2014, requires federal agencies to report deaths in custody to DOJ. *Id.* This report and investigation focuses on the portion of DCRA 2013 that concerns deaths in state or local custody, and does not consider the portion of the law that concerns deaths in federal custody.

⁴ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 1 (GAO-22-106033) (Sept. 20, 2022).

⁵ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249* (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800); Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013* (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

The co-sponsors of DCRA, which passed the United States Senate by unanimous consent and the United States House of Representatives by wide bipartisan margins in both 2000 and again in 2013, described why collecting death data was critical: it would bring a “new level of accountability to our Nation’s correctional institutions”; “provide openness in government”; “bolster public confidence and trust in our judicial system”; and “bring additional transparency.”⁶

DOJ itself described the law in similar terms. According to DOJ:

The requirements set forth in DCRA provide an opportunity to improve understanding of why deaths occur in custody and develop solutions to prevent avoidable deaths. Knowledge of the circumstances leading to death and the number of fatalities is crucial to developing policies and program changes that could reduce the number of deaths in custody.⁷

DCRA 2013 requires “at a minimum” that states report to DOJ the following information about custodial deaths: the name, gender, race, ethnicity, and age of the deceased; the date, time, and location of death; the law enforcement agency that was holding the decedent; and a brief description of the circumstances surrounding the death.⁸ DCRA 2013 also requires DOJ to report to Congress on how that information can be used to prevent avoidable deaths.⁹ This report was due on December 18, 2016, two years after DCRA 2013 became law.¹⁰

DOJ’s efforts to implement DCRA 2013 were a continuation of its efforts to implement the original version of the law, the Death in Custody Reporting Act of 2000 (“DCRA 2000”).¹¹ In response to DCRA 2000, DOJ tasked its criminal justice statistics agency, BJS, with creating a national survey of deaths in federal, state, and local custody.¹² From 2000 through 2019, BJS collected, studied, and made public information about deaths in custody, information that went

⁶ Statement of Representative Asa Hutchinson, Congressional Record, H6737 (July 24, 2000); Statement of Senator Patrick Leahy, Congressional Record, S6341 (Dec. 4, 2014).

⁷ Department of Justice, Bureau of Justice Assistance, Death in Custody Reporting Act (DCRA) Data Collection (bja.ojp.gov/program/dcra/overview).

⁸ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

⁹ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

¹⁰ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

¹¹ Death in Custody Reporting Act of 2000, Pub. L. No. 106-297. DCRA 2000 required DOJ to collect almost all of the same information as required under DCRA 2013. Specifically, the law required that the information collected “at a minimum” includes: (1) the name, gender, race, ethnicity, and age of the deceased; (2) the date, time, and location of death; and (3) a brief description of the circumstances surrounding the death. *Id.* Unlike DCRA 2013, DCRA 2000 did not require the collection of “the law enforcement agency that detained, arrested, or was in the process of arresting the deceased.”

¹² Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program).

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far beyond the statutory requirements.¹³ During this period, BJS claims to have collected data from an average of 98% of all local jails and 100% of all state prisons.¹⁴

In a change from DCRA 2000, DCRA 2013 authorizes the Attorney General to withhold up to 10% of Edward Byrne Memorial Justice Assistance Grant (“JAG”) funding from states that accepted those funds but did not report custodial death data to DOJ.¹⁵ In 2016, two years after DCRA 2013 became law, DOJ decided that BJS could no longer implement DCRA 2013.¹⁶ DOJ explained its rationale in a December 2016 report to Congress.¹⁷ According to DOJ, because BJS was a statistical agency, it was precluded from administering a data collection program with “compliance and penalty determinations,” such as the penalty included in DCRA 2013.¹⁸ DOJ informed Congress that it would be reassigning the state death data collection from BJS to the Bureau of Justice Assistance (“BJA”), a grant-making agency within DOJ’s Office of Justice Programs (“OJP”).¹⁹

However, BJS had already been collecting, studying, and reporting on state and local death data for sixteen years.²⁰ BJS continued to collect state and local custodial death data until BJA finally began its collection in FY 2020.²¹

Since the transfer of data collection responsibility to BJA, DOJ has not publicly reported on any data that BJA has collected.²² Additionally, DOJ is not expected to complete the

¹³ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program).

¹⁴ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 3 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

¹⁵ Department of Justice, *Report of the Attorney General to Congress Pursuant to the Death in Custody Reporting Act*, at 5 (Dec. 16, 2016) (www.justice.gov/archives/page/file/918846/download).

¹⁶ See Department of Justice, *Report of the Attorney General to Congress Pursuant to the Death in Custody Reporting Act* (Dec. 16, 2016) (www.justice.gov/archives/page/file/918846/download).

¹⁷ Department of Justice, *Report of the Attorney General to Congress Pursuant to the Death in Custody Reporting Act* (Dec. 16, 2016) (www.justice.gov/archives/page/file/918846/download).

¹⁸ Department of Justice, *Report of the Attorney General to Congress Pursuant to the Death in Custody Reporting Act*, at 8 n.17 (Dec. 16, 2016) (www.justice.gov/archives/page/file/918846/download); Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

¹⁹ Department of Justice, *Report of the Attorney General to Congress Pursuant to the Death in Custody Reporting Act*, at 8 n.17 (Dec. 16, 2016) (www.justice.gov/archives/page/file/918846/download). Federal data collection remained with BJS however, because there was no penalty associated with federal data collection. See *Death in Custody Reporting Act of 2013*, Pub. L. No. 113-242.

²⁰ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022); Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program).

²¹ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program).

²² See Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022). DOJ is not required to make public DCRA data under the statute. *Death in Custody Reporting Act of 2013*, Pub. L. No. 113-242.

statutorily required report to Congress before September 2024, at least eight years past due.²³ DOJ also has no plans to make public any further state and local death information.²⁴

In December 2021, PSI began a ten-month bipartisan investigation into DOJ’s efforts to implement DCRA 2013, and, specifically, BJA’s efforts to collect and report on state and local custodial deaths.²⁵ During the course of this investigation, PSI interviewed a DOJ official who spoke on behalf of the agency, family members of ten people who died in state or local custody across the country, and two criminal justice experts to assess how DCRA data can be used to bring transparency to custodial deaths.²⁶ On March 23, 2022, PSI requested that the Government Accountability Office (“GAO”) analyze data that BJA had collected for FY 2021 pursuant to DCRA 2013.²⁷ Based on a review of public and non-public information, including GAO’s analysis, the Subcommittee found that DOJ has failed to implement DCRA 2013.

The Subcommittee notes that DOJ failed to provide full and complete information to the Subcommittee.²⁸ DOJ’s resistance to bipartisan Congressional oversight impeded Congress’ ability to understand whether DCRA 2013 had been properly implemented, delaying potential reforms that could restore the integrity of this critical program.

²³ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022); Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 7 (GAO-22-106033) (Sept. 20, 2022).

²⁴ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

²⁵ The Subcommittee did not evaluate DOJ’s efforts to comply with the section of DCRA 2013 concerning federal agencies’ reporting of deaths in custody, which is administered by BJS and appears to be proceeding pursuant to the requirements of the law.

²⁶ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022); University of California Los Angeles School of Law Carceral Mortality Project, Briefing with Senate Permanent Subcommittee on Investigations (Aug. 3, 2022); Shanelle Jenkins, Interview with Senate Permanent Subcommittee on Investigations (May 31, 2022); Sandy Ray, Interview with Senate Permanent Subcommittee on Investigations (May 25, 2022); Dawn Reid, Interview with Senate Permanent Subcommittee on Investigations (May 9, 2022); Melania Brown, Interview with Senate Permanent Subcommittee on Investigations (May 9, 2022); Glenda Hester, Interview with Senate Permanent Subcommittee on Investigations (May 6, 2022); Belinda Maley, Interview with Senate Permanent Subcommittee on Investigations (May 4, 2022); Sherilyn Sabo, Interview with Senate Permanent Subcommittee on Investigations (Apr. 22, 2022); Vanessa Fano, Interview with Senate Permanent Subcommittee on Investigations (Apr. 20, 2022); Linda Franks, Interview with Senate Permanent Subcommittee on Investigations (Apr. 14, 2022); Jennifer Bradley, Interview with Senate Permanent Subcommittee on Investigations (Apr. 19, 2022); Professor Andrea Armstrong, Loyola University New Orleans School of Law, Briefing with Senate Permanent Subcommittee on Investigations (Apr. 19, 2022).

²⁷ Letter from Chair Jon Ossoff, Senate Permanent Subcommittee on Investigations, to Government Accountability Office (Mar. 23, 2022); U.S. Government Accountability Office, About Page (www.gao.gov/about) (accessed Sept. 19, 2022).

²⁸ Letter from Senate Permanent Subcommittee on Investigations to Department of Justice (Dec. 3, 2021); Letter from Department of Justice to Senate Permanent Subcommittee on Investigations (Feb. 11, 2022); Letter from Senate Permanent Subcommittee on Investigations to Department of Justice (Apr. 27, 2022). DOJ provided only a single interview to the Subcommittee and provide only aggregate death data from six states over two-years.

Key Facts:

- 1. Nearly One Thousand Missing Deaths.** As part of its review for PSI, GAO identified at least 990 deaths that were potentially reportable to BJA in FY 2021, but that BJA had not counted.²⁹ Of the 990 uncounted deaths, 341 were prison deaths disclosed on states' public websites and 649 were arrest-related deaths disclosed in a reliable, public database.³⁰ GAO determined that BJA's collection was missing information that is already in the public domain.³¹
- 2. Incomplete Data.** GAO found that for FY 2021, the vast majority of death in custody information that BJA collected from the states was incomplete.³² Specifically, 70% of records on deaths in custody were missing at least one DCRA 2013-required data field; approximately 40% of the records did not include a description of the circumstances surrounding the death; and 32% of the records were missing more than one DCRA 2013-required data field.³³
- 3. Failure to Report.** DCRA 2013 required DOJ to report to Congress by December 18, 2016 on how the data it collected can be used "to reduce the number of such deaths" and to "examine the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons, and other specified facilities relating to such deaths."³⁴ DOJ does not expect to complete these reporting requirements before September 2024—eight years late.³⁵ DOJ has not yet evaluated whether the data that it had collected in FY 2020 or FY 2021 is of sufficient quality to be used in the DCRA 2013-required analysis and report to Congress.³⁶
- 4. Failed Transition.** DOJ failed to properly manage the transition of DCRA 2013 data collection from BJS to BJA. BJA's failure to properly collect and report on custodial death data stands in marked contrast to BJS's successful efforts to do these same things for 20 years. To the extent that DOJ sought to assign DCRA 2013 responsibilities to

²⁹ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.33 (GAO-22-106033) (Sept. 20, 2022).

³⁰ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.33 (GAO-22-106033) (Sept. 20, 2022).

³¹ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 (GAO-22-106033) (Sept. 20, 2022).

³² Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 9 (GAO-22-106033) (Sept. 20, 2022).

³³ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 9 (GAO-22-106033) (Sept. 20, 2022).

³⁴ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

³⁵ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

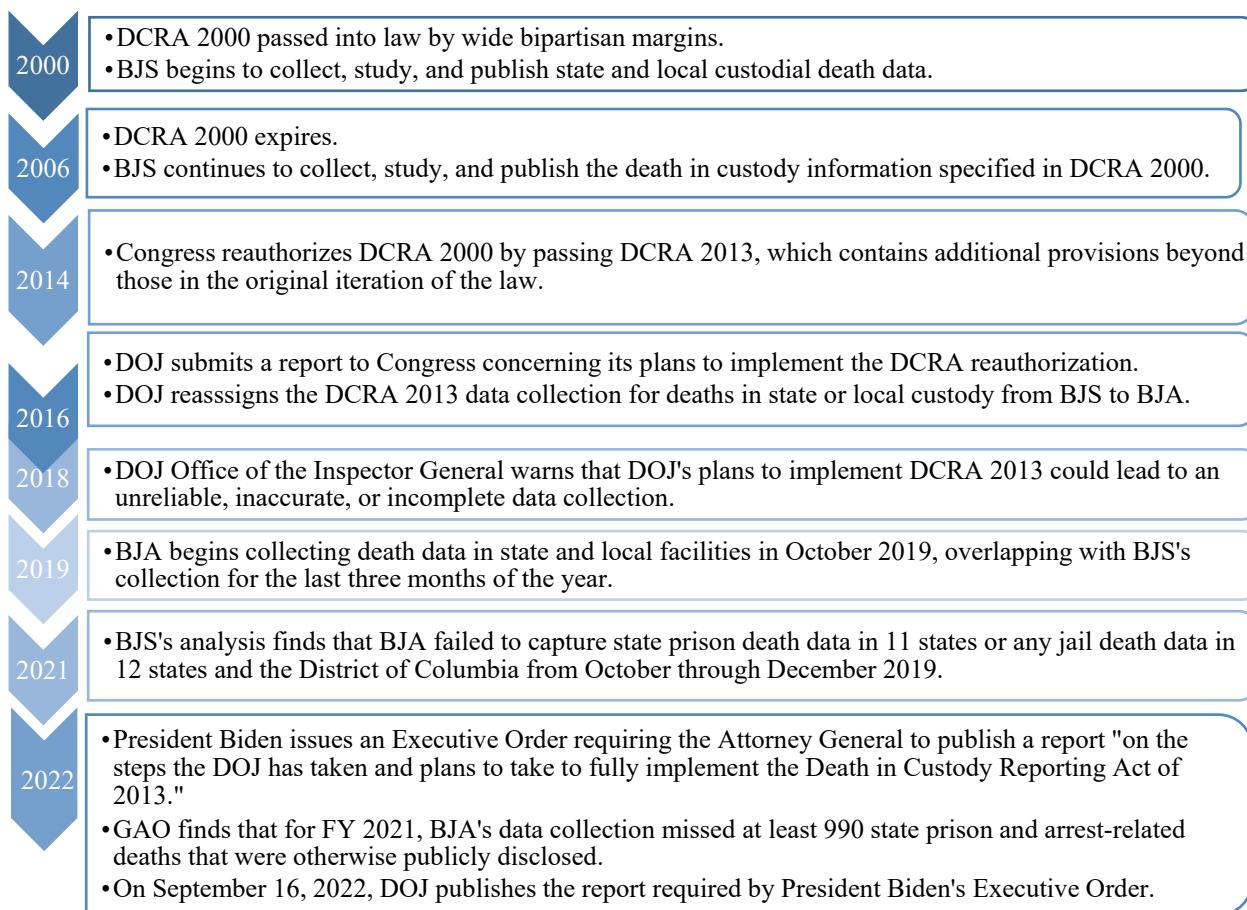
³⁶ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

BJA, it should have done more to equip it with the resources and strategies it already knew to be successful so that DOJ could meet its statutory obligations.³⁷

DOJ's failure to implement DCRA has deprived Congress and the American public of information about who is dying in custody and why. This information is critical to improve transparency in prisons and jails, identifying trends in custodial deaths that may warrant corrective action—such as failure to provide adequate medical care, mental health services, or safeguard prisoners from violence—and identifying specific facilities with outlying death rates. DOJ's failure to implement this law and to continue to voluntarily publish this information is a missed opportunity to prevent avoidable deaths.

³⁷ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022). The Subcommittee further notes that DOJ's rationale for reassigning the state death data collection from BJS—a statistical agency that had successfully collected and published DCRA data for 20 years—to BJA—a grant-making agency with no track record of collecting or reporting on similar data—was that the DCRA 2013 JAG penalty precluded BJS's administration of the program. Department of Justice, *Report of the Attorney General to Congress Pursuant to the Death in Custody Reporting Act* (Dec. 16, 2016) (www.justice.gov/archives/page/file/918846/download). Yet, DOJ's decision came two years after BJS had already been collecting state death data pursuant to DCRA 2013, and DOJ permitted BJS to continue its collection for another three years. Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

Figure 1: Death in Custody Reporting Act Timeline



I. The Death in Custody Reporting Act

a. History

In 2000, Congress passed DCRA 2000, which required states to issue quarterly reports to the Attorney General about prison and jail deaths.³⁸ In order to be eligible for Violent Offender Incarceration and Truth in Sentencing grant funding—funding for building or expanding correctional facilities—states were required to “provide assurances” that they will report data to DOJ for the following fields: (1) the name, gender, race, ethnicity, and age of the deceased; (2) the date, time, and location of death; and (3) a brief description of the circumstances surrounding death.³⁹

In response to the passage of DCRA 2000, BJS, DOJ’s statistical agency, established a national custodial death data collection.⁴⁰ BJS began collecting individual death records from local jails in 2000 and state prisons in 2001 as part of a national study that came to be known as Mortality in Correctional Institutions (“MCI”).⁴¹ Through MCI, BJS collected information about deaths in custody from the approximately 2,800 adult jails and 50 state departments of corrections, “track[ing] national trends in the number and causes of deaths occurring in correctional institutions.”⁴²

DCRA 2000 did not expressly require publication of state and local death data.⁴³ However, for the 20-year period from 2000 through 2019, BJS published information, statistics, and analyses of “comparative death rates across demographic categories, offense types and

³⁸ Death in Custody Reporting Act of 2000, Pub. L. No. 106-297.

³⁹ Death in Custody Reporting Act of 2000, Pub. L. No. 106-297; Department of Justice, Bureau of Justice Assistance, Violent Offender Incarceration and Truth-In-Sentencing (VOI/TIS) Incentive Program (<https://bja.ojp.gov/program/violent-offender-incarceration-and-truth-sentencing-voitis-incentive-program/overview>).

⁴⁰ Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, at 2-3 (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

⁴¹ Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, at 2 (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf); Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program) (BJS’s national study of death in custody).

⁴² Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, at 2 (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

⁴³ Death in Custody Reporting Act of 2000, Pub. L. No. 106-297.

facility/agency characteristics.”⁴⁴ BJS reported that it collected data from an average of 98% of all local jails and 100% of all state prisons.⁴⁵

When DCRA 2000 expired in 2006, BJS continued to collect and publish the data specified in the law because BJS determined “they represent a unique national resource for understanding mortality in the criminal justice system.”⁴⁶ BJS was able to continue collecting data under BJS’s authorizing statute.⁴⁷

In 2014, Congress reauthorized DCRA 2000.⁴⁸ The reauthorization restored and expanded DCRA 2000’s mandates with four key additions concerning deaths in state and local custody.⁴⁹ *First*, it requires states to report “the law enforcement agency that detained, arrested, or was in the process of arresting the deceased,” in addition to the fields required by DCRA 2000.⁵⁰ BJS had never before published information identifying the law enforcement agency holding the person who died.⁵¹ *Second*, it requires DOJ to collect state reported death data in perpetuity, with no expiration.⁵²

Third, it requires that by December 2016, two years after DCRA 2013 became law, DOJ issue a report to Congress that would “determine means by which [death in custody] information can be used to reduce the number of such deaths,” and “examine the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons, and other specified facilities relating to such deaths.”⁵³ DOJ has not yet provided any DCRA 2013-required reporting to Congress. It does not expect to complete its DCRA 2013-required reporting before 2024, eight years past its required due date.⁵⁴ *Fourth*, it authorized the Attorney

⁴⁴ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Deaths in Custody Statistical Tables* (July 2010) (bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/dictabs.pdf); *see also* Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program).

⁴⁵ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 3 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁴⁶ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Deaths in Custody Statistical Tables*, at 1 (July 2010) (bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/dictabs.pdf).

⁴⁷ 34 U.S.C. § 10132 (BJS is authorized to “collect and analyze statistical information, concerning the operations of the criminal justice system” at all levels of government, and to “publish, and disseminate uniform national statistics concerning all aspects of criminal justice.”).

⁴⁸ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

⁴⁹ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

⁵⁰ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

⁵¹ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program).

⁵² Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

⁵³ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

⁵⁴ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 7 (GAO-22-106033) (Sept. 20, 2022). DOJ has commissioned two studies in response to DCRA’s reporting requirements. *See* Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022). DOJ informed the Subcommittee that it expects to produce the first report to Congress in late 2022 and the second report at some point after September 2024. *Id.*

General, at the Attorney General's discretion, to withhold up to 10% of a state's JAG grant funding from states or territories if that state failed to report DCRA data to DOJ.⁵⁵ To date, DOJ has not withheld any funds from states that accept JAG grants but did not report DCRA-required data to DOJ, and has not assessed state compliance with DCRA reporting.⁵⁶

After Congress passed the reauthorization, BJS continued its collection and publication of death data.⁵⁷ On December 16, 2016, DOJ issued a report to Congress setting forth its plans for implementing DCRA.⁵⁸ Part of this plan included reassigning the DCRA 2013 state and local custodial death collection from BJS to BJA, a grant-making agency within OJP. DOJ explained its rationale for the change as follows:

BJA administers the Byrne JAG Program and the compliance and penalty determinations that program requires. BJS will not administer the DCRA collection because its compliance is tied to the administration of the Byrne JAG Program, and BJS's statistical directives make clear that it "must function in an environment that is clearly separate and autonomous from the other administrative, regulatory, law enforcement, or policy-making activities" of the Department.⁵⁹

⁵⁵ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

⁵⁶ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022); Government Accountability Office, Briefing with Senate Permanent Subcommittee on Investigations (Sept. 8, 2022).

⁵⁷ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program).

⁵⁸ Department of Justice, *Report of the Attorney General to Congress Pursuant to the Death in Custody Reporting Act* (Dec. 16, 2016) (www.justice.gov/archives/page/file/918846/download).

⁵⁹ Department of Justice, *Report of the Attorney General to Congress Pursuant to the Death in Custody Reporting Act*, at 8 n.17 (Dec. 16, 2016) (www.justice.gov/archives/page/file/918846/download). In later years, DOJ characterized its rationale for reassigning the collection from BJS to BJA differently. In a BJS report dated May 11, 2021 and on BJS's website, BJS describes DOJ's rationale as follows:

In 2016, the Department of Justice (DOJ) **decided to place more emphasis** on the section of P.L. 113-242 that concerned non-compliance with the data collection. Per the law, states that did not report on a quarterly basis individual-level data on deaths occurring in local jails, in state prisons, or in the process of arrest, could be penalized up to 10% of the DOJ-administered Justice Assistance Grants (JAG) awards. The DOJ determined that the Bureau of Justice Assistance (BJA) should manage collection of the data pursuant to the law because BJS, as a federal statistical agency, may not collect data for law enforcement purposes. BJA is not under similar requirements to collect data for statistical purposes only.

Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 3-4 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800) (emphasis added); Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program) (emphasis added).

DOJ reasoned that the JAG funding penalty provision requires BJS to collect data for “enforcement purposes,” which BJS is not permitted to do as a federal statistical agency.⁶⁰ Up until that point, BJS had been collecting death data in response to DCRA 2000 for approximately fifteen years.⁶¹ BJS continued to collect this same data until January 1, 2020.⁶²

In 2018, the DOJ Office of the Inspector General (“OIG”) conducted a review of DOJ’s plans to implement DCRA 2013.⁶³ DOJ OIG wrote, “We found that the Department’s state DCRA data collection plan that BJA proposed in June 2018 may not produce the quality of data about deaths in custody necessary to achieve the intent of the law.”⁶⁴ DOJ OIG’s provided two reasons for this finding.⁶⁵ First, it would be duplicative of other collections and risk “confus[ing] and fatig[uing] data respondents, who in turn may submit low-quality data.”⁶⁶ Second, the data collection methodology that BJA planned to employ—only seeking data from states themselves and “not fully leverag[ing] open sources”—might preclude BJA from achieving DCRA’s primary purpose.⁶⁷ DOJ OIG’s 2018 review also found that, despite the report being two years past due, DOJ did not have plans to issue the DCRA-required report due to Congress.⁶⁸

BJS continued to collect, study, and publish information about deaths in state and local custody through the 2019 calendar year, and formally closed the MCI program on March 31, 2021.⁶⁹ BJA began collecting state and local death data in FY 2020, using a data collection

⁶⁰ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 4 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁶¹ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program); Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

⁶² Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program); Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

⁶³ Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013* (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

⁶⁴ Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, at 13-14 (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

⁶⁵ Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, at 13-14 (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

⁶⁶ Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, at 13-14 (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

⁶⁷ Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, at 13-14 (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

⁶⁸ Department of Justice, Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, at i (Dec. 2018) (oig.justice.gov/reports/2018/e1901.pdf).

⁶⁹ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))* (bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program). BJS continues to collect data on deaths in federal custody. *See, e.g.*, Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Federal Deaths in Custody and During Arrest, 2020—Statistical Tables* (July 2022) (<https://bjs.ojp.gov/content/pub/pdf/fdcda20st.pdf>).

methodology and survey instrument that were both different from what BJS employed.⁷⁰ In May 2022, President Biden issued an Executive Order calling for DOJ to publish a report on the steps the Department has taken to implement DCRA 2013.⁷¹ The Department published this report on September 16, 2022.⁷²

b. DOJ’s Flawed FY 2020 Collection

Because BJS collected death data according to the calendar year and BJA collected death data according to the fiscal year, BJS’s collection overlapped with BJA’s for three months—from October through December 2019.⁷³ As a condition for approving the continued collection of MCI data for calendar years 2018 and 2019, the Office of Management and Budget (“OMB”) required BJS to issue a report comparing its collection to BJA’s for the overlapping period.⁷⁴ BJS issued this report to OMB on May 11, 2021.⁷⁵ BJS identified numerous shortcomings in BJA’s methodology and significant gaps in its collection.

Among the shortcomings BJS found were:

- “When compared to [BJS], BJA’s data collection did not capture any state prison deaths in 11 states or any local jail deaths in 12 states and the District of Columbia.”⁷⁶
- “BJA’s collection included only 38.9% of local jail deaths and 66.3% of state prison deaths” that BJS collected.⁷⁷

⁷⁰ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022); *see also* Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 5-8 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800) (discussing BJA’s data collection methodology and survey tool—Performance Measurement Tool).

⁷¹ Exec. Order No. 14074, 87 Fed. Reg. 32945 (May 25, 2022).

⁷² Department of Justice, Office of the Attorney General, *Department of Justice Implementation of the Death in Custody Reporting Act of 2013* (Sept. 16, 2022) (<https://bja.ojp.gov/doc/DOJ-Implementation-of-DCRA.pdf>).

⁷³ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 1 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁷⁴ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 1 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁷⁵ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249* (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁷⁶ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 2 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁷⁷ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 2 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

- States reported 1,246 deaths to BJS but only 744 deaths to BJA (59.7% of the deaths reported to BJS).⁷⁸
- Six states did not report any deaths in custody to BJA, but did report deaths to BJS.⁷⁹
- There were various data quality concerns with BJA’s collection, such as inaccuracies and missing fields. For example, 56 of the deaths reported to BJA as deaths during arrest had actually occurred in jails and prisons when reported to BJS.⁸⁰

c. DOJ’s Flawed FY 2021 Collection

On March 23, 2022, PSI requested that GAO study the submissions that BJA had received from states for FY 2021, and report to the Subcommittee on whether DOJ had taken steps to rectify the problems previously identified by BJS with BJA’s FY 2020 data collection.⁸¹ GAO’s findings, like BJS’s the year prior, revealed myriad deficiencies in BJA’s collection.

GAO found the following for FY 2021 data:

- At least 341 missing and potentially reportable prison deaths were disclosed on states’ public websites but were not collected by BJA.⁸² At least 649 missing arrest deaths were reported in a public database maintained by a non-profit civil rights organization, but were not collected by BJA.⁸³ Together, GAO determined that BJA missed at least 990 prison and arrest-related deaths.⁸⁴ GAO informed

⁷⁸ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 2 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁷⁹ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 2 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁸⁰ Dr. E. Ann Carson, Bureau of Justice Statistics, *Report Comparing Bureau of Justice Statistics and Bureau of Justice Assistance Mortality Death Collections, to fulfill Terms of Clearance for OMB Control Number 1121-0249*, at 2, 8 (May 11, 2021) (omb.report/icr/202105-1121-001/doc/111526800).

⁸¹ Letter from Chair Jon Ossoff, Senate Permanent Subcommittee on Investigations, to Government Accountability Office (Mar. 23, 2022).

⁸² Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.33 (GAO-22-106033) (Sept. 20, 2022). In its report, GAO noted that it was “relying on states’ disclosures of deaths in custody and did not independently verify that these deaths occurred in custody and therefore refer to these deaths as potentially reportable.” *Id.*

⁸³ In its report, GAO noted, “Mapping Police Violence uses media accounts and other open-source information to collect information on deaths. Therefore, if an arrest-related death was not made public, it would not be included in this database and we could not determine if it was captured in DCRA data or not.” Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.33 (GAO-22-106033) (Sept. 20, 2022); Campaign Zero, *Mapping Police Violence* (updated Mar. 31, 2022) (mappingpoliceviolence.org/).

⁸⁴ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.33 (GAO-22-106033) (Sept. 20, 2022).

the Subcommittee that it could not assess whether BJA missed jail deaths because there is no centralized, public repository of that information.⁸⁵ GAO estimated that the 990 missing deaths was an undercount of unreported deaths.⁸⁶

- Fifty-six states and territories received JAG funding and were required by law to report custodial death information to BJA.⁸⁷ Only 47 states reported deaths in custody.⁸⁸ For the nine states that did not report to BJA, GAO found that at least four of the states had deaths in custody—124 deaths in total.⁸⁹
- Seventy percent of death in custody records produced by states to BJA in FY 2021 were missing at least one category of information that DCRA required DOJ to collect; approximately 40% of the records did not include a description of the circumstances surrounding the death; and 32% of the records were missing more than one DCRA-required field.⁹⁰
- Only two states submitted DCRA data to BJA that contained all of the required data fields.⁹¹ Seven states did not produce a single record to DOJ with all the required data fields.⁹²

II. DOJ’s Failure to Implement DCRA 2013

Deaths in government custody can be probative of policy or administrative failures.⁹³ Understanding where and why prisoners are dying can reveal breakdowns in medical care,

⁸⁵ Government Accountability Office, Briefing with Senate Permanent Subcommittee on Investigations (Sept. 8, 2022).

⁸⁶ Government Accountability Office, Briefing with Senate Permanent Subcommittee on Investigations (Sept. 8, 2022).

⁸⁷ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.34 (GAO-22-106033) (Sept. 20, 2022). GAO did not disclose to the Subcommittee the names of the states that had not submitted data to BJA.

⁸⁸ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.34 (GAO-22-106033) (Sept. 20, 2022).

⁸⁹ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.34 (GAO-22-106033) (Sept. 20, 2022).

⁹⁰ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 9 (GAO-22-106033) (Sept. 20, 2022).

⁹¹ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 (GAO-22-106033) (Sept. 20, 2022).

⁹² Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 (GAO-22-106033) (Sept. 20, 2022).

⁹³ University of California Los Angeles School of Law Carceral Mortality Project, Briefing with Senate Permanent Subcommittee on Investigations (Aug. 3, 2022); Professor Andrea Armstrong, Loyola University New Orleans School of Law, Briefing with Senate Permanent Subcommittee on Investigations (Apr. 19, 2022).

substance abuse treatment, anti-drug diversion programs, mental health services, or safe custodial environments.⁹⁴

a. DOJ’s Statutorily-Prescribed Reporting Will Be at Least Eight Years Late

DCRA 2013 required that DOJ report to Congress by December 18, 2016 on how the custodial death information that it had collected can be used to “to reduce the number of such deaths” and “examine the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons, and other specified facilities relating to such deaths.”⁹⁵

DOJ has failed to comply with this requirement in two ways. First, DOJ does not intend complete these reporting requirements before September 2024, eight years past the statutory deadline.⁹⁶ Second, the data that BJA did collect for FY 2020 and FY 2021 missed hundreds of deaths and reports from multiple states.⁹⁷ Going forward, BJA intends to use the same failed data collection methodologies used in its FY 2020 and FY 2021 collections, including the same data collection tool and relying on state collection agencies.⁹⁸

b. DOJ Has Disrupted a 20-Year Data Set

From 2000 through 2019, DOJ demonstrated its ability to collect comprehensive data about deaths in state and local custody, assembling detailed information about why incarcerated people died by state, type of detention facility, and cause.⁹⁹ For example, BJS’s data collection, study, and publication revealed important information including:

- From 2001 through 2019, approximately 84,537 prisoners in America died in state or local facilities.¹⁰⁰

⁹⁴ University of California Los Angeles School of Law Carceral Mortality Project, Briefing with Senate Permanent Subcommittee on Investigations (Aug. 3, 2022); Professor Andrea Armstrong, Loyola University New Orleans School of Law, Briefing with Senate Permanent Subcommittee on Investigations (Apr. 19, 2022).

⁹⁵ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

⁹⁶ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

⁹⁷ Government Accountability Office, *Deaths in Custody: Additional Action Needed to Help Ensure Data Collected by DOJ are Utilized*, at 10 n.33 (GAO-22-106033) (Sept. 20, 2022). DOJ’s position is that it has not yet determined whether this data can be used to support the DCRA-required reporting. See Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

⁹⁸ In an interview with the Subcommittee, Dr. Wyrick described a number of strategies that DOJ plans to employ in an attempt to improve reporting quality and completeness, including additional training and technical assistance to state reporters. Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022). However, these strategies will not change the underlying data collection methodology that BJA used in FY 2020, FY 2021, and in subsequent years.

⁹⁹ See Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in State and Federal Prisons 2001-2019—Statistical Tables* (Dec. 2021) (bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf); Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Local Jails 2000-2019—Statistical Tables* (Dec. 2021) (bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf); Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

¹⁰⁰ This figure is derived from combining data from BJS reports on (1) deaths in state custody, and (2) deaths in local jails. See Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in State*

- Suicide was the single leading cause of death in local jails in 2019.¹⁰¹
- “Jails with an average daily population of 49 or fewer inmates had the highest mortality rates each year from 2000 to 2019.”¹⁰²
- From 2001 through 2019, “[t]he highest average annual rate of homicide in state prisons [] was in South Carolina (15 per 100,000 [prisoners]) and Oklahoma (14 per 1000,000 [prisoners]).”¹⁰³ New Hampshire, North Dakota, Vermont, and Wyoming reported no prison homicides during this period.¹⁰⁴

DOJ has disrupted this 20-year data set in two ways. First, BJA failed to collect complete or accurate data for FY 2020 and FY 2021.¹⁰⁵ Second, BJA changed its data collection methodology and survey instrument, ending certain important data sets and preventing analysis of certain longitudinal trends.¹⁰⁶ DOJ is not required to—and has no specific plans to—publish any state and local custodial death information for FY 2020, FY 2021, or beyond.¹⁰⁷

c. DOJ Has Never Reported on Facility-Level Death Data

DCRA 2013 required states accepting JAG funding to report—and DOJ to collect—data identifying the law enforcement agency holding the person who died in custody, and then use that information to “examine the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons, and other specified facilities relating to such deaths.”¹⁰⁸ Unlike the other data elements that DCRA 2013 requires DOJ to collect—which BJS

and Federal Prisons 2001-2019—Statistical Tables (Dec. 2021) ([bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf](https://www.bjs.gov/content/pub/pdf/msfp0119st.pdf)); Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Local Jails 2000-2019—Statistical Tables* (Dec. 2021) ([bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf](https://www.bjs.gov/content/pub/pdf/mlj0019st.pdf)).

¹⁰¹ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Local Jails 2000-2019—Statistical Tables*, at 2 (Dec. 2021) ([bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf](https://www.bjs.gov/content/pub/pdf/mlj0019st.pdf)).

¹⁰² Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in Local Jails 2000-2019—Statistical Tables*, at 1 (Dec. 2021) ([bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf](https://www.bjs.gov/content/pub/pdf/mlj0019st.pdf)).

¹⁰³ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in State and Federal Prisons 2001-2019—Statistical Tables*, at 5 (Dec. 2021) ([bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf](https://www.bjs.gov/content/pub/pdf/msfp0119st.pdf)).

¹⁰⁴ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Mortality in State and Federal Prisons 2001-2019—Statistical Tables*, at 5 (Dec. 2021) ([bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf](https://www.bjs.gov/content/pub/pdf/msfp0119st.pdf)).

¹⁰⁵ See Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

¹⁰⁶ Professor Andrea Armstrong, Loyola University New Orleans School of Law, Briefing with Senate Permanent Subcommittee on Investigations (Apr. 19, 2022).

¹⁰⁷ In an interview with the Subcommittee, Dr. Wyrick stated that he was unaware of whether the Department has made a decision publishing state and local death data collected after FY 2021. Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022). He also said that the Department is not planning to publish any death in custody information collected by BJA for FY 2020 and FY 2021 because the data that BJA had collected was incomplete and could be misleading if disclosed. *Id.*

¹⁰⁸ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242.

collected, studied, and published from 2000 through 2019—DOJ has never before publicly reported facility-level death data.¹⁰⁹

Faced with limited publicly available information identifying the specific facilities where prisoners are dying, journalists and non-profit organizations have undertaken piecemeal efforts to compile this information by submitting open records requests to individual jails and prison systems and then publishing the results.¹¹⁰ They have stepped in to attempt the data collection that DOJ is statutorily obligated and best situated to do, as DOJ has the resources, expertise, and tools to facilitate compliance and conduct cross-jurisdictional data analysis.¹¹¹

In October 2020, one media organization, *Reuters*, disclosed the results of its nationwide investigation into jail deaths.¹¹² Per *Reuters*, it engaged in this investigation because “[t]he U.S. government collects detailed data on who’s dying in which jails around the country – but won’t let anyone see it.”¹¹³ *Reuters* submitted 1,500 open records requests for death data from every large jail in the United States and the ten largest individual jails in every state for 2008 to 2019.¹¹⁴ The *Reuters* review of deaths in custody offered critical examples of why disclosure of facility-level death can help identify troubling trends in prisons and jails.

For example, on October 31, 2016, police officers in Baton Rouge, Louisiana, arrested Jonathan Fano for several misdemeanors after he suffered a mental health episode associated with his diagnoses of bipolar disorder and depression while traveling from Florida to California by bus.¹¹⁵ While held at the East Baton Rouge Parish Prison (“EBRPP”) pending adjudication of

¹⁰⁹ Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022). The Subcommittee’s investigation into corruption, abuse, and misconduct at the U.S. Penitentiary Atlanta (“USPA”) showed how facility-level death data can help shed light on whether prison and jail conditions are safe, humane, and managed effectively. USPA—a Federal Bureau of Prisons (“BOP”) facility rife with dangerous contraband, security failings, and inhumane conditions of incarceration since at least 2013—had 13 prisoner suicides from 2012 to 2021 and five suicides within the two-year period between 2019 and 2021. There were more prisoner suicides at USPA between 2016 and 2021 than any other BOP facility. Senate Permanent Subcommittee on Investigations, *Hearing on Corruption, Abuse, and Misconduct at U.S. Penitentiary Atlanta*, 117th Cong. (July 26, 2022) (hsgac.senate.gov/subcommittees/investigations/hearings/corruption-abuse-and-misconduct-at-us-penitentiary-atlanta); Memorandum from Sonya Thompson, Assistant Director of the Reentry Services Division to J.A. Keller, Southeast Regional Director re Psychology Reconstruction response (PSIDocumentProduction8-07082022-002846); Psychology Reconstruction of an Inmate Suicide at USPA (PSIDocumentProduction8-07082022-002).

¹¹⁰ See, e.g., Incarceration Transparency (www.incarcerationtransparency.org/) (accessed Sept. 13, 2022).

¹¹¹ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242; University of California Los Angeles School of Law Carceral Mortality Project, Briefing with Senate Permanent Subcommittee on Investigations (Aug. 3, 2022); Dr. Phelan Wyrick, Department of Justice, Interview with Senate Permanent Subcommittee on Investigations (Sept. 12, 2022).

¹¹² Grant Smith, *Jail Deaths in America: Data and Key Findings of Dying Inside*, *Reuters* (Oct. 16, 2020) (www.reuters.com/investigates/special-report/usa-jails-graphic/).

¹¹³ Peter Eisler, et al., *Why 4,998 Died in U.S. Jails Without Getting Their Day in Court*, *Reuters* (Oct. 16, 2020) (www.reuters.com/investigates/special-report/usa-jails-deaths/).

¹¹⁴ Grant Smith, *Jail Deaths in America: Data and Key Findings of Dying Inside*, *Reuters* (Oct. 16, 2020) (www.reuters.com/investigates/special-report/usa-jails-graphic/).

¹¹⁵ Fano was charged with obscenity, criminal trespass, disturbing the peace, resisting arrest, battery on an Officer, and simple criminal damage to property. *Zavala v. City of Baton Rouge*, No. 17-656-JWD-EWD (M.D. La. Sept. 20, 2018). The Fano family complaint in civil litigation following Fano’s death alleged that no officer was injured

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the charges against him, Fano was denied psychotropic medications.¹¹⁶ He hung himself on February 2, 2017 and was declared dead three days later.¹¹⁷ *Reuters* reported that from 2009 to 2019, there were 45 deaths at the EBRPP—an average of 4.5 deaths per year—more than double the national average of jail deaths.¹¹⁸ Given the higher than average death rate at this facility, it is possible that DCRA data could have identified the trend and allowed DOJ and EBRPP to take corrective measures.

Jonathan Fano’s sister, Vanessa Fano, told the Subcommittee that for the three months her brother was incarcerated at EBRPP, he was just “trying not to die in there.”¹¹⁹ Vanessa Fano provided the Subcommittee with a letter that she received from him on or about January 2017, while held at EBRPP.

during the arrest. Complaint at 6, *Zavala v. City of Baton Rouge*, No. 17-656-JWD-EWD (M.D. La. Sept. 20, 2018); *see also* Vanessa Fano, Interview with Senate Permanent Subcommittee on Investigations (Apr. 20, 2022).

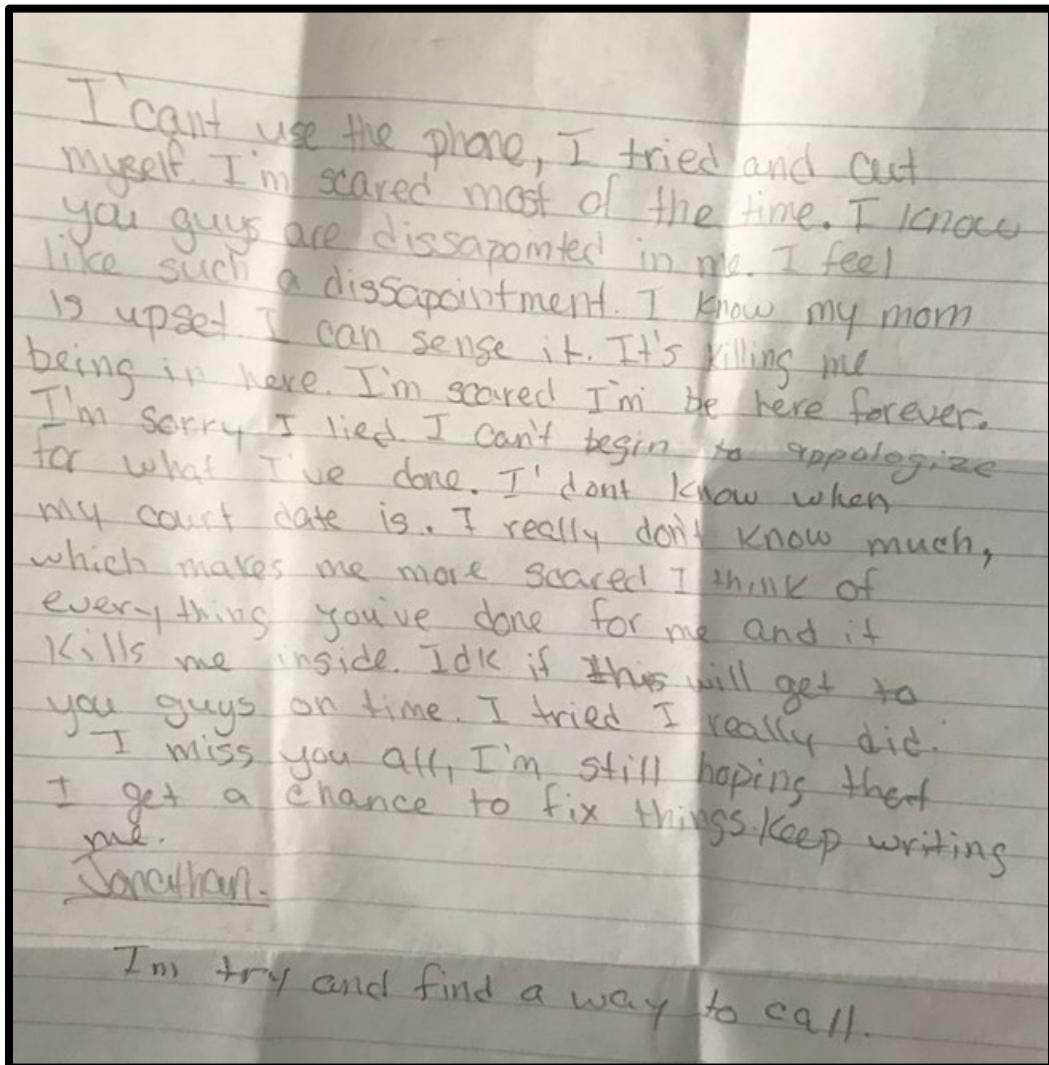
¹¹⁶ *Zavala v. City of Baton Rouge*, No. 17-656-JWD-EWD (M.D. La. Sept. 20, 2018); Vanessa Fano, Interview with Senate Permanent Subcommittee on Investigations (Apr. 20, 2022).

¹¹⁷ *Zavala v. City of Baton Rouge*, No. 17-656-JWD-EWD (M.D. La. Sept. 20, 2018); Vanessa Fano, Interview with Senate Permanent Subcommittee on Investigations (Apr. 20, 2022).

¹¹⁸ See Grant Smith, *Jail Deaths in America: Data and Key Findings of Dying Inside*, Louisiana PDF, Reuters (Oct. 16, 2020) (www.reuters.com/investigates/special-report/usa-jails-graphic/).

¹¹⁹ Vanessa Fano, Interview with Senate Permanent Subcommittee on Investigations (Apr. 20, 2022).

Figure 2: Letter by Jonathan Fano¹²⁰



For another example, in February 2014, officers arrested Matthew Loflin for possession, a non-violent drug charge, and incarcerated him at the Chatham County Detention Center (“CCDC”) in Georgia.¹²¹ From February to April 2014, Loflin repeatedly requested medical treatment for symptoms suggestive of congestive heart failure, including swelling of his extremities, difficulty breathing, and coughing up blood, but his requests were denied for weeks.¹²² Loflin died on April 24, 2014 after suffering irreversible brain damage following

¹²⁰ Email from Vanessa Fano to Senate Permanent Subcommittee on Investigations Staff (June 22, 2022).

¹²¹ *Maley v. Corizon Health, Inc.*, No. CV416-060, 2018 WL 1002635 (S.D. Ga. Feb. 21, 2018); Jason Szep, et al., *Special Report: U.S. Jails are Outsourcing Medical Care – and the Death Toll is Rising*, Reuters (Oct. 26, 2020) (www.reuters.com/investigates/special-report/usa-jails-privatization/).

¹²² See Belinda Maley, Interview with Senate Permanent Subcommittee on Investigations (May 4, 2022); Jason Szep, et al., *Special Report: U.S. Jails are Outsourcing Medical Care – and the Death Toll is Rising*, Reuters (Oct. 26, 2020) (www.reuters.com/investigates/special-report/usa-jails-privatization/).

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hospitalization for heart failure.¹²³ *Reuters* identified 22 people who died at CCDC from 2009 through 2019.¹²⁴ Of these deaths, 50% were due to illness.¹²⁵ There is the potential that had DCRA been implemented properly, the trend in illness-related deaths could have been identified and corrective measures taken. The last time Loflin spoke with his mother, days before his death, he told her that he was afraid he was going to die. A transcript of this recorded phone call follows:

¹²³ Jason Szep, et al., *Special Report: U.S. Jails are Outsourcing Medical Care – and the Death Toll is Rising*, *Reuters* (Oct. 26, 2020) (www.reuters.com/investigates/special-report/usa-jails-privatization/).

¹²⁴ See Grant Smith, *Jail Deaths in America: Data and Key Findings of Dying Inside*, Georgia PDF, *Reuters* (Oct. 16, 2020) (www.reuters.com/investigates/special-report/usa-jails-graphic/).

¹²⁵ Grant Smith, *Jail Deaths in America: Data and Key Findings of Dying Inside*, Georgia PDF, *Reuters* (Oct. 16, 2020) (www.reuters.com/investigates/special-report/usa-jails-graphic/).

Figure 3: Transcript of Recorded Call on March 28, 2014 from the Chatham County Detention Center¹²⁶

Mother: Matthew?

Loflin: Hey.

Mother: Okay, listen I found out everything I can. I'm gonna try to get... um, I'm having lawyers and the sheriff and all this other kind of shit trying to make it so I can come in there and see you. I am trying also to get you out of there and get you . . .

Loflin: I need to go to the hospital.

Mother: I know...

Loflin: I'm gonna die in here.

Mother: I know you are Matthew. I am doing everything I can to get you out, and so I can see you. Hello?

Loflin: Yeah.

Mother: They're doing everything they can.

PHONE: There are 15 seconds remaining.

Loflin: I've been coughing up blood and my feet are swollen. It hurts, Mom.

Mother: I know Matthew, I know what is wrong with you. I told you this would happen. I love you, Matthew. They are going to cut us off...

Loflin: I love you too. I'm gonna die in here.

III. Conclusion

DOJ has failed to effectively implement DCRA 2013, undermining the effective, comprehensive, and accurate collection of custodial death data. These failures were preventable. DOJ's September 16, 2022 report, released pursuant to President Biden's executive order, is an

¹²⁶ PSI staff transcribed an audio clip that was first released by *Reuters*. Jason Szep, et al., *Special Report: U.S. Jails are Outsourcing Medical Care – and the Death Toll is Rising*, *Reuters* (Oct. 26, 2020) (www.reuters.com/investigates/special-report/usa-jails-privatization/); see also *Loflin_audio.wav* (hdrive.google.com/file/d/14H7slAViw_KZmDdDkQYivsB9Yj5rUwWR/view).

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important step to improve DOJ's efforts to better implement DCRA 2013.¹²⁷ DOJ must act quickly to remedy the outstanding implementation failures, and Congress should continue to monitor DOJ's implementation efforts.

¹²⁷ Department of Justice, Office of the Attorney General, *Department of Justice Implementation of the Death in Custody Reporting Act of 2013* (Sept. 16, 2022) (<https://bja.ojp.gov/doc/DOJ-Implementation-of-DCRA.pdf>).