



**THE
SENTENCING
PROJECT**



February 8, 2022

Charles Allen, Chair
Committee on the Judiciary and Public Safety
Council of the District of Columbia

By email to judiciary@dccouncil.us

Dear Chair Allen and Members of the Committee,

We write on behalf of the undersigned individuals and organizations, a coalition committed to ensuring that every incarcerated D.C. resident has a meaningful opportunity to register and vote. Our testimony raises important issues for you to consider in assessing the Board of Election's ongoing efforts to provide D.C. residents incarcerated in the Bureau of Prisons (BOP) with registration forms and absentee ballots pursuant to the Restore the Vote Amendment Act of 2020, D.C. Law 23-277 ("Restore the Vote Act").

At the outset, we commend the Board for its efforts to engage D.C. residents in BOP custody during the 2020 general election. The Board developed relationships with BOP staff to obtain the number of D.C. residents held in each facility, sent registration materials to the wardens of those facilities for dissemination, and troubleshooted issues that arose for individual voters in receiving and casting their ballots.¹ Of the 3,364 D.C. residents in

¹ D.C. Board of Elections, *Performance Oversight Report, FY 2020-2021*, at 84 (Mar. 12, 2021), <https://dccouncil.us/wp-content/uploads/2021/03/JPS-Performance-Oversight-Responses-2021-BOE.pdf>.

BOP facilities in 2020,² the Board reported that 562 registered to vote and 264 voted in the 2020 general election.³ Given the compressed timeline for implementing the Restore the Vote Act in 2020 under pandemic conditions, we recognize that these turnout numbers, though extremely low, were hard won.

This year, the Board can and must increase these numbers and ensure that all incarcerated D.C. residents have equitable access to registration and voting. This testimony identifies key issues in the design and processing of voter registration forms and the dissemination and tracking of absentee ballots that make it needlessly difficult for D.C. residents in BOP to register and vote—all problems the Board can solve through administrative action.

I. The Voter Registration Form Must Be Made Usable and Accessible for Incarcerated Voters.

The Board's current voter registration form⁴ is neither accessible nor usable for D.C. residents who are incarcerated in BOP facilities outside the District.

First, there is no space on the registration form to list a voter's prison or jail ID number. Most jails and prisons in the country assign each incarcerated person an ID number, which *must* be included on all mail sent to that person. In BOP, this is known as a person's BOP register number. If that number is not included on a piece of mail—including, for example, on an absentee ballot—it will not be delivered. The Board can address this issue by including a space on the registration form for a voter to write their BOP register number or other jail or prison ID.

The Board has expressed concern that collecting an applicant's BOP register number could violate a provision of the National Voter Registration Act (NVRA) that prohibits disclosing the voter registration agency through which a person registered to vote. On November 16, 2021, Campaign Legal Center sent a letter to the Board, attached hereto, explaining that the NVRA does not prohibit the Board from adding a field on the registration form to collect individuals' BOP register numbers because the BOP is not a voter registration agency under the NVRA. The letter went on to explain that, even if the BOP were a voter registration agency, the NVRA would prohibit only

² D.C. Corrections Information Council, *2020 Annual Report*, at 7 (2020), [https://cic.dc.gov/sites/default/files/dc/sites/cic/page_content/attachments/CIC-Annual%20Report Dec2020%2011121finalprint%20%282%29-compressed.pdf](https://cic.dc.gov/sites/default/files/dc/sites/cic/page_content/attachments/CIC-Annual%20Report%20Dec2020%2011121finalprint%20%282%29-compressed.pdf).

³ *Supra* note 1 at 85.

⁴ See District of Columbia Voter Registration Application, VRF_Eng_10122021, https://www.dcboe.org/dcboe/media/PDFFiles/VRF-English-10122021-filable_1.pdf.

disclosure, not collection, of this information. Thus, we recommend that the Board collect this information on the voter registration form but redact this field on all forms so as not to reveal which voter registration applicants included a jail or prison ID number.

Though it is permitted to do so, the Board still has not added a space to the form for voters' prison or jail ID numbers. Instead, the Board has decided to enclose a separate postcard with each registration form that asks incarcerated voters to provide their BOP register numbers. This is a poor substitute for making the registration form itself work for incarcerated voters. Given the extreme unreliability of mail delivery in prisons, extra pieces of paper are likely to be lost, misplaced, or thrown away before they ever reach the voter. And as the Board itself has indicated, large bundles of registration forms and materials sent to some BOP facilities for dissemination have been rejected and never in fact made it to D.C. residents in those facilities. The sensible solution is to collect prison or jail ID numbers on the registration form itself.

Second, the language at the top of the form describing D.C.'s residency requirements is confusing and misleading. The form states that in order to vote, a person must "[b]e a resident of the District of Columbia" and "[m]aintain residency in the District of Columbia for at least 30 days prior to the election in which [they] intend to vote."⁵ Without more explanation, this language will likely confuse and dissuade D.C. residents incarcerated outside the District from registering. The form should explicitly state that a D.C. resident incarcerated outside the District meets the residency requirement if they lived in the District before incarceration and do not claim voting residence in another U.S. state or territory.

Third, the voter declaration in Box 13 the bottom of the form asks the voter to swear under penalty of perjury that they live at the address provided in Box 4, as indicated here:

13 Read and Sign the **Voter Declaration** below.
I swear or affirm that I meet each of the following qualifications:

- I am a U.S. citizen
- I live in the District of Columbia at the address (#4) above
- I am at least 16 years old
- I have not been found by a court to be legally incompetent to vote
- I do not claim voting residence or the right to vote in another U.S. state or territory

WARNING: If you sign this statement even though you know it is untrue, you can be convicted and fined up to \$10,000 and/or jailed for up to five years.

Signature **Date**

⁵ *Id.*

Box 4 is intended to collect a voter's D.C. residential address, which for an incarcerated voter is their last D.C. address before incarceration or the D.C. address where they will return after incarceration. But rather than simply asking for a voter's D.C. residential address, Box 4 confusingly asks for the "Address Where You Live." This is a problem for an incarcerated voter because their D.C. residential address is *not* where they live.

4	Address Where You Live		Select one: <input type="radio"/> NE <input type="radio"/> NW <input type="radio"/> SE <input type="radio"/> SW		Apartment Number	Zip Code
	Address Where You Get Your Mail (If different from #4)		Zip Code		E-mail address (Optional)	
5						

The Board has acknowledged that the language in Box 4 and Box 13 is confusing and led to many rejected forms during the 2020 election because many incarcerated voters understandably wrote their place of incarceration in Box 4. The Board has attempted to address this problem by sending incarcerated voters in BOP an instruction sheet asking them to fill in Box 4 with the D.C. address where they lived before incarceration or the D.C. address where they will be returning. But as noted above, extra paper is not a substitute for a usable form. And even if a voter correctly puts their D.C. residential address in Box 4, Box 13 makes the voter swear that they "live" at the address in Box 4, which is not true. An incarcerated voter should not be asked to attest to an untrue statement in order to vote.

For these reasons, the registration form should clarify that Box 4 asks for a voter's D.C. residential address—that is, the address where you currently live, or if you are incarcerated outside the District, the D.C. address where you lived before incarceration or where you will return after incarceration. The second bullet point in Box 13 should also be updated to say, for example, "I am a resident of the District of Columbia."

Fourth, the registration form should include a space to allow District residents with disabilities, including incarcerated District residents, to have the option to affirm that they need an accessible alternative format ballot or other accommodations due to disability at the time of registration. At bottom, the registration form must be accessible and usable for *all* D.C. citizens, including all those incarcerated outside the District.

II. The Board Must Take Steps to Ensure that Registered Voters in the Bureau of Prisons Receive Their Ballots.

The Restore the Vote Act requires the Board to send every registered voter in BOP an absentee ballot and postage-paid return envelope without first

requiring the voter to submit an absentee ballot application.⁶ But experience from the 2020 general election suggests that large numbers of D.C. residents in BOP who attempted to register to vote never actually received their ballots. A survey conducted by More Than Our Crimes of 287 D.C. residents in BOP facilities found that about two-thirds of them mailed in registration forms, but only a few of those individuals received ballots. The Board itself also reported that only 264 (47%) of the 562 registered voters in BOP successfully returned a ballot.⁷

These results suggest significant barriers to the exercise of the franchise and raise questions the Board must endeavor to answer. Why did so many voters who submitted registration forms fail to receive ballots in the 2020 election? The Board has indicated that many registration forms from residents in BOP had to be rejected because they did not include a D.C. address, a DMV ID or the last four digits of their social security number, or a voter signature. How many registration forms were rejected for these reasons? The Board has also noted that the addresses provided on some forms were illegible. How many forms were illegible, and how does the Board handle illegible forms?

This year, the Board must track (and publicly share) the number of registration forms received from D.C. residents in prison; the number of forms that were rejected due to completeness, legibility, language barriers, or other issues; the number of ballots received by D.C. residents in prison; and the number of such ballots that were counted. These numbers should also be broken down by prison/jail facility. This data will help the Board and organizations that serve incarcerated D.C. residents understand what works and what doesn't and where to focus their outreach efforts.

In addition, the Board must have a plan for tracking every incarcerated voter's BOP register number or other prison/jail ID number. In the absence of a spot on the registration form itself to write it down, *see* Part I, incarcerated residents may write their prison/jail ID number on other areas of the form, and most will include it in their return address on the envelope containing the registration form. All Board staff hired to process voter registration applications must be trained to look out for a prison/jail ID number, wherever it may be found, and track it in the applicant's voter registration record.

When the time comes to send absentee ballots to registered voters in prison, the Board must use the voter's prison/jail ID number to look up and verify the voter's current address. D.C. residents are frequently transferred while in BOP custody and cannot be expected to submit a new registration form

⁶ D.C. Code § 1-1001.05(a)(9a)(B)(iii).

⁷ *Supra* note 1 at 85.

every time they change facilities. The BOP provides an online search tool in which the Board can enter a registered voter's BOP register number and find the voter's current prison address where their ballot should be sent.⁸ Given the relatively small number of D.C. voters in prison, this task should not require significant staff time and will go a long way to ensure that absentee ballots reach voters in prison. The Board should also leverage its positive relationship with the BOP to see if BOP staff will batch verify current addresses of registered voters who have provided the Board with their BOP register numbers.⁹

The Board must also work with the BOP and the Department of Corrections to ensure that it affirmatively provides a fully accessible remote ballot and other accommodations for people with disabilities in prison and jail, including physical, psychiatric, intellectual, and developmental disabilities, to allow them to exercise their right to read, mark, verify, and return their ballots privately and independently.

The Board should also take extra care in recording the correct mailing address of voters who register from prison. Because the current voter registration form is so confusingly worded, incarcerated voters may write their current jail or prison mailing address in the wrong spot or omit it from the form altogether. During the 2020 election, the League of Women Voters DC received several inquiries from D.C. residents in BOP who registered to vote but never received their ballots. In one such case, the voter wrote that they had filled out a registration form three times but received no further communications from the Board, “no ballots, registration cards, or confirmation.” Upon investigation, the Board found that the voter's ballot had been mailed to his D.C. address rather than his prison address. Election workers must be trained to spot registration applications from residents in prison or jail and process them with sufficient attention to possible address errors.

⁸ Federal Bureau of Prisons, “Find an Inmate,” <https://www.bop.gov/inmateloc/>.

⁹ Citing Privacy Act concerns, the BOP has so far refused to provide the Board with the names, addresses, and register numbers of all D.C. residents incarcerated in BOP facilities. Many of the undersigned organizations have called on the Department of Justice to reverse this policy by promulgating a “routine use exception” to the Privacy Act, which would enable the BOP to share this information for the limited purpose of voter engagement. *See* Letter Re: Routine Usage Exception to Allow for Implementation of Universal Enfranchisement and Abolition of Prison Gerrymandering, from CLC, the Washington Lawyers' Committee for Civil Rights Under Law, and the League of Women Voters to Attorney General Merrick Garland (March 30, 2021), https://campaignlegal.org/sites/default/files/202103/DRAFT_03.30.2021_Routine%20Usage%20Exception%20Letter%20DOJ%20%5Bfinal%5D.pdf. We note, however, that what we suggest here—asking BOP staff to batch verify current addresses of residents who have *already* provided the Board with their name, address, and BOP register number—is permissible under the Privacy Act and should not require any regulatory action by the Department of Justice.

Finally, the Board should also display the address where a voter's absentee ballot was sent in the Board's "Track Your Ballot" tool provided on its website.¹⁰ The City Council should consider mandating this in the proposed Elections Modernization Act of 2021, B24-0507. This will enable incarcerated voters, or organizations assisting such voters, to quickly see whether their ballot was mailed to the wrong address.

* * *

We appreciate the Board's ongoing collaboration with the undersigned organizations in our shared commitment to afford all incarcerated D.C. residents an equal opportunity to participate in our democracy. We also appreciate this Committee's attention to this issue.

In partnership,

Campaign Legal Center
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Washington, DC 20005

More Than Our Crimes
info@morethanourcrimes.org

The Sentencing Project
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Washington, D.C. 20036

League of Women Voters DC
1233 20th St NW, Ste. 500
Washington, DC 20036

ACLU of the District of Columbia
PO Box 96503
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Neighbors for Justice
<http://neighborsforjusticedc.org>

Free Minds Book Club

¹⁰ D.C. Board of Elections, "Track Your Ballot," <https://www.dchoe.org/Voters/Absentee-Voting/Track-Absentee-Ballot>

& Writing Workshop
1816 12th Street NW
Washington, DC 20009

Washington Lawyer's Committee for
Civil Rights and Urban Affairs
700 14th Street NW
Suite 400
Washington, DC 20005

Disability Rights DC at University
Legal Services
220 I Street NE, Ste. 130
Washington, DC 20002

About Us

Campaign Legal Center is a non-partisan, non-profit organization dedicated to supporting and advancing American democracy through the practice of law. CLC has developed an expertise in identifying and removing barriers to the ballot for justice-involved voters, including by working directly with jurisdictions across the country to make democracy accessible to eligible incarcerated voters. Our Restore Your Vote program also helps restore voting rights to people with past convictions by providing direct rights restoration services and empowering community leaders to understand and monitor implementation of rights restoration laws.

More Than Our Crimes is a nonprofit initiative formed to advocate for and give voice to DC residents detained in federal Bureau of Prisons facilities. In particular, we are focused on creating a bloc that will be heard both during elections and when policy is shaped, with second chances our primary goal.

The Sentencing Project is a national, Washington DC based research and advocacy organization that has been leading the fight to end mass incarceration for over 35 years. We aim to center the leadership, voices, visions and experiences of Black people and those most directly harmed by mass incarceration through our strategic priorities that includes ending felony disenfranchisement. The Sentencing Project pioneered research on felony disenfranchisement laws and their impact. The latest report, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, estimated that 5.2 million are denied voting because of a felony conviction and found that one in every 16 Black people have lost their voting rights due to a

felony conviction. To strengthen democracy and address significant racial disparities, states must pass reforms establishing universal voting for people impacted by the criminal legal system.

League of Women Voters DC is a nonpartisan, grassroots volunteer organization working to protect and expand voting rights and ensure everyone is represented in our democracy. Our mission is to empower voters and defend democracy.

The ACLU of the District of Columbia is a nonprofit organization with more than 14,000 local members that fights to protect and expand civil liberties and civil rights through litigation, legislation, and public education for people who live in, work in, and visit D.C., and in matters involving federal employees and agencies.

Neighbors for Justice is a local group of DC residents, with more than 450 members, who are striving to be good neighbors to DC residents in the jail and the BOP.

Free Minds Book Club & Writing Workshop is a nonprofit that uses books, creative writing, and peer support to help incarcerated and formerly incarcerated youths. Free Minds serves more than 1,000 incarcerated and formerly incarcerated youths and adults each year in the DC Jail, juvenile detention center, federal prison system, and reentry.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs, founded in 1968, works to create legal, economic and social equity through litigation, client and public education and public policy advocacy. Since 2006, the Committee has litigated on behalf of D.C. residents incarcerated in the D.C. Department of Corrections, halfway houses, and in the federal Bureau of Prisons.

Disability Rights DC (DRDC) at University Legal Services is the federally designated protection and advocacy program for people with disabilities in the District of Columbia. DRDC's mission is to ensure that District of Columbia residents with disabilities have the legal rights to which they are entitled, including the right to vote independently and privately alongside residents without disabilities. <http://www.uls-dc.org/>



November 16, 2021

Lenez McCann, Public Affairs Specialist
District of Columbia Board of Elections
1015 Half Street S.E., Suite 750
Washington, D.C. 20003

Re: Collecting Bureau of Prisons register numbers on voter registration forms

Dear Ms. McCann:

We write to support the Board's ongoing efforts to facilitate voter registration and participation for incarcerated D.C. residents. In particular, this letter explains why the National Voter Registration Act of 1993 (NVRA or Act) does not bar the Board from collecting individuals' Federal Bureau of Prisons (BOP) register numbers as part of the voter registration process.

We recognize and applaud the Board for its efforts to increase voter registration and participation among D.C. residents incarcerated in BOP facilities. One tool that would further these efforts is access to incarcerated residents' BOP register numbers, which would allow the Board to correspond with and distribute materials to those residents by mail. The Board could collect these register numbers by including a field on the standard voter registration form where incarcerated residents can enter their numbers.¹ The Board has expressed concern, however, that collecting this information on registration forms could violate a provision of the NVRA that prohibits disclosing

¹ We recognize that collection of BOP register numbers on registration form may not be necessary if the Board and BOP are otherwise able to guarantee smooth transmission of election-related mail to incarcerated D.C. voters. Indeed, CLC has encouraged the BOP to promulgate a "routine use exception" to the Privacy Act to facilitate this collaboration. *See* Letter Re: Routine Usage Exception to Allow for Implementation of Universal Enfranchisement and Abolition of Prison Gerrymandering, from CLC, the Washington Lawyers' Committee for Civil Rights Under Law, and the League of Women Voters to Attorney General Merrick Garland (March 30, 2021), https://campaignlegal.org/sites/default/files/202103/DRAFT_03.30.2021_Routine%20Usage%20Exception%20Letter%20DOJ%20%5Bfinal%5D.pdf. If an agreement between the Board and BOP is not established in time for the 2022 election, the Board is not prohibited from soliciting BOP register numbers on the standard voter registration form for the reasons outlined in this memorandum.

the voter registration agency (VRA) through which an individual registered. In particular, the Board expressed concern that, were members of the public to access an incarcerated individual's registration records and see a BOP number listed, they would learn that that individual registered from the BOP. The Board has also indicated that, even if collecting register numbers would not technically violate the NVRA, doing so might violate the intent or policy of the Act.

We write to address these concerns. As discussed below, the NVRA's nondisclosure provision does not apply to the BOP and, even if it did, would not prohibit *collection* of BOP register numbers—only *disclosure* of them. Moreover, because collecting individuals' register numbers would facilitate voter registration and participation, doing so would best serve the Act's purposes. Thus, the Board should not be deterred from updating its voter registration form to include a field for BOP register numbers in order to help all D.C. residents exercise their fundamental right to vote.

I. Background on the NVRA

Congress enacted the NVRA in order to facilitate increased voter registration and participation.² To achieve this end, the Act requires states (including the District) to provide multiple avenues for voter registration.³ As relevant here, states must designate various existing offices as “voter registration agencies” (VRAs), which must then provide services related to voter registration in addition to their regular functions.⁴

The Act also imposes disclosure requirements on states, which must “make available for public inspection . . . all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.”⁵ Every court that has considered the question has concluded that this disclosure requirement extends to data collected from individual registrants.⁶ However, the Act excepts certain information from disclosure.⁷ The exception at issue here limits states' obligation to disclose records “to the extent that such records relate to . . . the identity of a [VRA] through which any particular voter is registered.”⁸ Elsewhere, the statute goes further and affirmatively requires

² 52 U.S.C. § 20501(b)(1)-(2). *See generally, e.g.*, Disabled in Action of Metro. N.Y. v. Hammons, 202 F.3d 110, 114-15 (2d Cir. 2000) (discussing Act's history, purposes, and provisions)

³ *See* 52 U.S.C. § 20503(a); *see also id.* § 20502(4) (defining “state” to include the District).

⁴ *See id.* § 20506.

⁵ *Id.* § 20507(i)(1).

⁶ *See* Ill. Conservative Union v. Illinois, No. 20 C 5542, 2021 WL 2206159, at *5 (N.D. Ill. June 1, 2021) (collecting cases).

⁷ *See* 52 U.S.C. § 20507(i)(1).

⁸ *Id.* The other exception is for records “relate[d] to a declination to register to vote.” *Id.*

states to “ensure that the identity of the [VRA] through which any particular voter is registered is not disclosed to the public.”⁹

II. The NVRA’s nondisclosure provision does not apply to the BOP.

Collection of BOP register numbers on registration forms would not violate (or risk eventual violation of) the NVRA. First, the BOP is not a VRA. Thus, disclosure of information connecting an applicant to the BOP would not violate the prohibition on revealing the VRA through which an individual applicant registered. Second, even if the BOP were a VRA, incarcerated individuals likely would not register *through* the BOP, such that the NVRA’s disclosure prohibition again would not apply.

A. The BOP is not a VRA for the District.

Collection and potential disclosure of individuals’ BOP register numbers cannot violate the Act’s prohibition on revealing the VRA through which an individual registered because the BOP is not a VRA. The Act divides VRAs into two categories: those that the state “shall designate”¹⁰ (mandatory VRAs) and those that the state chooses to designate (discretionary VRAs).¹¹ To be a VRA, then, the BOP would need to fit into one of those categories. However, the agency fails the requirements of both.

First, BOP cannot be a mandatory VRA because it is a federal agency. As the Second Circuit—the only federal appellate court to consider the question—has recognized, the text, structure, and legislative history of the Act all show that federal agencies (with the exception of armed forces recruiting centers¹²) can never qualify as mandatory VRAs.¹³ While the NVRA explicitly designates certain state agencies as mandatory VRAs,¹⁴ a neighboring provision of the

⁹ *Id.* § 20507(a)(6).

¹⁰ *Id.* § 20506(a)(2).

¹¹ *See id.* § 20506(a)(3). The state must designate at least some discretionary VRAs but is free to choose to which offices it gives that label. *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 115 (2d Cir. 2000); *see* 52 U.S.C. § 20506(a)(3).

¹² *See* 52 U.S.C. § 20506(c).

¹³ *See* *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 119-29 (2d Cir. 2000) (Katzmann, J.). The Second Circuit’s holding in *Hammons* focused on one part of the definition of mandatory VRAs—offices that provide public assistance. *See id.* However, its logic applies equally to the other category of mandatory VRAs—state-funded agencies that provide programs primarily serving people with disabilities. *See id.*

No court appears to have disagreed with the Second Circuit’s conclusion in *Hammons*, and the Supreme Court lent the view some support in *Young v. Fordice*, 520 U.S. 273 (1997), where, while applying a separate provision of the NVRA, it stated that the NVRA requires states to “provide . . . a system for voter registration at various *state* offices.” *Id.* at 275 (emphasis added).

¹⁴ *See* 52 U.S.C. § 20506(a)(2).

Act obliges federal entities to “cooperate” with state efforts only “to the greatest extent practicable.”¹⁵ As the Second Circuit observed, if the Act gives federal agencies discretion in whether to act as VRAs, “it cannot be said that such offices must be designated as mandatory VRAs.”¹⁶ And as the court noted, “[t]hat States cannot require the participation of federal agencies makes sense given the nature of our federal system.”¹⁷

The NVRA’s legislative history also suggests that federal offices cannot be mandatory VRAs.¹⁸ Both the Senate and House reports on the Act indicate that federal participation in the program “is subject to the Federal agency agreeing to participate” and that “[n]o specific Federal agencies are designated in this bill to participate, it being left to the States to negotiate such arrangements with the appropriate Federal agencies.”¹⁹ As the Second Circuit noted, various floor statements from debate on the measure also “show that the members of Congress most familiar with the legislation—both proponents and opponents—appear to have assumed that [the mandatory VRA provision] covers only State and local government offices.”²⁰ Taken as a whole, the evidence indicates that the BOP, as a federal agency, cannot be a mandatory VRA.

Second, the BOP also cannot be a discretionary VRA. To qualify as a discretionary VRA, an entity must be designated as such by the state²¹ and, if the entity is a federal agency, it must “agree[]” to that designation.²² The District has not designated the BOP as a VRA,²³ and the BOP has not agreed to act as a VRA for the District. Because the BOP is not a mandatory or discretionary VRA, the NVRA’s disclosure restriction related to VRAs is inapplicable and imposes no restraint on the Board’s ability to collect BOP register numbers during voter registration.

¹⁵ *Id.* § 20506(b). The Act also gives federal agencies greater leeway in the context of discretionary VRAs: they can be designated as such only “with the[ir] agreement.” *Id.* § 20506(a)(3)(B)(ii).

¹⁶ *Hammons*, 202 F.3d at 120.

¹⁷ *Id.*

¹⁸ *See Hammons*, 202 F.3d at 124-29.

¹⁹ H.R. Rep. 103-9, at 13 (1993); S. Rep. 103-6, at 29-30 (1993); *see also* H.R. Rep. No. 103-66, at 19 (1993) (Conf. Rep.) (stating that in requiring “offices in the State that provide public assistance,” 52 U.S.C. § 20506(a)(2)(A), to serve as VRAs, Congress intended to include “those *State* agencies in each State that administer” various benefit programs) (emphasis added).

²⁰ *Hammons*, 202 F.3d at 125; *see id.* at 125-26 (collecting statements). For example, an opponent of the Act, discussing a version of the measure that would have done away with mandatory VRAs in favor of greater state discretion, expressed that this alternative approach would “allow[] the States to decide which *State* agencies will offer voter registration.” 139 Cong. Rec. 7175 (emphasis added) (quoted in *Hammons*, 202 F.3d at 126).

²¹ *See* 52 U.S.C. § 20506(a)(3)(A).

²² *Id.* § 20506(a)(3)(B)(ii).

²³ *See* D.C. Mun. Regs. tit. 3, § 511.2; *see also* D.C. Code § 1-1001.07(c)(1)(A), (d)(1)(A).

B. Even if the BOP were a VRA, incarcerated people would not necessarily register “through” it for purposes of the NVRA.

The nondisclosure requirement at issue here bars disclosure only of “the identity of the [VRA] *through which* any particular voter is registered.”²⁴ Thus, this prohibition is relevant only if incarcerated individuals would register *through* the BOP. However, the fact that an individual happens to be incarcerated in a BOP facility while registering does not mean that that individual registered “through” the BOP any more than the fact that an individual happens to receive some public benefit at the time she registers to vote means that she necessarily registered through that public benefits agency. Since incarcerated D.C. residents would not be registered *through* the BOP, the nondisclosure requirement would not bar collection of their register numbers.

III. Even if the BOP were a VRA through which incarcerated residents registered, the nondisclosure provision would not prevent the Board from collecting BOP register numbers.

If the Board concludes that the BOP *is* a VRA through which incarcerated residents registered, it does not follow that the Board cannot collect the BOP register numbers from registration applicants. The NVRA requires the District to “ensure that the identity of the [VRA] through which any particular voter is registered is not disclosed to the public,”²⁵ and exempts from disclosure “records relate[d] . . . to the identity of a [VRA] through which any particular voter is registered.”²⁶ Both provisions deal only with *disclosure* of data, rather than with *collection*: the fact that information is not subject to public disclosure under the NVRA does not imply that election officials are forbidden from collecting that information.²⁷ The relatively few judicial opinions interpreting the disclosure provision reflect a consensus that certain information—such as Social Security numbers—either may or must be redacted from public releases of voter registration applications under the NVRA, yet no court has suggested that election officials may not *collect* that information.²⁸ Thus, the Board could still collect BOP registration numbers and would simply need to redact the BOP register number field so as not to reveal which applicants included a number.

²⁴ 52 U.S.C. § 20507(a)(6) (emphasis added).

²⁵ *Id.*

²⁶ *Id.* § 20507(i)(1).

²⁷ See, e.g., *Project Vote/Vote for Am., Inc. v. Long*, 682 F.3d 331, 339 (4th Cir. 2012) (requiring disclosure of voter registration records with Social Security numbers (SSNs) redacted, but not requiring state election officials not to collect SSNs); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1344-45 (N.D. Ga. 2016) (requiring redaction of sensitive information in registration applications before public release).

²⁸ See, e.g., *Pub. Int. Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 266-69 (4th Cir. 2021); *Long*, 682 F.3d at 339; *Kemp*, 208 F. Supp. 3d at 1344-45; *True the Vote v. Hoseman*, 43 F. Supp. 3d 693, 732-40 (N.D. Miss. 2014).

IV. The purposes of the NVRA as a whole are best served by maximizing voter registration and participation.

In enacting the NVRA, Congress specified that its purposes included “establish[ing] procedures that will increase the number of eligible citizens who register to vote” and “mak[ing] it possible for . . . State . . . governments to implement [the Act] in a manner that enhances the participation of eligible citizens as voters.”²⁹ In applying the NVRA, courts have recognized that those purposes extend to the provisions that require designation of VRAs: in obligating states to designate various agencies as VRAs, “Congress wanted to make voter registration services available in community-based offices that citizens visit frequently for services or assistance.”³⁰ In other words, the central purposes of the Act and of its VRA provisions are to facilitate voter registration and participation. Because collecting BOP register numbers during the voter registration process would promote registration and participation, doing so best serves the NVRA’s purposes. Conversely, interpreting the nondisclosure requirements related to VRAs expansively to forbid collecting this information would inhibit registration and participation and thereby undermine the NVRA’s aims.

To be sure, potential revelation of BOP register numbers through NVRA disclosure raises valid privacy concerns. As courts have noted in interpreting the statute, Congress likely created the VRA disclosure exception out of fear that “disclosure of where a particular applicant submitted a voter registration form—for instance, whether the form was submitted to a State office providing assistance to the poor . . . —might disclose information about an applicant that is stigmatizing or might otherwise adversely reflect upon a particular applicant.”³¹ The revelation that an applicant is serving a prison sentence could be “stigmatizing” for or “adversely reflect” upon that applicant.

However, this effect is undercut by the fact that information on individuals in BOP custody is already publicly available, and far more readily than information about individuals’ use of public benefits: while the latter is protected by a set of federal³² and District laws,³³ the BOP makes records of incarceration readily available through an online tool enabling any member of the public

²⁹ 52 U.S.C. § 20501(b).

³⁰ *Nat’l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 291 (4th Cir. 1998).

³¹ *Kemp*, 208 F. Supp. 3d at 1339. One could argue that Congress’s concern about disclosure of the VRA through which an applicant registered likely stemmed in part from concern that the risk of a potentially embarrassing disclosure would deter individuals from registering. In other words, Congress’s purpose in enacting the disclosure exception was still to facilitate voter registration and participation. In that case, collecting BOP register numbers would align with the exception’s purposes, rather than conflict with them.

³² *See, e.g.*, 7 C.F.R. § 272.1(c) (governing disclosure of information about SNAP recipients).

³³ *See, e.g.*, D.C. Code § 4-209.04 (governing confidentiality of information in public benefits programs administered by District’s government).

to search for incarcerated people by name or register number.³⁴ Moreover, individuals registering from BOP facilities need to include prison-based mailing addresses with their registrations, such that the inclusion of BOP register numbers likely would not add much new information. Thus, disclosure of information about BOP numbers would reveal less private information than disclosures related to public benefit programs.

More importantly, the Board could easily mitigate any possible privacy risk by redacting the register number field on all voter registration applications as a matter of course. Therefore, there is no reason why privacy concerns should override the NVRA's aims of maximizing registration and participation. Because including a field for BOP register numbers on the registration form would increase voter registration and participation, doing so would most effectively achieve the NVRA's purposes.

V. Conclusion

In sum, the NVRA does not prohibit the Board from collecting individuals' BOP register numbers as part of the voter registration process. And because collecting this information would facilitate voter registration and participation for incarcerated D.C. residents, doing so would best serve the Act's purposes. If the Board concludes that the NVRA does not permit disclosure of BOP register numbers, the Board can and should redact that field on all voter registration forms so as not to reveal which voter registration applicants included a number.

Thank you for your time and attention to this important matter. Please do not hesitate to reach out with questions or other ways we can support your efforts moving forward.

Best,

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³⁴ See *Inmate Locator Information*, Fed. Bureau of Prisons, https://www.bop.gov/inmateloc/about_records.jsp (last visited Oct. 12, 2021); *Find an Inmate*, Fed. Bureau of Prisons, https://www.bop.gov/mobile/find_inmate/byname.jsp (last visited Oct. 12, 2021); cf. *Project Vote/Vote for Am., Inc. v. Long*, 682 F.3d 331, 339 n.* (4th Cir. 2012) (observing that privacy concerns related to “prior felony convictions and mental incapacity” might be undercut by “the extent to which such information may already be a matter of public record”).