

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

ROSEBUD SIOUX TRIBE and their
members; OGLALA SIOUX TRIBE and their
members; LAKOTA PEOPLE'S LAW
PROJECT; KIMBERLY DILLON; and
HOKSILA WHITE MOUNTAIN,

Plaintiffs,

v.

STEVE BARNETT, in his official capacity as
Secretary of State for the State of South
Dakota and Chairperson of the South Dakota
State Board of Elections; LAURIE GILL, in
her official capacity as Cabinet Secretary for
the South Dakota Department of Social
Services; MARCIA HULTMAN, in her
official capacity as Cabinet Secretary for the
South Dakota Department of Labor and
Regulation; and CRAIG PRICE, in his
official capacity as Cabinet Secretary for the
South Dakota Department of Public Safety,

Defendants.

Civ. No. 5:20-cv-05058-LLP

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Nearly three decades ago, Congress passed the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. §§ 20501-20511, a landmark voting rights statute designed to expand opportunities for eligible Americans to register to vote and thus increase the number of citizens who can participate in the franchise. *See* 52 U.S.C. §§ 20501(a)-(b). In passing the NVRA, Congress recognized that “the right of citizens of the United States to vote is a fundamental right” and that the failure of state and local governments to promote the exercise of that right through “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.” 52 U.S.C. § 20501(a).

At the heart of the NVRA are two core provisions: Section 5, 52 U.S.C. § 20504, which requires states to register voters at driver’s license offices, and Section 7, 52 U.S.C. § 20506, which similarly requires states to provide voter registration services at all state offices that provide public assistance services. The animating principle of the NVRA is to make voter registration easier by offering services as part of common state government services where citizens have routine contact: driver’s licensing offices and, for low-income people less likely to have a car or need a license, state public assistance offices, as well as offices serving persons with disabilities. *See* S. Rep. No. 103-6, at 5 (1993); *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1035 (9th Cir. 2015); *Ga. State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1332 (N.D. Ga. 2012) (“It is evident that Congress’ concern was to provide citizens eligible to register to vote with opportunities to register by utilizing state offices with which they were likely to have contact.”); *League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1004 (W.D. Mo. 2018) (quoting same). “A main thrust of the legislation was for states to play a more

active role in promoting the enfranchisement of eligible voters.” *Nat’l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 854-56 (D. Md. 2001).

Unfortunately, since the NVRA took effect in 1995, the State of South Dakota (the “State”) has failed to comply with both the letter and spirit of the NVRA, denying countless South Dakotans, including many Native Americans, the opportunity to register to vote. Plaintiffs brought this case in 2020 following an investigation into the State’s compliance with Sections 5 and 7 of the NVRA. Plaintiffs initiated their investigation after the U.S. Election Assistance Commission (“EAC”) reported a drastic 84 percent decline in annual voter registrations from public assistance agencies in South Dakota from 2004 to 2018, despite an 80 percent increase in the number of South Dakota residents receiving public assistance over that period. SOF ¶¶ 137, 138. Further investigation revealed the State services offered to Native Americans were especially poor: while Native Americans regularly use State public assistance agencies, they remain disproportionately unregistered among eligible South Dakotans. SOF ¶¶ 27, 30-32, 36, 40, 46, 60, 227, 301, 371, 372.

Plaintiffs’ investigation revealed—and discovery has confirmed—that South Dakota Secretary of State Steve Barnett (“Secretary of State” or “SOS”), Department of Social Services (“DSS”) Cabinet Secretary Laurie Gill, Department of Labor and Regulation (“DLR”) Cabinet Secretary Marcia Hultman, and Department of Public Safety (“DPS”) Cabinet Secretary Craig Price (“Defendants”), and the agencies they head, have violated and continue to violate the NVRA in myriad ways. DPS, the State’s motor vehicle authority, has not correctly or consistently followed Section 5’s requirements to provide voter registration services in connection with driver’s license applications, renewals, and changes of address made at its own offices, nor has it ensured that driver’s license offices operated by other entities under an

agreement with DPS fulfill their Section 5 obligations. DSS and DLR, state agencies that provide public assistance benefits and services to low-income South Dakota residents, have violated Section 7 by providing inadequate assistance to individuals in completing voter registration applications, failing to transmit timely or complete voter registration applications to county election officials, and not providing required voter registration services at all with some public assistance programs, among other violations. And the Secretary of State—the State’s chief election official and person responsible for ensuring the State’s NVRA compliance—has both contributed to the other Defendants’ violations and failed to fulfill his duty to enforce NVRA requirements across all State agencies.

In a letter dated May 20, 2020 (the “Notice Letter”), Plaintiffs notified Defendants of the systemic NVRA violations identified during their investigation and offered to assist the State in developing a comprehensive plan to resolve those violations. SOF ¶ 61. Despite acknowledging receipt of the Notice Letter, Defendants refused to engage with Plaintiffs to resolve the identified violations. Although Defendants made some changes to their voter registration practices and trainings following receipt of the Notice Letter, those actions have neither brought the State into full compliance with the NVRA nor cured the effects of the longstanding past violations of the law. Having obtained ample admissions from Defendants and other evidence of NVRA noncompliance during discovery, Plaintiffs now move for summary judgment.

For the reasons that follow, Defendants have violated the NVRA and the Court should grant Plaintiffs’ Motion for Summary Judgment.

BACKGROUND

A. The Parties

1. Plaintiffs

Plaintiffs are two federally recognized Indian tribes, the Rosebud Sioux and Oglala Sioux tribes, and their members (the “Tribes”); the Lakota People’s Law Project (“Lakota Law”); and two individuals, Kimberly Dillon and Hoksila White Mountain, who have been harmed by Defendants’ failure to comply with the NVRA.

The Rosebud Sioux Tribe exercises powers of self-governance, self-determination, and jurisdiction over the Rosebud Indian Reservation in South Dakota, and is responsible for protecting the health, safety, and welfare of its 35,354 enrolled members. SOF ¶¶ 24-25. The Oglala Sioux Tribe exercises those same powers over the Pine Ridge Reservation in South Dakota, and is similarly responsible for the health, safety, and welfare of its 46,822 members. SOF ¶¶ 28, 29. The vast majority of the Tribes’ members live in poverty and receive public assistance. SOF ¶¶ 27, 30. Defendants’ failure to provide required registration services has led to eligible tribal members not being registered and qualified Native voters being turned away from the polls. SOF ¶¶ 36, 40, 45, 46, 105, 371, 372. Less voting by the Tribes’ members has led to an ongoing depression of the Tribes’ political power, including a reduced ability to advocate for much-needed resources for their people.

Lakota Law works to protect the inherent sovereignty and the right to autonomous self-rule and self-determination of Native Americans, with a focus on the Lakota communities of North and South Dakota. SOF ¶ 31. As a core part of its mission of elevating the voices of Native peoples, Lakota Law has long worked to protect voting rights and expand voter participation of Native peoples in South Dakota. SOF ¶ 32. Because of Defendants’ NVRA

violations, Lakota Law has been required to divert significant resources to registering voters in South Dakota who should have been registered to vote at a state agency.

Ms. Dillon, a Rosebud Sioux Tribe member and Rapid City resident, was turned away from the polls in the 2020 election due to a failure of the DSS office in Mission, South Dakota to update her address. SOF ¶¶ 38, 40. She recently moved to a new address in Rapid City, and fears that if she changes her address at DSS as permitted under Section 7, she may face similar problems in the upcoming 2022 elections. SOF ¶¶ 39, 41.

Hoksila White Mountain, a Standing Rock Sioux Tribe member and McLaughlin resident, ran for mayor in McLaughlin in 2020. SOF ¶¶ 42-44. His initial candidate petition was rejected by city election officials, who told him that he had insufficient signatures because several of the individuals who signed his petition, who believed they registered to vote at public assistance offices, were not listed on the voter register. SOF ¶ 46. Mr. Hoksila White Mountain intends to run for local office again and worries that similar issues could jeopardize his future candidacy if not resolved. *Id.*

2. Defendants

Defendants are the South Dakota Secretary of State and the Cabinet Secretaries of the DSS, DLR, and DPS, all of whom are sued in their official capacities. Secretary of State Steve Barnett, as the chief election official in South Dakota, is responsible for coordinating and enforcing the State's compliance with the NVRA, SOF ¶¶ 49-50, including ensuring that all state motor vehicle and public assistance agencies comply with their respective obligations under Sections 5 and 7. Secretary Barnett also serves as the chairperson of the South Dakota State Board of Elections. SOF ¶ 48; S.D. Codified Laws § 12-1-5. The State Board of Elections has

the authority to issue administrative regulations governing voting and elections, including voter registration. SOF ¶ 48; S.D. Codified Laws § 12-1-9.

The other Defendants—DPS Secretary Craig Price, DSS Secretary Laurie Gill, and DLR Secretary Marcia Hultman—are responsible for ensuring that their respective agencies comply with the NVRA. DPS, as the state’s driver’s licensing authority, is covered by Section 5 of the NVRA. SOF ¶ 59. DSS administers a variety of public assistance programs, including Temporary Assistance for Needy Families (“TANF”), Supplemental Nutrition Assistance Program (“SNAP”) benefits (formerly known as “food stamps”), and Medicaid/medical assistance programs, among others. SOF ¶ 53. As a public assistance agency, DSS is a voter registration agency covered by Section 7 and is so designated under state law. SOF ¶ 54. DLR, which administers several public assistance programs, including benefits under the federal Workforce Innovation and Opportunity Program (“WIOP”) and services under the TANF and SNAP programs, is also subject to Section 7. The Secretary of State, however, does not consider DLR to be a covered agency and has never required it to comply with Section 7. SOF ¶¶ 148. As the heads of DPS, DSS, and DLR, Defendants Price, Gill, and Hultman are responsible for ensuring that their agencies comply with their NVRA obligations. SOF ¶¶ 52, 54-59.

B. Plaintiffs’ Investigation

Starting in 2019, Plaintiffs investigated South Dakota’s compliance with the NVRA based on data indicating a drastic decline in voter registration services provided by South Dakota public assistance agencies, and other information about South Dakota agencies’ failure to provide required voter registration services. SOF ¶ 60, 137. Plaintiffs’ investigation included reviewing voter registration data submitted by South Dakota to the U.S. Election Assistance Commission (“EAC”); requesting and reviewing relevant public records; and conducting a field

investigation. SOF ¶ 60. Two investigators visited DSS offices and spoke with public assistance clients in and around tribal reservations. *Id.* Plaintiffs’ investigation found numerous violations of Sections 5 and 7 of the NVRA that form the basis of their claims. SOF ¶ 61.

On May 20, 2020, in their Notice Letter, Plaintiffs notified the Secretary of State of the NVRA violations found during the investigation and offered to engage with state officials to develop a comprehensive plan for compliance with the NVRA without the need for litigation. SOF ¶¶ 61, 63. In the letter, Plaintiffs advised Secretary Barnett of their right to bring litigation if the identified violations were not cured within 20 days. SOF ¶ 61; *see also* 52 U.S.C. § 20510(b). In a letter from DSS to Plaintiffs on June 8, 2020, DSS acknowledged the need to comply with the NVRA and briefly outlined some actions Defendants would take in the future, but did not address how Defendants would fully address Plaintiffs’ identified violations or to come into full compliance with the NVRA. SOF ¶¶ 62, 63. Plaintiffs followed up with a letter dated June 26, 2020—explaining that more concrete steps that would be needed to comprehensively address the violations and avoid litigation—but DSS never responded to that letter. SOF ¶ 63. The other Defendants did not respond on their own to the Notice Letter or Plaintiffs’ reply. SOF ¶ 62.

LEGAL STANDARD

Summary judgment is appropriate if, viewing the record in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *see also Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011). “An issue of fact is genuine when ‘a reasonable jury could return a verdict for the nonmoving party’ on the question.” *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). If the moving party “inform[s] the district court of the basis for its motion, and . . .

identif[ies] those portions of the record which it believes demonstrate the absence of a genuine issue of material fact,” the nonmoving party “must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial,” *Torgerson*, 643 F.3d at 1042, and “may not rest upon mere denials or allegations,” *Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 853 (8th Cir. 2012). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial,’” and summary judgment should be granted. *Wierman v. Casey’s Gen. Stores*, 638 F.3d 984, 993 (8th Cir. 2011) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

ARGUMENT

This case is especially well suited for summary judgment. Violations of Sections 5 and 7 of the NVRA are straightforwardly evaluated under the plain and unambiguous requirements of those provisions, and a Court can and must order compliance when those requirements are violated. *See* 52 U.S.C. § 20510(a)-(b) (authorizing the federal government and aggrieved private parties to bring federal lawsuits seeking declaratory and injunctive relief for NVRA violations). Here, a robust record of undisputed facts establishes Defendants’ numerous violations of Sections 5 and 7 of the NVRA; Plaintiffs’ Motion for Summary Judgment should be granted.

I. THE DEPARTMENT OF PUBLIC SAFETY (“DPS”) VIOLATED AND CONTINUES TO VIOLATE SECTION 5.

Section 5 of the NVRA, commonly known as the “Motor Voter” law, makes voter registration a virtually automatic part of the process for applying for and renewing a driver’s license or non-driver identification cards.¹ 52 U.S.C. § 20504(a). Section 5 requires that all

¹ The NVRA defines a “motor vehicle driver’s license” to include “any personal identification document issued by a State motor vehicle authority.” 52 U.S.C. § 20502(3). For brevity, Plaintiffs will use the term “driver’s license” to refer to all documents covered by that definition.

driver's license applications (including renewal applications) serve as applications to register to vote "unless the applicant fails to sign the voter registration application," *id.* § 20504(a)(1), that any voter registration application submitted as part of a driver's license application "be considered as updating any previous voter registration by the applicant," *id.* § 20504(a)(2), and that any change of address submitted by a registered voter to a driver's licensing authority shall automatically be considered a change of address for voter registration purposes unless the voter affirmatively declines in writing to change their address for voting purposes, *id.* § 20504(d). Section 5 further requires that a state "shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license," and that such form meet specific statutory requirements. *Id.* § 20504(c). Section 5 requires that driver's licensing authorities transmit completed voter registration applications to appropriate election officials "not later than 10 days after the date of acceptance" or, "[i]f a registration application is accepted within 5 days before the last day for registration to vote in an election, . . . not later than 5 days after the date of acceptance." *Id.* § 20504(e).

As South Dakota's designated driver's licensing authority, DPS has failed to comply with several of its central obligations under Section 5. Specifically, DPS has violated Section 5 by (1) failing to treat customers' change of address requests for their driver's licenses as address change notifications for voter registration purposes; (2) failing to provide voter registration services to customers who lack an existing South Dakota's driver's license or Social Security number; (3) failing to properly and timely transmit voter registration applications to election officials; (4) failing to provide adequate service to Native American communities by not monitoring or training the travel offices and issue sites that serve many reservations; and (5) failing to adequately monitor or enforce the agency's and its local offices' compliance with Section 5.

A. DPS has failed to follow required procedures for changes of address.

In South Dakota, when a DPS client fills out a change of address for driver's license purposes, DPS does not automatically update the address for voter registration purposes, violating the NVRA in two key ways. SOF ¶¶ 214-17, 220-21.

First, under Section 5, “[e]ach State motor vehicle driver’s license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration,” and, if an individual is already registered, the application “shall be considered as updating any previous voter registration by the applicant.”

52 U.S.C. § 20504(a). Section 5 also requires that:

[a]ny change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

52 U.S.C. § 20504(d). In other words, the motor vehicle agency must transmit all address changes to state election officials except for those individuals who decline to change their address for voter registration purposes. *See League of Women Voters of Mo.*, 336 F. Supp. 3d at 1003-04. This requirement “encompasses all address changes without regard to where or how they occur.” *Id.* at 1003 (quoting *Action NC v. Strach*, 216 F. Supp. 3d 597, 622 (M.D.N.C. 2016)).

The South Dakota Driver License/I.D. Card Application (“Driver’s License Application”) used by DPS for address change requests fails to indicate that a change of address for driver’s license purposes will automatically update the address for voter registration purposes unless the customer affirmatively opts out. SOF ¶ 221. Instead, both the March 2020 version of the Driver’s License Application in effect during Plaintiffs’ investigation, and the August 2020 version

currently in effect (which was revised at the request of the Secretary of State following Plaintiffs' Notice Letter), contain a stand-alone "voter registration" section that requires individuals to affirmatively elect to change their address for voter registration purposes. The March 2020 version of the form required applicants to affirmatively check a box saying "yes" if they wish to update their existing voter registration. SOF ¶¶ 216-17. DPS added an "opt-out" checkbox on the August 2020 form, but the form still requires individuals to check the "yes" box indicating they wish to update their address for voter registration purposes. SOF ¶ 220.

Contrary to Section 5's requirement that a change of address submitted to DPS be processed as a change of address for voter registration purposes unless the voter *opts out* of applying that change to their voter registration record, *see Action NC*, 216 F. Supp. 2d at 609, DPS requires individuals who change their address to *opt in* to changing their address for voter registration purposes, SOF ¶¶ 216-17, 220. Thus, DPS requires applicants who submit a driver's license application or ID card bearing an address different from the one at which the individual is already registered to vote, take an additional affirmative step on the application to update their voting address in violation of Section 5.

Second, DPS does not forward the change of address to the Secretary of State or county election officials, as Section 5 requires. SOF ¶ 214. County election officials do not receive address changes from DPS from individuals who submit an address change but do not separately indicate in the voter registration section of the form that they wish to change their voter registration address as well. *Id.*

By using a form for changes of address that improperly requires individuals to separately opt to change their address for voting purposes, and by not forwarding all address change

requests (except for those where the requestor declined in writing to change their voting address) to county election officials, DPS is violating Section 5, 52 U.S.C. § 20504(a).

B. DPS fails to provide mandatory voter registration services to individuals who lack a South Dakota driver's license or Social Security number.

Under Section 5, the voter registration portion of a state driver's license application "may require only the minimum amount of information necessary to—(i) prevent duplicate voter registrations; and (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C.

§ 20504(c)(2)(B); Section 5 requires that the application "state[] each eligibility requirement (including citizenship)" and "contain[] an attestation that the applicant meets each such requirement," that must be signed under penalty of perjury. *Id.* § 20504(c)(2)(C). Accordingly, a driver's licensing office must accept voter registration applications from persons who affirm their eligibility on the form itself. *Id.* The NVRA does not contain an exception to this attestation requirement and does not permit DPS to require more than the "minimal amount of information" allowed by Section 5. *See Fish v. Kobach*, 840 F.3d 710, 722 (10th Cir. 2016) (observing that Section 5 "establishes an overarching principle that restrains the discretion of states to require additional information in carrying out their eligibility-assessment and registration duties").

However, at the Secretary of State's direction, DPS does not offer voter registration services to driver's license applicants who do not have an existing South Dakota driver's license or a Social Security number. SOF ¶ 222. Instead, DPS staff direct such individuals to a county auditor's office to register to vote under State Board of Elections Administrative Rule 5:02:03:21, which requires them to complete an affidavit form in the presence of the county auditor. SOF ¶¶ 221-22. The policy of DPS and SOS to exclude persons without a driver's license or Social Security number from registering to vote by a signature attestation as part of a

driver's license application, renewal, or change of address transaction—instead, refusing to offer them voter registration services at all and directing them to a county auditor's office—violates the plain command of Section 5 to register all voters who attest their eligibility to vote on the voter registration application portion of their driver's license application. 52 U.S.C. § 20504(c).

C. DPS has repeatedly failed to transmit completed voter registration applications to county election officials.

DPS routinely violates its obligations under Section 5 to treat all driver's license applications as voter registration applications, 52 U.S.C. § 20504(a)(1), and to transmit the completed voter registration portion of driver's license applications to the appropriate election officials as required by state law and within the timeframes specified in Section, *id.*

§§ 20504(c)(2)(E), (d).

Deposition testimony by state officials and county auditors, as well as documentary evidence produced by Defendants, revealed widespread and longstanding problems with DPS offices failing to properly transmit voter registration applications to election officials. SOF ¶¶ 108-09, 231, 234, 236. The county auditors deposed by Plaintiffs reported that they routinely see errors in voter registration applications submitted by DPS through the state's voter registration database. SOF ¶¶ 108-09, 237. Common errors include DPS directing voter registration applications to the wrong county auditor's office, entering the wrong city or county, entering incorrect or outdated addresses, and not correctly inputting the date the voter signed the voter registration application form. SOF ¶¶ 105-06, 109-10, 115, 236-37. Sometimes, DPS fails to submit the voter registration at all. SOF ¶¶ 106, 111-12, 234.

As a result of these errors, voters have not been registered to vote, missed registration deadlines for upcoming elections, and either have been turned away from the polls (like Plaintiff Dillon) or forced to cast provisional ballots until local election officials can confirm with SOS

that the voter did, in fact, submit a timely voter registration. SOF ¶ 40. For those applications that DPS did not enter into the system at all, there is no way for election officials to determine whether an application was actually submitted. SOF ¶¶ 111, 234-35, 248.

D. DPS fails to ensure that voter registration services are provided at driver’s license issue sites in Indian Country.

While most driver’s licensing offices in South Dakota are DPS offices, DPS has contracted with county and city government agencies in some areas to provide driver’s licensing services. SOF ¶¶ 228. These locations, known as “issue sites,” are particularly prevalent in counties in Indian Country. SOF ¶¶ 228, 232-33. DPS has issue sites in Corson, Dewey, Jackson, Lyman, Mellette, and Ziebach counties—all counties on or near a reservation. Of the eight DPS offices on reservations in the State, three of them, or 40%, are issue sites. SOF ¶¶ 232-33.

The issue sites, as offices where individuals can apply for, renew, and change their address on their driver’s license, are subject to Section 5 just like any other driver’s license office in the State. *See* 52 U.S.C. § 20504(a)(1). DPS, as the State’s motor vehicle authority, and the Secretary of State, as South Dakota’s chief state election official, are obligated to ensure that these offices comply with their Section 5 obligations. They have failed to do so.

Some issue sites provide no voter registration services at all. SOF ¶ 229. For example, Ziebach County treasurer’s office in Dupree, which is the issue site for that county and many residents of the nearby Cheyenne River reservation, directs clients who wish to register to vote to the county auditor’s office. SOF ¶ 233. At the McIntosh issue site in Corson County, which is located on the Standing Rock reservation, Plaintiff Hoksila White Mountain was not offered the opportunity to register to vote when he applied for a driver’s license in 2017. SOF ¶ 45. The Corson County issue site is also that county’s treasurer’s office. SOF ¶ 233. During that

transaction, when Mr. White Mountain specifically asked about voter registration, he was also directed to another office by the issue site staff.

DPS admits that it does not supervise or oversee issue sites. SOF ¶¶ 229, 231. DPS does not monitor whether issue sites are collecting and transmitting voter registration applications as required by Section 5. SOF ¶¶ 229, 231. DPS has not trained any issue sites on voter registration procedures or the NVRA, and issue site employees do not attend the voter registration trainings provided by the Secretary of State to DPS employees. SOF ¶¶ 229-30.

DPS and the Secretary of State cannot evade their obligations under Section 5 by outsourcing driver's licensing services to other entities and failing to make any effort to train those entities on their NVRA obligations or to monitor whether they follow Section 5's requirements when conducting covered transactions. DPS and the Secretary of State remain obligated to ensure that all driver's licenses offices in the State, whether operated directly by DPS or otherwise, comply with the NVRA. *See United States v. Louisiana*, 196 F. Supp. 3d 612, 630, 659 (M.D. La. 2016) (“[A] state may not effectively rewrite supreme federal law simply by delegating both its enforcement function and its ultimate liability to other departments or actors.”); *Harkless v. Brunner*, 545 F.3d 445, 457 (6th Cir. 2008); *Valdez v. Herrera*, No. 09-668, 2010 U.S. Dist. LEXIS 142209, at *35 (D.N.M. Dec. 21, 2010), *aff'd sub nom.*, *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012). In failing to do so, DPS and the Secretary of State have violated Section 5.

E. DPS Fails to Monitor or Enforce Its Own Compliance with Section 5.

DPS has wholly failed to understand its obligations under Section 5 or to engage in any meaningful effort to monitor or enforce noncompliance by driver's license offices throughout South Dakota. Although the director of DPS's driver's licensing program is the highest-ranking

agency official with voter registration responsibilities, that official testified at the agency's Rule 30(b)(6) deposition that only "2 or 3 percent" of her job deals with voter registration, and that she is only "a little familiar" with the NVRA. SOF ¶¶ 212, 245. Even more troubling, although that official testified at the Rule 30(b)(6) deposition that she is responsible for ensuring NVRA compliance "in conjunction with the Secretary of State's office," SOF ¶ 245, she did not even know what section of the NVRA applies to DPS, SOF ¶ 212. Instead, DPS "count[s] on the Secretary of State's office for their expertise," deferring Section 5 implementation and enforcement nearly entirely to the Secretary of State. SOF ¶¶245. Furthermore, DPS does not track its own NVRA compliance and instead expects SOS to notify it if errors are made in processing voter registrations from DPS or other NVRA compliance issues. SOF ¶¶ 246-47. DPS itself still provides no training to its staff on voter registration obligations. SOF ¶ 238. Despite DPS's reliance on the Secretary of State to implement and enforce Section 5, the Secretary of State has failed to adequately do so, as explained in Section IV *infra*.

As explained above, DPS has violated and continues to violate its Section 5 obligations in numerous ways. In light of DPS's woeful ignorance of its responsibilities and its failure to employ any mechanisms to properly track or fulfill its obligations, summary judgment is warranted to compel DPS's immediate remediation of these deficiencies and a comprehensive plan to ensure ongoing compliance in the future.

II. THE DEPARTMENT OF SOCIAL SERVICES ("DSS") VIOLATED AND CONTINUES TO VIOLATE SECTION 7.

Recognizing that many low-income eligible voters are less likely to have or apply for a driver's license, Congress also passed Section 7 of the NVRA to require voter registration at state public assistance offices and other agencies. *Id.* § 20506. Congress's purpose in enacting Section 7 was to ensure that voter registration opportunities "will be convenient and readily

available [for] the poor . . . who do not have driver’s licenses and will not come into contact with the other princip[al] place to register under this Act,” namely, driver’s licensing offices. H.R. Rep. No. 103-66, at 19 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 144 (Conf. Rep.); *see also Harkless*, 545 F.3d at 449.

In relevant part, Section 7 requires that “[e]ach State shall designate as voter registration agencies . . . all offices in the State that provide public assistance,” 52 U.S.C. § 20506(a)(2)(A). Under Section 7, every state agency offering public assistance must provide voter registration services in connection with certain covered transactions—initial applications for assistance, recertifications and renewal applications, and changes of address— “unless the applicant, in writing, declines to register to vote.” *Id.* § 20506(a)(6)(A). Public assistance agencies must provide voter registration services during *all* covered transactions, whether conducted in person or remotely by telephone, mail, email, or other means. *See Louisiana*, 196 F. Supp. 3d at 669; *Ferrand v. Schedler*, No. 11-926, 2012 U.S. Dist. LEXIS 61862, *32-33 (E.D. La. May 3, 2012) (holding that public assistance agencies must provide a voter registration form with each covered transaction, whether conducted in person or remotely); U.S. Dep’t of Justice, Civil Rights Div., *National Voter Registration Act of 1993*, <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>.

As a state public assistance agency that provides social services and is so designated under the NVRA, DSS has violated its obligations under Section 7 by failing to comply with plain statutory voter registration requirements, failing to train its employees on the NVRA, and failing to engage in adequate oversight and enforcement when violations of the NVRA by local DSS offices have occurred. Because “Section 7 . . . prescribe[s] strict compliance with its commands” and “even minor noncompliance contravenes the NVRA,” each and every past and

ongoing failure by DSS to comply with Section 7's requirements violates the NVRA and warrants summary judgment for Plaintiffs. *Louisiana*, 196 F. Supp. 3d at 673, 676.

A. DSS failed to provide voter registration applications to clients who do not answer the voter preference question.

Section 7 requires that, during covered transactions, covered agencies present clients a form containing the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?" (the "voter preference question"). 52 U.S.C. § 20506(a)(6)(B)(i). The agency must provide a voter registration form to every applicant unless "the applicant, in writing, declines to register to vote." *Id.* § 20506(a)(6)(A). Although the agency is not obligated to provide voter registration services to an individual who declines or fails to respond to the voter preference question, the agency is only relieved of its obligation to provide a voter registration form to an applicant who affirmatively answers "no" in writing. 52 U.S.C. §§ 20506(a)(6)(A), (B)(iii). Accordingly, most courts have found that if a client declines or fails to respond to the voter preference question, the agency still must furnish a voter registration application to that person. *See Valdez*, 676 F.3d at 945-46 (10th Cir. 2012); *Action NC*, 216 F. Supp. 3d at 640; *but see Scott v. Schedler*, 771 F.3d 831, 840 (5th Cir. 2014).

Before July 2020, DSS violated this Section 7 provision by failing to provide mandated voter registration services to applicants who did not affirmatively decline in writing to register to vote, including to those who left the voter preference question unanswered. SOF ¶ 254. DSS's former "opt-in" policy of treating a blank response to the voter preference question as a declination violates Section 7's requirement that the declination must be in writing. DSS has stated that in July 2020 it changed its policy to require providing a voter registration application to clients who leave the voter preference question blank or decline to answer that question in response to Plaintiffs' Notice Letter. SOF ¶¶ 255-56. Since changing its policy, however, DSS

has not made any effort to reach out to individuals who were previously deprived of the opportunity to register to vote under the previous longstanding policy. SOF ¶ 257. The prior policy and DSS's failure to remedy the harms it caused on voters violates Section 7.

B. Even for individuals who indicate that they wish to register to vote, DSS offices do not consistently provide the assistance required by Section 7.

Section 7(a)(6)(C) of the NVRA requires public assistance agencies to provide not only general assistance with registering to vote, but to provide “the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.” *Id.* § 20506(a)(6)(C). Some local DSS offices, including those located in counties with large Native American populations, routinely transmit incomplete and incorrectly completed applications to county auditors. SOF ¶¶ 294-99, 306.

For example, in their investigation, Plaintiffs interviewed DSS clients who answered “yes” to the voter preference question while applying for benefits at DSS offices in Pine Ridge and Rapid City, but who were not offered voter registration forms or assistance. SOF ¶ 254. This requirement serves to ensure that clients can receive assistance in filling out the form, if needed, and that the agency takes responsibility for delivering the completed form to the county auditor's office. And cumulatively these errors show that DSS offices are not providing the assistance to clients required under the NVRA in completing these applications.

C. DSS does not provide voter registration services with some covered transactions.

In violation of Section 7, DSS does not provide voter registration services in connection with some covered transactions, including address change requests and some benefits renewals.

1. Change of Address Transactions

Public assistance recipients' change of address requests are covered transactions under Section 7. 52 U.S.C. § 20506(a)(6). DSS does not comply with this requirement.

First, for Supplemental Nutrition Assistance Program (“SNAP”), Temporary Assistance for Needy Families (“TANF”), and Medical Assistance (*i.e.*, Medicaid) clients who change their address, DSS does not present the voter preference question at any point in the address change process, in violation of Section 7. SOF ¶ 269. Instead, those clients are mailed a voter registration form from DSS’s central office in Pierre with instructions to return it to either DSS or a county auditor’s office. SOF ¶ 269. The mailing does not offer DSS’s assistance in completing the voter registration application or otherwise indicate whether the client may seek or obtain help from DSS. SOF ¶ 269.

Second, DSS does not instruct its staff to ask the voter preference question to clients who call to report a change of address by telephone. SOF ¶ 272. In turn, multiple local DSS offices, including the Hot Springs, Pine Ridge, and Rapid City offices, do not pose the voter preference question to clients who call those offices to report a change of address. SOF ¶ 273. DSS’s failure to ask the voter preference question to all clients who report their changes of address by telephone—or to offer assistance to those clients who wish to register with their voter registration application—violates Section 7’s change of address and assistance requirements. *See* 52 U.S.C. §§ 20506(a)(4)(A), 6(A)-(C).

2. Certain Renewal and Recertification Transactions

Although Section 7 requires that voter registration services be provided in connection with each recertification and renewal of benefits, 52 U.S.C. § 20506(a)(6)(A), DSS does not provide voter registration services in connection with some renewal and recertification

transactions for benefits programs it administers: administrative renewals of medical assistance benefits and six-month eligibility reports for TANF and SNAP recipients. SOF ¶¶ 281, 282, 283, 284, 285.

First, DSS processes administrative renewals when it can determine a client's continued eligibility without requiring the client to submit a renewal application or additional information. SOF ¶¶ 276, 277. Although DSS admits that an administrative renewal is a renewal of benefits, SOF ¶ 278, and that under DSS policy renewals of benefits are covered transactions under Section 7, SOF ¶ 279, DSS does not provide any voter registration services with these transactions, SOF ¶ 280.

Second, DSS requires some TANF and SNAP recipients complete a six-month report form which is required to maintain eligibility for benefits. SOF ¶ 281. Because DSS can revoke benefits from a recipient based on information provided in the six-month report form, SOF ¶ 282-83, the form is effectively a recertification form. However, because DSS does not consider the form to be a "full redetermination" of benefits, it does not provide any voter registration services to clients who are required to submit it. SOF ¶¶ 284-8. Section 7 does not, however, distinguish between different types of recertification transactions or authorize DSS's narrow construction of the term to apply only to "full redeterminations." Rather, Section 7 requires that voter registration services be provided during *all* recertification transactions, without limitation. 52 U.S.C. § 20506(a)(6).

DSS's failure to offer voter registration services in connection with all covered transactions violates Section 7.

D. DSS offices routinely transmit untimely voter registration applications to election officials.

Section 7 requires public assistance agencies to accept “completed voter registration forms for transmittal to the appropriate State election official.” 52 U.S.C § 20506(a)(4)(A)(iii). Public assistance agency staff must transmit completed voter registration applications to county auditors within the period required by the NVRA: ten days after the date the agency accepts the completed voter registration form, or five days if the agency receives the completed voter registration form within five days of the last day to register to vote in an election. *Id.* § 20506(d).

Discovery revealed significant inconsistencies in DSS offices’ policies and practices for date-stamping voter registration applications or transmitting them properly to county auditor offices. SOF ¶¶ 142, 180, 297. Local DSS offices acknowledged during depositions that they are unable to verify whether their employees actually transmitted completed applications to county auditors and that they do not otherwise monitor their compliance with NVRA requirements. SOF ¶¶ 312, 319, 320, 323, 324, 325.

DSS’s failure to properly transmit applications has led some voters to miss or come close to missing voter registration deadlines, or to believe they were registered, only to be turned away on Election Day for not appearing on the voter register. For example, Kimberly Dillon thought she was registered to vote in Todd County, only to be turned away from the polls. SOF ¶ 41. This failure to timely and properly transmit voter registration applications violates Section 7.

E. DSS does not provide required voter registration services to individuals with conviction histories.

Applicants with conviction histories are eligible to vote in South Dakota upon completion of their sentence, including probation, parole, and restitution. S.D. Codified Laws § 12-4-18; S.D. Sec’y of State, *Felony Convictions*, <https://sdsos.gov/elections-voting/voting/register-to->

vote/felony-convictions.aspx. Failure to provide accurate assistance regarding voter eligibility violates the equal assistance requirements of Section 7 of the NVRA, 52 U.S.C.

§ 20506(a)(6)(C). DSS fails to consistently provide clients with felony convictions with accurate information about their eligibility to register to vote. SOF ¶¶ 371-72.

DSS clients in two separate field offices were improperly denied the opportunity to register to vote for this reason. A DSS client in Rapid City incorrectly believed he could not vote due to a felony conviction, despite having completed his sentence. Because of his mistaken assumption, he did not register to vote. SOF ¶¶ 371-72. No one at the office informed him that this was the case or otherwise gave him accurate information about his eligibility. SOF ¶¶ 371-2. He remained unregistered. SOF ¶¶ 371-2. In Martin, the DSS case worker who assisted a client with her application skipped the voter preference question when reviewing the benefits application form because the client had once been convicted of a felony, even though she was now eligible to vote under South Dakota law. SOF ¶¶ 372. Like many of the State's other NVRA violations, this likely has a greater impact on the Native community because they are overrepresented in the criminal justice system in South Dakota. *See Prison Policy Initiative, Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity* (2014), Chart: Overrepresentation of American Indians are in South Dakota, https://www.prisonpolicy.org/graphs/2010percent/SD_American_Indian_2010.html.

Because DSS offices do not provide voter registration services to individuals with conviction histories, they are violating Section 7.

F. DSS Failed to Train Its Staff on The Agency's Section 7 Obligations Before 2020.

Prior to July 2020, DSS never trained its employees on voter registration procedures required by the NVRA. SOF ¶ 343. Nor had DSS ever provided written guidance or instruction

to local office supervisors on how to comply with the NVRA or train their staffs on voter registration. SOF ¶ 343. As a result, many supervisors lacked any awareness of their NVRA obligations until very recently. For example, the supervisor for the Hot Springs and Pine Ridge DSS offices, a 26-year agency employee, first learned about what the NVRA requires in July 2020. SOF ¶ 345.

The training now offered by DSS is deficient in several respects. The training presentation prepared by DSS leadership in July 2020, and amended in March 2021, does not differentiate between employees' obligations during in-person and remote transactions, provides no instruction on when or how to send a voter registration form to clients following telephonic transactions, and contains language suggesting that a DSS employee may not offer assistance in completing a voter registration application unless and until the client requests it, SOF ¶¶ 349-52, in direct conflict with Section 7's mandate that agencies provide the same degree of assistance to clients in completing voter registration forms as they do with their own forms (unless the client refuses that assistance), 52 U.S.C. § 20506(a)(6)(C). Certain staff who may be the first person a client interacts with in small local offices—such as front desk staff and employment specialists—are not required to receive any voter registration training at all. SOF ¶ 357. Indeed, the local DSS office in Hot Springs admitted that someone staffing the front desk, who may not have been a DSS employee, had improperly directed individuals to the county auditor office to register to vote. *Id.* In addition, DSS delegates training of employees to local office supervisors; beyond providing a PowerPoint presentation, however, DSS offers no guidance to supervisors on how to conduct the training. SOF ¶¶ 343, 346. In one office, the training given to staff only lasts 10 or 15 minutes. SOF ¶ 355.

G. DSS Has Failed to Adequately Monitor Its Own Compliance with Section 7.

DSS, in conjunction with the Secretary of State, is obligated to ensure Section 7 compliance by both the agency and its local offices. *See Action NC*, 216 F. Supp. 2d at 625; *ACORN v. Scott*, No. 08-CV-4084-NKL, 2008 U.S. Dist. LEXIS 53580, at *25-26 (W.D. Mo. July 15, 2008); *United States v. New York*, 255 F. Supp. 2d 73, 80 (E.D.N.Y. 2003). Despite the numerous violations of Section 7's requirements by local DSS offices in recent years, SOF ¶¶ 255, 257, 266, 269, 273, 275, 280, 285, 287, 288, 290, 291, 294. DSS made no effort to track, monitor, or enforce the agency's or its offices' compliance with the NVRA until 2021. SOF ¶¶ 312-16. Its current efforts to do so are minimal and inadequate.

DSS does not track data on the voter registration services provided by its offices, has never requested data on voter registrations conducted at DSS offices from the Secretary of State's office, and thus has no data on which to assess its own performance in providing NVRA-mandated voter registration services. SOF ¶ 312. DSS does not log or track records related to the transmission of voter registration applications to county auditors, SOF ¶ 320; does not track whether covered transactions are conducted in-person or remotely, SOF ¶ 313; and has no way to verify whether individual employees are fulfilling their obligations to assist voters in completing voter registration applications and to transmit those applications to county auditors on a timely basis, SOF ¶ 319. DSS leadership has no way to verify whether local offices are following Section 7 procedures, SOF ¶ 323, and their lack of familiarity with local practices is compounded by the fact that DSS leadership has never conducted on-site observations of local offices' voter registration practices, SOF ¶ 325-326.

Although, beginning in 2021, DSS added voter registration questions to the quality control reviews and management evaluations of local offices, the agency has made no effort to

tabulate or summarize the results of those reviews and evaluations, SOF ¶ 330, and does not specifically consider NVRA compliance for staff performance evaluations, SOF ¶ 331.

Because DSS has never attempted to assess its NVRA compliance at a systemic level, the agency was unaware of the 84 percent decrease in voter registration applications from 2004 to 2018 until Plaintiffs notified them of that fact in their May 2020 Notice Letter. DSS cannot explain that decline, does not know why voter registration rates vary dramatically by local office, and has never attempted to analyze such variations. SOF ¶¶ 340-41. Despite all this, at DSS's Rule 30(b)(6) deposition, the agency's designee testified that data on voter registration services would not be helpful to the agency in identifying or addressing NVRA violations. SOF ¶ 334.

DSS's failures to meet its NVRA violations, coupled with the agency's clear ongoing violations of the NVRA, justify summary judgment for Plaintiffs

III. THE DEPARTMENT OF LABOR AND REGULATION (“DLR”) IS A PUBLIC ASSISTANCE AGENCY BUT HAS FAILED TO PROVIDE VOTER REGISTRATION SERVICES, IN VIOLATION OF SECTION 7.

Section 7 requires states to “designate as voter registration agencies . . . *all* offices in the State that provide public assistance.” 52 U.S.C. § 20506(a)(2)(A) (emphasis added).² However, South Dakota has failed to properly designate DLR, which administers various public assistance programs, as a voter registration agency, and DLR has made no effort to comply with Section 7.

First, DLR administers public assistance benefits under the Workforce Innovation and Opportunity Act (“WIOA”), 29 U.S.C. §§ 3101-3161, many of which are similar to TANF benefits (including, *inter alia*, cash benefits and financial assistance with tuition, childcare, housing, work attire, and veteran training). SOF ¶¶ 359. Although these are public assistance

² The statute does not define “public assistance,” but the term includes, *inter alia*, TANF, SNAP, Medicaid, and CHIP benefits. *See* H.R. Rep. No. 103-66, at 19.

programs that fall plainly within Section 7's ambit, the State has not designated DLR a voter registration agency under Section 7 and DLR provides no voter registration assistance with applications (including renewals) or change of address requests made in connection with these programs. SOF ¶ 360.

Second, DLR participates in the administration of benefits and services under the TANF and SNAP programs. SOF ¶ 360. Specifically, DLR clients can and often do fill out form DSS-EA-201, titled "Application for Temporary Assistance for Needy Families (TANF)," which initiates the application process for TANF benefits and locks in the operative application date for those benefits. SOF ¶ 363. Section 7 requires that voter preference forms and voter registration applications be "distribute[d] with each application for such service or assistance" and other covered transactions. 52 U.S.C. § 20506(a)(6). "The plain meaning of this statement is clear: if an assistance office supplies an application for assistance, it must, without limitation, also distribute a voter registration form and voter preference form." *Ga. State Conference of NAACP*, 841 F. Supp. 2d at 1329. It matters not that DSS-EA-201 is not the full TANF application; it is both titled an "Application" for TANF and has the function of initiating the application process for benefits. Thus, under Section 7, DLR must provide the required forms with this application.

Lest there be any doubt that DLR is a public assistance agency, at the time this lawsuit was filed and until sometime after the August 30, 2020, Rule 30(b)(6) deposition of DLR a year later, DLR's website stated that it co-administered TANF with DSS. SOF ¶¶ 361-62. Although DLR changed the language on the website—likely in response to this litigation³—the fact remains that DLR administers employment-related services for TANF recipients and allows

³ Indeed, in their original Answer, ECF No. 25, Defendants admitted that DLR co-administers TANF with DSS, but in their Answer to the Amended Complaint, denied it, ECF No. 47.

individuals to begin the application for TANF at its offices. *Id.* Indeed, DLR’s website *still* indicates that it offers services under both the TANF and SNAP programs. SOF ¶ 362. There is simply no reasonable argument that DLR is exempt from Section 7’s requirements.

Because DLR provides TANF and SNAP benefits, in addition to the other public assistance under WIOA, it must provide voter registration services under both Section 7 and South Dakota election law, which requires that “[v]oter registration shall be available at . . . those locations which provide . . . food stamps [and] temporary assistance for needy families.” S.D. Codified Laws § 12-4-2. But DLR has never been treated by the State as a voter registration agency, SOF ¶¶ 365, 367; DLR staff have never received NVRA training, SOF ¶ 364; and customers who fill out the DSS-EA-201 form and WIOA application, renewal, and change of address forms at DLR offices are not offered the voter registration services required by Section 7, SOF ¶ 363. For these reasons, DLR has violated and continues to violate Section 7.

IV. THE SECRETARY OF STATE, AS SOUTH DAKOTA’S CHIEF ELECTION OFFICIAL, HAS CONTRIBUTED TO DEFENDANTS’ NVRA VIOLATIONS AND FAILED TO FULFILL HIS OVERSIGHT AND ENFORCEMENT DUTIES.

The NVRA requires each state to “designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities” under the statute. 52 U.S.C. § 20509. South Dakota has designated the Secretary of State as its chief election official for these purposes. SOF ¶ 49. Accordingly, “[u]nder the plain language of the statute, the designated officer, here the Secretary, must coordinate state responsibilities” under the NVRA. *Harkless*, 545 F.3d at 452; *see also United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008). The Secretary’s coordination role includes being “responsible for ‘harmonious combination’—or implementation of enforcement—of [the NVRA] on behalf of [the State]” and of each state agency with voter registration obligations under the statute. *Harkless*, 545 F.3d at 452. In short,

“the Secretary is responsible for the implementation and enforcement” of the NVRA. *Id.* at 453. “‘Under the plain language of the statute, *states* must take specific actions’ and thus bear ultimate liability and final responsibility for any contrary nonaction,” even where the state delegates NVRA implementation to subordinate actors. *Louisiana*, 196 F. Supp. 3d at 630, 659 (quoting *Missouri*, 535 F.3d at 849). In so delegating, a state “cannot devolve its ultimate responsibility for compliance and liability for defiance, as explicitly embodied in the NVRA’s sundry sections, unto these other entities.” *Id.* at 659.

While the Secretary of State’s designee conceded at the office’s Rule 30(b)(6) deposition that if various agencies are not complying with their responsibilities under the NVRA, the Secretary “probably” has a responsibility to take corrective action under the NVRA, SOF ¶ 104, the Secretary has never implemented any monitoring or enforcement procedures to ensure state agencies’ compliance, SOF ¶¶ 116, 131-166. Instead, the Secretary has artificially limited its role to providing some trainings, preparing voter preference forms and voter registration forms for agency use, reporting data to the federal Election Assistance Commission, and notifying agencies of individual voter registration issues on an *ad hoc* basis. SOF ¶¶ 145, 342. Not only have these limited responsibilities been insufficient to ensure the State’s compliance with the NVRA, the Secretary has contributed to the agencies’ NVRA violations by providing deficient and incorrect guidance to agencies, as explained below.

A. The Secretary of State has failed to provide adequate training and guidance to public assistance agencies and county auditors on the NVRA.

From 1995 to 2021, the Secretary never formally trained county auditors on their obligations under the NVRA. SOF ¶ 168. That training remains minimal: at the county auditor’s conference in October 2021, more than a year into this litigation, the office conducted a session on NVRA compliance that lasted only four minutes and 41 seconds. SOF ¶¶ 167-69. The

Secretary of State provides training to DPS employees, but, as explained below, those trainings are also deficient. *See* Section IV, *infra*.

The Secretary of State's office has *never* trained DSS employees, deferring entirely to that agency to train its employees on voter registration requirements with no oversight over those trainings. SOF ¶¶ 146, 152-56. Nor has it offered—or required—training of DLR and Department of Health employees who are involved in those agencies' administration of public assistance benefits and services provided by those agencies. SOF ¶ 148. And despite offering no training to public assistance agencies, the Secretary of State also refuses to answer even basic NVRA compliance questions from the agencies, claiming that they are legal questions that the Secretary of State's office is not responsible for answering. SOF ¶ 157.

The Secretary of State's failure to train county auditors is evident in the inconsistent and incorrect voter registration practices throughout the State. Although county auditors are the election officials responsible for receiving and processing voter registration applications from covered agencies, many county auditors in South Dakota have a limited understanding of the NVRA's basic requirements and, in turn, follow inconsistent and often incorrect procedures in processing voter registration applications transmitted by covered agencies. SOF ¶¶ 171-81. Several county auditors deposed by Plaintiffs testified that they did not know what the NVRA requires; were unfamiliar with both the term “covered transactions” and, more generally, lacked knowledge of when public assistance offices are required to provide voter registration services; and were unaware of the state laws and regulations governing NVRA compliance, including requirements pertaining to the registration of individuals lacking a South Dakota driver's license or Social Security number. *Id.*

B. The Secretary of State has provided incorrect information to agencies on their NVRA obligations.

The training the Secretary of State provides to county auditors and DPS includes instructions that require those offices and agencies to violate the NVRA.

First, although a voter without a valid United States Postal Service (“USPS”) address may register to vote by providing either a physical address or description of where the individual resides on the voter registration application, the Secretary of State’s office instructs DPS employees that if a client leaves the address field blank because they do not have a USPS address, the employee should forward the application to the county auditor as an incomplete application, resulting in individuals not being registered or experiencing delays in registration. SOF ¶ 122. The Secretary has not instructed DPS employees to inform such clients that they may include a description of the location of their residence on the voter registration form itself before DPS transmits it to election officials. SOF ¶ 123. Nor has the Secretary provided training or guidance to county auditors on how to process or input this information into the State’s TotalVote system. SOF ¶ 121. Finally, although the Secretary prepares the voter registration forms used by agencies and reviews the voter registration portion of the State’s driver’s license application, the form does not contain any instruction to individuals that they have the option of providing a description of where they live if they do not have a USPS address. SOF ¶ 119.

Second, the Secretary does not provide training or guidance to DPS employees or county auditors on the correct procedures to follow when an applicant lacks a South Dakota driver’s license or Social Security number when they apply for a license. *See* Section IV, *supra*; SOF ¶¶ 175, 358. Before this lawsuit was filed, the Secretary of State’s office did not provide any training to county auditors on the use of signature affidavits for such individuals. SOF ¶ 129. And now, there remains no way for prospective voters in this situation to know they can submit

an affidavit if they are otherwise eligible to vote, unless an employee affirmatively shares that information (which the Secretary does not require them to do). SOF ¶ 130.

C. The Secretary of State has contributed to DPS's Section 5 violations by providing faulty training and failing to enforce known noncompliance problems.

Despite actual knowledge of these systemic issues over the last five years, the Secretary of State has not implemented any oversight or monitoring process or systematic changes to assist DPS in improving its voter registration process or otherwise ensure DPS's compliance with its Section 5 obligations. SOF ¶¶ 104-06, 108-10, 112, 114-18.

1. Inadequate Training

Between 2015 and 2019, the time allotted to the Secretary of State's voter registration training at the annual DPS training was cut by two-thirds, eliminating an hour's worth of content. SOF ¶ 243. The Secretary of State did not conduct any training on voter registration from 2019 until October 2021. SOF ¶ 244. From 2015 through the present, the Secretary of State has conduct a cumulative total of only three hours of training for DPS staff. SOF ¶ 242. Other than providing this minimal training to DPS employees, the Secretary of State does not provide guidance to DPS on NVRA compliance. SOF ¶¶ 118, 145-46.

Trainings can be inaccurate and compound DPS's violations. For example, the Secretary of State's office instructs examiners that if an individual leaves the address field blank because they do not have a USPS address, the examiner should still send the application to the county auditor to process as an incomplete application. SOF ¶ 122. This can lead to an application not being processed and result in a voter not being registered or facing delays in registration if they are forced to submit a new application. Instead, per Section 5, these individuals, who in South Dakota are commonly Native American, must be allowed to provide a physical description of their location of residence. *See EAC, Register To Vote In Your State By Using This Postcard*

Form and Guide, https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf.

2. Insufficient Oversight and Enforcement

The Secretary of State is aware of recurring problems with DPS offices processing voter registration applications since at least 2018, including DPS entering the wrong city or county on, sending applications to the wrong county auditor's office, entering incorrect or old addresses for voters, and not submitting the voter registration application at all, resulting in some individuals not being registered despite their effort to do so through a DPS office. SOF ¶ 105.

For example, around the time of the 2018 primary election, the Secretary of State's office learned of eight voters whose applications through DPS were not appearing in the TotalVote system, at least six of whom had not been entered in TotalVote by the DPS examiners that processed the applications. SOF ¶ 112. The office is currently unaware of whether those individuals were successfully registered to vote or permitted to cast a ballot in the June 2018 primary. The Secretary of State's office does not recall following up with, taking any corrective action against, or monitoring or auditing DPS to address these specific issues or to assess whether these problems indicated a systemic issue. SOF ¶ 112.

As another example, in 2019, the Secretary of State's office identified a problem with bPro, the electronic system in which DPS examiners enter voter registration data. SOF ¶ 113. The system was automatically populating the date field with the current date, not the date the voter completed the voter registration form. SOF ¶ 113. A DPS examiner needed to manually change the date for it to be correct, but SOS notified DPS that its examiners were not always making this change. SOF ¶ 113. Although there were discussions about whether the bPro system could be changed to ensure accurate entry of the voter registration date, SOS is unaware of

whether such a change was ever implemented. SOF ¶ 114. SOS was aware that DPS's issues with incorrect date field entry persisted until at least Spring 2020. SOF ¶ 115. SOS has not followed up with DPS on this issue or monitored or audited whether the issue has been addressed, and has deferred entirely to DPS to correct the issue. SOF ¶ 116. SOS is unaware of any systematic changes made by DPS to improve its processing of voter registration applications after a significant number of problems in 2018 including untimely and incorrectly entered voter registration applications, nor has it required DPS to implement any changes. SOF ¶¶ 117-18.

D. The Secretary of State fails to monitor or enforce Section 7 compliance by public assistance agencies.

The Secretary of State exercises virtually no oversight over DSS's compliance with Section 7 and no oversight at all over the State's other public assistance agencies—DLR and the South Dakota Department of Health, which administers the Women, Infants and Children (“WIC”) program and is thus a covered agency under both Section 7 and South Dakota law. SOF ¶¶ 131-132. 145, 148-150. With respect to DSS, SOS has no knowledge of, and does not actively monitor, DSS's processes and procedures for handling voter registration applications. SOF ¶ 131. SOS does not know what, if any, procedures DSS follows to ensure the correct and timely transmission of voter registration applications to county auditors; whether or how DSS handles change of address requests; or whether or how DSS provides voter registration services during covered transactions performed online or by phone. SOF ¶ 131. SOS does not know when a public assistance agency is required to present a client with a voter preference form or, when it does, its procedures for providing voter registration forms to clients who wish to register. SOF ¶ 132. Even when it learns of NVRA compliance issues by DSS, SOS has not undertaken any monitoring or auditing to determine whether those issues have been resolved. SOF ¶¶ 141-42. Remarkably, even though the EAC reported an 84 percent decline in voter registration

applications from South Dakota’s public assistance agencies from 2002 to 2018, at the same time the number of public assistance applications in the State rose by 80 percent—using data *submitted by the Secretary of State*—the Secretary of State’s office was unaware of that decline before Plaintiffs alerted them to the issue because the office had *never* pulled or analyzed data it submitted to the EAC for compliance monitoring or enforcement purposes. SOF ¶¶ 137, 139.

Despite actual knowledge of recurring and widespread voter registration problems at DPS, DSS, and their individual offices, the Secretary of State’s office was unable to point to any instance in which the office has engaged in monitoring to assess whether known problems have been addressed. SOF ¶¶ 112, 140-41. Although the office is obligated to report NVRA compliance data to the federal government, the office was unable to explain significant discrepancies between the data it received from agencies and the data it reported to the government. SOF ¶ 193. The office has also not engaged in any independent data analysis to identify potential NVRA voter registration compliance issues. SOF ¶¶ 185, 248.

SOS’s hands-off approach to DSS and the other covered agencies—and its failure to make even minimal effort to monitor compliance statewide—is at odds with the Secretary’s coordination and enforcement obligations under the NVRA and contributes to DSS’s Section 7 violations. Accordingly, SOS is violating its obligations under the NVRA.

CONCLUSION

For the foregoing reasons, Defendants have violated and continue to violate Sections 5 and 7 of the NVRA. Plaintiffs’ motion for summary judgment should be granted.

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Respectfully submitted,

/s/ Terry Pechota

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CERTIFICATE OF SERVICE

I certify that on February 9, 2022, I electronically filed and served on all counsel of record the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment using the Court's CM/ECF system.

/s/ Terry Pechota
Terry Pechota