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

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

By failing for decades to comply fully with the voter registration mandates of Sections 5 and 7 of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. §§ 20501-20511, the State of South Dakota has denied countless residents the opportunity to register to vote in federal elections. Defendants have failed in myriad ways to ensure statewide compliance with the basic requirements of Sections 5 and 7: to provide voter registration services at *all* driver's licensing and public assistance offices in connection with applications, renewals, changes of address, and other covered transactions, and to ensure the timely transmission of applications completed at these offices to county election officials. Plaintiffs have developed a substantial record showing that the Defendants' violations have been caused or exacerbated by Defendants' failure to understand their NVRA obligations, fully comply with them, or to prevent and address systemic and recurring noncompliance by local offices.

In the face of this evidence, as detailed in Plaintiffs' Statement of Undisputed Material Facts ("SOF"), ECF No. 78, Defendants have wholly failed to meet their burden of "submitting evidentiary materials that set out 'specific facts showing that there is a genuine issue for trial.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)); *see also* Fed. R. Civ. P. 56(c)(1), L.R. 56.1(B). Rather, in their Response to Plaintiffs' Statement of Undisputed Material Facts ("SOF Response"), ECF No. 94, Defendants resort to conclusory denials, meritless objections, quibbles over word choices, improper argument, and assertions that otherwise undisputed facts are "immaterial." None of these things can manufacture a genuine dispute of material fact where none exists. *See Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 853 (8th Cir. 2012) ("a nonmovant may not rest upon mere denials or allegations" to defeat summary judgment);

Danielson v. Huether, No. 4:18-CV-04039-RAL, 2021 U.S. Dist. LEXIS 11244, at *22 (D.S.D. Jan. 21, 2021) (considering facts undisputed where "minor quibbles with wording or reference[s] [to] additional facts . . . do not undermine accuracy of initial statement"); *LeBeau v. Progressive N. Ins. Co.*, No. 12-cv-5044-JLV, 2015 U.S. Dist. LEXIS 130023, at *10-11 nn. 5-7, *15 n. 13 (D.S.D. Sep. 28, 2015) (finding arguments "are not proper responses" to a statement of undisputed material facts under L.R. 56.1(B)); 10A C. Wright, A. Miller & M. Kane, Fed. Practice & Proc.: Civil 2d § 2720 ("whether a genuine issue concerning a material fact exists is itself a question of law that must be decided by the court"). Every fact that Defendants has failed to properly dispute should be deemed undisputed. Fed. R. Civ. P. 56(e); *see also, e.g.*, *United States v. Hump*, 515 F. Supp. 3d 1015, 1018 n.4 (D.S.D. 2021); *Danielson*, 2021 U.S. Dist. LEXIS 11244, at *21.

Defendants' erroneously assert, based on abrogated case law, that summary judgment is an "extreme remedy" that "should be cautiously invoked." *See* Defs.' Response in Opp. to Pls.' Mot. for Summ. J., at 2 ("Defs.' Opp."), ECF No. 93. To the contrary, "summary judgment is *not* disfavored and is designed for 'every action'" as "a useful pretrial tool to determine whether any case . . . merits a trial." *Torgerson*, 643 F.3d at 1043 (citing *Celotex*, 477 U.S. at 327). Rule 56's principal purpose is to dispose of factually unsupported defenses. *Bedford v. Doe*, 880 F.3d 993, 996 (8th Cir. 2018). Thus, Defendants must "do more than raise some metaphysical doubt about the material facts . . . [and] instead present enough evidence that a jury could reasonably find in [their] favor." *Id.* at 997; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

Summary judgment is appropriate here because the vast array of material facts for which no genuine dispute exists establishes as a matter of law that Defendants have violated the NVRA. The Court should grant Plaintiffs' Motion for Summary Judgment ("Motion").

SUMMARY OF DEFENDANTS' NVRA VIOLATIONS

Under the NVRA, a state is liable for *any* past or ongoing violation of Section 5 or Section 7. *See United States v. Louisiana*, 196 F. Supp. 3d 612, 676 (M.D. La. 2016) ("even minor noncompliance contravenes the NVRA . . . only a few facts matter to ascertaining the existence of an actionable violation"). "Substantial compliance" or "reasonable effort" standards are insufficient in determining compliance with the NVRA; accordingly, anything less than full compliance is a legal violation of the NVRA. *Id.* at 674; *Action NC v. Strach*, 216 F. Supp. 3d 597, 638 (M.D.N.C. 2016).

In their Motion, Plaintiffs have documented a multitude of past and ongoing compliance issues by the South Dakota agencies charged with implementing the NVRA's voter registration requirements: (1) the Department of Public Safety ("DPS"), the state's driver's licensing authority; (2) the Department of Social Services ("DSS"), the state's primary public assistance agency that administers public assistance under the Temporary Assistance for Needy Families ("TANF"), Supplemental Nutrition Assistance Program ("SNAP"), Medicaid, and other federal and state public assistance programs; (3) the Department of Labor and Regulation ("DLR"), which provides public assistance benefits and services under TANF in conjunction with DSS; and (4) the Secretary of State, who, as South Dakota's chief election official, is obligated under the NVRA to enforce the State's compliance with the law. Specifically, as detailed in Plaintiffs' opening brief ("Pls.' Mem."):

- DPS has failed and continues to fail to comply with Section 5's requirement that "*any* change of address form submitted . . . for purposes of a State motor vehicle driver's license *shall* serve as notification of change of address for voter registration . . . unless the registrant states on the form that the change of address is not for voter registration purposes," 52 U.S.C. § 20504(d), *see* Pls.' Mem. at 10;
- DPS has violated Section 5 by failing to accept affidavits when voters do not have a driver's license or Social Security number at the time of registration, 52 U.S.C. § 20504(c)(2)(C), *see* Pls.' Mem. at 12-13;
- DPS has violated Section 5's transmittal deadline requirement, 52 U.S.C. § 20504(e), by failing to address the chronic, known compliance issues at local DPS offices and DPS-contracted driver's license issue sites, *see* Pls' Mem. at 13-15;
- DPS has failed to ensure that Section 5-mandated voter registration services are provided during covered transactions at driver's license issue sites operated by other entities serving Indian Country and other rural communities, *see* Pls.' Mem. at 14-15;
- DPS has failed to monitor or enforce its own compliance with Section 5, *see* Pls.' Mem. at 15-16;
- DSS has violated Section 7 by failing to consistently provide a voter preference form to clients during covered transactions, as required by 52 U.S.C. § 20506(a)(6)(B), *see* Pls.' Mem. at 18-19;

- DSS has failed to ensure that its local offices provide the assistance to voters in completing voter registration forms required by 52 U.S.C. § 20506(a)(6)(C), *see* Pls.' Mem. at 19;
- DSS and its local offices have failed to provide voter registration services in connection with all covered transactions, as required by 52 U.S.C. § 20506(a)(6)(A)-(B), including changes of address conducted remotely, administrative renewals of medical assistance benefits, and the six-month reports SNAP and TANF recipients must complete to maintain eligibility, *see* Pls.' Mem. at 19-21;
- DSS has failed to address its local offices' failures to transmit voter registration applications to county election officials by the statutory deadline set in 52 U.S.C. § 20506(d), *see* Pls.' Mem. at 22;
- DSS has failed to adequately monitor or enforce its own compliance with Section 7, including failing to sufficiently train its employees on their NVRA obligations, *see* Pls.' Mem. at 23-26;
- DLR, which provides certain TANF services in cooperation with DSS, fails to provide any voter registration services for covered transactions at its offices, *see* Pls.' Mem. at 26-28; and
- The Secretary of State, by failing to exercise any meaningful oversight or enforcement over the State's NVRA compliance, and providing inadequate training to DPS employees and county auditors, has contributed to and failed to correct the systemic and chronic NVRA violations across the State, violating the

Secretary's duty as the State's chief election official to coordinate NVRA compliance, 52 U.S.C. § 20509, *see* Pls.' Mem. at 28-35.

The full record—comprised of the State's own voter registration data, sworn Rule 30(b)(6) deposition testimony and written discovery responses from the Defendants, deposition testimony by local election officials, and documented instances of voter registration failures across the State experienced by the Plaintiffs and others, and other documentary evidence—paints a damning picture of Defendants' failure to understand their NVRA obligations, to comply with them, or to ensure consistent and compliant policies and practices across the State to fulfill the NVRA's central promise of expanding ballot access by making it easier to register to vote.

Defendants try to "dispute" facts by referring only to their *current* practices, including policies and practices adopted following Plaintiffs' May 20, 2020, Notice Letter ("Notice Letter"), ECF No. 44-1, or the filing of this lawsuit. *See, e.g.*, SOF & SOF Response ¶¶ 105, 113, 159-60. Even assuming *arguendo* that Defendants' *post hoc* attempts to address or mitigate some of their NVRA violations have been successful, which Plaintiffs do not concede, they certainly do not disprove the facts establishing past and continuing compliance issues. Even past NVRA violations warrant summary judgment. *See Louisiana*, 196 F. Supp. 3d at 630, 676. Because Defendants do not dispute those past practices, choosing instead to ignore them, each such fact should be considered undisputed for purposes of this motion. Fed. R. Civ. P. 56(e); *Hump*, 515 F. Supp. 3d at 1018 n.4; *Danielson*, 2021 U.S. Dist. LEXIS 11244, at *21.

ARGUMENT

I. DEFENDANTS' EVIDENTIARY OBJECTIONS TO OTHERWISE UNDISPUTED FACTS ARE MERITLESS.

Defendants assert a host of evidentiary objections based on hearsay and foundation, often to facts that they do not otherwise dispute. Few, if any, of these objections are valid, either

because a hearsay exception applies or because Plaintiffs can present the underlying evidence in an admissible form at trial. "[T]he standard is not whether the evidence at the summary judgment stage would be admissible at trial—it is whether it could be presented at trial in an admissible form." *Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 793 (8th Cir. 2012) (citing Fed. R. Civ. P. 56(c)(2)). For the reasons explained below, the Court should overrule these objections and consider the undisputed facts in consideration of Plaintiffs' motion.

A. Defendants' hearsay objections are meritless.

Defendants assert baseless hearsay objections to several facts contained in the SOF. *See* SOF Response ¶¶ 36, 37, 40, 46, 60, 115, 116, 157, 234, 255, 358, 364, 372.

First, Defendants object to facts supported by the Declaration of Chase Iron Eyes, ECF No. 87-6 ("Iron Eyes Decl."), who heads Plaintiff Lakota People's Law Project ("Lakota Law"). *See id.* ¶¶ 36, 37.[1] It is unclear which parts of the declaration Defendants consider "hearsay," but all of the information in the declaration is based on Mr. Iron Eyes's personal knowledge and can be presented in admissible form at trial through his testimony. To the extent Defendants are referring to the information about the NVRA that Lakota Law learned from Plaintiffs' counsel, that information is not being offered for the truth of the matter asserted (i.e., what the NVRA requires and whether Defendants violated the NVRA); rather, it is admissible for showing that Lakota Law was put on notice of Defendants' potential violations and responded by diverting resources to counteracting those violations. *United States v. Dupree*, 706 F.3d 131, 136-37 (2d Cir. 2013) ("a statement is not hearsay where . . . it is offered, not for its truth, but to show that a listener was put on notice").

[1] Defendants correctly point out that the Iron Eyes declaration does not contain paragraphs 16-17, which Plaintiffs cited in error in the SOF. The correct range is ¶¶ 9-15.

Second, Defendants object to paragraphs 12 and 15 of the Declaration of Kimberly Dillon ("Dillon Decl."), ECF No. 87-5. SOF Response ¶ 40. Those two paragraphs describe Ms. Dillon's experience of being turned away from the polls in the 2020 election after being informed by the poll worker that she was not registered. Ms. Dillon's statements are based on her actual knowledge and can be introduced through trial testimony. The poll worker's statements to Ms. Dillon about why she was turned away are not offered to prove that Ms. Dillon was not registered (which Defendants do not dispute), but rather to show Ms. Dillon's state of mind and that she was put on notice that the application she submitted at DSS had never been processed. *See Dupree*, 706 F.3d 131, 136-37. They also object to Ms. Dillon's declaration "as it was not signed under penalty of perjury as required by 28 U.S.C. § 1747 (sic)," by which they presumably mean 28 U.S.C § 1746. Ms. Dillon stated that she made her April 7, 2021, declaration "pursuant to 28 U.S.C. § 1746," but the declaration inadvertently omitted the language required by 28 U.S.C. § 1746(1). To cure this error, Ms. Dillon submits a second supplemental declaration with this reply brief confirming the truth of her original declaration under penalty of perjury. *See* Second Decl. of Samantha Kelty ("Kelty Second Decl.") Ex. 32 (Second Supp. Decl. of Kimberly Dillon).

Third, Defendants' hearsay objections to one sentence of Plaintiff Hoksila White Mountain's declaration regarding why his candidacy petition was rejected, SOF Response ¶ 46, are immaterial because Plaintiffs do not intend to rely on the injury to Mr. White Mountain's candidacy to establish his standing, *see* Pls.' Br. in Opp. to Mot. to Dismiss, at 16-17, ECF No. 92, and Plaintiffs do not seek to rely on that sentence to establish DSS's Section 7 liability.

Fourth, Defendants object to the description of Plaintiffs' investigation of Defendants' NVRA compliance on hearsay grounds. SOF Response ¶ 60. Once again, Defendants do not

explain what they consider hearsay. Paragraph 60 only describes the components of Plaintiffs' investigation, as summarized in their Notice Letter, all of which can be introduced at trial through testimony. To the extent Defendants object to third-party statements made to Plaintiffs' investigators as recounted in the Notice Letter, those statements are irrelevant to how Plaintiffs conducted their investigation, which Defendants do not dispute.

Fifth, Defendants raise hearsay objections to their own Rule 30(b)(6) designees' testimony and deposition exhibits containing email correspondence between Defendants' officials and personnel. *Id.* ¶¶ 115, 116, 157, 364. Both the deposition testimony and statements made in the referenced emails were made by officials and employees of Defendants Secretary of State and DSS on matters within the scope of their employment; accordingly, they are admissible statements by party-opponents. *See* Fed. R. Evid. 801(d)(2). Similarly, Defendants object to statements about voter registration information provided by DSS's Hot Springs office to a prospective applicant. *Id.* at 89 (¶ 358). The statements of DSS employees are admissions by party-opponents and, in any event, are supported by the direct deposition testimony of the designated representative of the Hot Springs office, not on third-party statements. For ¶ 364, where DLR's Rule 30(b)(6) designee discusses information provided to him by Penny Brandt, another DLR employee, Ms. Brandt's statements are admissible as admissions by a party-opponent and can otherwise be presented at trial if Plaintiffs call Ms. Brandt as a witness.[2]

[2] To simplify consideration of this motion, Plaintiffs concede that three statements made to Plaintiffs' investigators by third parties may constitute hearsay, as Plaintiffs do not anticipate being able to present those individuals' testimony at trial. *See id.* at 57 (¶ 234), 61 (¶ 255), 94 (¶ 372). Defendants do not otherwise dispute those facts. *Id.* As those statements are not needed to prove Defendants' liability, though, the Court need only consider the admissible and undisputed portions of those paragraphs. Relatedly, because Plaintiffs' argument that DSS provides inadequate services to individuals with conviction histories is based, at least in part, on statements challenged by Defendants as hearsay, Plaintiffs withdraw their request for summary judgment on that specific issue and reserve the right to raise it at trial.

B. Exhibits summarizing the State's voter registration data and related deposition testimony are admissible.

Defendants object to certain deposition testimony of their own Rule 30(b)(6) designees and other witnesses pertaining to historical voter registration data in South Dakota, and the underlying exhibits summarizing that data that were shown to those witnesses, for alleged lack of "foundation" or "verification." SOF Response ¶¶ 138-39, 337-42. As those summary charts were prepared using *Defendants' own data* and are admissible under Rule 1006 of the Federal Rules of Evidence, those objections should be overruled. In addition, much of the challenged testimony was based on the witness's actual knowledge about Defendants' collection and review of data, which did not hinge on the exhibits to which Defendants now object.

Rule 1006 permits parties to "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court," provided that the party "make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place." Fed. R. Evid. 1006. Summaries are admissible under Rule 1006 "when (1) they fairly summarize voluminous trial evidence; (2) they assist the jury in understanding the testimony already introduced; and (3) the witness who prepared it is subject to cross-examination with all documents used to prepare the summary.'" *Danielson*, 2021 U.S. Dist. LEXIS 11244, at *19 (quoting *United States v. Fechner*, 952 F.3d 954, 959 (8th Cir. 2020)).

As described in the Declaration of Pamela Cataldo ("Cataldo Decl."), each of the spreadsheets and charts at issue summarized data from two sources: (1) publicly available voter registration data reported by South Dakota to the federal Election Assistance Commission from 2001 to 2020; and (2) voter registration data produced by Defendants to Plaintiffs in response to discovery requests. Decl. of Samantha Kelty ("Kelty Decl.") Ex. 25 (Cataldo Decl. ¶¶ 11-35). In

her declaration, Ms. Cataldo, a former non-attorney project manager and investigator at Demos, detailed the sources and methods she employed in preparing these exhibits. *Id.* If necessary, Ms. Cataldo can testify at trial as to how the exhibits summarizing the voluminous data contained in the EAC reports and Defendants' document productions were prepared.

Moreover, at each deposition, Plaintiffs' counsel described the exhibit, explained the source data and how the charts were created, and provided the witness an opportunity to review it before answering questions. Kelty Second Decl. Exs. 33 (Miller Dep. 149:17-151:1, 151:6-16, 152:3-9), 34 (Miller Dep. Ex. 13), 37 (Naylor Dep. 67:3-70:5), 38 (Naylor Dep. Ex. 7), 39 (Longbrake Dep. 79:18-80:7); Kelty Decl. Exs. 11 (Miller Dep. Ex. 10), Ex. 17 (Longbrake Dep. Ex. 6). For the Rule 30(b)(6) depositions of the Secretary of State and DSS, documents containing the underlying source data were identified and entered as deposition exhibits before discussion of the summary tables derived from them. Kelty Second Decl. Exs. 33 (Miller Dep. 149:17-150:15, 151:6-16), 34 (Miller Dep. Exs. 11-12), 35 (Warne Dep. 133:1-10, 137:16-138:4, 139:20-140:3, 147:16-149:21, 155:21-156:20), 36 (Warne Dep. Exs. 18-20, 23, 25); *see also* Cataldo Decl. ¶¶ 15-16, 25-27. All of the underlying data is already available to Defendants, given that Defendants collected and reported it to EAC and Plaintiffs. Since Defendants themselves have never summarized or analyzed their data for purposes of identifying NVRA compliance issues, *see* SOF & SOF Response ¶¶ 139, 185, 192-93, 195, 196, 320, Plaintiffs needed to do so.

For these reasons, and because Defendants have offered no evidence to refute the accuracy of these exhibits, Defendants' objections to these exhibits and related deposition testimony should be rejected.

II. THE UNDISPUTED FACTS SHOW THAT DPS HAS VIOLATED AND CONTINUES TO VIOLATE SECTION 5 OF THE NVRA.

A. DPS fails to automatically process clients' changes of address for voter registration purposes.

Section 5 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 [for federal elections] . . . *unless* the registrant states on the form that the change of address is not for voter registration purposes." 52 U.S.C. § 20504(d) (emphases added); *see* Pls.' Mem. at 10-12. DPS's driver's license application form (both in its current and prior versions) violates this unambiguous requirement by requiring DPS clients to affirmatively opt to have their address change forwarded to election officials. Pls.' Mem. at 10-12.

DPS's driver's license application form in effect until August 2020 *only* contained an "opt-in" checkbox. *Id.* at 11; SOF & SOF Response ¶¶ 216-17. The updated form in effect since August 2020 added an "opt-out" checkbox, but still requires an individual to check the "opt-in" box for their address change request to be processed for voter registration purposes. SOF & SOF Response ¶ 220. In both iterations, the "opt-in" requirement violates Section 5. *See* Pls.' Mem. at 11-12; *see also League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1003 (W.D. Mo. 2018); *Stringer v. Pablos*, 274 F. Supp. 3d 588, 597 (W.D. Tex. 2017); *Action NC*, 216 F. Supp. 3d at 622.

Defendants do not dispute that both the pre- and post-August 2020 versions of the form require clients to check the "opt-in" box if they want their address update to also update their voter registration address. SOF & SOF Response ¶¶ 216-17. Nor do Defendants provide any evidence to rebut the fact that if the "opt-in" box is left blank—on *either* version of the form—

the address change request will not be forwarded to election officials for processing. *Id.* Rather, Defendants just argue that under the *current* version of the form, requiring someone to fill in the opt-in box is somehow not "an additional affirmative step" because DPS examiners are supposed to ensure that individuals complete one box or the other before accepting the form and that the online version of the form requires someone to check one of the boxes. *Id.*

Whatever DPS might expect its examiners to do, the gulf between DPS policy and examiners' NVRA compliance is well-established in the record, *see, e.g.*, SOF & SOF Response ¶¶ 239, 245, 247-48; Kelty Second Decl. Ex. 35 (Warne Dep. 83:1-3), so there is no reason to believe that examiners will ensure that the voter registration checkboxes are completed on every change of address application. *See* Defs.' Opp. at 13 (stating that "human errors . . . are occasionally made by staff" at DPS but are unavoidable). Nor should DPS employees have to shoulder this burden, because Section 5 requires that *every* change-of-address application must automatically be treated as a change of address for voter registration purposes (*except* for those where someone has affirmatively opted out of changing their voter registration address). 52 U.S.C. § 20504(d). Thus, DPS's reliance on its examiners to "request that any incomplete portions be filled in before the examiner processes the applications," Defs.' Opp. at 9, is an unnecessary step that violates Section 5's mandate that changes of address for both driver's licensing and voter registration be part of a single, simultaneous transaction. *See Stringer*, 274 F. Supp. 3d at 595-96.

By failing to transmit all address change applications to election officials to process as voter registration address changes as the default process—and only transmitting those where someone has affirmatively asked for their address change to apply to both their license and voter registration—DPS violates Section 5.

B. The State's policy of denying voter registration services to DPS clients without a Social Security, driver's license, or non-driver ID card during covered transactions violates Section 5.

There is no dispute that if a DPS client does not have a Social Security, driver's license, or non-driver ID, DPS does not allow them to register to vote during covered transactions at DPS, and instead requires them to go to a county auditor's office to sign an affidavit attesting to their eligibility to vote before being permitted to register. *See* Pls.' Mem. at 12-13; Defs.' Opp. at 11. This violates Section 5. Defendants' arguments that their policy is excused by South Dakota law and the Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 *et seq*., are incorrect as a matter of law.

Section 5 requires that driver's licensing offices allow individuals who meet eligibility requirements to attest to that eligibility on the application, renewal, or change of address form itself under penalty of perjury. Pls.' Mem. at 12; *see also* 52 U.S.C. § 20504(c)(2)(C); *Fish v. Kobach*, 840 F.3d 710, 722 (10th Cir. 2016). Section 5 thus bars the State from imposing additional barriers to registration for individuals who can provide this attestation on the driver's license form *during* a covered transaction at motor vehicle offices. *Fish*, 840 F.3d at 722. By denying eligible individuals who have not been issued a Social Security number, driver's license number, or nondriver identification number the ability to attest to their eligibility on the form itself during covered transactions—requiring them instead to register at another office at another time—the State's affidavit policy violates Section 5.

Defendants argue first that South Dakota law, S.D. Codified Law § 12-4-5.4 and S.D. Admin. Rule 5:02:03:21, requires them to require driver's license applicants to sign affidavits at county auditor's offices and not during Section 5 covered transaction. Defs.' Opp. at 11-12. But any state law that conflicts with the NVRA's requirements is preempted under the Elections

Clause, U.S. Const. art. 1, § 4, cl. 1, and the Supremacy Clause. *See Gonzalez v. Arizona*, 677 F.3d 383, 403 (9th Cir. 2012) (en banc), *aff'd sub nom.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013) (Elections Clause); *Fish*, 840 F.3d at 732 (same); *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 912 F. Supp. 976, 984 (W.D. Mich. 1995) (Supremacy Clause). Because the South Dakota statute and regulation plainly conflict with Section 5's requirement that eligibility attestations occur *on* the driver's license form *during* a covered transaction, they are preempted by Section 5.

Defendants next argue that HAVA compels their affidavit policy. Defs.' Opp. at 11-12. HAVA does not trump the NVRA and, in any event, Section 5's eligibility attestation requirement and HAVA's voter identification provisions are not in conflict. Defendants cite HAVA for the proposition that "a person registering to vote must provide a driver's license number or the last four digits of their social security number for identification purposes." *Id.* at 11 (citing 42 U.S.C. § 15483(a)(5)(A)). But Defendants' very next sentence contradicts this proposition, as they note that the cited provision of HAVA *also* provides that for anyone lacking that information, a state may assign a unique numerical identifier. *Id.* It is for just this reason that the Ninth Circuit, in *Gonzalez*, rejected Arizona's similar HAVA defense. *See Gonzalez*, 677 F.3d at 401-03. As *Gonzalez* holds, HAVA does not allow states to "impose additional requirements on applicants for voter registration" than those required by the NVRA and that HAVA itself precludes such an interpretation. *Id.* at 401-02. HAVA's savings clause confirms this; it "provides that except for the changes to the NVRA specified in HAVA, 'nothing in this Act may be construed to authorize or require conduct prohibited under [a number of federal laws, including the NVRA], or to supersede, restrict, or limit the application of [those federal laws].'" *Id.* at 402 (citing 42 U.S.C. § 15545(a)). Because HAVA did not alter Section 5's eligibility

attestation requirement, HAVA does not justify a violation of that provision. Accordingly, Defendants' HAVA defense must fail.[3]

For these reasons, Defendants' undisputed policy of denying eligible voters without a Social Security, driver's license, or non-driver ID number the ability to attest to their eligibility to vote on their voter registration form at DPS violates Section 5.

C. There is no genuine dispute that local driver's licensing offices frequently mishandle and misdirect voter registration applications.

Because DPS cannot credibly deny the ample record evidence of the agency's past and continuing failures to correctly process voter registration applications received at driver's licensing offices, DPS tries instead to downplay this evidence by offering the conclusory assertions that these problems are "not systemic" or result from "human errors" or "training errors." Defs.' Opp. at 13. The uncontroverted evidence speaks for itself: DPS's longstanding and recurring problems transmitting voter registration applications to appropriate election officials within statutory deadlines are well-known to Defendants and county officials throughout South Dakota, *see* Pls.' Mem. at 13-14, and cannot be explained away as the product of occasional error.

The Secretary of State's Rule 30(b)(6) designee testified that recurring problems with DPS, since at least 2018, have included DPS employees sending applications to the wrong county auditors' office, entering incorrect or old addresses for applicants into the TotalVote system, and in some instances failing to submit completed applications to county officials at all.

[3] In *Gonzalez*, Arizona, like Defendants, cited the Sixth Circuit's decision in *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), to argue that states may require Social Security numbers. The *Gonzalez* court rejected that as a "misreading" of *McKay*, finding that "*McKay* . . . does not support the proposition that a state may condition registration on an applicant's provision of information that is not requested on the Federal Form." 677 F.3d at 400 n. 26.

See SOF & SOF Response ¶¶ 105-06; *see also* Kelty Second Decl. Ex. 35 (Warne Dep. 94:21-95:2, 327:1-3) (testifying that DPS offices send applications to the wrong county "a few times every couple of weeks" and confirming there were "a lot of quality control issues" at DPS in 2018). While Defendants concede that significant issues existed in the 2020 election, they suggest that Ms. Warne, the Secretary's designee, did not admit to problems in the 2020 election. In her quoted deposition testimony, Ms. Warne testified only that there was an "improvement" since 2018, not that DPS's compliance problems had been resolved. Kelty Second Decl. Ex. 35 (Warne Dep. 327:9-328:5). She further testified, when pressed, that at least one systemic issue—DPS examiners failing to input the correct application date into TotalVote—persisted through at least March 2020. Kelty Second Decl. Exs. 35 (Warne Dep. 335:10-339:20), 36 (Warne Dep. Ex. 45). Because the Secretary of State's office could not explain the cause of the raft of compliance problems in 2018, why they might have improved during 2020 other than voter enthusiasm and increased use of mail registration during the pandemic, or whether known issues such as the TotalVote application date issue were ever resolved, Second Kelty Decl. Ex. 35 (Warne Dep. 327:4-8, 328:6-329:1, 339:11-340:9), there is no assurance that these problems will not recur in the 2022 election or future elections. The uncontroverted evidence of past compliance issues is enough to establish a Section 5 violation. *See Louisiana*, 196 F. Supp. 3d at 630, 676 (granting summary judgment for past NVRA violations).

D. DPS has failed to ensure that the DPS-contracted driver's license issue sites serving tribal communities provide mandatory voter registration services.

Non-DPS "issue sites" operated by other entities under contract with DPS (hereafter, "Issue Sites") are particularly prevalent in Indian Country. Pls.' Mem. at 14-15; SOF & SOF Response ¶ 233. Individuals can apply for, renew, and change their address on their driver's license or nondriver ID card at these sites. *Id.* at 14. Defendants do not genuinely dispute that,

unlike for DPS employees, there is no set training for Issue Site employees on the voter registration services required by the NVRA or that DPS has no formal way to be notified if Issue Sites are not properly collecting or transmitting voter registration forms. SOF & SOF Response ¶ 231.

Plaintiff Hoksila White Mountain's experience at the McIntosh Issue Site illustrates that DPS's lack of oversight over Issue Sites results in voters being denied the ability to register to vote during Section 5-covered transactions. In 2017, Mr. White Mountain was denied the opportunity to register to vote by the McIntosh Issue Site and instead was redirected to another office to register. SOF ¶ 45. Defendants' only response is that the driver's license application contains voter registration questions—but they offer no evidence to contradict Mr. White Mountain's sworn testimony about his experience. SOF Response ¶ 45.

Nor have Defendants offered any evidence to rebut Plaintiffs' showing that DPS fails to adequately monitor or train Issue Sites, instead merely describing DPS's general policies and stating that DPS relies on individual voters to report problems with Issue Sites not transmitting their application. SOF Response ¶ 228). Because DPS cannot outsource its NVRA obligations to Issue Sites (or its enforcement obligations to individual voters), it remains responsible for ensuring that the contracted Issue Sites are complying with Section 5 through adequate training, enforcement, and oversight. *See United States v. New York*, 255 F. Supp. 2d 73, 79 (E.D.N.Y. 2003) (holding that states cannot avoid NVRA liability by delegating responsibilities to local officials).

E. DPS's own Rule 30(b)(6) designee testified that the agency does not monitor its own Section 5 compliance.

Although Defendants in their opposition brief offer the conclusory assertion that DPS monitors its own NVRA compliance, it does not dispute Plaintiffs' facts establishing lack of

oversight, including testimony from DPS's own Rule 30(b)(6) witness. *See* SOF Response ¶¶ 247-52 (admitting that "DPS does not track its own NVRA compliance," that "DPS expects SOS to notify it of errors made in processing voter registrations from DPS or other NVRA compliance issues," and that DPS "does not conduct any analysis" of voter registration data it reports to the Secretary of State). While it is undisputed that DPS relies on the Secretary of State for these functions, SOF & SOF Response ¶ 248, the Secretary of State does not perform these functions either. *See* Pls.' Mem. at 28-29, 32-34. This game of passing the buck, with no agency taking responsibility for DPS's Section 5 compliance, plainly violates DPS's obligations under Section 5 in the absence of meaningful enforcement or oversight by the Secretary of State.

III. THE UNDISPUTED FACTS SHOW THAT DSS AND DLR HAVE VIOLATED AND CONTINUE TO VIOLATE SECTION 7 OF THE NVRA.

A. Defendants have failed to rebut Plaintiffs' evidence of DSS's past and current Section 7 violations.

1. *Before July 2020, DSS failed to offer voter registration forms to clients who did not answer the voter preference question, in violation of Section 7.*

Section 7 requires that a public assistance agency present the voter preference question to every client during covered transactions (applications, renewals, recertifications, and changes of address), and that the agency provide a voter registration form to every applicant unless "the applicant, in writing, declines to register to vote." 52 U.S.C. § 20506(a)(6)(A). Defendants do not dispute that, before July 2020, DSS required clients to affirmatively opt in on their voter preference question form in order to receive a voter registration form. Defs.' Opp. at 18. Nor do they genuinely dispute, or provide evidence to rebut the fact, that until July 2020, DSS had no agency-wide policy on what to do if a client left the voter preference question blank and did not check the opt-in box. SOF Response ¶ 255 (only disputing one of several sources establishing this fact). DSS's Rule 30(b)(6) designee testified that in July 2020, DSS established a uniform

procedure for handling that situation since none previously existed. Second Kelty Decl. Exs. 33 (Miller Dep. 45:8-49:15), 34 (Miller Dep. Ex. 3). Specifically, beginning in July 2020, DSS "changed the procedure or clarified the procedure to make sure that benefits specialists know if the question is not answered, then they need to provide a voter registration form," and "decided to provide that service to applicants when they don't answer the question." Second Kelty Decl. Ex. 33 (Miller Dep. 47:11-48:10, 48:17-49:8).

Because there is no genuine dispute that DSS's failure to require benefits specialists to provide voter registration forms to individuals who failed to affirmatively opt in or otherwise answer the voter preference question, this Court can find as a matter of law that DSS violated Section 7. The textual analysis employed by most courts adheres to Section 7's plain terms by concluding that "an applicant's failure to check either the 'YES' or 'NO' box on the declination form does not constitute a declination 'in writing.'" *Valdez v. Squier*, 676 F.3d 935, 945-46 (10th Cir. 2012); *see also Action NC*, 216 F. Supp. 3d at 640 (noting that "failure to check either box, thereby leaving the form blank is not consistent with the ordinary meaning of the phrase 'in writing,'" and adopting the Tenth Circuit's analysis that "[t]here is no indication in the Act that this phrase should 'carry a specialized—and indeed, unusual—meaning.'") (quoting *Valdez*, 676 F.3d at 946).[4] This Court should similarly find that an applicant's failure to answer the voter preference question is not a valid declination "in writing."

Since there is no dispute that until 2020, DSS's policy violated Section 7, summary judgment on this issue should be granted.

[4] This Court should reject the Fifth Circuit's minority view adopted in *Scott v. Schedler*, 771 F.3d 831, 840 (5th Cir. 2014) as unpersuasive for the same reasons articulated by the court in *Action NC*. *See Action NC*, 216 F. Supp. 3d at 640.

2. DSS has failed to ensure that its employees provide assistance to clients in registering to vote.

In response to Plaintiffs' argument that DSS fails to consistently provide the requisite level of voter assistance required by Section 7, 52 U.S.C. § 20506(a)(6)(C), Defendants point to some of DSS's new policies, *see* Defs.' Opp. at 21-24, but do not refute Plaintiffs' evidence that local DSS offices have failed to consistently provide adequate assistance to individuals, including those who submit applications by mail. Nor do they refute the concrete examples of those failures presented by Plaintiffs to establish that point. Defs. SOF Response ¶¶ 294-99 (offering argument instead of contravening evidence). For example, while Defendants assert that DSS will reach out to individuals whose mailed applications are incomplete, the testimony from local offices cited by Defendants shows disparate practices within and between local offices. SOF ¶¶ 292-299. Nor do Defendants dispute that DSS's training on Section 7's equal assistance requirements was only added to DSS's staff training in April 2021, long after this lawsuit was filed. SOF ¶ 352. Instead, Defendants offer irrelevant data on voter registration rates in some South Dakota counties, which in no way refutes the evidence of NVRA compliance problems in those counties. The deposition testimony they cite supports Plaintiffs, not Defendants, and DSS offers no other contravening evidence to support its contention that adequate assistance is provided. DSS has failed to meet their burden of disproving the record evidence plaintiffs have set forth.

3. DSS provides no voter registration services during some covered renewal, recertification, and change of address transactions.

DSS's undisputed failures to ask the mandatory voter preference question (1) to any public assistance clients who change their address in any manner, SOF Response ¶ 270; (2) during administrative renewals of medical assistance, *id.* ¶ 281; and (3) to individuals who

complete a six-month eligibility report to maintain eligibility for TANF and SNAP benefits, *id.* ¶¶ 281-86, all violate Section 7. Pls.' Mem. at 19-21.

Defendants assert that "[t]he voter preference question is not required to be asked for a change of address by phone," Defs.' Opp. at 25 (citing 52 U.S.C. § 20506(a)(4)(A), 6(A)-(C)), but that argument is not supported by the language of the statute. Section 7 requires, without exception, that public assistance offices provide a voter preference form during every covered transaction, 52 U.S.C. § 20506(6)(B)(i). Telephonic and other remote transactions, including changes of address, are not excepted from this requirement. *See Ga. State Conference of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1330-32 (N.D. Ga. 2012) (rejecting state's argument that NVRA's requirements apply only to in-person transactions); *Action NC*, 216 F. Supp. 3d at 622 (finding plaintiff alleged "a cognizable claim that Section 7 applies to remote as well as in-person transactions"); *Ferrand v. Schedler*, No. 11-cv-926, 2012 U.S. Dist. LEXIS 61862, at *12, *16 (E.D. La. 2012) (finding that "[t]he clear language of the statute implies that voter registration applications should be provided during all transactions, both remote and in person" and holding "that a mandatory voter registration agency must distribute with each application, recertification, renewal, or change of address a voter registration form as required in Section 7(a)(6) of the NVRA regardless of whether the transaction is done in person or remotely"). DSS's admitted failure to present the voter preference question to voters who engage in telephonic and other remote transactions violates Section 7.

Next, Defendants concede that they offer no voter registration services with administrative renewals for medical assistance, arguing only that since these renewals do not require forms, DSS is not required to offer voter registration services in connection with that process. Defs.' Opp. at 26. Section 7 requires voter registration services with all renewals, 52

U.S.C. § 20506(a)(6)(A); as there is no dispute that an administrative renewal is, indeed, a renewal of benefits, DSS's failure to provide voter registration services in this context violates Section 7.

Defendants also concede that they offer no voter registration services in connection with the six-month eligibility report forms for SNAP/TANF benefits; they simply deny that the six-month report is a recertification or renewal because "[c]lients are not required to list everything again and report everything." Defs.' Opp. at 26. DSS's Rule 30(b)(6) designee testified, however, that completion of the form is required to maintain benefits eligibility and that information provided in that form could lead to revocation of benefits. SOF & SOF Response ¶¶ 282-84. While this process may not amount to the "full" recertification that DSS conducts annually, it indisputably has the purpose and effect of determining an individual's continuing eligibility for benefits. *Id.* Thus, Section 7 obligates DSS to provide voter registration services with these renewal transactions. Its failure to do so is a Section 7 violation.

4. DSS has failed to adequately address recurring problems with local offices or to otherwise monitor or enforce agency-wide compliance with Section 7.

Defendants do not dispute past and ongoing noncompliance by local DSS offices with Section 7's requirement that they transmit completed voter registration applications within statutory deadlines, SOF & SOF Response ¶¶ 312, 319, 323-25. Nor do they dispute that DSS has no meaningful way to identify and respond to compliance issues by its local offices. The agency does not track or log the transmittal or delivery of voter registration applications to county auditors or otherwise confirm whether local offices are following agency-wide policies. *Id.* ¶¶ 321, 325-27. While more DSS local office evaluations have, since January 2021, included voter registration questions, there is no dispute that local offices' performance before then was never considered compliant with the NVRA. *Id.* ¶¶ 255-57, 259-60, 290, 293, 298-99, 309, 312.

Even since incorporating these questions last year, DSS has never tabulated or reviewed the responses. *Id.* ¶¶ 329-33.

This speaks to the broader acknowledgment by DSS that the agency has never engaged in meaningful monitoring or enforcement of local offices' NVRA compliance, nor endeavored to use data to identify or respond to recurring compliance issues. SOF & SOF Response ¶¶ 333-38, 340-42. Relatedly, there is no genuine dispute that DSS never offered agency-wide training or guidance on NVRA compliance to its own employees before July 2020. *Id.* ¶¶ 344-45. While employees may have received on-the-job training before then, DSS never "provided written guidance or instruction to local office supervisors on how to train their employees on voter registration and the NVRA" before the initial training adopted in July 2020. *Id.*

For all the reasons explained above, DSS has failed in numerous ways to comply with Section 7, and the Court should rule as a matter of law that DSS has violated the law.

B. By not providing voter registration services during covered TANF application transactions, DLR is violating Section 7.

DLR provides public assistance benefits and services under TANF and other programs.[5] With respect to TANF, Defendants seek to avoid DLR responsibilities for voter registration by asserting that DSS is the state agency primarily responsible for administering TANF, and

[5] Plaintiffs acknowledge that sufficient factual dispute exists over whether DLR's role in the SNAP program involves any covered transactions that would obligate it to provide voter registration services. Plaintiffs also concede, for purposes of the present motion, that the Court and parties would benefit from further development of the record to clarify the nature and scope of benefits and services DLR administers under the Workforce Innovation and Opportunity Act ("WIOA"), as certain ambiguities and inconsistencies in the existing record prevent a clear determination on summary judgment that these benefits are sufficiently akin to TANF and other public assistance programs to subject them to Section 7's requirements. Accordingly, with respect to DLR, Plaintiffs request that the Court limit its summary judgment decision to whether DLR is a covered agency under Section 7 based on its role in administering TANF benefits and services. Plaintiffs ask to reserve the right to raise the SNAP and WIOA programs at trial.

contending that DLR does not "administer" TANF or "determine eligibility for TANF applicants." Defs.' Opp. at 35. Which agency "administers" or determines eligibility for TANF is beside the point: Section 7 applies to "all offices in the State that *provide* public assistance," 52 U.S.C. § 20506(a)(2)(A) (emphasis added), and there is no dispute that individuals can commence a TANF application at DLR and, once determined eligible by DSS, can receive TANF services at DLR. In short, regardless of whether its role is more limited than DSS's, DLR "provides" benefits and services under TANF and must therefore comply with Section 7 for those covered transactions that occur at DLR.[6]

Defendants' own public statements and admissions made in this lawsuit refute their contention that DLR does not "participate in the administration" of TANF benefits. *See* SOF ¶¶ 362-65. Until long after this lawsuit was filed, DLR's own website stated that DLR "administers this program with the Department of Social Services" and specifically directed residents of non-reservation communities to contact DLR "[i]f you would like to know more about TANF." *Id.* ¶ 362. Defendants' *post hoc* efforts to quietly erase this language from their website over a year into this litigation and only after facing questions on it at DLR's Rule 30(b)(6) deposition in September cannot change the undisputed fact that DLR held itself out as providing TANF benefits or services in some form. *Id.* ¶ 363. At minimum, there is no dispute that DLR provides TANF services to TANF recipients under contract with DSS, *see* SOF Response ¶ 364, nor is there any dispute that individuals may initiate the TANF application

[6] Of course, even assuming that Defendants' assertion that DLR does not process renewals or changes of address for TANF is correct, which need not be resolved here, that only means that DLR has no obligation to provide voter registration services in connection with *those* transactions. At minimum, it must provide voter registration services for the transactions that *do* occur at DLR—including an individual's completion of the Form 201 application for TANF benefits at DLR.

process and lock in their TANF application date at DLR. This is enough to subject DLR to Section 7's requirements.

Defendants concede that individuals may complete Form DSS-EA-201 ("Form 201"), entitled "Application for Temporary Assistance for Needy Families." SOF Response ¶ 364. Defendants also admit that an individual's completion of Form 201 "starts the application process for receipt of TANF benefits." Kelty Second Decl. Ex. 47 (Response by Marcia Hultman to Pls.' Requests for Admission No. 7). It is also undisputed that the date an individual completes Form 201 at a DLR office is the effective date of the individual's TANF application, even though the full application must be completed at DSS. SOF & SOF Response ¶ 364. Even if Defendants' latest description of Form 201 as a "pre-application" in their opposition papers is correct, there is no dispute that it is a meaningful part of the TANF application process for those who complete it.

In arguing that DLR is not a voter registration agency, Defendants repeat arguments from their pending Motion to Dismiss, relying on the DOJ guidance on the NVRA and the South Dakota statutes and rules governing the administration of TANF and SNAP. Defs.' MSJ Opp. at 31-32. As fully explained in Plaintiffs' opposition to that motion, those arguments must fail because (1) the informal DOJ guidance cited by Defendants does not purport to limit the NVRA's broad statutory scope, and (2) the NVRA preempts any conflicting state law. Pls.' MTD Opp. at 19-21. South Dakota's failure to designate DLR as a voter registration agency violates Section 7, 52 U.S.C. § 20506(a)(2)(A); it does not excuse or justify it.

Defendants also argue that because DLR provides unemployment benefits, it is not a mandatory voter registration agency under Section 7, since Section 7 permits but does not require states to designate "unemployment compensation offices" as voter registration agencies.

Defs.' Opp. at 36-37 (citing 52 U.S.C. § 20506(a)(3)(B)(i)). But Defendants' argument is a non sequitur; Plaintiffs do not argue that DLR is a mandatory voter registration agency because it happens to administer unemployment. Instead, DLR's provision of public assistance (in the form of TANF and other benefits and services)—not unemployment—require DLR to provide voter registration services in connection with those covered programs. Whether DLR's unemployment offices may also opt to provide voter registration services is immaterial to Plaintiffs' case.

With respect to DLR's role in the TANF application process, Section 7 requires that DLR be designated as a voter registration agency and that it provide voter registration services in connection with those documents. Because the State has failed to designate DLR as a public assistance agency—and because DLR is failing to provide voter registration services in connection with Form 201—Defendants are violating Section 7.

IV. THE SECRETARY OF STATE HAS FAILED TO FULFILL ITS COORDINATION AND ENFORCEMENT OBLIGATIONS TO ADDRESS DEFENDANTS' PAST AND CONTINUING NVRA VIOLATIONS.

Under both the NVRA and South Dakota law, the South Dakota Secretary of State ("the "Secretary"), as the chief state election official, bears the ultimate responsibility of ensuring that the State, through its relevant offices and agencies, complies with the NVRA. *See* 52 U.S.C. § 20509; S.D. Codified Laws § 12-4-33; *see also* SOF & SOF Response ¶¶ 47-49. The Secretary's coordination responsibilities include the "'harmonious combination'—or implementation of enforcement—of [the NVRA] on behalf of [the State]" and each of the state's relevant agencies. Pls.' Mem. at 28 (citing *Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008)). Accordingly, the Secretary of State's office ("SOS") must ensure that agencies covered by Sections 5 and 7 understand their NVRA obligations, and that the State identify, address, and remedy NVRA noncompliance.

There are and have been systemic Section 5 and Section 7 violations occurring throughout the State. *See supra* Sections II-III. SOS's passivity in the face of these violations is well-established in the record, and wholly inadequate to meet SOS's coordination obligations. There is no dispute, for example, that SOS fails to monitor or analyze voter registration data that would enable it to oversee NVRA compliance, *see* SOF & SOF Response ¶¶ 125-26, 188-91; fails to even verify the accuracy of the data it is required to report to the EAC, *id*. ¶ 184; and cannot explain discrepancies in its own reported data, *id.* ¶¶ 192-96. By assigning a single agency code to all public assistance agencies (DSS, DLR, and the South Dakota Department of Health) for use on SOS-issued voter preference and voter registration forms, SOS renders it impossible for the State to sufficiently assess each agency's compliance. *Id.* ¶¶ 199-211. Until Plaintiffs brought it to the Secretary's attention, the Secretary had never analyzed voter registration data for DSS and was unaware of the drastic decline in voter registration applications generated at DSS since 2002, as reflected in the data. *Id.* ¶ 139. SOS has never trained DSS employees on their NVRA obligations, nor has it reviewed or weighed in on the training materials developed by DSS in July 2020 and updated in April 2021. SOF & SOF Resp. ¶¶ 146, 152-54, 316, 344-45, 347-48, 355-57.

With respect to the State's Section 5 compliance, SOS does not actively monitor or enforce DPS's compliance with the NVRA. SOF & SOF Resp. ¶ 250-52. Neither does DPS, since it expects SOS to do so. *See supra* Section II.E.; SOF & SOF Response ¶¶ 104, 248. The State can't have it both ways. For example, while SOS admits that DPS sends voter registration applications to the wrong county "a few times every couple of weeks," *id.* ¶ 110, it does not know how often, or even if, these issues are corrected, *id.* ¶ 111; does not know whether DPS is following SOS's "suggested procedure" for correcting errors, *id.* ¶ 108; and has failed to follow

up with DPS when significant compliance issues have come up to see if they have been resolved, *id.* ¶ 112-14, 117. SOS has also failed to seek or collect data on the total number of covered transactions that occur at covered agencies. This data would allow the State to assess the degree to which state agencies are offering mandatory voter registration services during these transactions. *Id.* ¶ 139.

These are just a small sample of the number of problems that the Secretary either knows about—or with any reasonable inquiry or analysis, should know about—problems that his office bears the ultimate responsibility for redressing. Defendants protest that because Plaintiffs' Amended Complaint did not specifically attribute all of these problems to the Secretary, this Court cannot consider them now. Defs.' Opp. at 29. Defendants are mistaken. The touchstone inquiry is whether the Secretary of State was given fair notice of Plaintiffs' claims through their Amended Complaint. *See WireCo Worldgroup, Inc. v. Liberty Mut. Fire Ins. Co.*, 897 F.3d 987, 992 (8th Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *Doe v. Grinnell Coll.*, 473 F. Supp. 3d 909, 932 (S.D. Iowa 2019) (same). Of course he was. Plaintiffs' Notice Letter, incorporated by reference in and attached as an exhibit to the Amended Complaint, was addressed to Secretary Barnett and expressly asked him, "as South Dakota's Chief Election Official, to act now to ensure that South Dakota's public assistance and DPS offices perform their federally-mandated responsibility to provide voter registration services." SOF ¶ 62. The Secretary is aware of his coordination obligations under the NVRA and State law, so the notice of the full range of violations described in the Notice Letter and Amended Complaint were more than sufficient notice of the claims for which his office could be held liable.

For these reasons, and those explained in fuller detail in Plaintiffs' opening brief, the Secretary is liable for his office's role in contributing to and failing to meaningfully address the State's systemic noncompliance with Sections 5 and 7.

CONCLUSION

The substantial record before the Court is more than sufficient to establish that the State of South Dakota, through Defendants, has violated and continues to violate the State's obligations under the NVRA to provide voter registration services at driver's license and public assistance offices. The uncontroverted evidence shows that:

- DPS has violated Section 5 of the NVRA by (1) failing to follow the statute's change of address, eligibility attestation, and transmittal deadline requirements; (2) failing to ensure that DPS-contracted Issue Sites provide voter registration services in compliance with Section 5; and (3) failing to monitor or enforce its own offices' compliance with Section 5;
- DSS has violated Section 6 of the NVRA by (1) failing consistently to provide the required voter preference form during all covered transactions, including remote transactions, administrative renewals of medical assistance benefits, and the six-month eligibility report process for TANF and SNAP recipients; (2) failing to ensure that DSS's local offices comply with Section 7's equal assistance requirements; (3) failing to address local DSS's office failures to timely transmit voter registration applications to county election officials; and (4) otherwise failing to monitor or enforce its own compliance with Section 7, including failing to provide any agency-wide training on the NVRA to employees before 2020;

- DLR has violated Section 7 by failing to provide voter registration services during covered transactions, including the preliminary TANF application that clients may complete at DLR offices; and
- The Secretary of State, as the chief state election official charged with statewide NVRA coordination, has both contributed to and failed to address the State's systemic Section 5 and Section 7 violations, in dereliction of his NVRA obligations.

For these reasons, Plaintiffs respectfully request that the Court hold that Defendants have violated Sections 5 and 7 of the NVRA, grant their Motion for Summary Judgment, and set a separate schedule for the Parties to brief the Court on the appropriate remedies for Defendants' violations.

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Respectfully submitted,

/s/ Terry Pechota
Terry Pechota
PECHOTA LAW OFFICE
1617 Sheridan Lake Road
Rapid City, SD 57702
(605) 341-4400
tpechota@1868treaty.com

Jacqueline De Leon*
Kim Gottschalk*
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760
jdeleon@narf.org
jeronimo@narf.org

Samantha Kelty*
NATIVE AMERICAN RIGHTS FUND
1514 P St., NW, Suite D
Washington, D.C. 20005
(202) 785-4166
kelty@narf.org

Brenda Wright*
DEMOS
80 Broad Street, 4th Floor
New York, NY 10004
(212) 633-1405
bwright@demos.org

Joseph J. Wardenski*
WARDENSKI P.C.
195 Plymouth Street, Suite 519
Brooklyn, NY 11201
(347) 913-3311
joe@wardenskilaw.com

* Admitted *pro hac vice*

Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation under Local Rule 7.1(B)(1). The brief contains 9,494 words, as calculated using the word count feature in Microsoft Word for Mac version 16.59 (Office 365).

/s/ Terry Pechota
Terry Pechota

CERTIFICATE OF SERVICE

I certify that on April 8, 2022, I electronically filed and served on all counsel of record the foregoing Plaintiffs' Reply Brief in Support of Motion for Summary Judgment using the Court's CM/ECF system.

/s/ Terry Pechota
Terry Pechota