

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ROSEBUD SIOUX TRIBE and
their members, OGLALA SIOUX TRIBE and
their members, and LAKOTA PEOPLE'S
LAW PROJECT, Kimberly Dillion, 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.

Civil Action No. 5:20-cv-05058-LLP

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending lawsuit. This matter implicates the interpretation and application of the National Voter Registration Act (NVRA), 52 U.S.C. § 20501 *et seq.*, a statute over which Congress accorded the Attorney General enforcement authority. *See* 52 U.S.C. § 20510(a). The United States has a

substantial interest in ensuring that the NVRA is properly interpreted and uniformly enforced around the country.¹

The United States files this Statement for the limited purpose of articulating its views of Sections 5 and 7 of the NVRA, 52 U.S.C. §§ 20504, 20506, on which Plaintiffs rely in their motion for summary judgment and Defendants rely in their motion to dismiss. It takes no position on any other issue before this Court.

I. BACKGROUND

A. Procedural Background

Plaintiffs sued the South Dakota Secretary of State and three state agencies—the Department of Public Safety (“DPS”), Department of Social Services (“DSS”), and Department of Labor and Regulation (“DLR”)—alleging violations of Sections 5 and 7 of the NVRA. Pending before the Court are Defendants’ Motion to Dismiss (ECF No. 73) and Plaintiffs’ Motion for Summary Judgment (ECF No. 76). Relevant to this Statement are:

- Plaintiffs’ claim that DPS violates Section 5(d) of the NVRA by requiring individuals to check a box on a DPS change of address form affirmatively stating that their address change is also for voter registration purposes. Pls.’ Mem. 10-11, ECF No. 77;
- Plaintiffs’ claim that DPS violates Section 5 by refusing to provide voter registration services to driver’s license applicants who do not have an existing South Dakota driver’s license or social security number. Pls.’ Mem. 12-13, ECF No. 77;
- Plaintiffs’ claim that South Dakota violates Section 7 by failing to provide voter registration opportunities to persons applying for public assistance services who have not indicated whether they wish to register to vote on the application for public assistance. Pls.’ Mem. 18-19, ECF No. 77;

¹ The United States has taken numerous enforcement actions under the NVRA and has also filed statements of interest or amicus briefs regarding its views on the NVRA. Various examples of these cases, settlements and briefs, including those relating to Sections 5 and 7 of the NVRA, are collected at <http://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act>.

- Defendants’ assertion that Department of Justice guidance listing public assistance programs subject to mandatory designation under the NVRA is comprehensive and should be read to exclude other programs from the definition of “public assistance.” Defs.’ Mem. 12, ECF No. 74; and
- Defendants’ apparent assertion that because DLR administers certain programs subject to “voluntary” designation under the NVRA, it cannot be designated as a mandatory voter registration agency even if it also provides public assistance benefits (which trigger mandatory designation). Defs.’ Mem. 12-13, ECF No. 74.

B. Sections 5 and 7 of the NVRA

Congress passed the NVRA to “establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” and “ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b). The NVRA thus requires States to provide three methods of voter registration for Federal elections: registration through motor vehicle authorities; registration by mail; and registration through State-designated voter registration agencies. *See* 52 U.S.C. §§ 20504–20506; *Young v. Fordice*, 520 U.S. 273, 275 (1997). States covered by the NVRA must “establish procedures” to provide registration through each of these methods “notwithstanding any other Federal or State law, [and] in addition to any other method of voter registration provided for under State law[.]” *Id.* 52 U.S.C. § 20503(a). The State of South Dakota is covered by the NVRA.

This case involves registration through DPS (the State’s motor vehicle authority), and DSS and DLR—agencies that plaintiffs allege provide public assistance that would make them subject to mandatory designation as “voter registration agencies” under the NVRA.

1. Section 5 of the NVRA

Section 5 of the NVRA—entitled “Simultaneous application for voter registration and application for motor vehicle driver’s license”—requires each state motor vehicle driver’s license application, including any renewal application, to serve as an application for voter

registration with respect to elections for federal office unless the applicant fails to sign the voter registration application. 52 U.S.C. § 20504(a)(1), (c)(1). The NVRA defines “motor vehicle driver’s license application” to include any personal identification document issued by a state motor vehicle authority. 52 U.S.C. § 20502(3). The voter registration application portion of an application for a state motor vehicle driver’s license must include a statement regarding state eligibility requirements and an attestation that the applicant meets each such requirement, and must require a signature under penalty of perjury. 52 U.S.C. § 20504(c)(2)(C).

The voter registration portion of an application for a state motor vehicle driver’s license may require only the minimum amount of information necessary to prevent duplicate voter registrations and to enable state election officials both 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).

In addition, Section 5 requires that any change of address form submitted under state law for purposes of a state motor vehicle driver’s license must also serve as notification of a changed 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). Congress crafted the change-of-address subsection to keep voter “rolls current through contact with licensees who change addresses,” while allowing registrants to “opt out” of updating their voter registration address because “the requirements of residency pertaining to driver’s licenses may vary from those pertaining to voting.” S. REP. NO. 103-6, at 5; H.R. CONF. REP. NO. 103-9, at 9.

State motor vehicle authorities must transmit the completed voter registration portion of a driver’s license application to appropriate state election officials within certain timeframes. 52 U.S.C. § 20504(c)(2)(E), (e). The NVRA contemplates that it is the job of those election

officials, and not motor vehicle authority employees, 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).

2. Section 7 of the NVRA

Under Section 7, States must designate as voter registration agencies all offices in the State that provide either public assistance or State-funded programs primarily serving persons with disabilities. 52 U.S.C. § 20506(a)(2)(A)-(B). Designated voter registration agencies that provide services or assistance must distribute a voter registration form with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance, unless the applicant, in writing, declines to register to vote. *Id.* § 20506(a)(6)(A). In addition, such mandatory voter registration agencies must provide applicants with a form—often called a “voter information” form—that includes this question: “If you are not registered to vote where you live now, would you like to apply to register to vote here today?” *Id.* § 20506(a)(6)(B)(i). The form must have boxes for the applicant to check to indicate the applicant’s intention to register or not. *Id.* § 20506(a)(6)(B)(iii). Failure to check either box is deemed a declination to register for purposes of receiving assistance in registration, but is not deemed a written declination to receive an application. *Id.*

In establishing these mandatory voter registration agency designations, “Congress rejected a system that would ‘permit States to restrict their agency program and defeat a principal purpose of this Act – to increase the number of eligible citizens who register to vote.’” *United States v. New York*, 700 F. Supp. 2d 186, 201 (N.D.N.Y. 2010) (quoting H.R. CONF. REP. NO. 103-66, at 19 (1993)). Congress designed the agency-based registration provisions “specifically to increase the registration of the poor and persons with disabilities who do not have driver’s licenses and will not come into contact with the other principal place to register under this Act

[motor vehicle agencies].” *Harkless v. Brunner*, 545 F.3d 445, 449 (6th Cir. 2008) (internal quotation omitted) (quoting H.R. CONF. REP. NO. 103-66, at 19 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 140, 144).

Section 7 also requires states to designate a second category of voter registration agencies, commonly known as “discretionary voter registration agencies” because states can choose which offices to designate. 52 U.S.C. § 20506(a)(3). The NVRA provides a non-exhaustive list of offices that can be designated as discretionary voter registration agencies, including public libraries, public schools, and unemployment compensation offices. *Id.*

The Department of Justice, pursuant to its responsibility for enforcing the NVRA, 52 U.S.C. § 20510(a), has provided guidance on its website in the form of “Questions and Answers” on NVRA requirements. <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>.

II. ARGUMENT

A. DPS’s Requirement that Customers Indicate Affirmatively that a Driver’s License Address Change is also for Voter Registration Purposes Violates Section 5 of the NVRA

DPS requires individuals who complete a DPS change of address form to check a box on that form affirmatively stating that their address change is also for voter registration purposes.

Defs.’ Mem. 7-11, ECF No. 93; Defs.’ Resp. to Pls.’ Statement of Undisputed Material Facts ¶ 214, ECF No. 94. That practice violates Section 5(d) of the NVRA.

Section 5(d) states in full:

Any 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) (emphasis added). Under this framework, the default rule is that motor vehicle change of address forms must also update a voter’s address for voter registration purposes. To overcome the default rule, the voter must “opt out.”²

South Dakota’s change of address procedure turns the NVRA upside down. It imposes an “opt-in” mandate—that is, in South Dakota, motor vehicle change of address forms *will not* update a voter’s address for registration purposes unless the voter states affirmatively that the change of address *is* for voter registration purposes. South Dakota’s practice thwarts Congress’s intent to keep voter registration “rolls current through contact with licensees who change addresses” while simultaneously allowing registrants to opt out of updating their voter registration address because “the requirements of residency pertaining to driver’s licenses may vary from those pertaining to voting.” S. REP. NO. 103-6, at 5; H.R. REP. NO. 103-9, at 9.

South Dakota defends its “opt-in” process by claiming that, because the form serves “multiple functions . . . some guidance as to the applicant’s intention for the application is necessary.” Defs.’ Mem. 10, ECF No. 93. Not so. The statute’s opt-out framework reflects Congress’s judgment as to how best to divine a voter’s intent. States are not free to override Congressional mandates. U.S. Const. art. I, § 4, cl. 1; *Arizona v. ITCA*, 570 U.S. 1, 7-9 (2013) (“*ITCA*”). If Congress intended for states to solicit additional “guidance” from applicants, Defs.’ Mem. 10, ECF No. 93, the statute would read differently. But it does not. And while states have some discretion in how to structure their forms, 52 U.S.C. § 20504(c), they cannot use that discretion to rewrite federal statutory requirements with which they disagree.

² To “opt out” is “[t]o choose not to participate in something.” *Opt out*, The American Heritage Dictionary of the English Language (online), <http://www.ahdictionary.com/word/search.html?q=opt+out> (last visited Apr. 2, 2022); *Opt out*, Black’s Law Dictionary (11th ed. 2019) (“To *choose* not to participate in (something).” (emphasis added)).

Courts must presume that “a legislature says in a statute what it means and means in a statute what it says there.” *Argus Leader Media v. U.S. Dep’t of Agric.*, 740 F.3d 1172, 1177 (8th Cir. 2014) (internal quotation omitted) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)). Thus, when a federal statute’s wording is unambiguous—as Section 5(d) is here—“this first canon is also the last: judicial inquiry is complete.” *Id.* This Court should find that DPS’s opt-in requirement violates Section 5 of the NVRA.³

B. DPS Must Not Deny a Voter Registration Opportunity to Applicants Who Do Not Already Have An Existing Driver’s License, ID card, or Social Security Number

DPS denies voter registration services to applicants for a South Dakota driver’s license or State ID card who do not already have an existing driver’s license, ID card, or social security number; those applicants are instructed to travel to a county auditor’s office to register to vote. Defs.’ Resp. to Pls.’ Statement of Undisputed Material Facts ¶ 222-223, ECF No. 94; Defs.’ Br. 12, ECF No. 93. That denial of services violates Section 5 of the NVRA.

Under Section 5, “[e]ach State motor vehicle driver’s license application (including any renewal application) . . . shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.” 52 U.S.C. § 20504(a)(1). By its terms, Section 5’s voter registration mandates apply to “each” covered DPS transaction. “Each” means every. *See Action NC v. Strach*, 216 F. Supp. 3d 597,

³ While no court has specifically opined on Section 5(d)’s meaning, that is likely because the statute’s plain language does not easily accommodate alternate meanings. In *League of Women Voters of Arizona v. Reagan*, 2018 WL 4467891, at *6 (D. Ariz. Sept. 18, 2018), the district court considered Arizona’s argument that failing to check the “Yes” box might equate to an indication that the change of address form was not meant for voter registration purposes. But the court did not rule on that question, instead acknowledging Arizona’s willingness to accept the plaintiffs’ position that the NVRA requires only an opportunity to opt out and crediting plaintiffs’ interpretation of the NVRA opt-out requirement as correct at the preliminary injunction stage of litigation.

634 (M.D.N.C. 2016) (finding that the word “each,” as used in the NVRA, is “unambiguous” and thus reflects “Congress’ intent to make the Act applicable to “each” and “any” covered transaction”).⁴ The NVRA therefore forbids DPS from denying voter registration opportunities to applicants who lack existing driver’s licenses, IDs, or social security numbers.

The State argues that it denies voter registration opportunities to certain DPS applicants to comply with a different federal statute, the Help America Vote Act of 2002, 52 U.S.C. § 20901 (“HAVA”), and with state law. Defs.’ Br. 11-12, ECF No. 93.⁵ The State is mistaken on both counts.

First, the State misapprehends HAVA. To be sure, Section 303(a)(5)(A)(1) of HAVA provides that voter registration applications for federal elections may not be accepted or processed without the applicant’s driver’s license number (in the case of an applicant who has been issued a current and valid license) or the last four digits of the applicant’s social security number. *Id.* § 21083(a)(5)(A)(1). But HAVA creates a “special rule” for applicants who lack those numbers, requiring that states assign those applicants a unique identifying number. 52 U.S.C. § 21083(a)(5)(A)(ii). Nothing in HAVA permits or requires DPS offices to deny NVRA-mandated voter registration opportunities to driver’s license applicants simply because they lack current licenses, ID cards, or social security numbers. Just the opposite is true. In such situations, DPS must offer the NVRA voter registration opportunity and transmit completed voter registration applications to appropriate elections officials so they may “assess the eligibility

⁴ See also *Georgia State Conference of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1329 (N.D. Ga.) (interpreting “each” as used in Section 7); *Ferrand v. Schedler*, 2012 WL 1570094, *9 (E.D. La. 2012), *vacated on standing grounds by Scott v. Schedler*, 771 F.3d 831 (5th Cir. 2014) (same).

⁵ The State cites to HAVA at Title 42 of the U.S. Code. Statutes related to voting and elections, including NVRA and HAVA, were recodified at Title 52 in 2014. This brief uses the updated Title 52 citations, but the statutory language remains the same.

of the applicant and . . . administer voter registration and other parts of the election process,” including assigning a unique identifying number under HAVA to those applicants if necessary. 52 U.S.C. § 20504(c)(2)(B).⁶

HAVA itself makes clear that nothing in its provisions is intended to restrict or limit application of the NVRA. 52 U.S.C. § 21145(a)(4). Hence, nothing in HAVA should be read to justify denying voter registration opportunities required by the NVRA, including to persons who currently lack driver’s licenses or social security numbers.⁷ Applicants need not and should not be turned away from applying for voter registration at DPS when they lack one of the relevant numbers.⁸

⁶ The State also appears to cite a related provision of HAVA, 52 U.S.C. § 21083(a)(5)(A)(iii), to justify its state-law procedure requiring voters to take an oath before the county auditor. Defs.’ Mem. 11-12, ECF No. 93. Again, the State misapprehends HAVA. Section 303(a)(5)(A)(iii) of HAVA, titled “determination of validity of numbers provided,” requires the State to “determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.” This HAVA subsection, which addresses requirements for statewide voter registration databases, does not give states free rein to create an additional hurdle for registrants who lack the requisite identification numbers. Instead, it requires the State to determine (as the title says) whether the numbers provided—if they are provided—are valid. The very next subsection, 52 U.S.C. § 21083(a)(5)(B), helps to make this possible by requiring data-sharing between the chief State election official, the State motor vehicle authority, and the Commissioner of Social Security.

⁷ HAVA provides that, “Except as specifically provided in section 21083(b) of this title [pertaining to “requirements for voters who register by mail”] . . . nothing in this chapter may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws: . . . (4) The National Voter Registration Act of 1993[.]” 52 U.S.C. § 21145(a)(4). “This language indicates Congress’s intent was to prevent HAVA from interfering with NVRA’s comprehensive voter registration system.” *Gonzalez v. Arizona*, 624 F.3d 1162, 1185 (9th Cir. 2010), *rev’d in part en banc on other grounds*, 677 F.3d 383 (9th Cir. 2012).

⁸ The NVRA, of course, “does not preclude States from deny[ing] registration based on information in their possession establishing the applicant’s ineligibility.” *ITCA*, 570 U.S. at 15 (quoting Br. for United States as *Amicus Curiae* 24) (internal quotation marks omitted). However, the mere non-possession of a driver’s license, ID card, or social security number alone should not lead to a presumption that an applicant is ineligible to register to vote, particularly given that Congress has accounted for that possibility.

Second, the State ignores the Elections Clause of Art. I, § 4. That Clause gives Congress “authority” to enact “regulations relating to ‘registration’” to vote in congressional elections. *ITCA*, 570 U.S. at 8-9 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). When Congress exercises that authority, as it has in the NVRA, the rules it enacts “supersede those of the State which are inconsistent therewith.” *Id.* at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)). It is true that under South Dakota law, applicants who lack a valid driver’s license number, state nondriver identification number, or a social security number must complete a statement attesting to the non-possession of those numbers on a form signed by the county auditor, and may only register to vote at the county auditor’s office. *See* SDCL 12-4-5.4; *see also* ARSD 5:02:03:21. Thus, the State argues, it must turn away DPS voter registration applicants who lack current driver’s licenses, State IDs, or social security numbers. But South Dakota’s requirement must yield to the need for compliance with federal law. Under the NVRA, the State cannot simply turn away these individuals.

That being said, as a remedial matter, the State’s interests may be reconcilable with its federal law obligations. For example, the NVRA requires the voter registration portion of the driver’s license application to include each eligibility requirement and an attestation that the applicant meets each requirement, requiring the applicant’s signature under penalty of perjury. 52 U.S.C. § 20504(c)(2)(C). South Dakota could thus add an attestation on its driver’s license forms “that the person does not have a valid South Dakota driver license, a South Dakota nondriver identification number, or a social security number,” SDCL 12-4-5.4; ARSD 5:02:03:21, provided that such a statement is “necessary to prevent duplicate voter registrations”

or to “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).⁹

C. Section 7 of the NVRA Prohibits Withholding Voter Registration Opportunities When the Voter Preference Question is Left Unmarked

Voter registration agencies designated under Section 7 of the NVRA have two distinct responsibilities. First, they must provide a voter registration form to each applicant for services “unless the applicant, *in writing*, declines to register to vote.” 52 U.S.C. § 20506(a)(6)(A) (emphasis added). Second, they must provide individuals an information form that, among other things, asks whether they would “like to apply to *register* to vote *here today*,” with check boxes for the applicant to indicate his or her preference, and an offer to provide help with the application if the individual wants it. *Id.* § 20506(a)(6)(B)(i), (iii), (iv) (emphasis added). An individual who checks neither box is deemed to have decided “not to register to vote *at this time*” and to have declined the offer of help. *Id.* § 20506(a)(6)(B)(iii) (emphasis added). But that consequence is distinct from not being given a voter registration form (which can, of course, be filled out later) at all. Leaving the boxes unchecked cannot be a declination “in writing” of the opportunity to receive the form.

South Dakota takes a different view. Contrary to the NVRA’s text and structure, applicants for services at South Dakota voter registration agencies who leave the voter preference question blank are deemed to have declined the opportunity to register and are not provided a voter registration form. Defs.’ Mem. 18-20, ECF No. 93. Because a declination needs to be “in writing,” that policy violates Section 7 of the NVRA.

⁹ *Cf. Fish v. Kobach*, 840 F.3d 710, 717, 732-747 (10th Cir. 2016) (suggesting that requiring in-person presentation of citizenship documentation at a non-DMV office is more than the NVRA’s “minimum amount of information necessary,” 52 U.S.C. § 20504(c)(2)(B), to assess eligibility when a state could instead add an attestation to the motor vehicle authority’s voter registration form).

The State tries to justify failing to provide voter registration opportunities to agency applicants who leave the voter preference question blank by citing *Scott v. Schedler*, 771 F.3d 831 (5th Cir. 2014). The Fifth Circuit, however, stands alone in asserting that “not checking either box equals a decision not to register to vote.” *Id.* at 840. The better reading of Section 7 is the one provided by the Tenth Circuit in *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012), and embraced by other courts. Relying on the statute’s plain language and structure, the Tenth Circuit rejected the notion that Section 7 requires applicants to “opt-in” to receive a voter registration application. *Id.* at 943-47. The court held:

If an applicant is passive, i.e., does not check either the “YES” or “NO” box on the declination form and thereby indicate his or her intent in writing, [the designated agency] must, in accordance with the mandate of subsection (A), still provide him or her with a voter registration form.

Id. at 947, *aff’g Valdez v. Herrera*, 2010 U.S. Dist. LEXIS 142209 (D.N.M. Dec. 21, 2010).

Other courts have so held. *See Action NC v. Strach*, 216 F. Supp. 3d 597, 639-40 (M.D.N.C. 2016) (examining both *Scott* and *Valdez*, finding “the *Valdez* court’s interpretation of Section 7 persuasive,” and holding that plaintiffs had established a likelihood of success on the merits at the preliminary injunction stage); *Georgia State Conference of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1332-33 (N.D. Ga. 2012) (holding that if Georgia interprets a blank response on a voter information form as declining voter registration and does not provide the applicant a voter registration form, that policy would “likely run[] afoul of Section 7”).

The Department of Justice’s NVRA guidance reinforces that construction: “Failure to check either [voter preference question] box is deemed a declination to register for purposes of receiving assistance in registration *but is not deemed a written declination to receive an application.*” The National Voter Registration Act of 1993 (NVRA): Questions and Answers ¶ 21, <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (emphasis added).

This Court should likewise conclude that South Dakota may not deny voter registration forms to social service applicants who leave the preference question blank. A blank check box is not a declination “in writing,” and thus DSS’s policy violates Section 7 of the NVRA.

D. The State Misconstrues the Department of Justice Guidance on NVRA Implementation

Plaintiffs allege that DLR administers certain public assistance programs—including programs under the Workforce Innovation and Opportunity Act (“WIOA”), as well as TANF and SNAP. Pls.’ Mem. 6, 26-27, ECF No. 77. The State denies that DLR administers TANF and SNAP, and it further alleges “WIOA is not considered public assistance under the NVRA.” Defs.’ Mem. 33-35, ECF No. 93. Plaintiffs concede that the Court and parties would benefit from further development of the record regarding WIOA and asks to reserve the right to raise issues related to WIOA at trial. Pls.’ Reply Mem. 24, ECF No. 99. Whether DLR provides public assistance programs is a fact-specific question on which the United States takes no position at this time.

However, the State cites the Department of Justice’s NVRA Q&A webpage to argue that the meaning of “public assistance” is limited to the public assistance programs identified there. Defs.’ Mem. 12, ECF No. 74 (“The DOJ guidance states that offices that provide public assistance would include offices that administer the Supplemental Nutrition Assistance Program (SNAP), the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the Temporary Assistance for Needy Families (TANF), the Medicaid program, and the State Children’s Health Insurance Program (SCHIP).”). The State suggests that the Department of Justice’s list is comprehensive. The State is incorrect.

As an initial matter, Section 7(a)(2)(A) requires each state to designate as voter registration agencies “all offices in the State that provide public assistance.” 52 U.S.C. 20506(a)(2)(A). “All” means “each and every member or example of; the entire number of.”

All, Oxford English Dictionary, <https://www.oed.com/view/Entry/5151> (last visited Apr. 3, 2022). The NVRA does not limit the kinds of offices providing public assistance that must be designated. Nor can the Department of Justice impose such a limitation.

And, of course, the Department's guidance is not, and does not purport to be, an exhaustive list of public assistance programs covered by Section 7(a)(2)(A). Question 13 of the Department's NVRA guidance reads:

“What is an office that provides public assistance under Section 7?

‘Public assistance’ offices that must offer voter-registration services under Section 7 of the NVRA include each agency and office in a State that administers or provides services or assistance under any public assistance programs. This includes any of the following federal public assistance programs: the Supplemental Nutrition Assistance Program (SNAP, formerly the Food-Stamp Program), the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the Temporary Assistance for Needy Families (TANF) program (formerly the Aid to Families with Dependent Children or AFDC program), the Medicaid program, and the State Children's Health Insurance Program (SCHIP). This also includes state public assistance programs.”

See <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>. The Department's guidance simply notes that a public assistance office under the NVRA “*includes*” those involved with certain relevant federal public assistance programs. The Department's illustrative list of the array of federal programs potentially implicated by Section 7(a)(2)(A) is neither exhaustive nor definitive. *See, e.g., Include*, Black's Law Dictionary (11th ed. 2019) (“The participle *including* typically indicates a partial list”); Antonin Scalia & Bryan A. Garner, *Reading Law* 132 (2012).¹⁰

¹⁰ Defendants also seem to suggest that because the U.S. Department of Labor instructs that “recipients of public assistance” should be prioritized for WIOA adult funds, WIOA funds themselves cannot constitute public assistance. Defs.' Mem. 33, ECF No. 93. This ignores the fact that recipients of one public assistance program often qualify for, and apply for, other public assistance programs, as well. To prioritize public assistance recipients in distributing funds for a different public assistance program would hardly be surprising, given that those recipients have

Indeed, the last sentence in the Department’s guidance indicates that “state public assistance programs” trigger Section 7, meaning there are necessarily programs beyond the federal ones that count. *See, e.g.,* Compl. at 4, *United States v. Rhode Island*, No. 1:11-cv-00113 (Mar. 25, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/30/ri_nvra_cd.pdf (“Public assistance,’ as used in Section 7 of the NVRA, includes, but is not limited to, federal- or state-provided food assistance, cash assistance, WIC, medical assistance, child care assistance, and utilities assistance, among others.”); Compl. at 3, *United States v. Louisiana*, No. 3:11-cv-00470 (July 7, 2011), <https://www.justice.gov/crt/case-document/file/1241351/download> (including a Section 7 public assistance claim against Louisiana’s Kinship Care Subsidy Program); Fed. Election Comm’n, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples* 4-2 to 4-3 (1994) (“The Conference Committee therefore delineated the minimum of agencies it concluded were to be encompassed. . . . States must decide for themselves what other of their offices meet the definition of ‘public assistance offices.’”).

E. All Offices that Provide Public Assistance Benefits Must be Designated as Mandatory Voter Registration Agencies, Even if those Offices Also Provide Other Programs That Would Permit Them to be Designated as “Voluntary” Voter Registration Agencies

Defendants briefly argue that because DLR provides unemployment compensation, and because unemployment compensation offices are subject to designation as discretionary voter

already been determined to meet the means-tested qualifications of at least one public assistance program. We also note that on March 25, 2022, the U.S. Department of Labor issued a Training and Employment Guidance Letter discussing the availability for designation by states for voter registration under the NVRA of American Job Centers, which are part of the public workforce system under the WIOA. *See* Advisory: Training and Employment Guidance Letter No. 8-21, https://wdr.doleta.gov/directives/attach/TEGL/TEGL_08-21_acc.pdf.

registration agencies, DLR cannot also be a mandatory voter registration agency. Defs.’ Mem. 36-37, ECF No. 93. This argument fails for several reasons.

First, the mandatory voter registration agency language of the NVRA has no exceptions. All offices that provide public assistance must be designated under the NVRA.

Second, Congress enacted the mandatory voter registration agency provision to ensure that states could not “restrict their agency program and defeat a principal purpose of this Act—to increase the number of eligible citizens who register to vote.” *New York*, 700 F. Supp. 2d at 200 (N.D.N.Y. 2010) (quoting H.R. CONF. REP. NO. 103-66, at 19 (1993)). The State’s theory that DLR may withhold voter registration opportunities from public assistance applicants merely because DLR provides other services and programs potentially subject to *voluntary* designation defies Congress’s intent.

Third, Defendants cite *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 120 (2nd Cir. 2000), to argue that because DLR provides programs that are subject to voluntary designation, DLR is somehow insulated from designation under Section 7’s mandatory provisions. Defs.’ Mem. 37, ECF No. 93. They are incorrect. As relevant here, that case stands for the unremarkable proposition that government offices that do not in fact provide public assistance in the first place are not subject to the mandatory designation under Section 7. *Id.* at 120. But if this court finds that DLR provides public assistance, in conjunction with its other activities, then DLR must be designated as a mandatory voter registration agency under Section 7 and provide required voter registration services to public assistance applicants.¹¹

¹¹ “Office” here does not refer to a physical place but rather to a subdivision of a government department or institution. *See, e.g., Nat’l Coal. For Students With Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 290-91 (4th Cir. 1998). This means that an agency designated pursuant to Section 7(a)(2)(A) need only provide voter registration opportunities through those offices or programs that actually provide public assistance, not through those offices or programs within the agency that do not provide public assistance, if any.

III. CONCLUSION

For the foregoing reasons, the Court should apply the proper legal standards under Sections 5 and 7 of the NVRA to resolve the pending cross motions.

Respectfully submitted,

Date: April 25, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, I electronically filed the foregoing Statement of Interest of the United States, using the CM/ECF system, which will send notification of such filing to all counsel of record.

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