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' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

At the eleventh hour of this case challenging South Dakota's numerous and systemic violations of the National Voter Registration Act ("NVRA"), 52 U.S.C. §§ 20501-11, Defendants file a Rule 12(c) motion for judgment on the pleadings (styled as a "motion to dismiss"), raising defenses that could and should have been raised and resolved at earlier stages of this case. Defendants' motion should be denied.

First, Defendants raise several challenges to the standing of Plaintiffs Kimberly Dillon and Hoksila White Mountain (the "Individual Plaintiffs") and the Lakota People's Law Project ("Lakota Law"), including asserting a previously unraised objection to these three plaintiffs' statutory standing. Though these challenges to the standing of Individual Plaintiffs and Lakota Law lack merit, the Court does not even need to entertain them. Under settled law, only one plaintiff need have standing for this case to proceed, and since it is undisputed that Plaintiffs Rosebud Sioux Tribe and Oglala Sioux Tribe (the "Plaintiff Tribes") have standing to challenge Defendants' NVRA violations and obtain the declaratory and injunctive relief sought by all Plaintiffs, the Court does not need to determine whether the other Plaintiffs have standing.

Second, Defendants move to dismiss the claims against Defendant Marcia Hultman, in her official capacity as the Cabinet Secretary of the South Dakota Department of Labor and Regulation ("DLR"), by disputing Plaintiffs' well-pleaded allegations that DLR is a public assistance agency required to provide voter registration services by Section 7 of the NVRA. Assuming the truth of Plaintiffs' allegations that DLR provides public assistance—as this Court must do on a Rule 12(c) motion for judgment on the pleadings—Plaintiffs have stated a claim that Section 7 requires DLR to provide voter registration services.

For these reasons, Defendants' Motion to Dismiss should be denied in its entirety.

LEGAL STANDARD

A "motion to dismiss" filed after pleadings have closed is properly considered a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. Under Rule 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A Rule 12(c) motion must be treated the same as a motion to dismiss under Rule 12(b)(6). *See Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Thus, this Court must "assume all well-pleaded factual allegations are true, draw all reasonable inferences in favor of [plaintiffs], and affirm dismissal under Rule 12(c) only if [Defendants are] entitled to judgment as a matter of law." *Guenther v. Griffin Constr. Co.*, 846 F.3d 979, 981 (8th Cir. 2017). "The court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010).

Although a court may convert a Rule 12(c) motion to a motion for summary judgment if it considers other matters outside the pleadings, including evidence submitted with another party's summary judgment motion, Fed. R. Civ. P. 12(d), it need not do so and may "refuse to accept materials outside the pleadings in order to keep the motion under Rule 12(c)." *Hill v. Auto Owners Ins. Co.*, No. 14-cv-5037, 2015 U.S. Dist. LEXIS 59877, at *25 (D.S.D. May 5, 2015) (citing 5C Charles Alan Wright *et al*., Federal Practice & Procedure Civil § 1371 (3d ed.)). If the court does convert a Rule 12(c) motion into one for summary judgment, however, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).[1]

[1] Plaintiffs believe Defendants' Motion can be decided on the pleadings and are submitting this brief with the presumption that the usual Rule 12(c) standards apply. If the Court treats it as a summary judgment motion, Plaintiffs request the opportunity to supplement this brief.

ARGUMENT

Defendants' Rule 12(c) motion should be denied because (1) the standing of the Plaintiff Tribes is undisputed, so the Court need not decide whether the other plaintiffs also have standing; (2) Plaintiffs provided adequate notice to Defendants of the NVRA violations common to all Plaintiffs before filing suit, such that separate notice by Plaintiffs Lakota Law, Kimberly Dillon, and Hoksila White Mountain before joining the suit as co-plaintiffs would have been unnecessary and futile; (3) Plaintiffs Lakota Law and White Mountain have alleged sufficient injury-in-fact to establish Article III standing; and (4) Plaintiffs have sufficiently alleged that Defendant DLR is a public assistance agency subject to the voter registration requirements of Section 7 of the NVRA, and is thus a proper defendant in this case.

I. BECAUSE THE PLAINTIFF TRIBES HAVE STANDING, THIS COURT NEED NOT REACH DEFENDANTS' CHALLENGES TO THE STANDING OF THE OTHER PLAINTIFFS.

The gravamen of Defendants' standing challenge is that some—but not all—of the Plaintiffs lack standing to pursue certain claims raised in the Amended Complaint. Specifically, Defendants contend that Plaintiffs Lakota Law, Kimberly Dillon, and Hoksila White Mountain lack statutory standing to challenge Defendants' NVRA violations because they did not provide separate notice to Defendants before joining the suit via the Amended Complaint, even though Plaintiffs already put Defendants notice of South Dakota's ongoing, systemic violations of Section 5 and Section 7 in their May 20, 2020, letter to Defendant Barnett (the "Notice Letter").

Br. in Support of Defs.' Mot. to Dismiss ("Defs.' Br.") at 4-6, ECF No. 74. Defendants further argue that Lakota Law and Mr. White Mountain lack Article III standing. Defs.' Br. at 6-7.[2]

While Defendants' standing arguments fail on the merits, this Court need not reach them at all. In any multi-plaintiff case, only one plaintiff need show standing for each claim and form of relief. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) ("For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue."); *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (in a case with multiple plaintiffs, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint"); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 70 n.2 (2006) (noting that "because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," and since one plaintiff had established standing, declining to reach the question of whether the other plaintiffs also had standing). Because there is no dispute that the Plaintiff Tribes have standing on each NVRA claim and each form of relief Plaintiffs seek, the Court "need not consider whether the other . . . plaintiffs have standing to maintain the suit." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977); *see also Newdow v. Roberts*, 603 F.3d 1002, 1008 (D.C. Cir. 2010) (endorsing argument that "once one plaintiff has standing, there is 'no occasion to decide the standing of the other [plaintiffs]'") (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977)).

[2] Although the heading to Section II of Defendants' Brief states that "Plaintiffs Lakota People's Law Project, Kimberly Dillon and Hoksila White Mountain do not have Article III standing," Defs.' Br. at 6, Defendants do not make any Article III argument as to Ms. Dillon and do not appear to challenge her standing on these grounds. Any such challenge would be meritless, as Ms. Dillon has plainly alleged injury-in-fact caused by Defendants' NVRA violations—namely, that the Departments of Public Safety and Social Services failed to properly transmit her voter registration applications to election officials, as required by Sections 5 and 7 of the NVRA, resulting in her being turned away from the polls in the 2020 election. Am. Compl. ¶¶ 59-61.

Defendants' motion does not contest the standing of Plaintiffs Rosebud Sioux Tribe and Oglala Sioux Tribe, tacitly conceding that the Plaintiff Tribes have standing to challenge Defendants' NVRA violations and to seek the declaratory and injunctive relief requested in the Amended Complaint.[3] Here, Plaintiffs collectively raise the same claims under the NVRA and seek the same relief: (1) a declaratory judgment that Defendants have violated Sections 5 and 7, and (2) injunctive relief to remedy those violations and bar Defendants from implementing practices and procedures that violate, or fail to ensure compliance with, the NVRA. Am. Compl. at 46-47 (Prayer for Relief). In short, none of the Plaintiffs seeks relief different from any other Plaintiff. Accordingly, Plaintiffs have satisfied the requirement that only one plaintiff need have standing for the Court to have jurisdiction; the Court need not consider whether Plaintiffs Lakota Law, Dillon, and White Mountain also have standing for this case to proceed. While the Court's analysis can and should end here, Defendants' standing arguments also fail for the further reasons explained below.

[3] Even if there were a dispute, there is no question that the Plaintiff Tribes, as sovereign governments, have Article III standing based on the injuries to their own interests or, as *parens patriae*, on behalf of their tribal members. *See Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1180 (N.D. Okla. 2009) (citing *Delorme v. United States*, 354 F.3d 810 (8th Cir. 2004)). A sovereign has standing to challenge a violation of federal law based on harm to its "quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general" and its own "quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); *see also Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1028 (D.S.D. 2014). Here, the Plaintiff Tribes have standing to challenge Defendants' NVRA violations both (1) in their own right, because when "tribal members are denied registration opportunities, the political power and ability to advocate for [the tribes'] needs is reduced and [each tribe] is denied full participation in the federal system through its diminished political power," Am. Compl. ¶¶ 29, 49, and (2) on behalf of their members, the vast majority of whom face barriers to voter registration (including, *e.g.*, poverty, geographic isolation, and lack of physical addresses), which are compounded by Defendants' failure to provide NVRA-mandated voter registration services and would be redressed by Defendants' compliance with their obligations under Sections 5 and 7 of the NVRA, *id*. ¶¶ 14-50.

II. DEFENDANTS' ARGUMENT THAT LAKOTA LAW AND THE INDIVIDUAL PLAINTIFFS LACK STATUTORY STANDING IS UNTIMELY AND WRONG.

Defendants seek dismissal of Lakota Law and the Individual Plaintiffs, arguing that they "did not provide written notice to the South Dakota Secretary of State that they were aggrieved by a violation of the NVRA" before joining this lawsuit through the Amended Complaint. Defs.' Br. at 5. This defense is both untimely and ignores the fact that Defendants have been on notice of the ongoing, systemic NVRA violations that are the basis for *all* Plaintiffs' claims since Plaintiffs' May 20, 2020, Notice Letter. *See* Am. Compl. ¶ 6. Because Lakota Law and the Individual Plaintiffs' claims are identical to those of the Plaintiff Tribes—they raise no claims and seek no relief unique to themselves—separate notice of those violations before joining the suit as co-plaintiffs through the Amended Complaint would have been redundant and futile.

A. Defendants' statutory standing defense is untimely.

Defendants newly object to the addition of Lakota Law and the Individual Plaintiffs at this late stage of the case, despite numerous opportunities to do so since July 2021:

- Defendants made no objection when Plaintiffs moved this Court for leave to file their Amended Complaint on July 8, 2021, *see* Mot. for Leave to File [Proposed] Am. Compl., ECF No. 37; Order, ECF No. 43 (granting motion for leave and noting that "[n]o objection has been filed by the Defendants");
- Defendants failed to plead the affirmative defense of lack of statutory standing in their Answer to the Amended Complaint ("Answer"), ECF No. 47, filed on August 24, 2021;
- Defendants failed to raise this defense as an objection to Plaintiffs' requests for discovery pertaining to the Individual Plaintiffs;

- Defendants failed to seek to amend their Answer to raise this defense by the October 13, 2021, deadline to amend pleadings.

Defendants' repeated failures to raise this defense until their Rule 12(c) motion—filed months after the deadline to amend pleadings, after the close of discovery, and on the dispositive motion deadline—is unduly prejudicial to Lakota Law and the Individual Plaintiffs, because the time has long since passed for them to cure any notice defects without delaying trial or a final judgment in this case. *See* Fed. R. Civ. P. 12(c).

B. Plaintiffs provided Defendants adequate notice of Plaintiffs' NVRA claims and separate notice by Plaintiffs Lakota Law, Dillon, and White Mountain would have been unnecessary and futile.

Defendants' newly asserted defense—that Plaintiffs Lakota Law, Dillon, and White Mountain lack statutory standing because they did not provide separate notice to Defendants of their NVRA violations before joining this suit—is a non-jurisdictional defense that, if not already waived by Defendants' failure to raise it in their Amended Answer or before the deadline to amend pleadings, does not bar these Plaintiffs' ability to be co-plaintiffs in this suit.[4]

The NVRA provides that a person aggrieved by an NVRA violation "may provide written notice of the violation to the chief election official of the State involved" and bring suit if the State fails to correct the violation "within 90 days after receipt of a notice . . . or within 20

[4] Statutory limitations are non-jurisdictional unless specified as jurisdictional by Congress. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Id*. "But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id*. at 516. As Congress did not indicate that the NVRA's notice requirement was jurisdictional, this Court must treat it as non-jurisdictional and, therefore, waivable. *See Nat'l Council of La Raza v. Miller*, 914 F. Supp. 2d 1201, 1208 (D. Nev. 2012) (describing the NVRA's notice requirement as non-jurisdictional), *rev'd on other grounds sub nom.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d. 1032, 1040 (9th Cir. 2015).

days after receipt of the notice if the violation occurred within 120 days before the date of an election for Federal office." 52 U.S.C. § 20510(b). The purpose of this notice provision is to give an offending state "an opportunity to attempt compliance [with the NVRA's mandates] before facing litigation." *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014); *see also Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997); *Judicial Watch, Inc. v. Griswold*, No. 20-cv-2992, 2021 U.S. Dist. LEXIS 154492, at *24 (D. Colo. Aug. 16, 2021); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 794 (W.D. Tex. 2015); *Ga. State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012).

Defendants do not dispute that they received and were put on notice of their NVRA violations in Plaintiffs' May 20, 2020, Notice Letter. The Notice Letter, attached as Exhibit A to Plaintiffs' Amended Complaint, ECF No. 44-1, was submitted "on behalf of the Rosebud Sioux Tribe and their members, the Oglala Sioux Tribe and their members, Four Directions, and *others similarly situated*." Notice Letter at 1. The detailed 12-page Notice Letter notified Defendant Barnett of the systemic, statewide, and ongoing violations of Sections 5 and 7 of the NVRA by Defendants, and offered to engage with state officials to develop a comprehensive plan for compliance with the NVRA by Defendants without the need for litigation. Notice Letter at 1, 10-11. As alleged in the Amended Complaint, "Defendants' sole response was a letter in which they acknowledged the need to comply with the NVRA, but did not propose any specific steps or timelines for bringing South Dakota's practices into compliance with the NVRA." Am. Compl. ¶ 6. "Plaintiffs followed up with a letter dated June 26, 2020, explaining the specifics that would be needed to avoid litigation, but Defendants did not respond to that letter and, upon information and belief, have failed to correct the violations." *Id.*

Plaintiffs' Notice Letter, delivered nearly four months before Plaintiffs filed suit on September 16, 2020, put Defendants on notice of all the violations challenged by the original Plaintiffs in the Complaint, ECF No. 1, and in the Amended Complaint, ECF No. 44, joined by Lakota Law and the Individual Plaintiffs. The purpose of the NVRA notice requirement—to give South Dakota the chance to cure violations before suit—was therefore met. Where, as here, all Plaintiffs allege the exact same, systemic, and continuing failures by a State to comply with the NVRA's voter registration requirements, requiring newly added plaintiffs to provide separate notice of those identical claims would be unnecessary and futile. *See Miller*, 129 F.3d at 838.[5]

The Sixth Circuit's decision in *Miller*, an NVRA suit against the State of Michigan, is instructive. In that case, after ACORN and individual plaintiffs had filed suit, another organization, Project Vote, intervened as plaintiffs in the lawsuit. *Id.* at 835. Separate suits filed by the United States and other plaintiffs were then consolidated with the original action. *Id.* As here, Michigan sought to dismiss Project Vote and the plaintiffs in the consolidated suits because they did not separately notify the state of the NVRA violations that formed the basis of ACORN's original suit. *Id.* The Sixth Circuit affirmed the district court's ruling denying Michigan's motion to dismiss for two reasons. First, the court held that the NVRA's notice requirement "pertains to those who *initiate* suits" and was inapplicable to Project Vote as an

[5] *But cf. Scott*, 771 F.3d at 836. In *Scott*, the Fifth Circuit disagreed with *Miller* and held that an individual plaintiff's failure to provide separate notice was fatal to his claim, based on several factors that distinguished it from *Miller*. *Id.* In relevant part, the Fifth Circuit found that separate notice in *Scott* "would not have been 'futile'" because Louisiana, unlike Michigan, had shown a "demonstrated desire to comply with the NVRA" and, upon learning of the individual plaintiff's claims through the lawsuit, promptly attempted to cure his claim by sending him a voter registration form. *Id.* South Dakota, like Michigan, failed to cure the NVRA violations before either the Complaint or Amended Complaint were filed. Nor have Defendants made any effort to address the specific violations alleged by Plaintiffs Dillon and White Mountain at any point since receiving notice of them in July 2020. Thus, the distinctions relied on by the Fifth Circuit do not apply here and, as in *Miller*, separate notice here would have been futile.

intervenor in the pending suit brought by ACORN. *Id.* at 838. Second, it held "that requiring these plaintiffs to file individual notice where Michigan had already ignored ACORN's actual notice amounts to requiring performance of futile acts." *Id.*

As in *Miller*, separate notice by Lakota Law, Ms. Dillon, and Mr. White Mountain would have been futile. The plaintiffs who initiated the lawsuit—the Plaintiff Tribes and former plaintiff Four Directions—provided South Dakota notice of all violations that form the basis of this suit. And, as in *Miller*, South Dakota failed to cure those violations after being put on notice of them. Nothing in the NVRA requires co-plaintiffs who share identical claims and seek identical relief to provide separate notice for newly added plaintiffs after the filing of a lawsuit. Where Defendants are already on notice of continuing, systemic violations, requiring separate notice of those same violations "would be unreasonable." *Judicial Watch, Inc.*, 2021 U.S. Dist. LEXIS 154492, at *28.

Plaintiffs' Notice Letter provided South Dakota notice of its NVRA violations and an opportunity to cure them on behalf of the Plaintiff Tribes, Four Directions, and all similarly situated individuals. Lakota Law and the Individual Plaintiffs, who are aggrieved by the same systemic Section 5 and Section 7 violations as the original plaintiffs, are similarly situated in all relevant respects. Because Lakota Law and the Individual Plaintiffs did not assert any different violations and do not seek separate individual relief through this suit—and put Defendants on notice through their proposed Amended Complaint filed on July 8, 2021, over a month before the Amended Complaint itself was filed on August 10, 2021—the Court should decline Defendants' invitation to dismiss them for not waiting 90 days to file the Amended Complaint, which would only have delayed discovery and needlessly prolonged the resolution of this case. If the Court agrees with Defendants, however, Plaintiffs request that the Court dismiss Lakota Law and the

Individual Plaintiffs without prejudice so that they can cure the notice deficiency and seek to rejoin the lawsuit as plaintiffs before trial.

III. PLAINTIFFS LAKOTA LAW AND HOKSILA WHITE MOUNTAIN HAVE BEEN INJURED BY DEFENDANTS' NVRA VIOLATIONS AND THUS HAVE ARTICLE III STANDING.

A. An organization's diversion of resources to register voters who should have been registered by Defendants is an injury-in-fact sufficient to confer standing in NVRA cases.

Lakota People's Law Project, as an organization that has diverted and will continue to divert resources to registering South Dakota voters that should have been registered by Defendants, has standing to challenge Defendants' NVRA violations. Defendants' two arguments to the contrary—that Lakota Law lacks statutory standing because it "does not have the ability to vote, nor do they [sic] allege their [sic] ability to vote was impaired," Defs.' Br. at 8—find no support in the NVRA's text or in NVRA case law.

1. Organizations can and routinely do challenge states' NVRA violations.

Defendants incorrectly suggest that only individual voters whose ability to vote was impaired by an NVRA violation have a private right of action under the statute. *Id.* The text of the NVRA does not limit standing in this way. Rather, the statute confers a private right of action on "[a] person who is aggrieved by a violation of this chapter," without defining what it means to be "aggrieved by" an NVRA violation or otherwise limiting the private right of action to individual voters. 52 U.S.C. § 20510(b). Nor has *any* court denied standing to an organizational plaintiff who sufficiently alleges organizational injury arising from a state's NVRA violations—including in the two non-controlling district court decisions that Defendants cite in their brief.[6]

[6] The plaintiffs in those cases were individuals, not organizations, and the courts in both cases relied on other grounds in holding that they lacked standing. *See Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1030 (D. Neb. 2000); *Krislov v. Rednour*, 946 F. Supp. 563, 566 (N.D. Ill. 1996).

Defendants ignore well-established case law that organizations can challenge violations of federal laws where the violations have frustrated the organization's mission and caused it to divert its resources to counteract that harm. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Nat'l Fed'n of Blind v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999). Under this established precedent, courts routinely find that organizations have standing to challenge states' violations of their voter registration obligations under the NVRA. *See Nat'l Council of La Raza*, 800 F.3d. at 1032 (holding that organizations had standing to challenge a state's NVRA violation when they "expended additional resources that they would not otherwise have expended, and in ways that they would not have expended them" to counteract the harm to voters resulting from being denied the opportunity to register to vote at driver's licensing and public assistance offices); *ACORN v. Fowler*, 178 F.3d 350, 360-61 (5th Cir. 1999) (finding that plaintiff organization's expenditure of resources to register voters who should have been registered by state public assistance agencies counteracted state's Section 7 violations and were sufficient to establish standing); *Action NC v. Strach*, 216 F. Supp. 3d 597, 616-18 (M.D.N.C. 2016); *Ga. State Conf. of NAACP*, 841 F. Supp. 2d at 1336-37; *ACORN v. Scott*, No. 08-cv-4084, 2008 U.S. Dist. LEXIS 53580, at *24-25 (W.D. Mo. July 15, 2008); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 849-50 (D. Md. 2001).

Defendants' argument that organizations are barred from establishing standing to challenge NVRA violations simply has no support in nearly three decades' worth of NVRA case law and should be rejected.

2. *Lakota Law has diverted resources to register voters in South Dakota that should have been registered by Defendants.*

Defendants argue, in the alternative, that Lakota Law failed to plead an injury-in-fact sufficient to establish Article III standing in this case. Defs.' Br. at 9-10. Specifically,

Defendants assert, incorrectly, that Lakota Law "would not have been using its resources any differently regardless of Defendants' alleged noncompliance with the NVRA" and thus has not been injured. *Id.* at 10.[7]

At the pleading stage, a "diversion-of-resources injury is sufficient to establish organizational standing . . . even when it is 'broadly alleged.'" *Nat'l Council of La Raza*, 800 F.3d at 1040 (quoting *Havens*, 455 U.S. at 379); *see also, e.g.*, *Martinez-Rivera*, 166 F. Supp. 3d at 788 (finding "[a]n organization can demonstrate injury 'by [alleging] that it had diverted significant resources to counteract the defendant's conduct'" and that "'[a]t the pleading stage, an organization need only broadly allege such an injury'"). A complaint need not precisely quantify the amount of diverted resources to plead an injury-in-fact to an organization. *See Pavek v. Simon*, 467 F. Supp. 3d 718, 741 (D. Minn. 2020).

Here, Lakota Law has sufficiently alleged that it has suffered, and will continue to suffer, injury caused by Defendants' NVRA violations. Am. Compl. ¶¶ 57-58. Specifically, Lakota Law alleges that it "has expended additional resources on efforts to assist individuals with registering to vote or updating their voter registration address, when those individuals should have been offered voter registration through South Dakota's public assistance agencies or through DPS," forcing it to use resources on these specific efforts that it would have spent on "other activities germane to its purposes, including its voter education and voter turnout activities," specifically get-out-the-vote (GOTV) efforts. *Id.* Lakota Law further alleges that the Defendants'

[7] Defendants mistakenly assert that Lakota Law did not allege "when and what election that their alleged injuries were to have occurred." Defs.' Br. at 10. The Amended Complaint specifically refers to Lakota Law's work in 2020 and its expectation that, due to Defendants' ongoing NVRA violations, it will need to continue to expend resources on registering voters in South Dakota who should have been registered by Defendants in the lead-up to the upcoming 2022 elections. Am. Compl. ¶¶ 54, 57.

noncompliance with the NVRA's provisions has frustrated its mission and forced it to expend organizational resources on voter registration efforts at the expense of the organization's other mission-critical activities, and will continue to do so in the 2022 election season and beyond if Defendants' violations continue. *Id.* Specifically, Lakota Law expended time, effort, and thousands of dollars on additional voter registration efforts because of the Defendants' noncompliance that it would otherwise spend on these other voter engagement efforts. *Id.* ¶ 57. "These allegations plainly satisfy the injury prong of the Article III test for standing." *Ga. State Conf. of NAACP*, 841 F. Supp. 2d at 1336.

Defendants' contention that Lakota Law "would not have been using its resources any differently regardless of Defendants' alleged noncompliance with the NVRA," Defs.' Br. at 10, ignores the organization's allegations to the contrary. Defendants suggest that the fact that Lakota Law's mission focuses broadly on Native American voting rights and voter engagement in the Dakotas and elsewhere necessarily means that the organization's diversion of resources to the specific voter registration activities in South Dakota, as described in the Amended Complaint, caused it no harm. *Id.* at 9-10. As other courts have recognized, though, a voter engagement organization's diversion of resources from other mission-critical work to voter registration efforts designed to counteract a state's NVRA violations is more than enough to establish standing. *See Nat'l Council of La Raza*, 800 F.3d at 1040; *Ga. State Conf. of NAACP*, 841 F. Supp. 2d at 1336; *Action NC*, 216 F. Supp. 3d at 617-18; *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, 150 F. Supp. 2d at 849-50.

For example, in *National Council of La Raza*, the Ninth Circuit held that the plaintiff organizations had standing because:

> [r]esources Plaintiffs put toward registering someone who would likely have been registered by the State, had it complied with the NVRA, are resources they would have spent on some other aspect of their organizational purpose—such as registering voters the NVRA's provisions do not reach, increasing their voter education efforts, or any other activity that advances their goals.

800 F.3d at 1040. In *Fowler*, the Fifth Circuit found that because ACORN "expended resources registering voters in low registration areas who would have already been registered if the appellees had complied with [Section 7]," "a portion of the resources ACORN has spent and currently spends on voter registration drives counteracts Louisiana's alleged failure to implement the Act." 178 F.3d at 361. The Fifth Circuit concluded that ACORN had Article III standing to challenge Louisiana's Section 7 violations because ACORN could have spent these "wasted resources" on "registering voters that the NVRA, even properly implemented, would not have reached (or which ACORN could have put toward any other use it wished)." *Id.* Likewise, in *Action NC*, the district court held that the plaintiff organization's allegations "that as a direct result of Defendants' Section 7 and 5 NVRA violations, [they have] had to divert time and resources to voter registration efforts, which [they] otherwise would have directed toward voter education, outreach, and engagement efforts" were sufficient to establish standing. 216 F. Supp. 3d at 617. In sum, these courts found that the plaintiff organizations had standing by expending resources to conduct voter registration drives to counteract states' NVRA violations that could have been spent on other voter registration work, voter engagement activities, or other work.

As in these other NVRA cases, Lakota Law alleges that it has been forced to divert resources to registering voters that were not offered the opportunity to register at South Dakota agencies, and that it otherwise would have deployed its resources toward other activities germane to its purposes, including voter education and GOTV efforts. Am. Compl. ¶ 58. This is precisely the kind of diversion that courts have found sufficient to establish standing. Because Lakota

Law's allegations state an injury-in-fact that is traceable to Defendants' NVRA noncompliance and would be redressed by a court order requiring Defendants to provide NVRA-mandated voter registration services, Defendants' motion to dismiss Lakota Law on Article III standing grounds should be denied.

B. Because Plaintiff White Mountain alleges that the Department of Social Services ("DSS") and Department of Public Safety ("DPS") failed to provide him voter registration services required by the NVRA, he has Article III standing.

Defendants erroneously assert that Plaintiff White Mountain "has not alleged that he was not able to vote nor was denied voter registration services and therefore was not aggrieved by a violation of the NVRA." Defs.' Br. at 11. But Mr. White Mountain alleges exactly that. *See* Am. Compl. ¶¶ 90, 130. In the Amended Complaint, Mr. White Mountain alleges that he "applied for a driver's license in McIntosh, South Dakota in Corson County, and was not offered an opportunity to register to vote," and that "[w]hen he specifically asked about voter registration he was directed to a separate office," in violation of Section 5 of the NVRA. *Id.* ¶ 90. He separately alleges that he "is a DSS client who has applied for SNAP benefits and conducted change of address transactions in DSS offices in Hughes County and Corson County and has either not been offered the chance to register to vote or has filled out voter registration applications only to later discover that he was not added to the voter rolls," in violation of his rights under Section 7 of the NVRA. *Id.* ¶ 130. In short, Mr. White Mountain has specifically alleged that, as a South Dakota resident and prospective voter, Defendants' NVRA violations denied him the opportunity to register to vote. Accordingly, he is "[a] person who is aggrieved by a violation of [the NVRA]," 52 U.S.C. § 20510(b)(1), and thus has standing to bring suit.

Because Mr. White Mountain has sufficiently pleaded standing based on the direct violations of the NVRA that he experienced, the Court need not address whether Mr. White

Mountain can *also* establish standing based on the past and prospective harms to his ability to run for elected office he alleges.[8] As a voter, Mr. White Mountain has adequately pleaded direct injury from Defendants' Section 5 and Section 7 violations to have standing in this case.

IV. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT THE SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION ("DLR") IS A PUBLIC ASSISTANCE AGENCY COVERED BY SECTION 7 OF THE NVRA.

Defendants move to dismiss Defendant Marcia Hultman, in her official capacity as the Cabinet Secretary for DLR, based on their bald assertion that DLR "does not provide 'public assistance' as that phrase is understood in the NVRA," and is not a covered voter registration agency under Section 7 of the NVRA. Defs.' Br. at 13. Because Plaintiffs alleged that DLR administers public benefits and services covered by Section 7, and since those allegations must be accepted as true for purposes of Defendants' motion for judgment on the pleadings, Defendants' request to dismiss DLR as a defendant must fail.

Defendants acknowledge that Plaintiffs alleged that DLR administers TANF, *see* Defs.' Br. at 14, but nevertheless ask this Court to ignore that allegation and accept their assertion that "DLR does not administer TANF." *Id.* But as Defendants acknowledge, this Court must treat their Rule 12(c) motion for judgment on the pleadings the same as a motion to dismiss under Rule 12(b)(6). Defs.' Br. at 2; *see also Westcott*, 901 F.2d at 1488.

In the Amended Complaint, Plaintiffs specifically allege that "DLR co-administers South Dakota's TANF program with DSS." Am. Compl. ¶ 70. Plaintiffs further allege that "[t]he DLR

[8] While some district courts have found that political candidates who alleged that NVRA violations harmed their candidacies lacked standing to bring NVRA claims, *see, e.g.*, *Krislov*, 946 F. Supp. at 566, other courts have held that candidates may have standing to represent the rights of voters in voting rights lawsuits, *see Penn. Psych. Soc'y v. Green Spring Health Servs., Inc*, 280 F.3d 278, 288 n.10 (3d Cir. 2002); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (collecting cases).

website states that 'The Department of Labor and Regulation administers [TANF] together with the Department of Social Services," Am. Compl. ¶ 150 (citing language on DLR's website); that "DLR typically receives applications for TANF assistance in-person, but DLR employment service specialists who receive TANF applications via fax, telephone, and mail may accommodate those clients," *id.* ¶ 151. Finally, Plaintiffs allege that, despite accepting Economic Assistance Application forms from TANF clients, DLR provides no voter registration services to those clients. *Id.* ¶¶ 153-56. Accepting these factual allegations about DLR as true and construing them in Plaintiffs' favor, as this Court must do on a motion for judgment on the pleadings, Plaintiffs have stated a claim against DLR under Section 7.

Defendants nonetheless protest that DLR "does not provide 'public assistance' as that phrase is understood in the NVRA." Defs.' Br. at 13. But Section 7 requires that "[e]ach State *shall* designate as voter registration agencies . . . *all* offices in the State that provide public assistance," and that each such office "distribute [a voter registration application] 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." 52 U.S.C. §§ 20506(a)(2), 20506(a)(6)(A) (emphases added).

In construing a statute, the court "begins its analysis with the plain language of the statute." *Owner-Operator Indep. Drivers Ass'n v. Supervalu, Inc.*, 651 F.3d 857, 862 (8th Cir. 2011). Defendants improperly ask the Court to ignore the plain language of the NVRA to read limitations into the statute that are not in the text. The NVRA does not define "public assistance" or limit Section 7's application to specific federal aid programs. Accordingly, "public assistance" should be construed to refer to its "plain, ordinary, and commonly understood meaning." *Schumacher v. Cargill Meat Sols. Corp.*, 515 F.3d 867, 871 (8th Cir. 2008). As commonly

understood, "public assistance" refers broadly to all federal and state assistance programs. For example, the Census Bureau broadly defines "public assistance" as "assistance programs that provide either cash assistance or in-kind benefits to individuals and families from any governmental entity." U.S. Census Bureau, *About Public Assistance*, https://www.census.gov/topics/income-poverty/public-assistance/about.html (last visited Mar. 15, 2022). Dictionaries define the term similarly. *See, e.g.*, *Public assistance*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/public%20assistance (last visited Mar. 15, 2022) (defining "public assistance" as "government aid to needy, aged, or disabled persons and to dependent children"); *Public Assistance*, Black Law's Dictionary (11th ed. 2019) (defining "public assistance" as "anything of value provided by or administered by a social-service department of government" and "government aid accorded to needy people, the elderly, or those who live in a disaster-stricken area"). Based on this broad common understanding of the term "public assistance," Section 7 of the NVRA must be interpreted to include all public assistance programs, not just the subset of federal programs listed by Defendants.

Although Defendants point to a U.S. Department of Justice ("DOJ") "questions and answers" webpage to argue that Section 7's coverage is limited to state offices that "administer" certain assistance programs, that informal guidance does not purport to limit NVRA's scope (nor could it). Rather, the guidance itself mirrors and, indeed, reinforces the language of the NVRA. The DOJ guidance states that "[p]ublic 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." U.S. Dep't of Justice, Civ. Rights Div., *The National Voter Registration Act of 1993* (updated Mar. 11, 2020), https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last visited Mar. 16, 2022)

(emphases added). Although the guidance indicates that covered programs "include[]" certain federal and state public assistance programs, it does not indicate or suggest that the list of federal programs is exhaustive. *Id.* Had Congress wished to limit the NVRA's application to specific programs or to those agencies that "administer" benefits, it could have done so; it did not.

Defendants also point to South Dakota state law requiring voter registration services in "those offices that provide driver licenses; food stamps; *temporary assistance for needy families*; women, infants, and children nutrition program; Medicaid; military recruitment; and assistance to the disabled as provided by the Department of Human Services." Defs.' Br. at 12 (citing S.D. Codified Laws § 12-4-2) (emphasis added). This citation supports Plaintiffs' case, not Defendants'. Again, in the Amended Complaint, Plaintiffs allege that DLR provides TANF services and allows its clients to complete TANF applications. Am. Compl. ¶¶ 70, 150-56. Assuming the truth of these allegations, as this Court must do on a Rule 12(c) motion, it necessarily follows that DLR is bound by this state law to provide voter registration services.

But even if the public assistance benefits and services that DLR provides fell outside those listed in that state statute, that would not excuse DLR from complying with the NVRA. Under the Elections Clause and Supremacy Clause, the NVRA preempts any inconsistent or conflicting state laws. *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 v. Kobach*, 840 F.3d 710, 732 (10th Cir. 2016) (same); *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 912 F. Supp. 976, 984 (W.D. Mich. 1995) (Supremacy Clause). Where a state law conflicts with the NVRA, it is inoperative. As the district court explained in *Miller*,

> the NVRA does not require a state to pass legislation. The Supremacy Clause, U.S. Const., Art. VI, Cl. 2, renders the NVRA binding on state officials even in the absence of any state legislative action. Any inconsistent state voter registration laws or state procedures for federal elections are simply preempted and superseded.

Miller, 912 F. Supp. at 984 (citing *Ex parte Siebold,* 100 U.S. 371, 392 (1880)).

Defendants also argue that "[r]ules are adopted by DSS to implement eligibility qualifications, application procedure, and assistance level for TANF benefits" under S.D. Codified Laws § 28-7A, and that "[t]here is nothing in South Dakota Codified Laws that allows DLR to administer the TANF program." Defs.' Br. at 13. But those listed DSS responsibilities do not preclude Plaintiffs' allegations that DLR administers TANF services and benefits (as supported by DLR's description of its own role in administering TANF on its website), Am. Compl. ¶¶ 70, 150, and that DLR permits clients to commence the TANF application process by completing a public assistance application form at DLR offices, *id.* at ¶¶ 151-52. These functions alone mean that South Dakota is required by Section 7 of the NVRA to designate DLR as a voter registration agency that must provide voter registration services during covered transactions.[9]

Rule 12(c) does not permit dismissal where, as here, Defendants merely deny the truth of Plaintiffs' factual allegations. Taking Plaintiffs' allegations against DLR as true, as Rule 12(c) requires on a motion for judgment on the pleadings, and applying the plain language of Section 7, this Court should find that Plaintiffs have stated a cause of action against Secretary Hultman and deny Defendants' motion to dismiss her as a defendant.

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[9] As detailed in Plaintiffs' summary judgment brief, DLR also administers public assistance under the federal Workforce Innovation and Opportunity Act, 29 U.S.C. §§ 3101-3161. *See* Pls.' Mem. in Support of Mot. for Summ. J. at 26-28, ECF No. 77; *see also* S.D. Dep't of Labor & Reg., *WIOA Manual*, https://dlr.sd.gov/workforce_services/wioa/manual.aspx#5_services. This also makes it a public assistance agency required by Section 7 to provide voter registration services. *Id*. Because DLR's provision of WIOA benefits is a matter of public record, this Court may consider that information in deciding this Rule 12(c) motion without converting it to a summary judgment motion. *See Faibisch v. Univ. of Minn.*, 304 F.3d 797, 803 (8th Cir. 2002).

CONCLUSION

Plaintiffs Lakota Law, Kimberly Dillon, and Hoksila White Mountain have standing to challenge Defendants' violations of the NVRA. Even if they did not, Plaintiffs have satisfied Article III's case-or-controversy requirement because Defendants do not dispute that the other plaintiffs, the Rosebud Sioux Tribe and Oglala Sioux Tribe, have standing. Accordingly, the Court does not need to separately consider the standing of the challenged Plaintiffs for them to remain in the case, and Defendants' motion to dismiss them on standing grounds should be rejected. In addition, Defendants' motion to dismiss Defendant Marcia Hultman as a defendant must also be denied because Plaintiffs have alleged sufficient facts to establish that DLR, the agency Secretary Hultman leads, is a public assistance agency within the meaning of Section 7 of the NVRA and has failed to meet its voter registration obligations under that provision. Plaintiffs have stated an actionable claim against Secretary Hultman under Section 7.

For these reasons, Defendants' Motion to Dismiss should be denied in its entirety.

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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 SERVICE

I certify that March 16, 2022, I electronically filed and served on all counsel of record the foregoing Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss using the Court's CM/ECF system.

/s/ Terry Pechota
Terry Pechota