

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

ACTION NC,
DEMOCRACY NORTH CAROLINA,
NORTH CAROLINA A. PHILIP
RANDOLPH INSTITUTE,
SHERRY DENISE HOLVERSON,
ISABEL NAJERA, and
ALEXANDRIA MARIE LANE,

Plaintiffs,

v.

KIM WESTBROOK STRACH,
*in her official capacity as Executive
Director of the North Carolina State Board
of Elections,*

RICK BRAJER,
*in his official capacity as Secretary of the
North Carolina Department of Health and
Human Services,*

KELLY THOMAS,
*in his official capacity as Commissioner of
the North Carolina Division of Motor
Vehicles, and*

NICK TENNYSON,
*in his official capacity as Secretary of the
North Carolina Department of
Transportation,*

Defendants.

Civil Action No. 1:15-cv-01063-LCB-JLW

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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I. THE MATTER BEFORE THE COURT

Plaintiffs are three individuals—Sherry Denise Holverson, Isabel Najera, and Alexandria Marie Lane (“Individual Plaintiffs”)—as well as three organizations—Action NC, Democracy North Carolina, and the North Carolina A. Philip Randolph Institute (“Organizational Plaintiffs”)— who have been directly aggrieved by the Defendants’ violations of the NVRA. By their undersigned counsel, Plaintiffs respectfully submit this memorandum in support of Plaintiffs’ Motion for Preliminary Injunction requiring Defendants to protect the right of North Carolina voters to participate in the democratic process, to comply with Sections 5 and 7 of the National Voter Registration Act of 1993 (“NVRA”), and to take measures to remedy past and preclude future violations of the law.¹

As underscored by the recent primary election, the actions of Defendants significantly inhibit the rights and opportunities of potential voters to register and exercise their right to vote and require preliminary relief prior to the November 2016 general election. More specifically:

- In violation of Section 7 of the NVRA (52 U.S.C. § 20506), Defendants are (1) failing to provide voter registration applications to clients who do not decline in writing to register to vote, depriving significant portions of public assistance clients of an important and federally mandated voter registration

¹ This motion is supported by the declarations of Christopher Butler (“Butler Decl.”), Pamela Cataldo (“Cataldo Decl.”), Matthew M. D’Amore (“D’Amore Decl.”), Colline Ferrier (“Ferrier Decl.”), Catherine M. Flanagan (“Flanagan Decl.”), Robert Hall (“Hall Decl.”), Sherry Denise Holverson (“Holverson Decl.”), Juliette Muniz Lafargue (“Lafargue Decl.”), Alexandria Marie Lane (“Lane Decl.”), Alexander P. McCoy (“McCoy Decl.”), Melvin Montford (“Montford Decl.”), Isabel Najera (“Najera Decl.”), and Emily Seawell (“Seawell Decl.”).

opportunity; and (2) failing to give public assistance clients written disclosures of their voter registration rights; and

- In violation of Section 5 of the NVRA (52 U.S.C. § 20504), Defendants are failing to collect and/or transmit voter registration applications to the appropriate elections officials and have failed to provide voter registration opportunities to customers interacting with the DMV by the internet.

The NVRA was passed to increase voter registration opportunities and electoral participation in the United States. Sections 5 and 7 of the NVRA are essential to achieving this goal. Section 5 requires that motor vehicle offices provide an opportunity to register to vote with every application for and renewal of a driver's license or state-issued identification card, and to automatically update a voter's address when he or she updates the address on his or her driver's license or state-issued identification card, unless the applicant requests otherwise. 52 U.S.C. § 20504. In enacting Section 5 of the NVRA, Congress recognized that "incorporating voter registration into the drivers licensing process provides a secure and convenient method for registering voters . . . and a procedure for keeping rolls current through contact with licensees who change addresses." S. Rep. No. 103-6, at 5 (1993). Section 7 similarly requires that public assistance agencies offer voter registration applications to clients who are applying for, renewing, or recertifying their applications for benefits, or changing their address. 52 U.S.C. § 20506. Section 7 requires voter registration services during each application for services, and with each recertification, renewal, or change of address transaction ("Covered Transactions"). *Id.* § 20506(a)(6)(A). Public assistance agencies must advise clients in writing of their voter registration rights, and supply them with a voter registration application unless the clients decline in writing to receive one. This emphasis

on written disclosures and written declinations was specifically intended by Congress to ensure that voters are informed of their rights and have freely decided whether to take the opportunity to register. *Valdez v. Herrera*, No. 09-668, 2010 U.S. Dist. LEXIS 142209, at *24 (D.N.M. Dec. 21, 2010) (citing H.R. Rep. No. 103-66, at 17 (1993)), *aff'd sub nom. Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012). Both Section 5 and Section 7 require that motor vehicle offices and public assistance agencies provide clients voter registration applications as well as the opportunity to update their registration, and to transmit applications and updates to the appropriate state election official according to precise statutory requirements to ensure clients receive the intended voter registration opportunities.

In North Carolina, the State Board of Elections (“SBE”), the Department of Health and Human Services (“DHHS”), and the Division of Motor Vehicles (“DMV”) are systematically disregarding these obligations. They have failed and are failing to provide the required voter registration services to their clients. The result is that individuals, like the Individual Plaintiffs, who registered at the DMV have no assurance that their votes will be counted, and that public assistance clients served by the Organizational Plaintiffs are not given the disclosures of their rights and voter registration services to which they are entitled.

In the absence of preliminary relief, Defendants’ misconduct increases the risk that North Carolina citizens will be disenfranchised in the 2016 general election, and forces the Plaintiff non-profit organizations to spend resources to register voters who should have been registered by Defendants, resources that would otherwise be spent on voter

education, outreach, and other activities important to their missions. Preliminary relief that is narrowly tailored to provide voter registration opportunities to those who have not received them, to ensure that registration opportunities are provided going forward, and to prevent individuals whose voter information was not transmitted by state agencies from being disenfranchised will protect the rights of voters in the upcoming election while imposing little burden on Defendants. Preliminary injunctive relief, or an expedited trial on the merits of these issues, is respectfully sought.²

II. STATEMENT OF FACTS

A. The Plaintiffs

The Plaintiffs have been directly aggrieved by the Defendants' violations of the NVRA. The Organizational Plaintiffs are all non-profit organizations whose mandates include, among other things, community development, community organization, and voter education and outreach. Hall Decl. at ¶¶ 7–8; Montford Decl. at ¶¶ 9–10; McCoy Decl. at ¶¶ 7–11. Each of them has conducted voter registration drives in North Carolina over the past five or more years. Hall Decl. at ¶¶ 5–6, 9–14; Montford Decl. at ¶¶ 6–8, 13–19; McCoy Decl. at ¶¶ 5–6, 13–18. The Organizational Plaintiffs target their voter registration efforts to low-income and disadvantaged voters—voters who disproportionately depend on the voter registration methods made available by Sections 5 and 7 of the NVRA. *See* Hall Decl. at ¶ 8; Montford Decl. at ¶¶ 12–15; McCoy Decl. at ¶¶ 8–10. For example, Democracy North Carolina recently held voter registration drives and voter registration trainings in Winston-Salem and Greensboro, among other

² Plaintiffs are concurrently filing a motion for expedited discovery in aid of this motion.

locations, which included trainings at churches, college campuses, food banks, and Industries for the Blind. Hall Decl. at ¶ 14. Thus, the need for these drives is directly linked to the Defendants' failures; if Defendants were complying with their obligations to provide voter registration services, the need for additional registration drives by Plaintiffs would be greatly reduced, and Plaintiffs could devote their resources to other important areas. Hall Decl. at ¶¶ 15–16; Montford Decl. at ¶¶ 15, 17–21; McCoy Decl. at ¶¶ 12, 22–23.

The Individual Plaintiffs have each been directly injured by Defendants' failure to comply with the NVRA. Specifically, each Individual Plaintiff interacted with the DMV in 2014 to apply for a driver's license or change her address. Ms. Najera and Ms. Lane both attempted to register to vote at the DMV and left the DMV believing that they had registered; Ms. Holverson changed her address at the DMV and specifically asked that the DMV update her voter registration information. Lane Decl. at ¶¶ 15–17; Holverson Decl. at ¶¶ 14–17; Najera Decl. at ¶¶ 8–11. But when they each arrived to vote in the November 2014 general election, they were told that they were not on the voter rolls and were given provisional ballots to complete—which ultimately were not counted because the DMV had kept no record of their attempts to register. Lane Decl. at ¶¶ 18–24; Holverson Decl. at ¶¶ 18–23; Najera Decl. at ¶¶ 12–17.

Furthermore, because each of the Individual Plaintiffs resides in the state and may relocate within the state at some time in the future, each Individual Plaintiff is reasonably likely to have need of the DMV's voter registration services in the future and therefore is at substantial risk of suffering from the Defendants' non-compliance again.

B. The Defendants

Defendant KIM WESTBROOK STRACH is the Executive Director of the North Carolina State Board of Elections. Pursuant to N.C. Gen. Stat. § 163-82.2 (2015), Ms. Strach is the Chief State Election Official in North Carolina and is responsible for overseeing the administration of the elections process throughout the State, including ensuring that the State is in compliance with the NVRA. Defendant RICK BRAJER (together with Defendant Strach, the “Section 7 Defendants”) is the Secretary of the North Carolina DHHS. DHHS administers the SNAP,³ Medicaid, CHIP, TANF, and WIC programs, among others, which are implemented through public assistance offices and organizations throughout the state. DHHS and its offices are mandatory voter registration agencies under both federal law and the North Carolina General Statutes and must provide voter registration services in compliance with the NVRA. *See* 52 U.S.C. § 20506; N.C. Gen. Stat. § 163-82.20 (2015).

Defendant KELLY THOMAS is North Carolina’s Commissioner of Motor Vehicles. Defendant NICK TENNYSON (together with Defendants Strach and Thomas, the “Section 5 Defendants”) is North Carolina’s Secretary of Transportation. The North Carolina Department of Transportation is the state agency that is responsible for all of the state’s transportation-related activities, including those conducted by the DMV. In North Carolina, the DMV is the state entity responsible for accepting and processing all

³ In North Carolina, SNAP is called Food and Nutrition Services. *See* North Carolina Department of Health and Human Services, *Food and Nutrition Services (Food Stamps)*, <http://www.ncdhhs.gov/assistance/low-income-services/food-nutrition-services-food-stamps> (last visited March 21, 2016).

applications for, renewals of, and changes of address on a state-issued driver's license or identification card and is required to provide voter registration services under Section 5 of the NVRA and the North Carolina General Statutes. 52 U.S.C. §§ 20504(a)(1), (d); N.C. Gen. Stat. § 163-82.19 (2015).

C. The Violations of the NVRA Requiring Preliminary Relief

1. The Section 7 Defendants Are Failing to Offer Voter Registration Services as Required by Law.

The Section 7 Defendants are failing to provide the voter registration services required by the NVRA when conducting both in-person and remote transactions (*i.e.*, those transactions conducted over the phone or through an online application portal). Time after time, at office after office, clients leave public assistance offices without being offered voter registration in any way whatsoever: They are not informed of their voter registration rights, they are not asked if they would like to register to vote, and they are not given voter registration application forms. Ferrier Decl. at ¶¶ 2–15; Cataldo Decl. at ¶¶ 3-10.

In October 2014, investigators from Project Vote and Demos visited DHHS offices across the state and spoke to individuals who were eligible to register to vote and who had engaged in transactions covered by Section 7. One investigator went to 11 DHHS offices and talked to 143 public assistance clients. Ferrier Decl. at ¶¶ 2–15. Of these clients, only 27 individuals were even made aware of their right to vote—11 through the written notification required by the NVRA and 16 orally. The remaining 116 clients were completely unaware that they had the opportunity to register to vote during

their transaction with DHHS. Ferrier Decl. at ¶¶ 5–15. A second investigator went to 5 DHHS offices and talked to 53 public assistance clients. Cataldo Decl. at ¶¶ 6–10. Of these clients, 36 did not receive any notification of their right to register to vote. Cataldo Decl. at ¶¶ 6–10. The striking number of individuals who left the DHHS office completely unaware that they should have been given an opportunity to register to vote demonstrates that DHHS is routinely disregarding its obligation to provide voter registration services to clients.

The findings of Plaintiffs’ investigation are not surprising given that the Section 7 Defendants’ policies do not require DHHS caseworkers to provide voter registration application forms during in-person transactions to all clients who do not decline in writing to receive them. D’Amore Decl. Ex. D, at 15, 27, 31.

During in-person transactions, rather than requiring caseworkers to provide clients a voter preference form allowing them to indicate in writing whether or not they wish to register, the Section 7 Defendants use an internal “Online Preference Form” to record the clients’ choices. D’Amore Decl. Ex. D, at 31, 39–44. This form is completed by the caseworker, not the client, and Defendants’ use of the online form appears to provide no assurance that clients *in fact* are offered voter registration or that they receive a written disclosure of their rights alerting them to that opportunity. Defendants themselves have already learned of problems with how this system is used. D’Amore Decl. Ex. D, at 15.

Defendants’ violations in telephone transactions are unequivocal. During a telephone transaction, the Section 7 Defendants simply cannot provide any written disclosures of rights or receive a written declination of the opportunity to register to vote.

See D’Amore Decl. Ex. D, at 31 (“If you do make phone contact, then please be sure [to] ask the NVRA question and record the preference using our online preference form system.”). Although Defendants’ policy of requiring case workers to mail voter registration application forms to clients who answer “yes” to an oral offer of voter registration may appear efficient and cost-effective, it is contrary to the plain language of Section 7 and provides *no* assurance that there has been any offer of the opportunity to register to vote. If a caseworker assisting a client by telephone fails to ask the voter preference question, there will be no record of that deviation from policy. *See* D’Amore Decl. Ex. C, at 20–21 (“[I]f you’re having phone contact with your client, please remember to ask the NVRA question. If they say yes, mail the form.”).

Additionally, “ePass,” DHHS’s online self-service system for public assistance clients to apply for Medicaid and Food and Nutrition Services without caseworker assistance, fails to satisfy the Section 7 Defendants’ NVRA obligations. While the system asks a voter preference question and allows clients to respond with a “yes” or a “no,” clients are not required to respond to the voter preference question in order to complete their transaction. Seawell Decl. at ¶¶ 4–6 & Ex. A. However, the Section 7 Defendants’ policy is to provide a voter registration application only to users who answer “yes,” but not those who, because they fail to see it or are rushing or for any other reason, leave the question blank. *See* D’Amore Decl. Ex. D, at 27 (“Distribute a voter registration form if the answer is yes, the client would like voter registration services.”).

Importantly, the ePass application system does not provide most of the statutorily required disclosures or explain how clients can receive assistance with the voter

registration application. *See* Seawell Decl. at ¶ 10. Therefore, ePass users presented with the voter preference question are not informed of crucial rights, such as the right that the client’s decision to register or not to register will not affect the client’s benefits.

2. The Section 5 Defendants Are Failing to Collect and Transmit Voter Registration Information to the Appropriate State Elections Official.

The experiences of the Individual Plaintiffs show that while the DMV is accepting voter registrations and changes of address during in-person transactions, it is failing to transmit them to the appropriate state elections official so that those applicants can actually vote. Holverson Decl. at ¶¶ 17, 19–22; Lane Decl. at ¶¶ 15, 17–23; Najera Decl. at ¶¶ 8–11, 14; *see also* Lafargue Decl. at ¶¶ 9–13. These experiences are confirmed from the Defendants’ own data: Documents produced from public records requests show that an unacceptably high percentage of voters who were forced to vote provisionally because they were not believed to be registered had in fact registered to vote or changed their address at a DMV office; in Mecklenburg County, 17.8 percent of all provisional ballots cast in the 2014 general election were attributable to the DMV; in Nash County, DMV-related provisional ballots accounted for 10 percent of all provisional ballots. Flanagan Decl. at ¶¶ 5–7 & Exs. I–K.

Moreover, the Defendants have been well aware of these difficulties for many years. Internal communications from 2014 produced by the Section 5 Defendants suggest a “meltdown” at the DMV because “over and over again” qualified voters have been forced to vote provisionally. Hall Decl. at ¶¶ 17–19 & Ex. A. A number of these provisional ballots end up being rejected because the “DMV [is] not doing their job.” *Id.*

Notably, these problems have continued through the primary election last week, demonstrating the need for preliminary relief prior to the November 2016 general election. As one witness reported, after moving from Forsyth County to Durham County, she used the DMV's online services on February 7, 2016, to change her address on her driver's license. She was prompted about changing her voter registration address as well, and confirmed that she wished to do so. She received her new driver's license approximately a week later. However, when she looked up her voter registration record on Election Day, Tuesday March 15, 2016, she found she was still registered in Forsyth County. She was forced to cast a provisional ballot because of the DMV's failure to comply with Section 5. Her mother, who had also moved to Durham, but from Craven County, had the exact same experience. Lafargue Decl. at ¶¶ 7, 9–13, 18–19.

In addition to problems in data transmission, the Section 5 Defendants have failed to offer required voter registration opportunities through their online self-service system. While today the DMV appears to be offering online voter registration, it failed to do so at least through the end of 2015.⁴ As can be seen in a comparison of screenshots from the DMV's online change-of-address system from December 2015 and February 2016, the December 2015 site does not contain any disclosure of voter registration opportunities other than a link to the Board of Elections. *Compare* Butler Decl. Ex. A, at 2 (screenshot from December 22, 2015), *with* Butler Decl. Ex. A, at 4 (screenshot from February 2,

⁴ Plaintiffs do not believe that the DMV's current implementation of voter registration services complies with the NVRA, including with respect to the way it handles changes of address and license renewals. Plaintiffs are seeking limited expedited discovery to further develop these facts.

2016). Consequently, individuals who engaged in such online transactions before December 2015 had no opportunity to register to vote or update their address information for voter registration purposes, in violation of Section 5.

D. The Need For Preliminary Relief.

As set forth in further detail below, the Defendants' NVRA violations have deprived many North Carolinians of opportunities to register to vote and, ultimately, of opportunities to cast a ballot that counts. Absent correction, these violations will leave many North Carolina voters out of the upcoming general election, whether because they are not being given the opportunity to register to vote as the law requires or because, like Juliette Lafargue and the Individual Plaintiffs, they will believe that they are registered but may find that they are not when they appear at a polling site to vote.

III. ARGUMENT: PRELIMINARY RELIEF IS REQUIRED

A. Legal Standard

A court may issue a preliminary injunction to “prevent irreparable harm during the pendency of a lawsuit.” *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)). In seeking a preliminary injunction, a plaintiff must establish “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013). Particularly in light of

the important statutory and constitutional rights at stake, these requirements are more than satisfied here.

B. The Plaintiffs Are Likely to Succeed in Establishing a Violation of Section 7 of the NVRA.

A central part of the NVRA is its requirement that clients of public assistance agencies be offered the opportunity to register to vote whenever they apply for, renew, or recertify benefits, as well as when they change the address they have on file with the agency (engage in a “covered transaction”). Section 7 of the NVRA requires that this opportunity be offered in writing. 52 U.S.C. § 20506(a)(6)(B) (emphasis added) (noting that public assistance agencies are required to “*provide* a form” that, among other things, offers clients the opportunity to register to vote, allows them to indicate whether they would like to register, and informs them that their selection will not affect the benefits they receive). Furthermore, “unless [an] applicant, **in writing**, declines to register to vote,” Section 7 demands that they be provided with a voter registration application form. *Id.* § 20506(a)(6)(A) (emphasis added). For purposes of Section 7, the term “in writing” has been understood to mean “[t]he state or condition of having been written or penned; written form.” *Valdez*, 676 F.3d at 945.

The “voter preference form”—a form that includes a voter registration question and that the NVRA requires be distributed to each individual engaging in a covered transaction—may serve as the required “writing” *if completed by the applicant*. 52 U.S.C. § 20506(a)(6)(B) (providing the language and disclosures that must be included as part of the voter preference form). If a public assistance client does not check “no” on

the voter preference form (or otherwise decline in writing to register to vote), the public assistance agency must provide the client with a voter registration application form that can be completed at a later date. *See Valdez*, 676 F.3d at 945–46 (noting that 52 U.S.C. § 20506(a)(6)(A) “must be interpreted as requiring a designated voter registration agency to provide an applicant with a voter registration application unless *the applicant* declines, *in written form*, to register to vote”) (emphasis added); *see also* 52 U.S.C.

§ 20506(a)(6)(A)–(B).⁵ The system created by 52 U.S.C. § 20506(a)(6)(A)–(B) serves the NVRA’s purposes of ensuring that voters are actually offered an opportunity to register to vote and are informed of their rights by ensuring that clients are actually answering the question and making the decision whether or not to register to vote for themselves. *See, e.g., Valdez*, 2010 U.S. Dist. LEXIS 142209, at *24–25; H.R. Rep. No.

⁵ In another case, the Fifth Circuit agreed that “[r]equiring that a declination be ‘in writing,’ rather than oral, creates evidence showing that the state complied with the NVRA despite not distributing a voter registration form,” *Scott v. Schedler*, 771 F.3d 831, 840 (5th Cir. 2014) (“*Scott II*”), that court wrongly allowed a failure to answer the voter preference question to qualify as a sufficient “writing.” The dissent in *Scott* strongly disagreed. First, the dissent argued that the ordinary meaning of “in writing” stands in direct opposition to the majority’s view, as a failure to write cannot be interpreted as an affirmation “in writing,” as required by the NVRA. *Id.* at 842 (Stewart, C.J., dissenting). Second, Congress was clear that a failure to check either box constitutes a declination of subsection (C)—relieving the agency of providing the applicant with assistance when registering to vote—but not subsection (A), therefore still requiring the distribution of a voter registration application. *Id.* Lastly, the dissent reasoned that *Valdez* is more consistent with Congress’s intent to “increase the number of eligible citizens who register to vote in elections for Federal office.” *Id.* (quoting 52 U.S.C. § 20501(b)(1)) (internal quotation marks omitted). For these reasons, the opinion in *Valdez* and the dissent’s position in *Scott* accurately interpret the law and should be adopted here.

103-66, at 17 (1993). These requirements also serve to create an authentic record of the client's choice.⁶

1. The Section 7 Defendants Are Violating the Requirements to Disclose Voter Registration Rights in Writing.

Unambiguous data gathered from interviews of public assistance clients throughout North Carolina demonstrate that during in-person transactions, the Section 7 Defendants are systematically failing to provide their clients written notice of their voter registration rights. In or about 2010, the Section 7 Defendants began using an “online” system, with screens on a computer terminal that attempt to duplicate the written voter preference form, to record client's voter preference choices during in-person transactions. *See D'Amore Decl. Ex. B.* Screenshots of the relevant pages of the online system are set forth below. Unfortunately, this system does not appear to require the client to answer

⁶ Furthermore, Section 7's requirements apply regardless of the mode by which a transaction takes place. Whether an individual engages in a Section 7 covered transaction in-person, telephonically, or through an online system, the NVRA requires that the individual be provided a written declination form and—unless he or she declines to vote in writing—a voter registration application. *See, e.g., Ga. State Conference of N.A.A.C.P. v. Kemp*, 841 F. Supp. 2d 1320, 1332 (N.D. Ga. 2012); U.S. Department of Justice, Civil Rights Division, *The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, Q24, <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last visited March 21, 2016) (“[Q:] Do the voter registration requirements of Section 7 of the NVRA apply to all application, renewal, recertification and change of address transactions with designated offices? [A:] Yes. . . . Many Section 7 designated agencies/offices routinely provide services/assistance such as application for, or renewal of, services or change-of-address notification through the internet, by telephone, or by mail. States should ensure the availability of voter-registration opportunities to individuals using such remote service/assistance opportunities from designated agencies.”).

the question and therefore has proven inadequate to ensure clients are advised of their rights during in-person transactions.

North Carolina State Board of Elections
NC NVRA PROGRAM VOTER REGISTRATION PREFERENCE FORM

If you are not registered to vote where you live now, would you like to apply to register to vote here today?

Please select one of the options below:

- ☐ YES, I would like to apply to register to vote here today.
- ☐ YES, I would like to apply to register to vote, but I will take a voter registration application home to complete at a later time.
- ☐ YES, I would like to pre-register to vote.
- ☐ I am ALREADY REGISTERED, but I would like to update my voter registration information. I will complete a voter registration Application/Update form for this purpose.
- ☐ I am ALREADY REGISTERED to vote at my current address.
- ☐ NO, I am declining the opportunity to register to vote today.

(IF YOU DO NOT CHECK A BOX, YOU WILL BE CONSIDERED NOT TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.)

Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency. If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private. If you believe that someone has interfered with your right to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with the North Carolina State Board of Elections, PO Box 27255, Raleigh NC 27611-7255, or you may call the toll free number, 1-866-522-4723.

READ, PRINT YOUR NAME AND DATE OF BIRTH, AND SIGN BELOW:
I have been offered the opportunity to register to vote at the agency named below and I understand that I will be offered the opportunity to register to vote at the initial application for service of assistance and with each recertification, renewal or change of address relating to such service or assistance.

I understand that I may request and receive assistance from this agency in completing the voter registration form. The decision to seek or accept help is mine. I may fill out the application in private.

If I choose to register to vote, the location where I completed the voter registration application form will be used only for voter registration purposes. If I decline to register to vote, the fact that I declined will be used only for voter registration purposes.

Applicant Full Name: _____ Applicant Date of Birth: _____

☐ I Agree to transmit this form electronically and submitting this form electronically will serve as my electronic signature for all purposes required by state and federal law.

☐ I DO NOT AGREE to transmit this form electronically.

Date: _____ Agency Name: Wake County DSS

TO REGISTER TO VOTE IN NORTH CAROLINA YOU MUST:

Qualifications

1. Be a citizen of the United States of America
2. Be 18 years old or older, or will be at the time of the next General Election, OR in order to pre-register to vote, be at least 15 years of age
3. Be a resident of North Carolina, this county, precinct, or other election district for 30 days before the next election in which you intend to vote
4. You must not vote in any other county or state after submission of a voter registration form. If you register to vote today, any voter registration you have elsewhere will be canceled
5. You must not have not been convicted of a felony, or if you have been convicted of a felony, you must have completed your sentence, including any probation or parole. (Citizenship and voting rights are automatically restored upon completion of the sentence. No special document is needed.)

FOR NVRA AGENCY USE ONLY:

The problem with the online preference form is that the screens are seen by the caseworker; the information appearing on the screens is not presented to the *client* whose rights are being discussed. Relying on the agent to present the disclosures orally increases the chance that they will be omitted entirely. Under the Defendants' current system, caseworkers could easily skip over the voter registration portion of the benefits application. This appears to be exactly what is happening in DHHS offices throughout the state. Ferrier Decl. at ¶¶ 5–15; Cataldo Decl. at ¶¶ 6–10. As shown by the interviews conducted by Plaintiffs' investigators, in which 146 out of 196 clients left DHHS offices totally unaware of the opportunity to register to vote, clients are either not being provided a written voter preference form or are not being made aware of it. Ferrier Decl. at ¶¶ 5–15; Cataldo Decl. at ¶¶ 6–10. Furthermore, Defendants themselves have found that agents were not asking the correct question, demonstrating why the requirement of written disclosures is so important. D'Amore Decl. Ex. D, at 5–7, 15.

Defendants' oral delivery of the NVRA disclosures during telephone transactions is also wholly noncompliant with the NVRA. As the SBE has acknowledged, "we know that there's a lot of phone contact now." D'Amore Decl. Ex. C, at 30. But for transactions conducted by telephone, there is no possible way the online preference form system could provide the disclosures required by the NVRA. By asking caseworkers to make these disclosures orally, and to check boxes (and sign) a form as if they were the client, North Carolina has deviated from the statutory requirements and abdicated responsibility for informing their clients of their rights in writing. D'Amore Decl. Ex. C, at 30 ("[I]f you're communicating with your client via phone, if they say no, then you're done.").

Furthermore, the Section 7 Defendants' implementation of the ePass online system used directly by clients also fails to contain the required disclosures of voter registration rights. *See* 52 U.S.C. § 20506(a)(6)(B). Other than the voter preference question itself, none of the required disclosures appears in the ePass system for SNAP benefits. Seawell Decl. at ¶¶ 1, 10 & Ex. A.

2. The Defendants Are Violating the NVRA Requirement to Distribute a Voter Registration Application Form Unless the Client Declines to Receive One In Writing During Both In-Person and Remote Transactions.

In addition to requiring written disclosures of registration rights during in-person and telephone transactions, the NVRA requires public assistance agencies to provide each client with a voter registration application unless the client declines the opportunity to register to vote in writing. However, the Section 7 Defendants are failing to meet this

legal obligation with respect to clients who engage in in-person, telephonic, and online transactions.

a. In-Person Transactions

The Section 7 Defendants routinely fail to distribute voter registration applications during in-person transactions. Almost three-fourths of clients surveyed who conducted in-person transactions did not see and respond in writing to a voter preference question, yet also did not receive a voter registration application. Ferrier Decl. at ¶¶ 5–15; Cataldo Decl. at ¶¶ 6–10. Additionally, to the extent the Defendants are relying on paper forms, the voter preference question in the SNAP application is buried, making it easy to miss, and therefore there is no meaningful offer of voter registration. *See, e.g.*, D’Amore Decl. Ex. E (Application for Food and Nutrition Services). Regardless, each client who fails to see and respond to the question must be provided a voter registration application. 52 U.S.C. § 20506(a)(6). Even if the clients reviewed a written voter preference form (and the interviews indicate that they did not), the plain language of Section 7 mandates, as the *Valdez* court confirmed, that unless such clients affirmatively declined to register to vote *in writing*, they should have received a voter registration application.

b. Telephonic Transactions

For transactions conducted by telephone, a client cannot decline “in writing” to register to vote. The Section 7 Defendants are obligated to mail a voter preference form and voter registration application to each such client. The Section 7 Defendants, however, are not doing this; their policy is to mail forms only to those clients who orally respond “yes.” *See* D’Amore Decl. Ex. C, at 20–21 (“[I]f you’re having phone contact

with your client, please remember to ask the NVRA question. If they say yes, mail the form.”). This system violates the specific statutory requirements of the NVRA and undermines the purpose of those requirements.

c. Online “ePass” Transactions

The Section 7 Defendants’ online system for applying for Medicaid or Food and Nutrition Services likewise does not properly implement the requirements of the NVRA. While it contains the NVRA’s voter preference question, ePass does not require an answer, making the question easy to ignore, skip over, or leave blank. But as with all of their other transactions, the Section 7 Defendants are mailing voter registration application forms (if at all) only to those users who answer the question and check “yes.” D’Amore Decl. Ex. C, at 20–21. This practice violates the NVRA and transforms the Act’s “opt out” system into one that requires clients to affirmatively request a voter registration application. 52 U.S.C. § 20506(a)(6).

C. The Plaintiffs Are Likely to Succeed in Establishing a Violation of Section 5 of the NVRA.

Section 5 of the NVRA requires states to treat driver’s license or a state issued identification card applications and renewals as voter registration applications unless the client opts out by failing to sign the voter registration portion of the application or renewal form. 52 U.S.C. § 20504(c)(1); *see also id.* § 20504(a)(1). In addition, Section 5 requires that driver’s license and identification card changes of address be applied to the individual’s voter registration record unless the individual affirmatively opts out by indicating that the change of address is not for voter registration purposes. *Id.*

§ 20504(d). All voter registration information collected by the DMV must be transmitted to the appropriate state election official within ten (and sometimes five) days. *Id.* § 20504(e)(1).⁷ These requirements exist regardless of whether a transaction is conducted in person, online, or by other remote means. U.S. Department of Justice, Civil Rights Division, *The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, Q4⁸ (noting that “to the extent that the State provides for remote applications for driver’s licenses, driver’s license renewals, or driver’s license changes of address, via mail, telephone, or internet or other means, then provision must be made to include the required voter registration opportunity as well”); *see also Kemp*, 841 F. Supp. 2d at 1332 (determining that the language of Section 7, which is closely tracked in Section 5, unambiguously established that the NVRA’s voter registration requirements apply to remote transactions).⁹

The Section 5 Defendants are violating these requirements in at least two ways. First, they have repeatedly failed to transmit voter registration information to the

⁷ Under North Carolina’s statutory implementation of Section 5, any updates to voter registration information received by the DMV must “be forwarded by the Department of Transportation to the appropriate board of elections not later than five business days after the date of acceptance.” N.C. Gen. Stat. § 163-82.19(a).

⁸ <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last visited March 21, 2016).

⁹ In *Kemp*, the court found Section 7 “unambiguous” in applying to remote transactions, citing Section 7’s use of “**each** application” and “**each** recertification, renewal, or change of address.” 841 F. Supp. 2d at 1329 (quoting 52 U.S.C. § 20506(a)(6)(A)) (emphasis in original). Section 5 of the NVRA, similarly, places voter registration obligations on motor vehicle offices for “each . . . driver’s license application (including any renewal application),” 52 U.S.C. § 20504(a)(1), and “any change of address form submitted.” *Id.* § 20504(d).

appropriate state elections official. Second, through at least the end of 2015, they have failed to offer voter registration services through their self-service online portal, and those they have offered since that time do not comply with the requirements of the NVRA.

1. DMV Fails to Properly Transmit Voter Registration Information to Election Officials.

The DMV regularly fails to transmit voter registration applications and change of address information to the appropriate state election official. The experiences of the Individual Plaintiffs demonstrate that, for the 2014 election, the DMV failed to transmit voter registration information as required by the NVRA. *See, e.g.*, Holverson Decl. at ¶¶ 17, 19–22; Lane Decl. at ¶¶ 17, 19–23; Compl. ¶ 35; Lafargue Decl. at ¶ 18; Hall Decl. at ¶¶ 17–19 & Ex. A. Public information provided by the Section 5 Defendants confirms that this problem is not limited in geographic scope; in counties across the state, voters were forced to vote provisionally despite having registered at the DMV. Flanagan Decl. at ¶¶ 2–12 & Exs. F–P. And this problem continued through the March 2016 primary election. Lafargue Decl. at ¶ 18. Plaintiffs are likely to succeed on the merits.

2. The DMV Is Failing to Provide Voter Registration Services Through Its Self-Service Internet Portal.

At least as of the filing of the Complaint, the DMV was failing to offer adequate voter registration services through its online portal. *See* Butler Decl. Ex. A, at 2. Accordingly, untold numbers of voters who were entitled to be given the opportunity to register to vote, or to have their change of address information transmitted to the Board of Elections, may be unregistered. Plaintiffs are likely to succeed in showing both that the

DMV's failure to offer online voter registration services prior to 2016 violated the NVRA. And while it has since upgraded its website, in view of its recent history and the experiences with the March 2016 primary, the DMV very likely remains non-compliant. Lafargue Decl. at ¶¶ 9–18.

D. The Plaintiffs Have Standing to Seek Injunctive Relief.

Under settled law, the named Individual Plaintiffs have standing to seek injunctive relief arising from injuries personally suffered as a result of the Defendants' actions. In addition, the Organizational Plaintiffs have standing to seek injunctive relief on their own behalf for resources they have diverted to counter Defendants' NVRA violations.

1. Individuals

To establish standing, an individual must demonstrate: (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Each individual Plaintiff was deprived of the right to vote in the 2014 election due to the failure of the DMV to transmit her voter registration information. Holverson Decl. at ¶¶ 22–23; Lane Decl. at ¶¶ 23–24; Compl. at ¶ 35–36. They are likely to be aggrieved in the future should they relocate or conduct a covered transaction at the DMV. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462–63 (2007). Furthermore, the wrong they complain of is “capable of repetition, yet evading review.” *Davis v. FEC*, 554 U.S. 724, 735 (2008) (rejecting mootness argument even though election had passed); *Arcia v. Florida Sec'y of State*, 772 F.3d 1335, 1343 (11th Cir. 2014). To force the issues they raise to be litigated only

after the 2016 general election would unquestionably allow Defendants' violations to evade review.

2. Organizations

An organization claiming standing in its own right must adequately allege that (1) it has suffered an injury in fact that is “(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical”; (2) there is a “causal connection” between the injury and the challenged action of the defendant; and (3) it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005) (quoting *Lujan*, 504 U.S. at 560–61). The organizational standing requirements are satisfied here.

The Organizational Plaintiffs have suffered and will continue to suffer an injury in fact by the Defendants' conduct. Because of the Defendants' failings, these Plaintiffs have had to divert resources to voter registration drives that would otherwise go toward educating voters about the issues in the upcoming election, and Organizational Plaintiffs expect this diversion of resources to continue in view of the failure of the Defendants to offer the required voter registration opportunities. Hall Decl. at ¶¶ 14–16; Montford Decl. at ¶ 15, 18–21; McCoy Decl. at ¶¶ 17–23. This diversion of institutional resources to address Defendants' misconduct constitutes an injury in fact. *Williams v. Poretzky Mgmt., Inc.*, 955 F. Supp. 490, 493 (D. Md. 1996) (noting that “defendants' discriminatory actions have caused the [Fair Housing Council (FHC)] to divert its scarce resources to identifying and counteracting the defendants' discriminatory practices, taking time and money from the FHC's usual educational and counseling activities”);

Lane v. Holder, 703 F.3d 668, 674 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 1273 (2014); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

This injury is traceable to the conduct of the Defendants and redressable by this action. *Lujan*, 504 U.S. at 560–61; *Lane*, 703 F.3d at 674; *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 663–64 (D.C. Cir. 1996). For purposes of establishing standing, “no explicit guarantee of redress to a plaintiff is required.” *Equity In Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 100–01 (4th Cir. 2011). Here, there is no dispute that the Defendants are the source of the injury and have the power to correct it. The failure to offer required voter registration services has led and continues to lead the Organizational Plaintiffs to spend time and money on registering individuals who should have been registered by Defendants. If Defendants were to comply with the law and take steps to offer voter registration opportunities to those who have been previously deprived of them, the Organizational Plaintiffs could apply their resources to the voter education and outreach tasks that are core to their missions. *See Havens*, 455 U.S. at 379; *Williams*, 955 F. Supp. at 493; Hall Decl. at ¶¶ 14–16; Montford Decl. at ¶ 15, 18–21; McCoy Decl. at ¶¶ 17–23.

E. The Plaintiffs Will Suffer Irreparable Harm in the Absence of Preliminary Relief.

The injury suffered by the organizations will be irreparable if preliminary relief is not granted. *See, e.g., Scott v. Schedler*, No. CIV.A. 11-926, 2013 WL 264603, at *9, *17 (E.D. La. Jan. 23, 2013), *aff’d in part, vacated in part*, 771 F.3d 831 (5th Cir. 2014); *Ass’n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 361 (5th Cir. 1999). In

Scott, the district court found standing and irreparable injury under the NVRA where the NAACP was:

[F]orced to expend resources registering Louisiana voters who would have already been registered if the Defendants had complied with the NVRA. As the legislative history of the NVRA highlights, this was exactly the type of burden that the NVRA was designed to eliminate. As such, the Louisiana State Conference of the NAACP undoubtedly sustained an injury due to the failure of Defendants to comply with the mandates of the NVRA.

2013 WL 264603, at *9 (citations omitted);¹⁰ *see also Scott II*, 771 F.3d at 837 (“We nevertheless hold that the NAACP has suffered injury in fact.”). The court found the irreparable injury requirement easily met, stating “the NVRA expressly provides that the remedies available for persons aggrieved under the act are declaratory or injunctive

¹⁰ On appeal, the Fifth Circuit affirmed the district court’s finding that the plaintiff, the Louisiana NAACP, had organizational standing with respect to in-person transactions. *See Scott II*, 771 F.3d at 837. The Fifth Circuit found, however, that the Louisiana NAACP did not have standing to challenge NVRA violations during remote transactions because the Louisiana NAACP had introduced no evidence at trial showing that its voter registration efforts reached individuals who had engaged in remote transactions. *Id.* at 837. Here, the evidence will show that Plaintiffs have been injured by Defendants’ failure to provide voter registration services to individuals engaging in online transactions, and Plaintiffs’ concurrently filed motion for expedited discovery seeks discovery on this issue, among others.

relief. Since monetary damages are not available, an injunctive remedy is the appropriate mechanism to ‘compensate’ the Plaintiffs.” *Scott*, 2013 WL 264603, at *17.¹¹

The Organizational Plaintiffs face irreparable harm if an injunction is not issued. *See* Hall Decl. at ¶¶ 14–16; Montford Decl. at ¶ 15, 18–21; McCoy Decl. at ¶¶ 17–23. As a result of North Carolina’s failure to comply with the NVRA, the Organizational Plaintiffs have spent and will continue spending additional time and resources to voter registration efforts toward unregistered individuals who would have been registered through the DMV and/or public assistance agencies, and will lose the ability to spend those resources on other important activities in advance of the upcoming election. The Organizational Plaintiffs will continue to suffer irreparable harm without preliminary injunctive relief.

F. The Balance of the Equities and the Public Interest Strongly Favor the Issuance of Narrowly Tailored Preliminary Injunctive Relief.

1. Plaintiffs’ Proposed Relief is Narrowly Tailored.

While Defendants’ processes and online services are broadly in need of reform as set out in the Complaint, narrow temporary relief can be granted in advance of the November 2016 general election that will limit harm to the Plaintiffs and go a long way

¹¹ *See* 52 U.S.C. § 20510(2) (expressly authorizing “a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.”); *see also United States v. City and Cnty. of S.F.*, 310 U.S. 16, 30 (1940) (stating that, where Congress expressly authorized injunctive relief, “we are satisfied that this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued”); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983) (“The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.”).

toward protecting the right to vote in North Carolina. Plaintiffs do not by this motion seek everything a permanent injunction in this matter will require. They seek limited relief that is narrowly tailored and practically implemented before the election. Plaintiffs therefore seek an order that:

- Directs the Section 7 Defendants to mail an Explanatory Letter and a prepaid, coded voter registration application to all individuals who engaged in a covered transaction with a public assistance agency or office in North Carolina from January 1, 2013 and through such time as interim procedures ensuring NVRA compliance are in place, whom Defendants cannot show (a) to be registered to vote at their current address or (b) to have a hand-signed or self-executed ePass voter preference form declining to register to vote;
- Directs the Section 7 Defendants to institute certain interim procedures ensuring that going forward all individuals who engage in a covered transaction with a public assistance agency receive the required NVRA voter registration services, whether the transaction takes place in-person, over the telephone or through the internet;
- Directs the Section 5 Defendants to mail a prepaid, prepopulated voter registration application to all individuals who conducted an online application, renewal or change of address transaction with the DMV; and
- Directs Defendant Strach to (a) count the votes of any person who votes provisionally because they are not on the voter rolls but indicates that they registered or changed their address at the DMV, if the DMV can confirm that the individual engaged in a transaction with the DMV and regardless of whether the DMV can confirm that the individual submitted a voter registration application during that transaction; and (b) provide notice at polling places and at the DMV that if a person is not on the voter rolls but registered or changed their address at the DMV, their vote will be counted.

Defendants must also be required to provide training regarding the NVRA and any other relief ordered by the Court to employees responsible for voter registration.

2. The Balance of the Equities and the Public Interest Favor Plaintiffs.

As the Fourth Circuit has observed, “[b]y definition, ‘[t]he public interest . . . favors permitting as many qualified voters to vote as possible.’” *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247–48 (4th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)), *cert. denied*, 135 S. Ct. 1735 (2015); *Doe v. Walker*, 746 F. Supp. 2d 667, 683 (D. Md. 2010) (“Though the Court is reluctant to interfere with Maryland’s election machinery, where the risk of disenfranchisement of a group of voters is as great as it is in this case, narrowly tailored injunctive relief is warranted.”). The state, ostensibly, shares this interest. Ensuring that potential voters receive the full opportunity to register to vote to which they are entitled protects a strong public interest. Furthermore, the deficiencies at North Carolina’s DMV places potential voters at great risk that their attempts to vote during early voting or on election day will not be counted—leaving North Carolina little time to remedy the situation after the fact. Likewise, DHHS’s violations of the NVRA are preventing numerous qualified low-income voters from becoming registered to vote and being able to participate in the democratic process. Preliminary relief is an appropriate remedy for violations of Section 5 and Section 7 of the NVRA. *See, e.g., U.S. Student Ass’n Found. v. Land*, 585 F. Supp. 2d 925, 939–41 (E.D. Mich. 2008) (granting preliminary injunction where Michigan DMV cancelled voter registration when individual applied for a driver’s license in a different state).

Here, the Defendants' violations of law place significant burdens on the Organizational Plaintiffs to undertake efforts to register voters who would have been registered had the Defendants done their job. Furthermore, those efforts will necessarily be inefficient: Defendants are uniquely situated to reach the citizens Congress intended to be served through the requirements of the NVRA. The Organizational Plaintiffs will thus spend needless time and limited resources attempting to register voters when they could be conducting other educational and outreach efforts central to their missions. Given the strong public interest in protecting the right to vote, the ample time prior to the election for Defendants to rectify their failings, the potential risk to the Individual Plaintiffs, and the burden the Organizational Plaintiffs will face absent relief, the balance of the equities tips strongly towards Plaintiffs.

IV. CONCLUSION

For the reasons set forth above, preliminary relief is necessary to protect the Plaintiffs from further injury, and to protect the integrity of the voting process and the rights of the citizens of this state to register to vote.

Dated: March 21, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I have electronically filed Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction with the Court using the CM/ECF system, which will send electronic notification to the following:

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Dated this 21st day of March, 2016.

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