

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-1063-LCB-JEP

STATEMENT OF INTEREST OF THE UNITED STATES

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

Defendant Kim Strach's motion to dismiss misstates the law under Sections 5 and 7 of the NVRA in several important respects. The United States files this Statement for the limited purpose of articulating proper NVRA standards. It takes no position on any other issue before this Court.

I. BACKGROUND

On December 15, 2015, Plaintiffs sued the Executive Director of the North Carolina State Board of Elections and the heads of the North Carolina Department of Transportation (DOT), Division of Motor Vehicles (DMV), and Department of Health and Human Services (DHHS), alleging various violations of Sections 5 and 7 of the NVRA. *See generally* Complaint (ECF No. 1). Relevant to this Statement of Interest, Plaintiffs allege that (1) DHHS, a mandatory voter registration agency under Section 7 of the NVRA, *id.* ¶¶ 6, 42, violates Section 7 by failing to provide required voter registration services to public assistance clients and applicants who conduct covered transactions remotely (*i.e.*, through the internet, telephone, or mail), *id.* ¶ 65; (2) DHHS also violates Section 7 by failing to ensure that private organizations with which it contracts to help implement its programs provide required voter registration services to individuals who conduct covered transactions with those contractors, *id.* ¶ 64; and (3) DOT and DMV violate Section 5 by failing to provide required voter registration services to individuals renewing or submitting a change of address for a North Carolina driver's license through the DMV's online portal, *id.* ¶¶ 85-89.

On March 17, 2016, Defendant Kim Strach moved to dismiss. (ECF No. 28.) Among other things, Defendant Strach contends that North Carolina public assistance

agencies and the North Carolina DMV may restrict NVRA-mandated voter registration opportunities solely to clients who appear in person and that those agencies may lawfully withhold voter registration services from individuals who apply for a driver's license or public assistance by phone, internet, or mail ("remote transactions"). *See* Mem. in Support of Mot. to Dismiss on Behalf of Def. Strach 17-19 (ECF No. 29) ("Strach Mem."). Second, Defendant Strach maintains that private organizations with which the State has contracted to provide public assistance services on its behalf need not offer voter registration services. *Id.* at 19-20.

II. STATUTORY FRAMEWORK

Congress passed the NVRA "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b)(1). Congress found that the right to vote is fundamental; that federal, state, and local governments have a duty to promote the exercise of that right; and that discriminatory and unfair registration laws and procedures can negatively affect voter participation in federal elections and disproportionately harm voter participation by groups including the poor and persons with disabilities. *See id.* § 20501(a); *Harkless v. Brunner*, 545 F.3d 445, 449 (6th Cir. 2008).

The NVRA requires states to provide at least three ways for citizens to register to vote for federal elections: (1) as part of the application, renewal, or change of address for a driver's license or similar identification; (2) by mail; and (3) through state-designated voter registration agencies. *See* 52 U.S.C. §§ 20504–20506; *Young v. Fordice*, 520 U.S. 273, 275 (1997). Section 4(a), captioned, "In general," sets out these three modes by

which voter registration opportunities are guaranteed by the NVRA. 52 U.S.C. § 20503(a). As its title suggests, Section 4(a) does no more than identify a state’s general obligation to “establish procedures” for voter registration in each of these circumstances. *Id.*¹ The NVRA’s next three provisions set forth detailed requirements regarding voter registration through each of these three methods: voter registration in connection with certain state motor vehicle transactions, often referred to as “motor voter” (Section 5), voter registration by mail-in application (Section 6), and voter registration in connection with transactions for public assistance, disability services, and services provided by other designated agencies (Section 7). *Id.* §§ 20504–20506. This case involves motor voter registration under Section 5, *id.* § 20504, and agency-based registration under Section 7, *id.* § 20506.

A. Section 5

Section 5 requires states to provide citizens an opportunity to register to vote (or update their voter registration) while they apply for or renew their driver’s license or other identification issued by a state motor vehicle agency.² If an applicant is already registered to vote, a driver’s license application or renewal must include the opportunity

¹ While certain states are exempt from the NVRA’s requirements, *see* 52 U.S.C. § 20503(b), North Carolina is not one of them.

² Section 5 provides that “[e]ach State motor vehicle driver’s license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.” 52 U.S.C. § 20504(a)(1); *see also id.* § 20502(3) (defining “motor vehicle driver’s license” to include “any personal identification document issued by a State motor vehicle authority”); *id.* § 20504(c) (providing that a voter registration application shall be integrated with the driver’s license application).

to update the registrant's existing voter registration. *Id.* § 20504(a)(2). In addition, a change of address form submitted for driver's license purposes must also serve as notification of a change of address for voter registration, absent a written declination by the registrant. *Id.* § 20504(d).

Section 5 requires that each state's motor vehicle authority transmit the completed voter registration portions of an application for a driver's license to the appropriate election official within certain timeframes. *Id.* § 20504(e).

B. Section 7

Under Section 7 of the NVRA, states must designate as voter registration agencies (VRAs) all offices in the state that provide (1) public assistance, or (2) state-funded programs primarily serving persons with disabilities. 52 U.S.C. § 20506(a)(2)(A)-(B). Congress designed the agency-based registration provisions "specifically to increase the registration of 'the poor and persons with disabilities who do not have driver's licenses and will not come into contact with [motor vehicle agencies].'" *Harkless*, 545 F.3d at 449 (quoting H.R. REP. NO. 103-66, at 19 (1993) (Conf. Rep.), *as reprinted in* 1993 U.S.C.C.A.N. 140, 144); *see also Nat'l Coal. for Students with Disabilities Educ. and Legal Def. Fund v. Gilmore*, 152 F.3d 283, 292 (4th Cir. 1998).

In establishing these mandatory designations, "Congress rejected a system that would 'permit States to restrict their agency program and defeat a principal purpose of this Act – to increase the number of eligible citizens who register to vote.'" *United States v. New York*, 700 F. Supp. 2d 186, 201 (N.D.N.Y. 2010) (quoting H.R. REP. NO. 103-66, at 19). Congress thus required states to designate public assistance agencies and covered

disabilities services offices as agencies providing voter registration services, without exception, explaining that “[t]he only way to assure that no State can create an agency registration program that discriminates against a distinct portion of its population is to require that the agencies designated in each State include an agency that has regular contact with those who do not have driver’s licenses.” H.R. REP. NO. 103-66, at 19.

Beyond designating “mandatory” VRAs under Section 7(a)(2), each state must also designate additional offices as VRAs under Section 7(a)(3), but may decide which federal, state, local, or non-governmental offices to select. *See* 52 U.S.C. § 20506(a)(3)(A)-(B); *Gilmore*, 152 F.3d at 285-86 (describing the NVRA’s mandatory and discretionary designation requirements).

Section 7 also prescribes what designated VRAs must do. Section 7(a)(4) requires all designated VRAs to distribute voter registration application forms, offer assistance in completing such forms, and accept and timely transmit completed registration forms to appropriate state election officials. 52 U.S.C. § 20506(a)(4)(A); *see also New York*, 700 F. Supp. 2d at 201 (stating that “[o]ffices designated as mandatory or discretionary VRAs must . . . furnish voter registration application forms to applicants, offer applicants assistance with the completion of those forms, and accept completed forms for transmittal”); *Gilmore*, 152 F.3d at 286 (same).

Section 7(a)(6) imposes additional and more particularized obligations on a certain subset of designated VRAs. *See* 52 U.S.C. § 20506(a)(6). Under this provision, those VRAs “that provide[] service or assistance in addition to conducting voter registration” must also “distribute with each application for such service or assistance, and with each

recertification, renewal, or change of address . . . the mail voter registration application form” unless “the applicant, in writing, declines to register to vote.” *Id.* § 20506(a)(6)(A). Section 7(a)(6) also requires these VRAs to provide their clients and applicants with a voter preference form that, among other things, provides the opportunity to record in writing a client’s desire to register to vote or decline the opportunity to register. *Id.* § 20506(a)(6)(B). For a client who wishes to register to vote, Section 7(a)(6) requires VRAs to provide not only general assistance, but “the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.” *Id.* § 20506(a)(6)(C).

III. ARGUMENT

“A Rule 12(b)(6) motion to dismiss ‘challenges the legal sufficiency of a complaint considered with the assumption that the facts alleged are true.’” *Luna-Reyes v. RFI Constr., LLC*, 109 F. Supp. 3d 744, 748 (M.D.N.C. 2015) (quoting *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009)). Because Defendant Strach’s construction of the NVRA conflicts with the statute’s plain language and existing case law, it should be rejected.

A. A Complaint Alleging that the State Fails to Offer Voter Registration during Remote Transactions at DMVs and Public Assistance Agencies States a Claim for Relief under the NVRA

1. Section 5 of the NVRA Requires States to Offer Voter Registration Opportunities When DMV Clients Conduct Remote Transactions

Defendant Strach argues that North Carolina need not provide voter registration opportunities to DMV clients who conduct NVRA-covered transactions remotely, as opposed to in person. *See* Strach Mem. 17-19.³ This is incorrect. Section 5’s plain language is broad in scope and applies to both remote and in-person transactions.

“The starting point for any issue of statutory interpretation . . . is the language of the statute itself.” *United States v. Bly*, 510 F.3d 453, 460 (4th Cir. 2007). Thus, under well-settled rules of statutory construction, the “most reliable indicator” of Congress’s intent is “the plain language of the statute.” *Soliman v. Gonzales*, 419 F.3d 276, 281-82 (4th Cir. 2005). Here, Sections 5(a) and (d) of the NVRA require North Carolina DMVs to provide voter registration opportunities as part of “each” application for or renewal of a driver’s license or non-driver identification card and “any” change of address form submitted for driver’s license or non-driver identification card purposes. 52 U.S.C. §§ 20504(a)(1), (d). No language restricts this expansive mandate to in-person transactions only.

³ Although Defendants Brayer, Thomas, and Tennyson did not move to dismiss Plaintiffs’ complaint on this basis, *see generally* Jt. Mem. in Support of Mot. to Dismiss (ECF No. 32), they have raised this argument in opposition to Plaintiffs’ motion for preliminary injunction. *See* Jt. Mem. In Opp’n to Pls.’ Mot. for Preliminary Injunction 27-28 (ECF No. 69). The discussion that follows would apply equally to them.

Congress’s use of “each” and “any” should be “given their common and ordinary meaning.” *Gilmore*, 152 F.3d at 288. “Each,” as used in the statute, is all-encompassing. It ordinarily means “[b]eing one of two or more considered individually; every.” *American Heritage College Dictionary* 430 (3rd ed. 1997); *see also Sierra Club v. EPA*, 536 F.3d 673, 678 (D.C. Cir. 2008). Similarly, “any” means what it naturally says, “[o]ne, some, every, or all without specification.” *American Heritage College Dictionary* 61; *U.S. v. Gonzalez*, 520 U.S. 1, 5 (1997).

Congress’s use of “any” and “each” to modify “application” conveys a deliberately vast scope covering every application and form—including those submitted remotely. *See Gilmore*, 152 F.3d at 290 (explaining, in a similar context, that “all” as a modifier “suggests an expansive meaning” because it is a word of “great breadth”); *Georgia State Conf. of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1329 (N.D. Ga. 2012) (holding that Congress’s use of the word “each” in Section 7(a)(6) of the NVRA communicated an “unambiguous” mandate to provide voter registration services to all applicants for public assistance “without limitation,” including those who did not appear in person). When, as here, Congress’s “intent is clear from the plain text, ‘then this first canon is also the last: judicial inquiry is complete.’” *Ojo v. Lynch*, 813 F.3d 533, 539 (4th Cir. 2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)). Accordingly, North Carolina must provide voter registration services to each DMV applicant, not just those who appear in person.

Defendant Strach suggests that a reference to “the office at which the applicant submits a voter registration application,” in Section 5(c)(2)(D)(iii),⁴ creates a remote transaction exception to Section 5’s voter registration mandate. Strach Mem. 18. Not so. Her approach, which takes a single phrase out of context, undercuts common canons of statutory construction and misinterprets the NVRA’s plain language.

Defendant’s reading would upend the NVRA, as statutes “are not read as a collection of isolated phrases.” *S.E.C. v. Pirate Investor LLC*, 580 F.3d 233, 254 (4th Cir. 2009) (quoting *Abuelhawa v. United States*, 556 U.S. 816 (2009)). Instead the phrase “the office” must be read in the context in which it is used. *In re Coleman*, 426 F.3d 719, 725 (4th Cir. 2005); *Lynch*, 813 F.3d at 539. Section 5(c)(2)(D) is a notice provision, specifying information that must be given to an individual applying for or renewing a driver’s license or non-driver identification card. Section 5(c)(2)(D)(iii) notifies applicants for voter registration that aspects of the process will be kept confidential. And as used in Section 5(c)(2)(D)(iii), the reference to “the office at which the applicant submits a voter registration application” merely gives notice that the *identity* of the institution offering the voter registration opportunity will be confidential. That is,

⁴ Section 5(c)(2)(D)(iii) states:

The voter registration application portion of an application for a State motor vehicle driver’s license— . . . shall include, in print that is identical to that used in the attestation portion of the application— . . . a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes

52 U.S.C. § 20504(c)(2)(D)(iii).

in context, the reference offers assurance that the fact that an individual registered *at the DMV* (whatever that institution may be called in a particular state) will be kept confidential; it does not refer to a particular brick-and-mortar building with a specific designated street address at which an individual must personally appear. And this notice provision does not negate the NVRA's guarantee of the right to register to vote concurrently with "any" covered DMV transaction. *See id.* § 20504(c)(2)(D); *accord Gilmore*, 152 F.3d at 292 (concluding that the term "office" as used in Section 7(a)(2)(B) means "a subdivision of a government department or institution"); *Kemp*, 841 F. Supp. 2d at 1330-31 (rejecting the argument that the language "at an office" in Section 7 of the NVRA imposed a "locational or in-person limitation[]").

Other NVRA provisions support this view. *See Lynch*, 813 F.3d at 539 (courts must "read the words in their context and with a view to their place in the overall statutory scheme") (internal citation and quotation marks omitted). For instance, the Section 5 confidentiality notice Defendant cites mirrors the one in Section 9, which addresses the Election Assistance Commission's national mail-in voter registration form. *Compare* 52 U.S.C. § 20504(c)(2)(D) *to id.* § 20508(b)(4) (both requiring the same statement notifying applicants that "the office at which" voter registration applications are submitted "will remain confidential"). "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) (citation and internal quotation marks omitted); *see also Wood v. Comm'r*, 955 F.2d 908, 913 (4th Cir. 1992).

Congress created the mail-in voter registration form so that citizens could register to vote by mail without having to appear in person at an office. *See* 52 U.S.C. § 20503(a)(2); *id.* § 20505 (providing for voter registration through mail-in applications). But under Defendant’s proposed construction, the phrase “the office” in the confidentiality notice of Section 9 would limit use of the national *mail-in* voter registration application to an in-person appearance at an office—a nonsensical result that would effectively nullify the NVRA’s mail-in voter registration provisions. This argument should be rejected. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (statutory interpretations “produc[ing] absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available”); *Clark v. Absolute Collection Svs., Inc.*, 741 F.3d 487, 491 (4th Cir. 2014) (“[A] court should avoid an interpretation that renders any clause, sentence, or word . . . superfluous, void, or insignificant.”) (alteration in original; citation and internal quotation marks omitted).

Congress crafted the NVRA to provide broad voter registration opportunities. Neither Section 5’s language nor its legislative purpose suggest that Congress intended to restrict its application to in-person transactions only and permit the denial of voter registration opportunities to all other DMV clients. *See* 52 U.S.C. § 20504; *id.* § 20501(b)(1) (“The purpose[] of this Act [is] . . . to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.”). Section 5 furthers Congress’s goals by requiring North Carolina to provide voter registration opportunities with “each” and “any” covered DMV transaction. Because the

plain language of the statute is unambiguous, consistent, and coherent, the inquiry simply ends there. *United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003).

2. Section 7 of the NVRA Requires States to Offer Voter Registration Opportunities When Agency Clients Conduct Remote Transactions

Defendant Strach also claims that Section 7 of the NVRA applies solely to in-person transactions at specific, physical offices (such as those providing public assistance or disability services).⁵ Like her argument about Section 5’s scope, Defendant’s reading of Section 7 is inconsistent with the NVRA’s plain text and Congress’s intent. And it has been rejected by the two federal district courts that have addressed the question.

As always, the “starting point for any issue of statutory interpretation . . . is the language of the statute itself.” *Bly*, 510 F.3d at 460. Defendant Strach contends that because *Section 4* of the NVRA requires states to offer voter registration “in person” at offices designated under Section 7, *Section 7* must apply *only* to in-person transactions. Strach Mem. 17-18. She is incorrect. As noted, Section 4 of the NVRA requires states generally to “establish procedures to register to vote . . . by application in person” at all offices designated under Section 7. 52 U.S.C. § 20503(a). Section 7(a)(4), in turn, prescribes the voter registration services that must be made available at all designated VRAs. *See* 52 U.S.C. § 20506(a)(4). But Section 7(a)(6) goes further. It requires a subset of VRAs—those that provide “service or assistance” through an application

⁵ Again, Defendants Brayer, Thomas, and Tennyson did not move to dismiss Plaintiffs’ complaint on this basis but have raised this argument in opposition to Plaintiffs’ motion for preliminary injunction. *See* Jt. Mem. In Opp’n to Pls.’ Mot. for Preliminary Injunction 23-24. The discussion that follows would apply equally to them.

process—to do more than simply provide in-person voter registration opportunities. “[I]n addition to conducting voter registration” generally, those VRAs must also “distribute with *each* application for such service or assistance, and with *each* recertification, renewal, or change of address form relating to such service or assistance . . . (i) the mail voter registration application form.” 52 U.S.C. § 20506(a)(6)(A)(i) (emphasis added). During these covered transactions, VRAs must also distribute the distinct voter registration preference form, *id.* § 20506(a)(6)(B), and offer assistance in completing the voter registration form, *id.* § 20506(a)(6)(C).

No language restricts Section 7(a)(6)’s application to in-person transactions only. To the contrary, just like Section 5, Section 7(a)(6) requires states to offer voter registration with “each” covered transaction. And as noted, “each” is a comprehensive term. *See supra* at 9. Section 7 does not, therefore, permit states to deny voter registration opportunities to citizens conducting covered transactions remotely.⁶

The two federal district courts to address the issue have so held. In *Ferrand v. Schedler*, 2012 WL 1570094 (E.D. La. May 3, 2012), *vacated in part on jurisdictional*

⁶ The Fourth Circuit’s decision in *Gilmore*, 152 F.3d 283, is not to the contrary. *Contra* Def. Strach Reply Mem. In Support of Mot. to Dismiss 10-11 (“Strach Reply”). In *Gilmore*, the Fourth Circuit held that states must designate as mandatory VRAs under Section 7(a)(2)(B) “state-funded offices that provide services to disabled students at public colleges.” *Gilmore*, 152 F.3d at 288. The court did not, as Defendant contends, define “office” as “a physical place.” Strach Reply 11. Rather, the court concluded that the term “office” in Section 7(a)(2)(B) means “a subdivision of a government department or institution,” and “includes an office providing services to disabled students at a public college.” 152 F.3d at 292. Nothing in *Gilmore* excludes from Section 7(a)(6)’s coverage remote transactions that clients conduct with such offices, and applying *Gilmore*’s definition to Section 7(a)(6) does nothing to limit the State’s obligations under that Section to in-person transactions. *See* 52 U.S.C. § 20506(a)(6).

grounds sub nom. Scott v. Schedler, 771 F.3d 831, 837, 841-42 (5th Cir. 2014), defendants argued that Section 7 of the NVRA applies to in-person transactions only. The court disagreed. Analyzing the statute’s text and legislative intent, the court concluded that Section 7(a)(6)’s requirements apply to “each” covered applicant and client transaction, not just in-person transactions conducted at the physical location of the assistance office. *See id.* at *9-*12. In other words, the court held that Section 7(a)(6)(A)’s plain text indicates its “application to both in person transactions and remote transactions, including those via the internet, telephone and mail.” *Id.* at *9.⁷

The court in *Georgia State Conference of N.A.A.C.P. v. Kemp* faced the same issue and reached the same conclusion. Relying on the NVRA’s “unambiguous” text, it held that when a VRA offers applications for public assistance,

it must, *without limitation*, also distribute a voter registration form and a voter preference form. There is no clear textual basis in the operative language of Section 7 paragraph (a)(6) [for a construction] ... which limits the application of the mandatory distribution of forms to only those instances when such application, recertification, renewal, or change of address is made in person.

Kemp, 841 F. Supp. 2d at 1329 (emphasis added) (citation and internal quotation marks omitted). The court explained that “[t]o sustain [defendant’s] position, the court would be forced to ignore the ordinary meaning of the plain language of Section 7 paragraph (a)(6), and the court declines to do so.” *Id.* (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (declining to read in an exception to the Endangered Species Act where the “language admits of no exception”)).

⁷ Although the Fifth Circuit vacated the remote transactions decision because the plaintiffs in that case lacked standing to raise the issue, it did not suggest that the district court’s underlying analysis was incorrect.

Defendant Strach nonetheless argues that language in the voter preference form supports her view. *See* Def. Strach’s Mem. in Opp’n to Pls.’ Mot. for Preliminary Injunction 15 (ECF No. 68). This too is incorrect. The preference form is a means to heighten the salience of voter registration, to confirm that the choice to register is offered to someone engaging the office for other service or assistance, and to record the applicant’s decision to apply for voter registration or forego such application. The language in the preference form upon which Strach relies—“If you are not registered to vote where you live now, would you like to apply to register to vote *here today*?”—merely focuses on the applicant’s opportunity to register to vote at the time he or she is in contact with the office. 52 U.S.C. § 20506(a)(6)(B)(i) (emphasis added) It does not unravel the specific requirements imposed by Section 7(a)(6). That is why the *Kemp* court rejected this argument explicitly, concluding that “ambiguous words such as ‘here’ or phrases such as ‘at an office’ in other provisions” should not be read to impose “a limitation that these words and phrases do not demand and that would contradict the plain language of Section 7 paragraph (a)(6).” 841 F. Supp. 2d at 1331.⁸

⁸ The U.S. Department of Justice, which is responsible for enforcing the NVRA, 52 U.S.C. § 20510(a), has provided the following guidance for applying Section 7 in this context: “Many Section 7 designated agencies [and] offices routinely provide services [or] 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 [or] assistance opportunities.” The National Voter Registration Act of 1993 (NVRA): Questions and Answers ¶ 24, http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php (last visited May 19, 2016). The Department’s policy statements “reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (citation and internal quotation marks omitted). They are “entitled to a measure of respect.” *Id.* (citation and internal quotation marks omitted); *see also* *Martin v. Occupational Safety &*

In short, Section 7's scope is broad and not restricted to in-person transactions only. Defendant Strach's contrary view "ignore[s] the ordinary meaning of the plain language of Section 7." *Id.* at 1329. It is simply incorrect.⁹

B. Plaintiffs Have Sufficiently Alleged that North Carolina has Delegated Administration of Public Assistance Programs to Third-Party Contractors to State a Claim Under Section 7

Defendant Strach also argues that Plaintiffs have failed to state a claim under Section 7 of the NVRA because a state is not liable for NVRA violations committed by third parties with whom the state contracts to perform public assistance services on its behalf.¹⁰ Strach Mem. 20. She is incorrect.

Under Section 7, "[e]ach State shall designate as voter registration agencies . . . all offices in the State that provide public assistance." 52 U.S.C. § 20506(a)(2)(A). This includes all offices providing public assistance at the state's behest. *See Gilmore*, 152 F.3d at 290 ("[T]he use of the word 'all' to modify 'offices' suggests an expansive

Health Review Comm'n, 499 U.S. 144, 157 (1991) (noting "informal interpretations are still entitled to some weight"); *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (concluding that "deference is still due" to a federal agency's litigating positions).

⁹ Defendant's resort to proposed legislation introduced but never enacted by recent Congresses, *see* Strach Mem. 19, is unavailing. Putting aside that these cited bills do not address remote transactions under Section 5 or 7 of the NVRA, "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. . . . Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (internal citations and quotation marks omitted).

¹⁰ Defendant Brajer, the DHHS Secretary, does not advance any similar argument. However, the following discussion would apply equally to him as to Defendant Strach.

meaning because ‘all’ is a term of great breadth.”). When, as alleged here, the State has contracted with local community-based organizations to undertake certain functions related to the administration of a public assistance program on the State’s behalf, those organizations must be treated as mandatory VRA offices as well. This contractual relationship provides “a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.” *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 122 (2d Cir. 2000) (citation and internal quotation marks omitted).¹¹

Moreover, courts have routinely held that state agencies cannot avoid liability under the NVRA by delegating NVRA compliance responsibilities to other entities, as Defendant seeks to do here. For example, a federal district court in New York analyzed the impact of the state’s delegation of public assistance and disability services to local officials on its NVRA responsibilities. The court concluded that “[i]t would be plainly unreasonable to permit a mandatorily designated State agency to shed its NVRA responsibilities because it has chosen to delegate the rendering of its services to local municipal agencies.” *United States v. New York*, 255 F. Supp. 2d 73, 79 (E.D.N.Y. 2003). And a different court in a different action similarly held New York responsible for ensuring that NVRA-mandated voter registration services were provided by disability services offices of community colleges to which the state had delegated “the provision of

¹¹ While the court in *Hammons* concluded that certain medical offices that assisted individuals with completion of Medicaid applications were not mandatory VRAs, the offices at issue provided such assistance voluntarily and “in order to obtain Medicaid reimbursement and not pursuant to statute or by virtue of a contractual relationship with the City or State.” *Hammons*, 202 F.3d at 116, 123.

higher education services.” *United States v. New York*, 700 F. Supp. 2d at 205; *see also* *Scott v. Schedler*, 771 F.3d 831, 838-39 (5th Cir. 2014) (concluding that the NVRA “centralizes responsibility in the state”); *Harkless*, 545 F.3d at 451-53 (holding Ohio’s chief election official responsible for Section 7’s implementation and enforcement despite the state’s attempt to delegate responsibility to local government agencies).¹²

The principle is reflected in federal regulation as well. Several federally funded public assistance programs are at the core of those programs administered by states and captured in Section 7 of the NVRA. Federal regulations governing several of these federal public assistance programs note the obligation of the administering state agencies to provide NVRA voter registration services. *See, e.g.*, 45 C.F.R. 205.50(a)(4)(iv) (Social Security); 42 C.F.R. 431.307(d) (Medicaid). These regulations likewise require that the state agencies administering those programs not delegate away to other entities their authority over, or obligations under, those programs. *See* 45 C.F.R. 205.100 (Social Security); 42 C.F.R. 431.10 (Medicaid); *see also* *Robertson v. Jackson*, 972 F. 2d 529, 533 (4th Cir. 1992) (“Although the state is permitted to delegate administrative responsibility for the issuance of food stamps, ‘ultimate responsibility’ for compliance with federal requirements nevertheless remains at the state level.” (quoting *Woods v. United States*, 724 F.2d 1444, 1447-48 (9th Cir. 1984))).

¹² The U.S. Department of Justice’s guidance regarding Section 7 quoted above, *supra* note 8, also states as follows: “When a state contracts with a private entity to administer services in an agency that is required to offer voter registration, the ultimate responsibility for ensuring provision of voter registration services remains with the state, and the voter registration requirements under the NVRA remain the same.” The National Voter Registration Act of 1993 (NVRA): Questions and Answers ¶ 24, http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php (last visited May 19, 2016).

The NVRA is also similar in this non-delegation principle to other federal statutes and constitutional provisions that impose obligations on states, such as the Rehabilitation Act, Americans with Disabilities Act, and Equal Protection Clause of the Fourteenth Amendment. *See Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir. 2013) (a state is “obligated to ensure that [the private defendant]—like all other State contractors—complies with federal laws prohibiting discrimination on the basis of disability”); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003) (a state is “liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance, including compliance with the Rehabilitation Act”); *id.* at 286-87 (citing cases involving other federal statutes); *see also Stanley v. Darlington Cnty. Sch. Dist.*, 84 F.3d 707, 713 (4th Cir. 1996) (“Because the Fourteenth Amendment imposes direct responsibility on a state to ensure equal protection of the laws ‘to any person within its jurisdiction,’ a state’s delegation to a political subdivision of the power necessary to remedy the constitutional violation does not absolve the state of its responsibility to ensure that the violation is remedied.”).

Accordingly, North Carolina cannot avoid Section 7 liability by contracting away the provision of public assistance services. Defendant Strach’s arguments to the contrary should be rejected.

IV. CONCLUSION

For all the foregoing reasons, the Court should apply the proper legal standards under Sections 5 and 7 of the NVRA to resolve Defendant Strach’s motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on May 20, 2016, I electronically filed the foregoing Statement of Interest of the United States, using the CM/ECF system, which will send notification of such filing to all counsel of record.

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