Case No. 13-30185

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUTHER SCOTT, JR., for himself and all other persons similarly situated;
LOUISIANA STATE CONFERENCE OF THE NAACP, for themselves
and all other persons similarly situated,
Plaintiffs-Appellees,

v.

TOM SCHEDLER, in his official capacity as the Louisiana Secretary of State,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
USDC No. 2:11-CV-926

BRIEF OF PLAINTIFFS-APPELLEES LUTHER SCOTT, JR. AND LOUISIANA STATE CONFERENCE OF THE NAACP

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Case No. 13-30185

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v.

TOM SCHEDLER, in his official capacity as the Louisiana Secretary of State,

Defendant-Appellant.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. All persons listed by Appellant
2. Tom Schedler, in his official capacity as Louisiana Secretary of State, Appellant
3. Celia R. Cangelosi, Counsel for Appellant
4. Carey T. Jones, Counsel for Appellant
5. Luther Scott, Jr., Appellee
6. Louisiana State Conference of the NAACP, Appellee
7. NAACP Legal Defense & Educational Fund, Inc., Counsel for Appellees

8. Sherrilyn Ifill, Counsel for Appellees
9. Ryan P. Haygood, Counsel for Appellees
10. Natasha M. Korgaonkar, Counsel for Appellees
11. Leah C. Aden, Counsel for Appellees
12. Johnathan J. Smith, Counsel for Appellees
13. Elise C. Boddie, Counsel for Appellees in the District Court and Circuit Court proceedings until May 17, 2013
14. Dale E. Ho, Counsel for Appellees in the District Court and Circuit Court proceedings until April 29, 2013
15. Kristen M. Clarke, Counsel for Appellees in the District Court proceedings until August 5, 2011
16. Project Vote, Counsel for Appellees
17. Sarah Brannon, Counsel for Appellees
18. Niyati Shah, Counsel for Appellees
19. Michelle Rupp, Counsel for Appellees
20. Brian Mellor, Counsel for Appellees
21. Nicole Kovite Zeitler, Counsel for Appellees in the District Court proceedings until February 6, 2012
22. Ronald L. Wilson, Counsel for Appellees
23. Fried, Frank, Harris, Shriver & Jacobson LLP, Counsel for Appellees

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25. Israel David, Counsel for Appellees
26. Jesse R. Loffler, Counsel for Appellees
27. David S. Yellin, Counsel for Appellees
28. Erica Sollie, Counsel for Appellees in the District Court proceedings
29. Bruce D. Greenstein, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, former Defendant in the District Court proceedings
30. Kathy H. Kliebert, in her official capacity as Interim Secretary of the Louisiana Department of Health and Hospitals, Defendant in the District Court proceedings
31. Ruth Johnson, in her official capacity as Secretary of Louisiana Department of Children and Family Services, former Defendant in District Court proceedings
32. Suzy Sonnier, in her official capacity as Secretary of Louisiana Department of Children and Family Services, Defendant in District Court proceedings
33. Louisiana Department of Health & Hospitals, Bureau of Legal Services, Counsel for former Defendant Bruce D. Greenstein and Defendant Kathy H. Kliebert
34. Douglas L. Cade, Counsel for former Defendant Bruce D. Greenstein and Defendant Kathy H. Kliebert

35. Brandon J. Babineaux, Counsel for former Defendant Bruce D. Greenstein and Defendant Kathy H. Kliebert
36. David L. McCay, Counsel for former Defendant Bruce D. Greenstein and Defendant Kathy H. Kliebert
37. Kimberly L. Humbles, Counsel for former Defendant Bruce D. Greenstein and Defendant Kathy H. Kliebert
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40. Taylor, Porter, Brooks & Phillips LLP, Counsel for former Defendant Bruce D. Greenstein, Defendant Kathy H. Kliebert, and Defendant Suzy Sonnier
41. Amy C. Lambert, Counsel for former Defendant Bruce D. Greenstein , Defendant Kathy H. Kliebert, and Defendant Suzy Sonnier
42. Harry J. Philips, Jr., Counsel for former Defendant Bruce D. Greenstein, Defendant Kathy H. Kliebert, Defendant and Suzy Sonnier
43. Katia Desrouleaux, Counsel for former Defendant Bruce D. Greenstein, Defendant Kathy H. Kliebert, and Defendant Suzy Sonnier
44. State of Louisiana Department of Children and Family Services, Bureau of General Counsel, Counsel for Defendant Suzy Sonnier

45. Amy Colby, Counsel for Defendant Suzy Sonnier
46. Celia M. Williams-Alexander, Counsel for Defendant Suzy Sonnier
47. Eboni M. Townsend, Counsel for Defendant Suzy Sonnier
48. Charles L. Dirks, III, Counsel for Defendant Suzy Sonnier
49. Unites States of America, Interested Party in District Court proceedings
50. U.S. Department of Justice, Civil Rights Division, Counsel for the United States
51. Anna M. Baldwin, Counsel for the United States
52. U.S. Attorney's Office, New Orleans, Counsel for the United States
53. Sandra E. Gutierrez, Counsel for the United States

Counsel is unaware of any other persons with an interest in this brief.

Dated: May 20, 2013

Respectfully submitted,

s/ Natasha M. Korgaonkar
Natasha M. Korgaonkar

Counsel for Plaintiffs-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellees Luther Scott, Jr. and the Louisiana State Conference of the NAACP respectfully request oral argument. This appeal involves complicated legal and statutory matters, including the proper interpretation of Sections 7 and 10 of the National Voter Registration Act ("NVRA"), as well as the validity of a Permanent Injunction issued by the District Court. Oral discussion of the facts and the applicable precedent would benefit the Court.

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the Eastern District of Louisiana in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issues presented for review by the Appellant are in error. The correct issues for review are:

1. Whether Appellees have satisfied the elements of standing required by Article III of the Constitution;

2. Whether obligations on mandatory voter registration agencies under Section 7 of the National Voter Registration Act of 1993 apply to all covered transactions, including remote transactions;[1]

3. Whether Section 7 requires the distribution of voter registration forms in all covered transactions, unless a client declines the form "in writing;";

4. Whether Louisiana's chief election official designated by the State of Louisiana is required and empowered to "coordinate" State NVRA responsibilities under Section 10;

5. Whether the Permanent Injunction entered by the District Court complies with Federal Rule of Civil Procedure 65(d);

6. Whether Appellees have satisfied the notice requirement of the NVRA;

7. Whether Appellees are prevailing parties in the case, and, therefore, entitled to reasonable attorneys' fees and costs;

[1] Appellant purports to appeal a similar ruling from the District Court concerning Section 4 of the NVRA. Br. at 1. No issues regarding remote transactions beyond Section 7(a)(6) were before the District Court, and thus, it made no ruling with respect to Section 4. That issue is therefore not properly before this Court in this appeal.

8. Whether the District Court's refusal to take judicial notice of Act 5799 of 2012, a since-expired bill from the 112th Congress, was an abuse of discretion; and,

9. Whether the exclusion of testimony of Elsie Cangelosi by the District Court was an abuse of discretion.[2]

STATEMENT OF THE CASE

Congress enacted the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq*. (the "NVRA" or "Act"), to expand America's promise of democracy by, among other things, making the opportunity to register to vote more available to the most marginalized citizens: people of color and the poor. 42 U.S.C. §§ 1973gg(a)(3), (b)(1). Section 7 of the Act sets forth the specific roles of public assistance agencies—which include benefits and disabilities offices—recognizing that these agencies reach hundreds of thousands of Americans daily.[3] This case seeks to remedy Louisiana's failure—over several decades—to adhere to Section

[2] Schedler's appeals of two evidentiary issues—one regarding a denial of the judicial notice and the other the exclusion of Elsie Cangelosi's testimony—are not adequately briefed. This Court need not consider these issues. *Osterweil v. Edmonson*, 424 F. App'x 342, 344 (5th Cir. 2011) (The circuit court "need not consider [an] argument . . . [that is] conclusory, and is inadequately briefed."). Moreover, this Court has already decided not to take judicial notice of the expired bill, Doc. 00512239896, thereby precluding further review by the law of the case doctrine. *See infra* at n.18; *United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984) ("[O]ne panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent.").

[3] "Public assistance clients" are clients of benefits programs—such as the Supplemental Nutritional Assistance Program ("SNAP" or "food stamps"), Women, Infants, and Children ("WIC"), or Medicaid—administered by public assistance agencies.

7, and ultimately to make voter registration accessible to the State's most impoverished and marginalized citizens.

Appellees, Luther Scott, Jr. and the Louisiana State Conference of the NAACP ("Louisiana NAACP," and together with Mr. Scott, "Plaintiffs" or "Appellees"), filed this action in the Eastern District of Louisiana in April 2011, challenging the failure of two public assistance agencies in the State of Louisiana ("State")—the Department of Children and Family Services ("DCFS") and the Department of Health and Hospitals ("DHH")—and Appellant Tom Schedler, the Louisiana Secretary of State ("Schedler," or "Appellant"), to comply with Sections 7 and 10 of the NVRA.

In particular, Appellees' Complaint, R.59-94,[4] alleged that DCFS and DHH violated their obligations to offer a voter registration application to each public assistance client submitting a benefits application, benefits renewal, or change of address (together, "covered transactions"), unless the client declines an application in writing. *See* 42 U.S.C. § 1973gg-5(a)(6). It further alleged that Schedler violated his obligations under Sections 7(a)(6) and 10 to coordinate these agencies' NVRA compliance. Appellees sought declaratory and injunctive relief to remedy

[4] Excerpts from the certified Record on Appeal are cited as "R._." Excerpts from documents filed with the District Court after Record on Appeal was certified are cited as "Doc. _." Defendants-Appellants' Record Excerpts are cited in Plaintiffs-Appelles' Brief as "RE1" to "RE8." Plaintiffs-Appellees' Record Excerpts are cited in Plaintiffs-Appelles' Brief as "RE9" to "RE15."

Defendants' violations.

In May 2012, the District Court ruled in favor of Appellees' cross-motion for partial summary judgment, finding that Section 7(a)(6)'s mandates apply to *all* covered transactions, including those occurring via mail, telephone, Internet, and other remote means ("remote transactions"). RE5. Appellant appeals that decision.

The District Court ruled in favor of Appellees' in all other claims, following a bench trial in October 2012, finding that Mr. Scott and the Louisiana NAACP have standing, and that Schedler and his co-defendants[5] violated the NVRA in myriad ways. RE4. The District Court granted declaratory and prospective injunctive relief to Appellees, issuing a Permanent Injunction ("Injunction"). RE3. Appellant also appeals these decisions.

STATEMENT OF FACTS

Mr. Scott is a Louisiana and United States citizen and a Vietnam War veteran. After Hurricane Katrina devastated his neighborhood, Mr. Scott struggled to find housing and steady employment. As a result, and notwithstanding his best efforts, Mr. Scott has been intermittently homeless, and since September 2009, has received SNAP benefits, which are administered by DCFS. During three separate covered transactions at DCFS offices in 2009 and 2010, Mr. Scott was not offered

[5] DCFS and DHH do not appeal the District Court's rulings, and have certified their compliance with the Injunction. RE9, DCFS Certification; RE10, DHH Certification.

the opportunity to register to vote or to update his voter registration information. As the District Court found, each of these omissions violated Section 7, which requires that a voter registration application be offered during every covered transaction, unless an applicant refuses an application in writing. Mr. Scott did not refuse a voter registration application in writing, and was denied the opportunity to register to vote or to update his information.

The Louisiana NAACP is a civil rights organization that works to advance the rights of African Americans in Louisiana, including by protecting and expanding voting rights. Accordingly, the Louisiana NAACP conducts voter registration drives in areas with high concentrations of unregistered persons. When Reverend Edward Taylor, who is responsible for coordinating voter registration activities for the Louisiana NAACP, found that many citizens leaving public assistance offices were not registered to vote, he and other Louisiana NAACP volunteers devoted time and financial resources to register those citizens outside of public assistance offices. If these offices had been properly offering voter registration forms, the Louisiana NAACP would have devoted its limited resources to expanding voter registration elsewhere.

As Louisiana's chief election official, Schedler is the sole State official responsible for coordinating the State's continuing NVRA compliance. Schedler's failure to fulfill his obligations has resulted in violations at DCFS and DHH. Even

when Schedler has attempted to discharge his duties under the NVRA, he has repeatedly misinterpreted the NVRA, failed to provide accurate advice to agencies, and ignored known Section 7 violations to the detriment of hundreds of thousands of public assistance clients.

SUMMARY OF THE ARGUMENT

The District Court, in ruling for Appellees, made several proper conclusions and findings, all of which this Court should affirm:

First, the District Court correctly determined, based on specific factual findings, that Appellees have satisfied requirements for Article III standing because they have been injured (1) by Schedler's failure to coordinate DCFS and DHH's compliance with the Act, and (2) by the insufficient and inaccurate advice regarding Section 7 that Schedler provided to those agencies. The District Court made a factual determination that Mr. Scott was injured by being denied the opportunity to receive a voter registration form during covered benefit transactions, in violation of Section 7. The District Court also made a factual determination that the Louisiana NAACP sustained injury by having spent resources to correct the agencies' non-compliance with the NVRA by conducting its own voter registration services outside of public assistance offices. Schedler's failure to coordinate DCFS's NVRA compliance led to these violations. In the absence of injunctive relief requiring compliance with the NVRA, Appellees' injuries will recur. If

Schedler reverts to non-compliance, Mr. Scott will likely be deprived of a voter registration application, and the Louisiana NAACP will again need to counteract NVRA violations by conducting voter registration outside public assistance offices. Based on its specific factual findings, the District Court properly found that both Appellees have standing under Article III.

Second, the District Court properly held that Section 7 requires public assistance agencies to provide clients an opportunity to register to vote during "each" covered transaction between the client and the agency, including those transactions occurring via remote means. Because Section 7(a)(6) mandates that the registration opportunity be provided with "each" covered transaction, without any further limitation in the text, the Court's conclusion is consistent with the plain meaning of the statute. This conclusion is further supported by principles of statutory interpretation, other courts' interpretations, and the express purpose of the NVRA itself.

Third, the District Court properly concluded that Section 7 requires public assistance agencies to affirmatively provide each client with a voter registration application, unless she, "in writing, declines to register to vote," as stated in Subsection 7(a)(6). This Subsection mandates that public assistance agencies are not required to give clients voter registration applications only if the clients affirmatively "opt out" of receiving an application, rather than mandating that

clients "opt in" to receiving one. As the Tenth Circuit has held, based on the clear meaning of the phrase "in writing," where forms ask clients to check a "yes" or "no" box indicating whether they wish to receive an application and a client leaves both boxes blank, that client has not declined an application "in writing." Accordingly, the client must still be given an application. In addition to its reliance on the plain meaning of Section 7(a)(6), the District Court's decision is also consistent with the NVRA's goal of broadening voter registration access for low income citizens.

Fourth, the District Court properly concluded that Section 10 of the Act requires Louisiana's "chief election official" to "be responsible for coordination of State responsibilities under" the NVRA. The duty to "coordinate" includes an ongoing responsibility to ensure that the State's public assistance agencies comply with Section 7, as the Sixth Circuit has held. Having been designated Louisiana's "chief election official," Schedler is responsible for the ongoing coordination of the State's NVRA compliance.

Schedler raises several additional meritless issues on appeal. Notwithstanding that he has already certified compliance with the District Court's Permanent Injunction, Schedler now argues that the District Court's Injunction fails to comply with Federal Rule of Civil Procedure 65(d) on grounds of vagueness. As a threshold matter, Schedler is judicially estopped from arguing that

he cannot discern the terms of an injunction with which he has already certified compliance. Nevertheless, the District Court's Injunction is sufficiently specific.

Schedler also appeals the District Court's determination that Appellees have satisfied the NVRA's predicate requirement of sending a notice letter before the initiation of this litigation. Schedler, misconstruing caselaw regarding this statutory requirement, is incorrect; as the District Court found, the notice letter received by Schedler was sufficient, and the requirement has been satisfied.

Finally, Schedler's argument that Appellees are not entitled to attorneys' fees is premature, as briefing on attorneys' fees and costs is still ongoing in the District Court. In any event, as prevailing parties, Mr. Scott and the Louisiana NAACP are entitled to reasonable attorneys' fees from Schedler, who is responsible for each claim raised and proven at trial.[6]

For these reasons, and those set forth below, Appellees respectfully urge this Court to affirm the judgments of the District Court.

[6] Schedler has also appealed the District Court's orders with respect to two evidentiary decisions—the denial of judicial notice of a since-expired bill, and the exclusion of testimony of Elise Cangelosi, a former employee in the Secretary of State's office. Schedler offers no legal arguments as to why the District Court's rulings were an abuse of discretion; accordingly, these issues may, and should, be disregarded by this Court.

ARGUMENT

STANDARD OF REVIEW

The District Court's legal conclusions are subject to *de novo* review. *Anderson ex rel. Anderson v. Canton Mun. Separate Sch. Dist.*, 232 F.3d 450, 453 (5th Cir. 2000). This Court reviews the District Court's factual findings for clear error. Evidentiary determinations are reviewed under the deferential abuse of discretion standard. *Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 508 (5th Cir. 2012).

I. THE DISTRICT COURT PROPERLY FOUND THAT APPELLEES HAVE SATISFIED ELEMENTS OF ARTICLE III STANDING.

The District Court concluded that Appellees have satisfied requirements for Article III standing, which are (1) "'injury in fact'—an invasion of a legally protected interest," (2) traceability—"a causal connection between the injury and the conduct complained of," and (3) redressability—"that the injury will be 'redressed by a favorable decision.'" *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). The same elements are required of individual and organizational plaintiffs. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

Jurisdictional issues, including standing, are generally reviewed *de novo*. *Bonds v. Tandy*, 457 F.3d 409, 411 (5th Cir. 2000). Where, as here, the District

Court's determination of standing is based on "[s]pecific factual findings," those findings are "entitled to review under the clearly erroneous standard." *See Hearst Newspapers, L.L.C. v. Cardenas-Guillen*, 641 F.3d 168, 174-75 (5th Cir. 2011) (citation and internal quotation marks omitted).

A. Luther Scott, Jr. Has Article III Standing.

The District Court properly concluded that Mr. Scott has standing because he suffered an actionable injury caused by Schedler's non-compliance with the NVRA, which is likely to recur without injunctive relief. This Court should affirm that judgment. RE4 at R.21444-45.

Mr. Scott was injured when he was denied the opportunity to receive a voter registration form "with each application . . . and with each recertification, renewal, or change of address form relating to [his public benefits] . . . ." *See* 42 U.S.C. § 1973gg-5(a)(6)(A). *See also* RE4 at R.21439-40. Specifically, the District Court found that DCFS did not offer Mr. Scott a voter registration form during any of three covered transactions for food stamps benefits.[7] *Cf. Lujan*, 504 U.S. at 561-62

[7] Mr. Scott did not receive a voter registration form during covered transactions in: (1) September 2009; (2) December 1, 2009; and (3) November 15, 2010. *See* RE14; RE13 at R.20895 (19:7-13); R.20895-97(19: 24-21:9); R. 20888-93 (12:15-17:7); R.20915 (39:9-13); R.20916 (40:23-24). The only rebuttal evidence was testimony of a DCFS worker who claimed to have offered Mr. Scott the opportunity to register during the September 2009 transaction; however, the District Court did not credit this testimony. RE4 at R.21442-43 (finding that Mr. Scott did not receive a voter registration form during this transaction). *See Jarvis Christian Coll. V. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 197 F.3d 742, 746 n. 4 (5th Cir. 1999) ("Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous….") (citation omitted).

(where the suit challenges "the legality of government action or inaction . . . . [and] the plaintiff is himself an object of the action (or foregone action) at issue[,] . . . there is ordinarily little question that the action or inaction has caused him injury."). Because Schedler "is required to coordinate the state of Louisiana's responsibilities under the NVRA, [Mr.] Scott's injury is traceable to the SOS." RE4 at R.21444. *See* Part IV, *infra*.

Given the overwhelming evidence in the record supporting these findings, the District Court's factual determination was not clearly erroneous. Because the State thrice denied Mr. Scott the opportunity to fill out a voter registration application, he was thrice deprived of his "legally protected interest." The District Court correctly determined that these deprivations constituted actionable injury. RE4 at R.21444.

Mr. Scott's injury is redressed by the Injunction. The District Court's factual finding that Mr. Scott has "moved frequently, been intermittently homeless, and has had at least four different addresses since 2005," RE4 at R.21439,[8] underscores

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Schedler also references another covered transaction from December 2011, Br. at 26-27, but the District Court properly concluded—and Schedler does not contest—that that transaction was not relevant to Mr. Scott's standing because it occurred after this suit was filed. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 987 (5th Cir. 2000) (courts "look exclusively to the time of filing" to determine standing).

[8] Specifically, the record establishes that Mr. Scott was living at 510 St. Patrick Street in 2008 when he submitted his voter registration form. R.20901 (25:4-12); R.20905-06 (29:25-30:3). When Mr. Scott applied for food stamps in September 2009, he was living temporarily at a church at 1301 S. Derbigny Street. R.20888-89 (12:18-13:7); RE13 at R.20890-91 (14:13-15:3). In December 2009, when he applied for food stamps again, he lived at a different address, 1803

that the injury to Mr. Scott is likely to recur without injunctive relief. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (explaining that a registered voter denied the right to use an application to update her address has suffered an injury).

Whether Mr. Scott was a validly registered voter at the time of these transactions, Br. at 25, is not dispositive. *See* RE4 at R.21443.[9] The District Court found that Mr. Scott never received confirmation of the acceptance of a voter registration application he had submitted at a registration drive in 2008, and was therefore unaware of his registration status. *See id. See also* R.20901-02 (25:18 – 26:2); R.20927 (51:8-12); R.20928 (52:4-10); & R.20940 (64:2-4). Regardless of whether the application had been received and accepted, however, "[a] plaintiff need not have the franchise wholly denied to suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." *Cox*, 408 F.3d at 1352. Mr. Scott's injury, and resulting standing, flows from his

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Gravier Street. RE13 at R.20919 (43:2-18). Finally, at the time of trial in October 2012, he resided at 2515 Magnolia Street. *Id.* at R.20887 (11:2-6). It is uncontroverted that each of these addresses is located in a different voting precinct. *See* R. 21370-71.

[9] The District Court determined that "[i]rrespective of [Mr. Scott's] voter registration status, [he] suffered an actionable injury during his transactions with DCFS when they failed to meet their obligations to [him]," RE4 at R.21444, and accordingly, "[t]he validity of [Mr.] Scott's voter registration is of no import to whether or not [he] suffered an injury," *id.* at n.3. The District Court, therefore, made no findings of fact with respect to whether he was validly registered. As a result, this issue has not been properly presented for review, and this Court should remand for further proceedings if it determines that Mr. Scott's voter registration status is relevant.

deprivation of the opportunity to receive a registration application, which may be used either to register to vote, or to verify or update voter registration information, such as a new address. *See Adar v. Smith*, 597 F.3d 697, 706 (5th Cir. 2010) ("[A]llegations of injury flowing from the Registrar's failure to comply with the statute satisfy the prerequisites of injury-in-fact for Article III standing purposes."), *overruled on other grounds but aff'd as to standing*, 639 F.3d 146 (5th Cir. 2011).

For these reasons, the District Court properly found that Mr. Scott satisfied the requirements for constitutional standing.

B. The Louisiana NAACP Has Article III Standing.

The District Court's finding that the Louisiana NAACP "has met its burden of showing that the constitutional requirements of standing have been met," RE4 at R.21453, should be affirmed, and is supported by the evidence adduced at trial and this Court's precedent on organizational standing.

This Court has held that an organizational plaintiff has standing under Section 7, if "[1] it has expended resources registering voters in low registration areas [2] who would have already been registered if the [Defendants] had complied with the requirement under the NVRA that Louisiana must make voter registration material available at public aid offices." *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 361 (5th Cir. 1999). Here, the Louisiana NAACP has satisfied both conditions.

First, the record clearly establishes that the Louisiana NAACP "has expended resources registering voters in low registration areas." Such resources may be in the form of "money or time [expended] counteracting Louisiana's alleged failure [to comply with the NVRA]"). *Id*. at 367. The District Court found that the Louisiana NAACP invested both time and financial resources to register "the low-income African-American community in Louisiana" because that "community was largely not registered to vote." RE4 at R.21452.

The District Court found that the Louisiana NAACP "received approximately $10,000.00 [in grants] from the national NAACP to perform voter activities for the 2010 election in Louisiana." RE4 at R.21450. Although Schedler disputes that the Louisiana NAACP used those funds for voter registration, Br. at 30-31, the District Court made a factual finding that they did, based on unchallenged trial testimony. *See* RE13 at R.21048-49 (172:25-173:5) (Reverend Taylor testifying that the grants supported the Louisiana NAACP's voter registration efforts); *see also* R.21004-05 (128:22-129:12); R.21086 (210:2-5).

Schedler's argument relies solely upon the lack of detailed financial records that the Louisiana NAACP keeps. However, this is an insufficient basis on which to reverse the District Court's factual findings as clearly erroneous. *See Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 215 (5th Cir. 1998) (finding that plaintiff successfully established thousands of dollars of out-of-pocket expenses based on

live testimony alone, even though plaintiff "did not produce any documents at trial"). Courts have recognized that non-profit organizations may not always maintain detailed records. *See, e.g.*, *Shakman v. Democratic Org. of Cook Cnty.*, No. 69-2145, 1992 WL 80519, at *8 (N.D. Ill. Apr. 14, 1992) ("non-profit organizations may not be expected to keep the same sort of records that would be expected of private practitioners").

The Louisiana NAACP would have standing even if it had not spent financial resources on voter registration. Relying on uncontroverted testimony, the District Court found that the Louisiana NAACP conducted voter registration activities "outside of the food stamp offices and health benefit offices because many of those individuals are not registered to vote." RE4 at R.21449. "During . . . 2010 . . . [its] volunteers spent approximately two to four hours, once a month, for three months at the public assistance offices." *Id.*[10] The Louisiana NAACP's commitment of time alone to voter registration constitutes "definite resources" within the meaning of *Fowler*, and compares favorably with the organizational plaintiff in that case, which conducted "one voter registration drive a year . . .

[10] The District Court found that Reverend Taylor's voter registration efforts were conducted on behalf of the Louisiana NAACP. RE4 at R.21447 ("the president of the LSC NAACP[] testified that he . . . appointed . . . Reverend Taylor . . . to take charge of [voter registration] activities . . . [in] an official position within the LSC NAACP."). That finding also was based on uncontroverted trial testimony. *See* RE13 at R.21102 (226:22-24) ("I represented the Louisiana State Conference in everything I did when it came to voter registration.").

registering people . . . on Food Stamp lines." *See* 178 F.3d at 361 (internal quotation marks omitted).[11]

Second, the District Court found that the Louisiana NAACP expended these voter registration resources to reach "voters who would have already been registered if the Defendants had complied with the NVRA." RE4 at R.21452. The record is replete with evidence demonstrating that: (a) the Louisiana NAACP used its resources to register voters outside of public assistance offices, RE13 at R.21027 (151:19-23); *id.* at R.21101-02 (225:22-226:8), R.21030 (health units); RE13 at R.21035-36 (159:5-160:6) (food stamps offices), and (b) it would have diverted those resources elsewhere had Defendants complied with their NVRA obligations. *Compare* RE13 at R.21034 (158:15-22), and R.21036 (160:11-16) (time spent registering voters outside of health clinics and food stamps offices would have been spent registering voters elsewhere), *with id.* at R.21036 (160:18-24) (Louisiana NAACP shifted resources away from voter registration at DMVs after determining that most individuals there were already registered to vote). Indeed, Schedler concedes that, had the Louisiana NAACP's voter registration efforts outside of benefits offices been unnecessary, they "would have gone [elsewhere] to register other low income individuals." Br. at 33. The loss of these

[11] The Louisiana NAACP's voter registration activities were not limited to those conducted by Reverend Taylor. Reverend Taylor testified that he also recommended and encouraged local NAACP branches—which are members of the Louisiana NAACP—to direct their voter registration efforts towards "health units and food stamp offices." R.21103-04 (227:16-228:4).

"wasted resources, which [the Louisiana NAACP] could have put to use registering [other] voters," or "toward any other use [that the Louisiana NAACP] wished" constitutes injury sufficient to confer organizational standing. *Fowler*, 178 F.3d at 361.

This Court should not credit Schedler's misplaced reliance on *National Council of La Raza v. Miller*, No. 3-12, 2012 WL 6691729 (D. Nev. Dec. 19, 2012), for the proposition that the Louisiana NAACP's voter registration efforts were not "shown to be linked to NVRA violations by any defendant, [and] certainly not [the Secretary]." *See* Br. at 31-35. In *Miller*, the court concluded that organizational plaintiffs could not demonstrate that *any* of their voter registration activities were undertaken to combat alleged non-compliance by Nevada. 2012 WL 6691729, at *13-14. Here, the District Court made the contrary determination, specifically finding that the Louisiana NAACP "undertook efforts designed to counteract deficiencies with [all] Defendant[s'] compliance with their NVRA obligations." RE4 at R.21449. Those "efforts" took the form of voter registration efforts outside of public assistance offices. *Id.* Furthermore, and as the District Court found, the Louisiana NAACP would have devoted its resources differently had Louisiana complied with the NVRA. *See* RE4 at R.21453 ("Had DCFS, DHH, and the SOS properly conducted their voter registration duties as required under the NVRA, the [Louisiana] NAACP could have spent its meager resources on

other priorities.").

Absent injunctive relief preventing Schedler from reverting to previous practices and further non-compliance, the Louisiana NAACP would organize such registration efforts again, incurring a "drain on its resources" spent "counteracting the effect of [Schedler's] actions." *See La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000).

For these reasons, the Louisiana NAACP satisfies the requirements for Article III standing.

II. THE DISTRICT COURT PROPERLY HELD THAT AGENCIES' SECTION 7 OBLIGATIONS APPLY TO ALL COVERED TRANSACTIONS, INCLUDING THOSE CONDUCTED REMOTELY.

The District Court held that Section 7(a)(6) requires public assistance agencies to provide clients an opportunity to register to vote during "each" covered transaction between the client and agency, including those transactions occurring in person and remotely (*e.g.*, over the phone, through the mail, via the internet). RE5 at R.3952-53[12] In arguing for an in-person limitation, Schedler ignores the provision of the NVRA that governs this case—disregarding the NVRA's plain language, structure, and purpose, and violating canons of statutory interpretation—

[12] Schedler also seeks a ruling from this Court with respect to whether the District Court's judgment on remote transactions applies to Section 4(a)(3). However, as explained, *supra* at n.1, no claims related to Section 4 were raised or decided in the District Court. Accordingly, that question is not before this Court.

and instead relies entirely and fatally on Section 4, a separate provision of the statute. 42 U.S.C. § 1973gg-2. The District Court properly rejected Schedler's manufactured limitation, as should this Court.

A. The Plain Text of Section 7(a)(6) Applies to All Covered Transactions.

In rejecting Schedler's in-person limitation of Section 7(a)(6), the District Court properly focused on the plain language of the statute, holding that "nothing in Section 7(a)(6) limits its scope to in-person transactions only." RE5 at R.3952. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 169 (5th Cir. 2000) (internal quotation marks omitted). In its ordinary sense, the word "each" "denotes or refers to every one of the persons or things mentioned . . . 'Each' is synonymous with 'all.'" *Black's Law Dictionary* 507 (6th ed. 1990). *Accord The Am. Heritage Coll. Dictionary* 430 (3d ed. 1997).

Here, "each" is used in reference to three types of public assistance benefits transactions covered by the statute: (1) initial applications; (2) recertifications or renewals; and (3) changes of address. The term "in person" is not found in Section 7. Where, as here, "the words of a statute are unambiguous," the "judicial inquiry is complete." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal citation and quotation marks omitted). The statute is clear that public assistance

agencies must fulfill their voter registration obligations for *each* covered transaction, regardless of whether the transaction occurs in person or remotely. As the court in *Georgia State Conference of the NAACP v. Kemp* explained when concluding that defendants violated Section 7(a)(6) by, *inter alia*, failing to offer voter registration applications to clients during remote transactions,

> There is no clear textual basis in the operative language of Section 7 paragraph (a)(6) for limit[ing] . . . the application of the mandatory distribution of forms to only those instances when such [covered transactions are] made *in person*. . . . To sustain [that] position, the court would be forced to ignore the ordinary meaning of the plain language of Section 7 paragraph (a)(6) . . . .

841 F. Supp. 2d 1320, 1329 (N.D. Ga. 2012) (citation and internal quotation marks omitted).

B. Schedler Ignores that Section 7 Establishes Two Tiers of Voter Registration Agencies.

Schedler erroneously argues that all voter registration agencies ("VRAs") established by Section 7 have identical obligations. Br. at 43. This fails to account for the fact that, while Sections 7(a)(2) and 7(a)(3) both establish VRAs, they create two different tiers of VRAs with distinct obligations. The subset of VRAs established by Section 7(a)(2)—those that provide public assistance or disability services—have unique obligations, described in 7(a)(6), that are not limited to in-person interactions.

Section 7(a)(2) of the NVRA states that offices providing (i) "public

assistance" and (ii) "services to people with disabilities" must mandatorily be designated as VRAs in every state; these offices constitute the first subset of VRAs ("mandatory VRAs"). 42 U.S.C. § 1973gg-5(a)(2). The next subsection of the statute, Section 7(a)(3), requires States to designate "other offices" of the State's selection; these offices constitute the second subset of VRAs ("discretionary VRAs"). 42 U.S.C. § 1973gg-5(a)(3). Louisiana has chosen to designate public high schools, colleges, and universities as discretionary VRAs. La. Admin. Code tit. 31, pt. II, § 503 (2011). Section 7 thus establishes "two tier[s]" of VRAs: mandatory VRAs and discretionary VRAs. S. Rep. No. 103-6, at 13.

Regardless of the tier, however, *all* VRAs have in-person voter registration obligations under Section 7(a)(4), which requires that certain voter registration services shall be made available in person "*[a]t each* voter registration agency." 42 U.S.C. § 1973gg-5(a)(4) (emphasis added).

As the District Court noted, mandatory VRAs have *additional* duties that are set forth under Section 7(a)(6). RE5 at R.3948, 3951-53. Unlike Section 7(a)(4)—which applies to all VRAs—Section 7(a)(6) applies only to those "voter registration agenc[ies] that . . . provide[] *service* or *assistance*" and articulates an "addition[al]" set of obligations that such agencies owe to their clients. 42 U.S.C. § 1973gg-5(a)(6) (emphasis added). "In *addition* to conducting voter registration," mandatory VRAs shall: (1) distribute to clients a voter registration application with

each covered transaction; (2) provide clients a voter preference form that informs her that she can register to vote; and (3) assist clients in completing voter registration applications. *Id*.

These obligations cannot apply to discretionary VRAs, such as public high schools and universities, which generally do not offer public assistance or disabilities services, or conduct transactions such as "recertification[s]" or "renewal[s]." *See* 42 U.S.C. § 1973gg-5(a)(6)(A).[13] By ignoring the distinction between mandatory and discretionary VRAs, Schedler's interpretation renders Section 7(a)(6) superfluous.

C. Schedler Improperly Seeks to Import the Term "In Person" from a Different Provision of the NVRA into Section 7.

Unable to support his argument on the text of Section 7, Schedler improperly seeks to import the phrase "in person" from Section 4 of the NVRA, an entirely different provision, into Section 7. In so doing, Schedler violates settled principles of statutory construction. Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *See Nken v. Holder*, 556 U.S. 418, 430 (2009) (citation and internal quotation marks omitted).

[13] Schedler ignores that the obligations described under Section 7(a)(6) are, as the NVRA plainly states, "in addition to" the general obligation to conduct voter registration described in Section 7(a)(4).

Section 4 broadly requires that States establish three channels through which *any* citizen—not only clients of public assistance agencies—can register to vote: (1) with a driver's license application; (2) by mail; and (3) by application in person at a voter registration agency designated under Section 7. *See* 42 U.S.C. § 1973gg-2(a). Rather than to impose limitations on public assistance agencies' obligations under Section 7, Section 4 establishes a baseline of general voter registration obligations and procedures for States.

Section 4's general requirements "are not intended to be exclusive," but rather "set[] a floor on registration acceptance methods." *Cox*, 408 F.3d at 1353. Congress intended Section 4 to ensure that any State without these three general channels of registration already in place would adopt them "in addition to any other method of voter registration provided for under State law." 42 U.S.C. § 1973gg-2(a).

By contrast, Section 7 is directed at VRAs, and sets forth those agencies' specific obligations in detail. As noted above, for mandatory VRAs, these obligations include, per Section 7(a)(6), offering an opportunity to receive a registration application when distributing application, renewal, and change of address forms to public assistance clients.

Sections 4 and 7, therefore, target different actors, serve different functions, and set forth different obligations. Section 4 "says nothing of the manner in which

voter registration applications or voter preference forms must be distributed or provided. Section 7 paragraph (a)(6) regulates those forms. Section 4 simply regulates a different requirement under the NVRA." *Kemp*, 841 F. Supp. 2d at 1330.[14]

Furthermore, Schedler's assertion that Section 4's general requirements limit the specific requirements of Section 7, Br. at 42-43, is inconsistent with the canon of statutory construction that "the specific governs the general." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007). Section 4 sets a baseline federal standard requiring that procedures be established for in-person voter registration for any eligible citizens, and Section 7(a)(4) demonstrates such procedures by generally requiring distribution of, assistance with, and acceptance and transmittal of voter registration forms "[a]t each voter registration agency." *Id.* at § 1973gg-5(a)(4). Section 7(a)(6), in comparison, establishes voter registration practices for the benefit of public assistance recipients engaging in covered transactions—with

[14] Crucially, that Section 4 includes the term "in person," while Section 7(a)(6) does not, underscores Congress's intent not to limit public assistance offices' voter registration activities to "in person" transactions. "Where, as here, Congress expressly chose to limit the mandates of [Section 4] of the NVRA" to in person interactions, but did not include such language in Section 7, "[t]he court is bound to respect these different treatments by limiting the applicability of the former and declining to infer a limit where Congress chose not to include one in the latter." *Kemp* at 1331 (internal citations omitted). Schedler's attempt to import an "in person" limitation from Section 4 into Section 7(a)(6) crosses the line "between filling a gap left by Congress's silence and rewriting rules that Congress has affirmatively and specifically enacted," *see Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), and would require this Court to re-write the text of Section 7, reading "absent word[s]" into the Act notwithstanding their deliberate omission. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004).

no regard to how the transactions occur.[15]

D. Schedler's Interpretation Contravenes the NVRA's Express Statutory Purpose and Congressional Intent.

Schedler's attempt to graft the words "in person" into Section 7, Br. at 10-11, would also "read in an artificial limit that would frustrate [Section 7's] purpose," *Kemp*, 841 F. Supp. 2d at 1332, undermining the rule that courts should avoid construing a statute in a manner that would "frustrate [its] goals, intent, and purposes," *Hightower v. Tx. Hosp. Ass'n*, 65 F.3d 443, 449 (5th Cir. 1995).

First, Schedler's interpretation of the statute would contravene Congress's express goal of increasing voter registration. Congress found that "it is the duty of the Federal, State, and local governments to promote the exercise of th[e] right [to vote]," 42 U.S.C. § 1973gg(a)(2), and enacted the NVRA with the express purpose of "increas[ing] the number of eligible citizens who register to vote." 42 U.S.C. § 1973gg(b)(1).[16] Schedler's interpretation would exclude hundreds of thousands of

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[15] Section 4's sole reference to Section 7 is merely definitional: Section 4 requires States to ensure that in person voter registration is available at all VRAs defined in Section 7. *See* 42 U.S.C. §§ 1973gg-2(a)(3)(B), 1973gg-5(a)(1)-(3). It does not limit the range of obligations set forth in Section 7.

[16] Although the Fifth Circuit generally applies the plain language of an unambiguous statute without regard to the legislative history, the court "may examine the relevant legislative history of a particular statute in order to ensure that its literal application fulfills manifest congressional intent." *Fischl v. Gen. Motors Acceptance Corp.*, 708 F.2d 143, 147 (5th Cir. 1983) (citing *Watt v. Alaska*, 451 U.S. 259 (1981)). "Expanding the rolls of the eligible citizens who are registered . . . is one positive action Congress can take to give the *greatest number of people* an opportunity to participate." H.R. Rep. No. 103-9, at 2, *reprinted in* 1993 U.S.C.C.A.N. 105, 107 (emphasis added). The Senate Report also makes clear that, in implementing the NVRA, "government should do all it can to make registration widely and easily available." S. Rep. No. 103-6, at 13.

individuals in Louisiana alone—and potentially millions nationwide—from the opportunities guaranteed by the NVRA.[17] Artificially limiting Section 7's application to in person transactions would contravene the Supreme Court's directive that courts "cannot, in the absence of an unmistakable directive, construe [an] Act in a manner which runs counter to the broad goals which Congress intended it to effectuate." *See F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

Second, Schedler's interpretation would exclude individuals who, due to their poverty or disability, would have great difficulty registering to vote—the very population that Section 7 intends to reach. While the NVRA is well known for its "motor voter" provision, which requires voter registration services at departments of motor vehicles, *see* 42 U.S.C. § 1973gg-3, Congress observed that "motor-voter registration programs may not adequately reach low income citizens and minorities," S. Rep. No. 103-6, at 15. *See id.* (noting that "50 percent of those persons who do not have a driver's license have annual incomes of less than $10,000").

To account for this disparity, "Section 7 of the NVRA [was] designed

[17] SNAP receives over 500,000 applications per year in Louisiana; the majority of them are received via remote means. R.19422-23, ¶¶ 11-17. Similarly, 88 percent of the approximately 300,000 Medicaid applications per year in Louisiana are received via remote means. R.19417-18, R.19422-24. Louisiana is not alone in its reliance on remote transactions. Forty states accept Internet applications for at least one form of public assistance benefits. *See* R.1665-66.

specifically to increase the registration of 'the poor and persons with disabilities who do not have driver's licenses and will not come into contact with the other principal place to register under this Act.'" *Harkless v. Brunner*, 545 F.3d 445, 449 (6th Cir. 2008) (quoting H.R. Rep. No. 103-66, at 16, *reprinted in* 1993 U.S.C.C.A.N. 140, 144). Section 7 requires public assistance agencies to provide voter registration services "because [such agencies] are considered most likely to serve persons of voting age who may not have driver licenses and therefore are not served by the motor-voter provisions." H.R. Rep. No. 103-9, at 11, *reprinted in* 1993 U.S.C.C.A.N 105, 116. *See also* S. Rep. No. 103-6, at 13 (Section 7 was designed to "enable[] more low income and minority citizens to become registered"). Schedler's interpretation of the statute would turn Section 7 on its head, requiring public assistance clients to obtain transportation and physically travel to a state office to register to vote—a result clearly not intended by Congress. *Cf. Lamie*, 540 U.S. at 534 ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.").

Finally, Schedler's reading of the NVRA would undermine Congress's specific decision to impose *mandatory* obligations on public assistance agencies to offer their clients an opportunity to register to vote. Congress rejected an amendment eliminating the mandatory designation of public assistance offices as

voter registration agencies. The conference report explains that:

> If a State does not include [public assistance] in its agency program, it will exclude a segment of its population from those for whom registration will be convenient and readily available—the poor and persons with disabilities who do not have driver's licenses and will not come into contact with the other principle [sic] place to register under this Act. *It is important that no State be permitted to so restrict its agency registration program . . . .*

H.R. Rep. No. 103-66, at 16, *reprinted in* 1993 U.S.C.C.A.N 140, 144 (emphasis added).

But under Schedler's incorrect reading of the statute, an agency could opt out entirely of its obligations under the NVRA by conducting all public assistance transactions remotely rather than in person—a result that is not permitted by the NVRA. As the Congressional reports indicate, such discretion would provide the ability for "States to restrict their agency program and defeat a principal purpose of the Act." *Id*.

There is nothing about Section 7's pronouncement that public assistance agencies must provide voter registration forms "with each" covered transaction that suggests that remote transactions are excluded. Where, as here, Congress speaks in clear, broad, and unequivocal language, it is not required to enumerate every possible application of the statute. *Cf. Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-12 (1998) (applying the unequivocal language of Title II of the ADA to

all public entities, including prisons). As new modes of remote communication become increasingly common, Congress is not required to regularly update statutory language in order to enumerate each individual technological advance.[18]

III. THE DISTRICT COURT PROPERLY HELD THAT SECTION 7 REQUIRES THE DISTRIBUTION OF VOTER REGISTRATION APPLICATIONS UNLESS A CLIENT DECLINES "IN WRITING."

The District Court properly concluded that Schedler violated the NVRA by failing to instruct public assistance agencies that voter registration forms must be provided to *each* client, unless she "in writing, declines to register to vote," as required by Section 7. RE4 at R.21462.

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[18] Schedler also appeals the District Court's decision not to take judicial notice of H.R. 5799—an expired House of Representatives bill proposed in 2012. Br. at 44-45. Having offered no argument as to why the denial constituted an abuse of discretion, Schedler has not adequately briefed the issue for this Court's review. *Osterweil*, 424 F. App'x at 344 (the circuit court "need not consider [an] argument . . . [that is] conclusory, and is inadequately briefed."). Additionally, in light of this Court's earlier decision not to take judicial notice of the same expired bill, Doc. 00512239896, Schedler's argument is now barred by the law of the case doctrine. *See, e.g.*, *U.S. v. 162.20 Acres of Land*, 733 F.2d 377 (5th Cir. 1984).

However, if that issue were properly before this Court, it should be rejected because the District Court did not abuse its discretion by declining to take judicial notice of H.R. 5799. Schedler's claim that H.R. 5799 "consider[ed] modernization of the NVRA to cover 'remote' transactions at designated voter registration agencies" is simply false. *See* Br. at 44-45. While H.R. 5799 proposed some amendments to the NVRA, *see* § 101(a), it was silent as to any issue relevant to this case. Appellees hereby also incorporate the arguments set forth in their opposition to Schedler's since-denied motion for judicial notice in this Court. Doc. 00512193637.

A. The Plain Language of Section 7 Requires Distribution of Voter Registration Applications to All Clients Unless They Decline in Writing.

Section 7(a)(6)(A) clearly requires public assistance agencies to distribute a voter registration application during each covered transaction, unless the client "in writing, declines to register to vote." 42 U.S.C. § 1973gg-5(a)(6)(A). Section 7(a)(6)(B) creates a "voter preference form," by which applicants may, in writing, decline to receive an application. The voter preference form asks clients whether they wish to register to vote, contains "yes/no" checkboxes, and recites various disclosures. 42 U.S.C. § 1973gg-5(a)(6)(B). Subparagraph (B) states that "failure to check either box [is] deemed to constitute a declination to register for purpose of subparagraph (C)." 42 U.S.C. § 1973gg-5(a)(6)(B)(iii). Subparagraph (C), the "assistance provision," requires that clients be provided with assistance in completing voter registration applications, unless assistance is refused. 42 U.S.C. § 1973gg-5(a)(6)(C).

The plain meaning of the statute language is clear: a public assistance client shall be given a voter registration application unless she declines, *in writing*, to receive one. "Section 7 does not make the provision of a voter registration application contingent upon an affirmative request, either written or verbal, from a client." *Valdez v. Herrera*, No. 09-668, 2010 U.S. Dist. LEXIS 142209, *18

(D.N.M. Dec. 21, 2010).[19] *See also Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 853-54 (D. Md. 2001) (rejecting the claim that Section 7 requires an affirmative request of voter registration application in order for it to be provided). Nor does it require clients to "opt in" by affirmatively requesting a voter registration application. Instead, it establishes an "opt out" procedure, whereby a client must receive a voter registration application, unless she expressly declines a form in writing. "[A]n applicant's failure to check either the 'YES' or 'NO' box on the declination form does not constitute a declination 'in writing.'" *Valdez v. Herrera*, 676 F.3d 935, 945-46 (10th Cir. 2012).

Schedler's erroneous interpretation—that a client who checks neither box has declined an application in writing, Br. at 53—would require this Court to depart from the clear meaning of "writing," defined as "any intentional recording . . . that may be viewed or heard with or without mechanical aids." *Black's Law Dictionary*, 1748 (9th ed. 2009). Far from an "intentional recording," leaving both boxes blank on a voter declaration form is a lack of writing, recording nothing. There is no express indication by Congress that it intended for the words "in writing," as used in Section 7, "'to carry a specialized—and indeed, unusual—

[19] Although the caption of this case is "*Valdez v. Herrera*," it is misspelled on Lexis/Nexis as "*Vladez v. Herrera*."

meaning.'" *Valdez*, 676 F.3d at 946 (citations omitted). *See also Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

B. Schedler's Reading of the Subsection Ignores Portions of the Subsection's Text.

In arguing that checking the "no" box or leaving it blank both have the same meaning—that the applicant declines to register to vote at the time of the application—Schedler ignores one portion of Subsection B's text, and misconstrues a different portion. *See* Br. at 55.

As the Tenth Circuit has explained, the complete language of Subsection B makes clear that failure to check the box only absolves the agency of the requirements of Subparagraph C, the assistance provision:

> Congress made clear, by way of the language contained in the first parenthetical in subsection (B)(iii), that an applicant's failure to check either box on the declination form must only "be deemed to constitute a declination to register *for purposes of subparagraph (C)*," i.e., it relieves the agency from its duty to provide the applicant with assistance in completing a voter registration form. Had Congress intended for an applicant's failure to check either box to also relieve the agency of its obligation under subsection (A) to provide a voter registration form, it presumably would have said so.

Valdez, 676 F.3d at 946 (emphasis added). Schedler's reading of Subsection B ends, for no reason, after "deemed to constitute a declination to register," and

ignores "for purposes of subparagraph (C)." Such a reading violates a cardinal rule of statutory construction by ignoring the last few words of the clause. *See La. World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 241 (5th Cir. 1998) ("[A] court charged with interpreting a statute must endeavor to adopt a construction which gives meaning to all the words of the statute.").

Additionally, as the *Valdez* court recognized, the phrase "at this time," which must be included at the end of the question offering voter registration, indicates that the failure to check a box simply reflects a decision by the client not to fill out the registration application contemporaneously with the benefits transaction. 42 U.S.C. § 1973gg-5(a)(6)(B)(iii). But "it is conceivable that an applicant who chooses not to register to vote 'at that time' might still be interested in . . . completing it at another time and/or location." *Valdez*, 676 F.3d at 946. The disclaimer language on a voter declaration form, notifying the client that "[i]f you do not check either box, you will be considered to have decided not to register to vote *at this time*," does not change the statutory right to *receive* a form unless expressly declined in writing. *See* 42 U.S.C. § 1973gg-5(a)(6)(B)(iii) (emphasis added). A failure to check either box only means that a client does not wish to register (*i.e.*, fill out a registration application) along with her benefits application, not that she does not wish to receive a registration application at all.[20]

[20] Schedler argues that someone who checks the "NO" box may theoretically be interested

C. A Plain Reading of the Subsection is Supported by the Purpose of the NVRA.

The plain meaning interpretation of Subsection B is consistent with Congress's intent in enacting the NVRA for two reasons.

First, it creates a failsafe whereby a person who does not see the voter registration question (and thus, does not answer it), is still provided with an application by default. This fulfills Congress's stated goal of "increas[ing] the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1).

Second, Congress created the voter preference form, including its various disclosures, specifically to avoid "the possibility of intimidation and coercion." Joint Explanatory Statement of the Committee of Conference (hereinafter "Joint Statement") 19-20, R. 15678-79. The operation of the plain language of the statute makes sense under such considerations: If a client leaves the voter preference question unanswered, he avoids being pressured or coerced into disclosing whether he will elect to register to vote. Instead, he must still be provided with an application (albeit without assistance in completing it), and may choose whether to

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in registering to vote at a later time also, and that Appellees' interpretation of "at this time" is therefore incorrect. Br. at 55. It is not dispositive that a person who checks the box "NO" and one who leaves the voter preference question blank may both want to register to vote later. Speculation about the motives of a client who has elected to "decline, in writing," is not a basis for ignoring the statutory text. Nor is it a basis for ignoring the text when a client has *not* declined in writing. Under the statute's plain meaning, a client who leaves both boxes blank has not declined. *Cf. Lamie*, 540 U.S. at 534.

complete it privately later. Thus, the plain language is consistent with Congressional intent. *Cf. Fischl*, 708 F.2d at 147 (the court "may examine the relevant legislative history of a particular statute in order to ensure that its literal application fulfills manifest congressional intent").

Finally, Schedler's citations to documents beyond the clear language of Subsection B are unpersuasive. Schedler's reliance on the Joint Explanatory Statement of the Committee of Conference, for example, undermines the statutory text itself. Although the Statement suggests that, "[f]ailure to check either would be deemed a declination for purposes of *this provision*," R.15679 (emphasis added), its replacement of the statute's language with contrary language is improper. The statute clearly states that "failure to check either box [constitutes] a declination to register for purposes of *subparagraph (C)*," the assistance provision. 42 U.S.C. § 1973gg-5(a)(6)(B)(iii) (emphasis added). "[I]nferences drawn from a statute's legislative history . . . cannot justify an interpretation that departs from the plain language of the statute itself." *Baker Hughes Oilfield Operations, Inc. v. Cage (In re Ramba, Inc.)*, 416 F.3d 394, 401 (5th Cir. 2005). *See also Universal Seismic Assocs. v. Harris Cnty.*, 288 F.3d 205, 207 (5th Cir. 2002) ("[W]hen a plain reading of a statute precludes one party's interpretation, no legislative history—be it ever so favorable—can redeem it." (quoting *Nalle v. Comm'r*, 997 F.2d 1134, 1140 (5th Cir. 1993)).

Schedler's reference to a 1994 manual from the Federal Elections Commission is similarly misplaced. As an initial matter, this Court has made clear that where a statute is unambiguous, the Court "will not defer to extrinsic aids." *See Guilzon v. Comm'r*, 985 F.2d 819, 823 n.11 (5th Cir. 1983). Moreover, the manual has no force of law, as it plainly states:

> It is very important to note . . . that the Federal Election Commission does *not* have legal authority [] to interpret the Act . . . . THIS DOCUMENT, THEN, IS INTENDED ONLY AS A GENERAL REFERENCE TOOL. ANY SUGGESTIONS CONTAINED IN THIS DOCUMENT ARE PURELY HEURISTIC AND ARE OFFERED WITHOUT FORCE OF LAW, REGULATION, OR ADVISORY OPINION.

R.15468 (emphasis in original). The FEC chart Schedler relies upon merely serves as a general, limited summary of the statute, and cannot replace the language of the statute.[21]

Employing the plain meaning of Subsection 7(a)(6)(B) is essential to reaching the NVRA's goal. Public assistance applications are lengthy, and can be complicated. In person interactions between a client and the agency may only last a few minutes. In some remote transactions, clients may not interact with agency

[21] This is not the only instance in which the manual is at odds with the plain language of the statute. For example, at one point the manual sets out the requirements of the declination form, but includes two statements that are actually required on the mail-in voter registration application (under Section 9(b)(4)), not the declination form. R.15526-27. It is for good reason that the manual is "intended only as a general reference tool."

personnel at all.[22] Schedler's proposed departure from the ordinary meaning of Subsection B would enable public assistance agencies to gloss over the voter registration question, rather than to ensure that only those citizens who elect *not* to register not be given a registration application. Schedler's interpretation would circumvent the NVRA's fundamental principle of making it easier, rather than harder, for public assistance clients to access voter registration forms.

IV. THE DISTRICT COURT PROPERLY HELD THAT THE CHIEF ELECTION OFFICIAL IS RESPONSIBLE FOR FULLY "COORDINAT[ING]" STATE RESPONSIBILITIES UNDER THE NVRA.

As the District Court properly recognized, Section 10 of the NVRA mandates that "[e]ach State shall designate a State officer or employee as the chief State election official to be responsible for the coordination of State responsibilities under this subchapter." 42 U.S.C. § 1973gg-8. Under Louisiana's law implementing the NVRA, the Secretary of State is designated as the State's chief election official, and is charged with "coordinat[ing] the responsibilities of [Louisiana] under the National Voter Registration Act of 1993 (P.L. 103-31) as required by 42 U.S.C. Section 1973gg-8." La. R.S. 18:18(A)(6); RE4 at R.21436-37; Br. at 50.

[22] Schedler incorrectly posits that "[t]he statutorily required declination form is unworkable with remote transactions." *See* Br. at 70-71. But, since the filing of this lawsuit, DHH has begun to provide a voter preference form *and* a voter registration form with every Medicaid application or renewal form sent through the mail to clients and applicants. *See* R.19429 at Uncontested Fact No. 86; R.20661 at 79:5-11; R.20665 at 83:8-15.

Schedler does not dispute the facts underlying the District Court's determination that he has failed to "coordinate" State responsibilities under the meaning of the NVRA. Instead, he argues that the District Court erred in "assigning enforcement authority" to the Secretary with respect to NVRA compliance, and that State law limits the Secretary's power to "coordinat[e]" the State's responsibilities, as federal law requires. Br. at 46, *et seq.* Schedler further argues that, to the extent that the State of Louisiana has not complied with Section 7, this is the State's fault, rather than Schedler's. Br. at 50.

This Court must reject Schedler's arguments for two reasons. *First*, the chief election official's responsibility to ensure that State agencies comply with the NVRA is clear from the plain text of the statute. *Second*, the chief election official, having been designated by the State of Louisiana to "be responsible for coordination of State responsibilities," is uniquely empowered by law to discharge that responsibility, and may not shift that duty to others.

A. The Plain Text of the Statute Requires that Schedler Coordinate the State's Compliance with the NVRA.

In arguing that his duty to coordinate statewide compliance with the statute cannot be inferred from the terms of the NVRA and that his duty is limited to the initial implementation of the statute, Br. at 48, Schedler disregards the plain meaning of Section 10 and the procedures established by the NVRA.

Section 10 provides that "each State shall designate a State officer or

employee as the chief State election official to be responsible for *coordination* of State responsibilities." 42 U.S.C. § 1973gg-8 (emphasis added). In the Section 7 context, these responsibilities include voter registration agencies and the various requirements that fall upon those agencies by dint of the statute. The statute's plain meaning establishes a chief election official's ongoing duty to coordinate a State's continuing responsibility to comply with the NVRA.

Schedler urges this Court to depart from the statute's plain meaning and to adopt an artificially narrow construction of the word "coordination." While at once conceding that the chief election official must "coordinate the state's responsibilities to orchestrate the efforts of the involved agencies," Schedler also argues that "coordination" is limited to "structur[ing] *implementation* among its agencies and to assign[ing] powers and authority to its Chief Election Officer [sic]." Br. at 47 (emphasis added). Schedler's position that this responsibility was discharged upon Louisiana's implementation of the NVRA in the mid-1990s is wholly unsupported by the ordinary meaning of "coordination" and by the effect of that word in the context of the statute. By divorcing "coordination" from that which is to be coordinated—the "State responsibilities under [the NVRA]"—Schedler essentially petitions this Court to replace "coordination" with "implementation," rather than to give full effect to the meaning of Section 10.

Schedler's argument has been rejected by every court that has considered the

meaning of "coordinating" Section 7. The Sixth Circuit in *Harkless* held that "the Secretary, as [] chief election officer, is responsible for 'harmonious combination'—or implementation and enforcement—of [NVRA responsibilities of public assistance agencies]." 545 F.3d at 452 (quoting *Oxford English Dictionary* (2d ed.1989)). Similarly, in *Valdez,* the court held that the chief election officer is "responsible for ensuring compliance [with the NVRA]," and "bears at least some responsibility for the state's compliance with Section 7's mandates." 2010 U.S. Dist. LEXIS 142209, at *34-35.

The plain meaning of Section 10 is also confirmed by other sections of the NVRA. For example, the notice requirement in Section 11(b) requires that aggrieved private parties provide notice of NVRA violations to a State's chief election official before initiating legal action. 42 U.S.C. § 1973gg-9(b)(1). That provision does not impose any similar requirement with respect to the State generally, or to non-compliant local offices or state agencies. "Requiring would-be plaintiffs to send notice to their chief election official about ongoing NVRA violations would hardly make sense if that official did not have the authority to remedy NVRA violations." *Harkless*, 545 F.3d at 453. Schedler's interpretation of his responsibilities under the NVRA would render the notice provision of Section 11(b) ineffective, in violation of settled rules of statutory construction. *See Crandon v. United States*, 494 U.S. 152, 156-58 (1990) ("In determining the

meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

While States may maintain "discretion as to means and methods of enforcing the Act's mandates among [their] agencies," Br. at 50, they may not maintain discretion as to *whether* to enforce the mandates of the NVRA. As the official designated by Louisiana to be responsible for the coordination of the State's NVRA responsibilities, and by the plain terms of the statute, Schedler is required to discharge his duty to coordinate *fully*; the Secretary—here, Schedler—does not have the discretion to abandon that duty after having initially implemented the NVRA.

B. Schedler Is Empowered by both State and Federal Law to Coordinate Louisiana's NVRA Responsibilities.

Schedler argues that Louisiana law prevents the State's NVRA compliance because it does not "give[] the Secretary . . . enforcement powers over other state agencies," and that the District Court's decision "[e]nlarg[es] the Secretary's powers and authority." *Id.* at 49. Schedler further argues that although Louisiana "may have a 'non-delegable duty,' that duty is not by operation of law assigned to the chief election official." *Id.* at 50. These arguments lack merit, are resolved by principles of preemption, and misapprehend the role of Section 10 in the NVRA.

As a threshold matter, Louisiana's law implementing the NVRA does not constrain Schedler's ability to discharge each duty imposed by the statute upon

Louisiana's chief election official. As noted by the District Court, the implementing law states that the Secretary "shall [c]oordinate the responsibilities of this state under the National Voter Registration Act of 1993 . . . as required by 42 U.S.C. Section 1973gg-8." La. R.S. 18:18(A)(6). This broad language explicitly confers upon Louisiana's chief election official power and authority as is consistent with Section 10 and coextensive with the NVRA.

However, even if the implementing State law did constrain Schedler's ability to exercise power to coordinate the State's NVRA compliance, this still would not create an impediment to compliance, as Louisiana law would be preempted by federal law. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (holding that a federal statute need not explicitly provide that conflicting state laws are preempted). In addition to the principle of federal preemption, State laws are invalid to the extent that they "actually conflict[] with a . . . federal statute." *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978). "Such a conflict will be found when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Int'l Paper Co. v. Oulette*, 479 U.S. 481, 491-92 (1987) (internal quotations and citations omitted). Congress structured the NVRA generally, and Section 10 specifically, to charge a State's designated chief election official with the duty to be the sole coordinator of the State's responsibilities under the statute. To the

extent that Schedler argues that Louisiana's law implementing the NVRA does not confer upon the Secretary the power to discharge that duty, that State law is preempted. *See id.* at 494 ("A state law . . . is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal.").

Schedler attempts to distinguish this case from *Harkless* and *Valdez* by arguing, incorrectly, that those decisions relied upon power granted to States' chief election officials by State laws. However, in both cases, State law provided an independent and alternative basis for chief election officials' authority to enforce the NVRA—not the sole basis. *See Harkless*, 545 F.3d at 453 ("[*E*]*ven if* the word 'coordination' in the NVRA is truly vague, Ohio law makes it abundantly clear that the Secretary is responsible for implementation and enforcement of Section 7.") (emphasis added); *Valdez*, 2010 U.S. Dist. LEXIS 142209, at *35 (the "concept that the chief election official has the ability and responsibility to ensure compliance with Section 7 is *not only* contained in the NVRA, but *also* in New Mexico law.") (emphases added).

Schedler in fact concedes that he has exercised his power to coordinate, and has assumed at least some responsibility for ensuring NVRA compliance among State agencies. For example, the Secretary of State's NVRA trainings for voter registration agencies, although "sporadic and faulty," RE4 at R.21466, demonstrate that the Secretary has accepted some degree of authority to instruct and direct the

actions of those agencies, and has exercised that authority before.

Schedler's additional argument that it is the State of Louisiana, rather than the State's chief election official, who "may not delegate its responsibilities under the NVRA," *id.*, misapprehends the structure that the NVRA requires. Br. at 50. Section 10 mandates that States "shall designate a State officer or employee" as chief election official, who in turn will "be responsible for coordination of State responsibilities." 42 U.S.C. § 1793gg-8. Louisiana did this by designating the Secretary of State. Br. at 47. Accordingly, insofar as Schedler concedes that "[t]he State has a duty to carry out the mandates of the Act," that duty is indeed "by operation of law assigned to the chief election official." *Id*. at 50 The responsibility to fulfill that duty belongs to Schedler by virtue of the State's having so designated him.[23]

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[23] Schedler asserts that the District Court erred when it excluded, pursuant to Federal Rule of Evidence 405, the testimony of Elsie Cangelosi, a Louisiana Secretary of State employee who retired in 2005. Br. at 52. Schedler, however, provides no argument as to how the District Court abused its discretion in making that determination. Accordingly, this Court need not consider this question on appeal. *Osterweil*, 424 F. App'x at 344 (The circuit court "need not consider [an] argument . . . [that is] conclusory, and is inadequately briefed.").

The District Court's exclusion of this testimony was, at any rate, not an abuse of discretion and should not be overturned. First, the testimony proffered by Ms. Cangelosi would have been from a time period excluded from trial for the NVRA claims presented in this case. Second, the testimony would have pertained to training programs developed by the chief election official at the time of Louisiana's implementation of the NVRA in 1995, and the State's "method of implementation" of the NVRA at that same time, Br. at 47, 52, neither of which are at issue in this litigation. Since Ms. Cangelosi's testimony was irrelevant to the questions presented at trial, this Court should not disturb the District Court's evidentiary ruling. *See Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 180 (5th Cir.1995) ("Because of his or her involvement in the trial, a district court judge often has superior knowledge and understanding of the probative value of

V. THE DISTRICT COURT'S INJUNCTION COMPLIES WITH RULE 65(d) AND SHOULD BE AFFIRMED.

Federal Rule of Civil Procedure 65 requires "every order granting an injunction" to "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or enjoined." Fed. R. Civ. P. 65(d)(1). "[A]n injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369 (5th Cir. 1981).

The District Court's Injunction satisfies Rule 65(d)(1), and Schedler, having already certified his compliance with the Injunction, is judicially estopped from now arguing that the Injunction is unclear and "leaves [him] to guess" as to what it means.

A. Schedler is Estopped from Arguing that He Cannot Adhere to an Injunction with Which He has Certified Compliance.

Having certified his compliance with the Injunction on March 15, 2013, Doc. 465, Schedler is estopped from arguing that he now cannot understand it. "The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." *Ergo Sci., Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996).

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evidence. Therefore, we show considerable deference to the district court's evidentiary rulings, reviewing them only for abuse of discretion.").

Judicial estoppel is appropriate where "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012). Here, Schedler asserts that the Injunction is unclear despite having certified that he has made specific changes "referenced in the Permanent Injunction" to enforce the NVRA. Br. at 8; RE11 at 1-2. *See* RE3.

The District Court and Appellees have accepted Schedler's certification (and those of his co-defendants) as evincing his compliance with the Injunction. RE9, RE10, & RE11. By now claiming that he has been left to "guess" what the Injunction requires, Br. at 61, Schedler is playing "'fast and loose' with the court by 'changing positions based upon the exigencies of the moment.'" *See Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 400 (5th Cir. 2003) (quoting *Ergo Sci.*, 73 F.3d at 598).[24]

[24] That the District Court ordered Schedler to certify compliance is not dispositive. The District Court issued its Injunction on January 23, 2013. RE3 at R.21471. Schedler then waited a full month—until February 22, 2013—before seeking to stay the Injunction. As a result, his motion to stay was not even submitted for consideration to the District Court until March 13, 2013, a mere two days before he was required to certify compliance with the Injunction. *See* RE12 at 3; RE3 at R.21473. Unlike co-defendant DHH, Schedler did not seek relief from the March 15 deadline, R.21493-98; nor did Schedler request expedited review of his motion for stay pending appeal. By the time Schedler moved for a stay pending appeal in this Court on March 22, 2013, the certification deadline had already passed and he had already certified compliance with the Injunction. *See* Doc. 00512239896 (denial).

Moreover, compliance with an Injunction can by itself indicate that the Injunction satisfies Rule 65(d). *See Liberty Mut. Ins. Co. v. Gunderson*, 305 F. App'x 170, 178 (5th Cir. 2008). All three defendants, including Schedler, certified compliance with the Permanent Injunction in this case; Schedler never sought clarification of its terms from the District Court. RE9, RE10, & RE11. The Injunction is therefore *a fortiori* valid under Rule 65(d). *See Liberty Mut. Ins. Co.*, 305 F. App'x at 178 ("First Health complied with [the injunction's requirements] . . . . Therefore, this Court holds that the permanent injunction is framed in a manner that enables [it] to know what conduct the district court prohibited.").

B. The Injunction Satisfies the Requirements of Rule 65(d).

The District Court's reason for issuing the Injunction is clear: Defendants "have violated the requirements of the National Voter Registration Act." RE3 at R.21471. The Injunction further provides that Schedler shall "maintain in force and effect [his] policies, procedures, and directives, as revised, relative to the implementation of the National Voter Registration Act," and shall certify compliance by March 15, 2013, which Schedler has done. *Id.* at R.21472.

Rather than simply requiring Schedler to "'obey the law,'" Br. at 61, the Injunction addresses only those issues raised in this case, and requires narrow and limited changes by Schedler to specific programs. The Injunction is distinct from those that have simply adopted the language of statutes without any additional

detail. *Cf. Payne v. Travenol Labs. Inc.*, 565 F.2d 895, 897 (5th Cir. 1978) (reversing where the injunction was not significantly more specific than Title VII itself). Thus, "[w]hile the Permanent Injunction may not be elaborate, the requirements of Rule 65(d) have been soundly met." RE12 at 5.

Schedler asserts that the Injunction's reference to the District Court's Findings of Fact and Conclusions of Law violates Rule 65's prohibition on "referring to the complaint or other document." Fed. R. Civ. P. 65(d)(1)(C). But Schedler ignores that the Injunction was issued *concurrently with* the Findings of Fact and Conclusions of Law. Courts routinely consider papers filed concurrently with injunctions when evaluating their sufficiency under Rule 65(d). *See, e.g.*, *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (consulting both "the brief judgment order [and] the accompanying opinion"). *See also CPC Int'l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 459 (4th Cir. 2000) (considering a detailed "Schedule A").

C. The Injunction is an Appropriate Remedy.

Schedler also argues that the Injunction is improper because Appellees are not at risk of irreparable harm given that the specific actions that give rise to standing—Scott's applications for SNAP benefits in 2009 and 2010, and Louisiana NAACP's voter registration activities in 2010—occurred in the past and, therefore, will not be remedied by prospective relief. This argument misconstrues the relevant legal standards and mischaracterizes the District Court's factual findings.

Both Mr. Scott and the Louisiana NAACP are entitled to a permanent injunction, as the District Court found, because they have no adequate remedy at law because their injuries are capable of repetition. *See* 11A Charles Alan Wright *et al*., Federal Practice & Procedure – Civil § 2944.

Without an injunction, Mr. Scott, who continues to receive SNAP benefits and move frequently, may not receive a voter registration application during covered transactions, and would likely be deprived of the opportunity to register or to update his registration information during those transactions. *See* 42 U.S.C. § 1973gg-5(a)(6)(A)-(C); RE4 at R.21439, R.21444. Similarly, without prospective relief, the Louisiana NAACP would be forced to continue conducting voter registration activities outside of public assistance offices, thereby expending resources "designed to counteract deficiencies with [defendants'] compliance with their NVRA obligations." RE4 at R.21449. *See also Vitek v. Jones*, 445 U.S. 480, 487 (1980) (allowing an injunction where "it is not 'absolutely clear,' absent the injunction, 'that the allegedly wrongful behavior could not reasonably be expected to recur.'") (citations omitted). These harms, as the District Court appropriately recognized, can only be remedied by prospective injunctive relief.

VI. THE DISTRICT COURT PROPERLY FOUND THAT APPELLEES SATISFIED THE NOTICE REQUIREMENTS OF THE STATUTE.

Schedler challenges the January 2011 notice he received from the Louisiana NAACP ("Notice Letter"), pursuant to Section 11's requirement that putative private litigants provide written notice of violations to a State's chief election official, informing him of Louisiana's NVRA and Section 7(a)(6) violations. R.95-100. 42 U.S.C. § 1973gg-9(b). Each of the collateral respects in which Schedler challenges the sufficiency of the Notice Letter is without merit.

A. Schedler Has Waived Arguments Regarding the Filing of the Notice Letter.

Schedler asserts that neither Appellee "offered evidence at trial that the required notice was filed." Br. at 23. However, no filing requirement exists. Indeed, Schedler concedes that the notice requirement is a non-jurisdictional limitation on a cause of action. *See* Br. at 23 (citing *Nat'l Council of La Raza*, 2012 WL 6691729, at *4, *10). Non-jurisdictional limitations are affirmative defenses that are subject to waiver and estoppel. *See, e.g.*, *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982). Therefore, by failing to object on this basis below, Schedler has waived this objection to the notice.

B. The Notice Letter Fulfills the Statutory Requirements.

Schedler also appears to challenge the legal sufficiency of the Notice Letter. *See* Br. at 23-24. As the District Court held, however, based on the content of the

Notice Letter, Schedler had sufficient information to investigate Appellees' claims of NVRA violations. RE6 at R.1129-30, including Mr. Scott's claims. *Ferrand v. Schedler*, No. 11-926, 2011 WL 3268700, at *6 (E.D. La. July 21, 2011) (holding that the Notice Letter "described the nature of the violations and identified the allegedly non-compliant public assistance offices"). The Notice Letter set forth the precise ways that public assistance offices were violating Section 7 of the NVRA.[25] *See* R.95-96.

The Notice Letter sufficiently "provide[d the State] in violation of the Act an opportunity to attempt compliance before facing litigation." *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997). Such a letter need not provide detailed, specific allegations of violations; rather, it must provide sufficient information to allow the state to understand the nature of the violations, and to investigate the non-compliant agencies, offices, or practices. *Id.*

C. Mr. Scott Was Not Required to Send a Duplicative Notice Letter.

The District Court correctly ruled that the Notice to Schedler was sufficient, and also ruled that "it was inconsequential that individual plaintiff[] . . . failed to provide duplicate notice of the alleged NVRA violations." RE6 at R.1130. It is irrelevant that Mr. Scott was not mentioned by name in the Notice Letter. The

[25] The Notice Letter alleged six different categories of NVRA violations, including failure to give clients a voter registration application with each covered transaction (citing 42 U.S.C. § 1973gg-5(a)(6)(A)). *See* R.95-96.

Notice Letter identified widespread violations, including violations under Section 7(a)(6). Mr. Scott's grievances are precisely the type of violation detailed in the Notice Letter; and additional notice from him would have contained no distinct allegations.

Other courts have refused to require duplicative notices where one plaintiff had already placed the State on notice of the same types of violations. *See, e.g.*, *Miller*, 129 F.3d at 838 ("[W]e agree with the district court that requiring . . . plaintiffs to file individual notice where Michigan had already ignored [the organizational plaintiff's] actual notice amounts to requiring performance of futile acts."); *Judicial Watch, Inc. v. King*, No. 12-800, 2012 WL 6114897, *3 (S.D. Ind. Dec. 10, 2012) (sending duplicative notices would not have furthered the purpose of the NVRA's notice requirement).

The case relied upon by Schedler is inapposite. In *Kemp*, the grievances raised by the individual plaintiff were "not made known to the defendants until they were served with the *amended complaint*," and the *Kemp* plaintiffs did not argue that the individual plaintiff's violations were described in the notice letter. 841 F. Supp. 2d at 1335 (emphasis added). Here, since the violations that aggrieved Mr. Scott are of the same type that aggrieved the Louisiana NAACP, and that were described in the Notice Letter, a separate letter in Mr. Scott's name would have been duplicative. Schedler and his co-defendants were already on

notice of the allegations that DHH and DCFS offices were failing to offer voter registration to clients during covered transactions, as required by Section 7(a)(6).

VII. THE DISTRICT COURT PROPERLY RULED THAT APPELLEES ARE "PREVAILING PARTIES" AND ENTITLED TO REASONABLE ATTORNEYS' FEES AND COSTS.

A. The Appeal of Attorneys' Fees is Not Ripe.

The District Court's order awarding Appellees' reasonable attorneys' fees, costs, and expenses is not yet a final, appealable order. It is well settled that "an order awarding attorney's fees or costs is not reviewable on appeal until the award is reduced to a sum certain." *S. Travel Club v. Carnival Air Lines*, 986 F.2d 125, 130 (5th Cir. 1993). *See also Hay v. City of Irving, Tex.*, 893 F.2d 796, 800 (5th Cir. 1990). Briefing regarding attorneys' fees in this case is ongoing in the District Court. *See, e.g.*, Doc. 446. Thus, the issue is not ripe, and this Court lacks jurisdiction to consider it.

B. Appellees Are Prevailing Parties, and Schedler is Jointly and Severally Liable with DCFS and DHH for Violations of the NVRA.

Schedler would not succeed on the merits of this issue if it were ripe. There is no question that the Appellees were the prevailing parties. Appellees sought relief against all three original defendants, and the District Court found in Appellees' favor with respect to each of them. As a result, Schedler is subject to an injunction providing relief to Appellees, has certified compliance with that Injunction, and is subject to continuing jurisdiction. *See, e.g.*, *Walker v. City of*

Mesquite, 313 F.3d 246, 249 (5th Cir. 2002). *See also Nat'l Coal. for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272 (N.D. Fla. 2001). Schedler, therefore, is jointly and severally liable with his co-defendants for violating the NVRA.[26]

Schedler claims that the NVRA's private right of action only affords recovery of attorneys' fees, costs, and expenses on a per violation basis, and contends that Appellees were directly aggrieved by violations committed by DCFS and DHH, rather than by Schedler. Br. at 63. Contrary to his assertions, the NVRA provides that a court may allow a "prevailing party" reasonable fees and costs, 42 U.S.C. § 1973gg-9(c), and it has long been held that the prevailing party determination is not based on a count of the number of claims or defenses, but instead on the relationship of the litigation outcome to the objective of the litigation. *See, e.g., Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989).

CONCLUSION

For the reasons stated above, Appellees respectfully request that this Court affirm the District Court's judgments.

[26] Even if Schedler were correct that DCFS and DHH are "more at fault," this is irrelevant to his obligations to Appellees. "A plaintiff may recover against any joint wrongdoer and . . . the wrongdoers then can file contribution actions . . . and allocate fault among themselves," so that even in cases of "disparate fault," joint and several liability is appropriate. *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 99 F.3d 761, 773 (5th Cir. 1996). *See also Nash v. Chandler*, 848 F.2d 567, 573 (5th Cir. 1988) (joint and several award of attorneys' fees and expenses proper).

Dated: May 20, 2013

Respectfully submitted,

/s/ Natasha M. Korgaonkar

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CERTIFICATE OF SERVICE

Pursuant to Fifth Circuit Rule 25.2.1, I hereby certify that on May 20, 2013, an electronic copy of the foregoing *Brief of Plaintiffs-Appellees Luther M. Scott, Jr. and Louisiana State Conference of the NAACP* was filed with the Clerk of Court and served on the following counsel through the Court's electronic filing system:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13, 830 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

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