UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

CELIA VALDEZ, et al.,	)
	)
Plaintiffs,	) Civil Action No: 1:09-cv-00668 JCH/DJS
	)
v.	)
	)
MARY HERRERA, et al.,	)
	)
Defendants.	)

DEFENDANT MARY HERRERA'S REPLY IN SUPPORT OF HER
MOTION FOR SUMMARY JUDGMENT

Plaintiffs repeatedly misapprehend the gravamen of the Secretary of State's Motion for Summary Judgment. The National Voter Registration Act does not, contrary to Plaintiffs' belief, obligate the Secretary to act as an enforcement agent of the federal government. Because their reliance on *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008) is misplaced, and because Plaintiffs do not come to terms with the Secretary's argument regarding that case, the Secretary is entitled to summary judgment in her favor.

ARGUMENT

Plaintiffs offer three reasons why the Court should deny the Secretary's Motion. First, they argue, albeit half-heartedly, that the Court should deny the Motion for failure to comply with Local Rule 56.1(b). Second, they contend that the NVRA does, in fact, require the Secretary to enforce a piece of federal legislation. Third, Plaintiffs contend that the Secretary has failed to meet even the minimal obligations of "coordination" as set forth in the Motion. Plaintiffs are wrong on each point.

I. FAILURE TO COMPLY WITH RULE 56.1(b) HAS NEITHER PREJUDICED PLAINTIFFS NOR BURDENED THE COURT.

Plaintiffs contend in a footnote that "[t]he Secretary's violation of [Local Rule 56.1(b)] goes to the heart of the summary judgment process since it directly undermines this Court's ability to ascertain" whether there are disputed material facts and "has prejudiced Plaintiff's [sic] ability to contend that summary judgment should be denied" on the basis that there are material disputes of fact. (Response, pg. 9, n. 3.) This contention fails. The dispositive issue raised by the Motion is a legal one; namely, does the NVRA require the Secretary to enforce compliance with the NVRA by other State agencies that bear clear burdens under the statute?

This is a purely legal question. The only facts the Secretary has relied upon are clearly set forth in the portion of her Motion discussing the steps the Secretary has taken to coordinate New Mexico's responsibilities under the NVRA. To ascertain those facts, Plaintiffs needed to do little more than read that section of the Motion. They appear to have done so, and have responded to those factual assertions.

Those responses indicate that there is no material factual dispute in this case. Plaintiffs do not dispute the fact that the Secretary has taken the following actions: (1) promulgating regulations to assist in the implementation of the NVRA (Response, pg. 5, ¶ 3); (2) assigning a unique site code number to each individual office of any State agency responsible for registering voters under the NVRA (Response, pg. 5, ¶ 4); (3) conducting training regarding NVRA compliance to those State officers responsible for registering voters under the NVRA (Response, pg. 5, ¶ 5); and (4) produced a manual, most recently revised in 2009, to aid the New Mexico Human Services Division ("HSD") in NVRA compliance (Response, pg. 5, ¶ 6). Instead, Plaintiffs take issue with whether these actions are sufficient to meet the Secretary's obligations under the NVRA. This is a legal question (or, at most, a mixed question of fact and law). There

is an ample record before the Court to rule on the Motion, and dismissal for a violation of Local Rule 56.1(b) is inappropriate.[1]

II. THE NVRA DOES NOT CONSCRIPT THE SECRETARY INTO THE ROLE OF ENFORCING FEDERAL LEGISLATION.

Plaintiffs argue that the Secretary, as the chief election official under the NVRA, is ultimately responsible for any NVRA violations that occur in New Mexico. In support of this argument, Plaintiffs rely almost exclusively on *Harkless*. That reliance is misplaced.

Plaintiffs do not dispute that HSD (and the Taxation and Revenue Department) is directly charged with the burden of implementing Section 7 of the NVRA, 42 U.S.C. § 19733gg-5. Plaintiffs fail to understand, however, the importance of the manner in which the NVRA apportions those burdens. The Secretary, as the chief election official, is responsible for the "coordination of State responsibilities" under the NVRA. 42 U.S.C. § 1973gg-8. The Secretary is not responsible for handing blank voter registration forms to HSD clients; nor is the Secretary responsible for ensuring that any voter registration forms completed by HSD clients are forwarded to the appropriate election official.

Plaintiffs note that the *Harkless* court rejected the argument that the Ohio Secretary of State was not responsible for Ohio's NVRA violations, and assert that "the Secretary does not offer any reason for this Court to not follow the Sixth Circuit's reasoning." (Response, pg. 11). To the contrary, the Secretary has provided three reasons, only one of which Plaintiffs attempt to grapple with, why this Court should not blindly adopt *Harkless*. First, as a Sixth Circuit opinion it is not binding precedent on this Court. Second, the holding in *Harkless* is not as broad as

[1] Plaintiffs do take issue with the Secretary's assertion that her office has acted as an ombudsmen for NVRA compliance issues, arguing that the Secretary has offered no facts supporting that claim. (Response, pg. 6, ¶ 7). The Secretary's actions in response to Plaintiffs' pre-complaint notice of potential violations of the NVRA – actions with which Plaintiffs are obviously familiar – are an example of how the Secretary fulfills this role. In any event, these facts are not central to the principal issue raised by the Motion for Summary Judgment, and no fact finder needs to resolve those facts to determine that the Secretary has met her obligation under the NVRA.

Plaintiffs suggest. Third, to the extent *Harkless* stands for the proposition that the Secretary is responsible for enforcing the NVRA in New Mexico (and not for the proposition that a State cannot delegate its NVRA obligations to local authorities), it is wrongly decided. Plaintiffs refer to the "plain language" of the NVRA in support of the *Harkless* court's decision, but *Harkless* takes a much more circuitous route to its conclusion that the Ohio Secretary of State was responsible for enforcing NVRA compliance in Ohio.

First, the court sought out a definition of coordination from the Oxford English Dictionary defining the word as "[h]armonious combination of agents or functions towards the production of a result." *Harkless*, 545 F.3d at 452. From there, the court made the leap to "implementation and enforcement" of the NVRA. *Id*. In so doing, the Sixth Circuit added words to Section 1973gg-8 that appear nowhere in the statute. Accordingly, to the extent *Harkless* would either: (1) require the Secretary to enforce the provisions of the NVRA against other State agencies; or (2) hold the Secretary liable for the failure of other State agencies to perform the tasks explicitly designated to them by the NVRA, it is wrongly decided.[2]

Plaintiffs attempt to buttress their argument by noting that would-be NVRA plaintiffs must notify a State's chief election official before filing a lawsuit against that State. This provision, however, lends equal support to the Secretary's contention that the NVRA requires her to act as an ombudsmen of sorts; when potential violations are brought to her attention, she facilitates a potential resolution. This is not the same as enforcing the statute. It is, instead, coordinating the State's NVRA responsibilities. Plaintiffs' citation to *Harkless* on this point is

[2] Plaintiffs note that the Eighth Circuit has imposed joint and several liability under the NVRA in *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008). But that case dealt with joint and several liability between local and state agencies, not amongst the state agencies charged in the NVRA itself with implementation of the statute. Joint and several liability is, in any event, something of a straw man. The question before the Court is not whether the Secretary is jointly liable for any NVRA failing by HSD, but what the NVRA requires of the Secretary in the first instance by tasking her with coordinating the State's NVRA responsibilities.

similarly unavailing. While the *Harkless* court did suggest that the notification required by 42 U.S.C. § 1973gg-9(b)(1) "would hardly make sense if [the chief election official] did not have the authority to remedy NVRA violations," *Harkless*, 545 F.3d at 453, this assertion is simply incorrect. It would in fact make a great deal of sense to require notification to a State's chief election official who is then tasked with coordinating the State's responsibilities and attempting to facilitate a resolution with the State agency directly charged by the NVRA with compliance.

Ultimately, Plaintiffs do not dispute that HSD is directly responsible for compliance with Section 7. The dispute centers on whether Section 1973gg-8 requires the Secretary to enforce the NVRA in New Mexico, as the *Harkless* court incorrectly suggests, or whether Section 1973gg-8 requires the Secretary to coordinate the State's responsibilities under the NVRA. The best application of *Harkless* – the one which creates no conflict with the language of the NVRA – is to prohibit a State from delegating to local authorities its obligations under the NVRA. New Mexico has not done so. HSD is liable for any NVRA violations it commits, and Plaintiffs can get full relief from HSD for those violations. Holding the Secretary liable for violations committed by other State agencies is both contrary to the language Congress chose in crafting the NVRA and unnecessary to ensure New Mexico's compliance (through HSD) with the NVRA.

Finally, Plaintiffs argue that the Secretary has full authority to direct the actions of HSD in relation to NVRA compliance, pointing principally to NMSA 1978, §§ 1-2-1(A) and 1-4-48(A), which give the Secretary authority to promulgate rules regarding the administration of a state-agency based voter registration program. Plaintiffs read this authority too broadly, however, if they believe that this vests authority in the Secretary to tell HSD how to conduct its day-to-day business. The Secretary can, for example, create a system by which completed voter

registration forms are collected and transmitted to the appropriate election authority. The Secretary can also direct agencies to keep an adequate supply of forms on hand. But there is a point at which the Secretary's directives must yield to the independent authority of the agency principally tasked with NVRA compliance. The Secretary cannot, for example, tell HSD to purchase a new computer system for use in voter registration activities.

The legal dispute between Plaintiffs and HSD has been fully briefed in the parties' motions for summary judgment. The Secretary agrees with, and to the extent necessary adopts, the position HSD has taken in that briefing regarding the circumstances under which HSD must make voter registration forms available to recipients of public assistance. Those burdens, however, fall on HSD. The NVRA does not deputize the Secretary to enforce its terms against other State agencies, and the Secretary is accordingly entitled to summary judgment in her favor.

III. THE SECRETARY OF STATE HAS COMPLIED WITH THE NVRA'S COORDINATION OBLIGATIONS.

Plaintiffs contend that the Secretary has not taken sufficient action to meet her obligations to coordinate the State's Section 7 compliance. First, Plaintiffs point to their pending motion for partial summary judgment. As noted above, the Secretary adopts HSD's position on that motion and on HSD's own motion. The remainder of Plaintiffs' argument regarding the Secretary's Section 7 activity consists of complaints that she has not taken sufficient recent action, pointing to the fact that the Secretary has conducted no training since 2004 and has not issued any regulations since the passage of the NVRA sixteen years ago. (Response, pg. 18.)

These complains are of no significance. The NVRA does not require the Secretary to conduct training on any particular schedule, and certainly does not require the Secretary to amend her regulations or promulgate new ones. Plaintiffs' lament that the Secretary's regulations "do not reflect any active 'coordination' by the Secretary today" (Response, pg. 18)

misses the point. Those regulations, regardless of when they were promulgated, are significant steps concerning the coordination of New Mexico's NVRA responsibilities. The fact that those regulations were promulgated when a different individual held the office of Secretary of State is entirely irrelevant to determining whether those regulations constitute coordination of the State's NVRA obligations.

Finally, Plaintiffs argue that the Secretary must not be coordinating any responsibilities because she does not know, according to her discovery responses, "whether or not the State is complying with Section 7 at HSD offices." (Response, pg. 17.) This is a mischaracterization of those discovery responses. Plaintiffs submitted an interrogatory asking about specific actions taken or not taken by HSD offices in New Mexico. The Secretary's response indicated that she did not have sufficient information to state whether or not each HSD office was taking the specific actions listed. What this means is that the Secretary does not send investigative staff to all of the HSD offices in New Mexico to observe those offices in their daily operations. The NVRA clearly does not require such burdensome activity from the Secretary. The Secretary's role, and the role mandated by the NVRA, is more reactive. When the Secretary receives a complaint about NVRA compliance, like the complaint Plaintiffs submitted prior to the filing of this lawsuit, she responds to that complaint in an effort to determine what, if any, actions must be taken.[3] She is not responsible for literally policing HSD and its employees.

Plaintiffs offer no other challenge to the evidence submitted by the Secretary in support of her Motion. Most tellingly, Plaintiffs' conclude that "there exists a longstanding pattern of

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[3] This activity certainly qualifies as monitoring and evaluating NVRA compliance. Thus, contrary to Plaintiffs' contention that the Secretary "fails to offer any evidence whatsoever that she has engaged in any 'monitoring' and 'evaluating' of Section 7 compliance" (Response, pg. 17), she in fact has. Plaintiffs' real complaint is that the Secretary's monitoring and evaluating activity was in response to a written complaint that HSD was not complying with the NVRA as opposed to a proactive program to affirmatively ensure that HSD was in compliance. As discussed above, the obligation Plaintiffs seek to impose on the Secretary is simply not the same as the obligation that the NVRA imposes on her.

conduct by the State of New Mexico in failing to offer voter registration to the state's public assistance clients" (Response, pg. 18), but ignore the evidence submitted by the Secretary that New Mexico has not in the past had problems with wholesale noncompliance. *See* Lamb Aff., ¶ 5. Ultimately, Plaintiffs' complaint boils down to this: the Secretary has not done as much as they believe she should have. Unfortunately for Plaintiffs, they are not the arbiters of the scope of the obligations imposed on the Secretary by the NVRA. Plaintiffs' characterization of the Secretary's efforts as "minimal" (Response, pg. 18) is predicated on their preconceived notion of what the NVRA requires. Because the NVRA's requirements are less onerous than Plaintiffs believe, and because Plaintiffs cannot refute the actions taken by the Secretary and identified in her Motion, the Secretary is entitled to summary judgment in her favor.

CONCLUSION

The Secretary of State's burdens under the NVRA are not nearly as broad as Plaintiffs believe. The Secretary has complied with her obligations under the NVRA, and thus respectfully requests that the Court enter an Order: (1) granting summary judgment to the Secretary of State on any remaining claims in this litigation; (2) requiring the parties to bear their own costs and fees in connection with that application; and (3) providing to the Secretary of State any additional relief to which she may be justly entitled.

DATED: September 30, 2010.

Respectfully submitted,

GARY K. KING
NEW MEXICO ATTORNEY GENERAL

/s/ Scott Fuqua___________________
Scott Fuqua
Assistant Attorney General
New Mexico Attorney General's Office
408 Galisteo Street
Santa Fe, NM 87501
(505)827-6000 – Telephone
(505)827-6036 – Facsimile

Attorney for Defendant Mary Herrera

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing answer on Plaintiffs' counsel of record via electronic filing with the CM/ECF filing system on September 30, 2010.

/s/ Scott Fuqua___________________
Scott Fuqua