

contact for the county with respect to ... implementation of other provisions of applicable federal law governing elections.” Mont. Code Ann. § 13-1-301(3). Voter challenges are filed with and resolved by the county election administrators. Mont. Code Ann. § 13-13-301. If the challenge is not made in the presence of the elector, within five days “the election administrator or election judge shall notify the challenged elector as soon as possible” of the challenge. Mont. Code Ann. § 13-13-301(4)(b). Like service of process, this notice provision is a ministerial duty that does not involve a determination of the sufficiency of a challenge. Cf. Fed. R. Civ. P. 4.

The registration challenges at issue in this case are unprecedented. See Compl. ¶ 2. Soon after hearing of the challenges, Deputy Secretary of State for Elections Lisa Kimmet notified all counties of the challenges and the statute and regulation governing the challenges. (Kimmet Aff. Ex. 1.) As the scope and substance of the challenges became clear, Ms. Kimmet provided initial guidance that it was the county election administrator’s duty to make final decisions on each challenge, but also cautioned not to lead the voter “to believe that the failure to provide the [optional rebuttal] affidavit will necessarily prove fatal to their ability to vote.” (Id.)

Prior to receiving the initial guidance, however, several county election administrators began to receive independent advice from county attorney offices. See Compl. Ex. I; (Kimmet Aff. Ex. 3). In order to ensure uniformity, Ms. Kimmet reviewed the county attorney guidance, which was consistent with applicable state law, and forwarded it to all counties as guidance in addressing intra-county challenges. (Kimmet Aff. Ex. 4.) Ms. Kimmet also forwarded to the affected challenge counties Missoula County’s sample letters to voters. (Kimmet Aff. Ex. 5). In addition, she provided further guidance emphasizing that “when notifying the challenged elector, please review your letter to make sure that it does not have an indication that would discourage the elector from updating their information or voting.” (Kimmet Aff. Ex. 6.)

Before the deadline for notifying the challenged electors arrived, Ms. Kimmet consulted legal counsel concerning the requirements of the NVRA and directed county election administrators to “not cause the challenged elector to think that inaction on their part will cause them to not be able to vote, or to have to vote provisionally.” (Kimmet Aff. Ex. 7.) A few hours

later, Ms. Kimmet issued the final Challenge Procedure Resolution Guidance, to help “resolve challenges in a uniform manner.” (Kimmet Aff. Ex. 8.) That guidance provided in bold print at its beginning: “*a postal change of address form by itself is insufficient to cancel the registration, especially of an elector who confirms his residence in the voting process.*” (Id.)

Plaintiffs then informed the Secretary of State of its lawsuit, and Ms. Kimmet informed the counties not to send out notification letters. (Kimmet Aff. Ex. 9.) The same day, Defendant Eaton called the county attorneys of the affected counties and “requested that [the] county NOT send the letters and that he wouldn’t sue us if we didn’t.” (Kimmet Aff. Exs. 10. & 11) Defendant Eaton then informed the counties that he was withdrawing all challenges. Upon hearing this Ms. Kimmet planned notification for voters who may have received challenge notices from the counties. (Kimmet Aff. Ex. 12.) That guidance provided for a notice on large card-stock:

IMPORTANT NOTICE

YOU HAVE THE RIGHT TO VOTE

Please disregard a previous communication from this office regarding your voter registration challenge. **ALL CHALLENGES HAVE BEEN WITHDRAWN.**

Please VOTE early by absentee ballot, or at the polls on November 4, 2008!

(Kimmet Aff. Ex. 13.) On October 10, the Secretary of State certified the official voter registry, including all challenged voters. See Mont. Code Ann. § 13-2-115(1); (Kimmet Aff. Ex. 14.)

ARGUMENT

The Court is correct that the Secretary of State made “an effort ... to avoid partisan decision-making and a good faith attempt at complying with state law.” 10/08/08 Order at 3 n. 2. As reflected in the Complaint and its attachments, it may not have been clear to the Court “whether Secretary of State Johnson’s response to the voter challenges at issue here is illegal.” Id. at 11. The State respectfully suggests that, when the guidance is understood as a whole, the Secretary of State’s response was consistent with state and federal law.

The unprecedented nature and scope of the voter challenges required the Secretary of State to adapt a simple procedure designed for single-voter challenges to a large scale on a short

deadline, while county election administrators and county attorney offices faced pressure and potential litigation threats from both sides in this case. The guidance provided was based upon a fundamental respect for voter rights and a careful attempt to apply the law strictly as it read rather than as either side in a partisan dispute might want it to read.

I. THE SECRETARY OF STATE’S GUIDANCE FOLLOWED THE LAW.

The Court has expressed a concern that the guidance provided may conflict with applicable provisions of NVRA. The applicable provision of NVRA is 42 U.S.C. § 1973gg-6(d). (Subsection (c) applies to state-initiated systematic “voter removal programs,” not a state’s removal of names from voting rolls for other reasons, including challenges.) Subsection (d) allows removal of a voter from the registry only when the voter confirms a change of residence outside the registered jurisdiction, or when the voter fails to respond to a notice and has not voted in two consecutive general federal elections after the notice. See 42 U.S.C. § 1973gg-6(d)(1)-(2).

Consistent with this provision, the Secretary of State advised county election administrators that a change of address form, without more, could not form the basis for cancelling registration in response to a challenge. (Kimmet Aff. Exs. 7 & 8.) Those notices actually sent by county election administrators reflected this guidance, but did not fully comply with the additional guidance that notices should “not cause the challenged elector to think that inaction on their part will cause them to not be able to vote.” (Compl. Ex. A.) Thus, after the withdrawal of the challenges, the Secretary of State provided further guidance to remedy any impression that a voter’s registration would be affected by the challenge. (Kimmet Aff. Ex. 13.)

The Court has suggested the guidance “could be construed” inconsistently with the NVRA by requiring a voter to rebut the challenge outside of the voting process itself. 10/08/08 Order at 13-14. However, while the guidance may not have been perfectly clear, its purpose was not to suggest a need for a rebuttal, but to emphasize that a challenged voter who exercises his right to vote is “especially” entitled to a rejection of the challenge (whereas a voter who fails to vote for two general federal elections may be removed at that point if the county complies with the NVRA notice provisions). Similarly, the Court has suggested that the use of the word “may”

in referring to the rejection of challenges would be wrong if interpreted to provide counties discretion in rejecting the challenges. 10/08/08 Order at 15. Again, this is a function of unclear expression rather than incorrect interpretation, as the word “may” was used imperatively in the way it appears in Mont. Code Ann. § 13-1-112(8), rather than permissively.

To be absolutely clear, it is the Secretary of State’s position that a voter challenge premised solely on a change-of-address form cannot be granted to remove a voter from the registry absent full compliance with the notice provisions and two-election waiting period required by NVRA. Any implications to the contrary are incorrect, and (perhaps understandably) result from the imperfect language used in uniform guidance for an unprecedented mass voter challenge under pressure of a five-day deadline for notification and the potential of litigation from political parties on both sides. The State appreciates the additional clarification from the Court’s analysis on these points.

II. THE REMAINING CLAIMS AGAINST THE SECRETARY OF STATE ARE MOOT.

As required by Montana law, see Mont. Code Ann. § 13-2-115(1), the Secretary of State has certified the official statewide voter registration list, including the names of all voters subject to the challenges at issue. Therefore, Plaintiffs’ request for an injunction against the Secretary of State “from certifying the official roll of registered voters” is moot. Compl., Prayer ¶ D. Similarly, Plaintiffs’ request for an injunction against the Secretary of State (and nonparty counties) “from allowing any change in legally registered Montana electors’ status” is moot. Compl., Prayer ¶ C. While that request also seeks to restrain “county officials ... from contacting challenged voters during the pendency of this case,” id., those officials are not a party to this case and the Secretary of State already has provided guidance to remedy any notices sent by counties prior to the commencement of this case. (Kimmet Aff. Ex. 13.)

Therefore, while the declaratory relief claims against the non-State defendants may still present a justiciable issue, see Compl., Prayer ¶ B, the injunctive relief claims against the Secretary of State are moot because the challenges have been withdrawn and the voter registry certified. See Padilla v. Lever, 463 F.3d 1046, 1050 (9th Cir. 2006).

CONCLUSION

The State respectfully requests the Court to deny Plaintiffs all relief with respect to the Secretary of State.

The State intends to rely on the affidavit of Lisa Kimmet and call no witnesses.

Respectfully submitted this 10th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008, an accurate copy of the foregoing Prehearing Brief was served on the following persons by the following means:

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