

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CELIA VALDEZ, *et al.*,

Plaintiffs,

v.

MARY HERRERA, *et al.*,

Defendants.

CIVIL ACTION NO. 1:09-cv-668 JCH/DJS

MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiff Shawna Allers moves for partial summary judgment on her claims for violations of Section 7 of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-5. Defendants' current policy regarding the distribution of voter registration applications at New Mexico public assistance offices violates Section 7 because Defendants fail to distribute a voter registration application to all public assistance clients who do not decline in writing to register to vote. Partial summary judgment in Plaintiff's favor on this issue is appropriate because there are no disputed issues of material fact and, as a matter of law, Plaintiff is entitled to judgment in her favor. This Motion is supported by the following Memorandum in Support of Plaintiff's Motion and the entire record herein, and is opposed by Defendants.

Dated this 2nd day of September, 2010.

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**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

Section 7 of the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg-5, requires public assistance offices in New Mexico to “distribute [a voter registration application] with each application for . . . service or assistance, and with each recertification, renewal, or change of address . . . unless the applicant, in writing, declines to register to vote.” Plaintiff Shawna Allers moves for partial summary judgment that the policy adopted by the New Mexico Human Services Department (“HSD”) to implement Section 7, on its face and as a matter of law, violates this statutory directive.¹

According to HSD’s description of its current practices, voter registration application forms are not, as a matter of course, distributed to New Mexico residents who apply for public assistance benefits at HSD offices, or to existing public assistance clients who recertify, renew, or submit a change of address at HSD offices. Instead, HSD’s policy is to first provide all clients (both new applicants and existing clients) with a voter information form which, inter alia, asks whether the client desires to “register to vote here today.” A voter registration application then is provided under two circumstances: (1) if the client checks “yes” in response to the voter registration inquiry contained on the voter information form; or (2) if the client verbally indicates that she or he would like to register to vote. Thus, HSD interprets Section 7 of the NVRA as requiring that voter registration applications be distributed only to those clients who affirmatively state that they desire to register to vote.

¹ The other Plaintiffs in this case, Celia Valdez, Graciela Grajeda, and Jesse Rodriguez, are Plaintiffs as to the separate claim brought in this lawsuit with regard to the State of New Mexico’s compliance with the NVRA at motor vehicle offices. That claim was resolved through the July 1, 2010 settlement agreement filed with this Court. *See* Settlement Agreement Regarding Plaintiffs’ Claims Asserting Violations of Section 5 of the National Voter Registration Act [Docket No. 84-1].

HSD, consequently, refuses to provide a registration application to clients who do not provide a written response to the voter registration inquiry contained on HSD's voter information form (i.e., clients who do not check either the "yes" box or the "no" box which appear on the form next to the registration inquiry), and who do not otherwise verbally respond "yes" to a verbal registration inquiry made by a HSD employee. Thus, HSD's position is that, insofar as Section 7 allows public assistance agencies to not distribute registration applications to clients who "in writing, decline[] to register to vote," the *absence* of a written response on the voter information form (and the *absence* of a verbal request for a registration application) constitutes a statement by the client, "in writing," that the client does not wish to register to vote, such that HSD then may refuse to provide a registration application to that individual.

HSD's interpretation of the NVRA violates the plain language of Section 7. Section 7 requires that all public assistance clients (who engage in any of the specified transactions) receive a voter registration application unless they decline to register "in writing," and HSD therefore must distribute voter registration applications to clients who do not complete either of the "yes/no" checkboxes located on the HSD voter information form (as well as to clients who check "yes"). As discussed below, Congress' goal in enacting the NVRA was to significantly enhance the opportunity of individuals to register to vote and to remove existing barriers to voter registration. Congress understood that persons who, for whatever reason, intentionally or unintentionally, leave the "yes/no" checkboxes blank should be given a registration application so that they have the opportunity either to register at the agency or complete the application at home (with assistance from family members or simply when they have more time). Congress also sought, in specifying the voter registration procedures to be followed by public assistance agencies, to guard against the possibility of coercion by agency officials regarding voter registration; for that reason, Congress provided that agency distribution of registration forms

may not be made contingent – to any extent – on clients verbally expressing a desire to register to vote.

Accordingly, Plaintiff moves for partial summary judgment that HSD has violated and is continuing to violate Section 7 of the NVRA by not distributing voter registration applications to persons who leave the voter information form blank (and who otherwise do not receive an application pursuant to a HSD verbal inquiry).² Specifically, partial summary judgment is sought against Defendant Mary Herrera, in her capacity as the New Mexico Secretary of State, Defendant Kathryn Falls, in her capacity as Secretary of the New Mexico Human Services Department; Defendant Fred Sandoval, in his capacity as Director of the HSD’s Income Support Division; and Defendant Carolyn Ingram, in her capacity as Director of HSD’s Medical Assistance Division.³ The issue raised by this Motion is one of first impression since it has not previously been addressed by any court.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The State of New Mexico is subject to the requirements of the NVRA. 42 U.S.C. § 1973gg-2.

2. HSD is a New Mexico state government agency responsible for providing public assistance to qualifying residents of New Mexico. N.M. CODE ANN. § 27-1-2; Amended Complaint, ¶ 20 [Doc. 106]; Compl. ¶ 24 [Doc. 1]; Answer of Defendants (other than Defendant Herrera) ¶ 24 [Doc.11].

² Plaintiff previously addressed the same issue in her July 9, 2010 “Opposition to Defendant HSD’s Motion for Summary Judgment,” at 17-24 [Docket No. 88], arguing that HSD’s continuing failure to distribute registration applications to persons who do *not* decline, in writing, to register is one of several reasons why Defendants’ Motion for Summary Judgment should be denied.

³ Plaintiff’s Motion does not address numerous other aspects of HSD’s violation of Section 7, which are more broad-ranging and require factual examination of HSD’s past and current practices, and commensurately require more extensive relief. *See generally* Plaintiff’s “Opposition to Defendant HSD’s Motion for Summary Judgment” [Docket No. 88].

3. The State of New Mexico has designated HSD as a voter registration agency. N.M. CODE ANN. §§ 1-4-5.2, 1-4-48; N.M. CODE R. § §1.10.8.2, 1.10.8.7, 1.10.8.8. *See also* Amended Complaint ¶¶ 32, 52-53 [Doc. 106]; Complaint ¶¶ 36, 56-57 [Doc. 1]; Answer of Defendants (other than Defendant Herrera) ¶¶ 36, 56-57 [Doc. 11].

4. Defendant Herrera, as the New Mexico Secretary of State, is designated as “the chief election officer of the state.” N.M. CODE ANN. § 1-2-1(A).

5. HSD’s current policy is that voter registration applications shall not be attached to applications for public assistance, recertification or renewal applications, or change of address forms, and that voter registration applications shall not otherwise be automatically distributed to public assistance clients. Memorandum in Support of Defendant HSD’s Motion for Summary Judgment at 5 [Doc. 58].

6. HSD’s current policy is to include a so-called “declination provision,” i.e., a voter information form, in all applications for assistance (in both English and Spanish), recertification and renewal applications, and its change of address form. The current language of this “declination provision” or voter information form is as follows:

If YOU are NOT registered to vote where you live now, would you like to register to vote here today? (Please check one) YES NO

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

The NATIONAL VOTER REGISTRATION ACT provides you with the opportunity to register to vote at this location. If you would like help in filling out a voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private.

IMPORTANT: Applying to register or declining to register to vote WILL NOT AFFECT the amount of assistance that you will be provided by this agency.

Signature

Date

CONFIDENTIALITY: Whether you decide to register to vote or not, your decision will remain confidential. **IF YOU BELIEVE THAT SOMEONE HAS INTERFERED with your right to register or to decline to register to vote, or your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with the Office of the Secretary of State, 419 State Capital, Santa Fe, NM, 87503, (phone: 1-800-477-3632.)**

Memorandum in Support of Defendant HSD's Motion for Summary Judgment at 5 [Doc. 58].

7. HSD's current policy is that a voter registration application is provided to public assistance clients who check "yes," and a registration application is not provided to clients who check "no." HSD's current policy is that a registration application is not provided to clients who leave both boxes blank, except if such clients verbally indicate that they desire to register to vote, HSD's current policy is that a voter registration application then is provided. Memorandum in Support of Defendant HSD's Motion for Summary Judgment at 5-6, 14 [Doc. 58] and Def. Ex. 1-B [Doc. 58-3].⁴

III. STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Upon a *prima facie* showing that summary judgment is

⁴ As a point of reference, and in order to place the above facts in context, Plaintiff also notes the following: Prior to HSD's finalizing of the current policy on or about January 2010, Defendants for many years did not consistently provide voter registration forms *or* the "declination form" to all eligible benefits applicants and clients. See Memorandum in Support of Defendant HSD's Motion for Summary Judgment at Def. Ex. 1-B [Doc. 58-3] (ISD-GI 08-01, dated January 22, 2008), Def. Ex. 1-C [Doc. 58-6] (ISD-GI 08-37, dated September 5, 2008). See also, Espinosa Deposition Transcript, attached hereto as Exhibit 1, at 76:8-20 (stating that she does not recall what her Region 3 offices did regarding voter registration before the January 2008 ISD-GI was issued, other than vague "discussions" and "reminders"); Fisher Deposition Transcript, attached hereto as Exhibit 2, at 7:24-8:19, 10:13-20 (stating that she does not recall if she or *any* of the five or six employees in her unit offered voter registration services to clients while she was a unit supervisor at the Las Cruces office between approximately 1994 and August of 2003).

proper, the burden shifts to the party opposing summary judgment to show specific evidentiary facts in the form of admissible evidence that require a trial on the merits. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Parker v. Housing Auth.*, No. 92-3136, 1993 U.S. App. LEXIS 13799, at *14-15 (10th Cir. June 9, 1993).

IV. ARGUMENT

As set forth above, Section 7 of the NVRA establishes a simple, direct, and easily-administered requirement that public assistance agencies, including the New Mexico HSD, must provide voter registration applications to their clients, subject to a narrowly defined exception. Specifically, Section 7 requires public assistance agencies such as HSD to: (1) provide a voter registration application with each application for services, and with each recertification, renewal, or change of address form, unless voter registration is declined “in writing”; (2) provide a voter information form with the appropriate disclosures; and (3) provide assistance to registration applicants in completing the voter registration form, subject to certain limitations. 42 U.S.C. § 1973gg-5(a)(6). Because HSD’s current NVRA policy, on its face, fails to comply with these requirements, Plaintiff is entitled to partial summary judgment as a matter of law.

A. Section 7 of the NVRA

Section 7 provides that “[e]ach State shall designate as voter registration agencies – (A) all offices in the State that provide public assistance” 42 U.S.C. § 1973gg-5(a)(2). Section 7 goes on to specify, that

At each the voter registration agency, the following services shall be made available:

- (i) Distribution of mail voter registration application forms in accordance with paragraph [a](6).
- (ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

42 U.S.C. § 1973gg-5(a)(4)(A).

Paragraph (a)(6) of Section 7 sets forth the manner in which public assistance agencies must distribute voter registration applications, and is the key paragraph at issue in this motion. Subparagraph (A) of paragraph (a)(6), in turn, sets forth the NVRA requirement for distributing voter registration applications:

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall – (A) *distribute with each application* for such service or assistance, and *with each recertification, renewal, or change of address form* relating to such service or assistance – (i) the mail voter registration application form . . . ; or (ii) the office’s own form if it is equivalent to th[at] form . . . , unless the applicant, *in writing*, declines to register to vote.

42 U.S.C. § 1973gg-5(a)(6)(A) (emphasis added).

In addition to requiring that public assistance agencies distribute voter registration applications, subparagraph (B) of Section 7(a)(6) requires public assistance agencies to provide clients with a voter information form. That form must include, inter alia, the question, “[i]f you are not registered to vote where you live now, would you like to apply to register to vote *here today?*” 42 U.S.C. § 1973gg-5(a)(6)(B) (emphasis added).⁵ The form also must notify the client that the decision whether to register to vote has no bearing on the amount of assistance provided by the agency, include a statement regarding the availability of assistance in completing the registration application, and include a statement regarding the client’s ability to file a complaint if he or she believes that voter registration was not properly offered. 42 U.S.C. § 1973gg-5(a)(6)(B)(ii), (iv), (v).

⁵ HSD refers to the form required by Section 7(a)(6)(B) as a “declination” form, but it more accurately should be referred to as a “voter information” form and that term will be used herein.

In addition, the voter information form must include checkboxes for the client to indicate whether she or he would like to register to vote at the public assistance agency that day. 42 U.S.C. § 1973gg-5(a)(6)(B)(iii). Subparagraph (a)(6)(B)(iii) further specifies that the form should include a statement in close proximity to the checkboxes that “if you do not check either box, you will be considered to have decided not to register to vote at this time.” *Id.* (emphasis omitted). With regard to what public assistance agencies should do or not do when a client leaves the checkboxes blank, subparagraph (a)(6)(B)(iii) instructs that “failure to check either box . . . constitute[s] a declination to register for *purposes of subparagraph (C)*.” *Id.* (emphasis added). Subparagraph (C), in turn, deals solely with the issue of agencies providing assistance to their clients in filling out voter registration applications, and does not address the threshold question of whether a voter registration application must be distributed to public assistance clients. Subparagraph (C) specifies that public assistance agencies are to provide clients the same degree of assistance in completing a registration application as they provide with regard to clients completing the agency’s own forms, subject to clients refusing such assistance (and, as indicated, subject to the omission of a client checkmark in the “yes/no” checkboxes on the voter information form). 42 U.S.C. § 1973gg-5(a)(6)(C).

B. HSD is Violating the Plain Language of Section 7

Section 7 of the NVRA directs public assistance agencies to distribute voter registration applications to their clients, with the only exception being those clients who decline “in writing” to register to vote. 42 U.S.C. § 1973gg-5(a)(6)(A). In violation of Section 7, HSD – a New Mexico public assistance agency – provides voter registration applications only to clients who check “yes” on their voter information form or who verbally respond “yes.” HSD’s failure to provide a voter registration application to clients who have left the voter information form blank is contrary to Section 7’s plain language, the canons of statutory construction, and Section 7’s

legislative history.⁶

1. The plain language of Section 7 and the canons of statutory construction require HSD to distribute voter registration applications to all clients who leave the voter registration inquiry checkboxes blank.

The general rule is that courts must enforce a statute according to its plain language provided the disposition required by the text is not absurd. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (“[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.”).⁷ In construing the plain language meaning of Section 7, its terms should be afforded their “ordinary, contemporary, common meaning” unless Congress intended those terms to have a different meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (noting that “words will be interpreted as taking their ordinary, contemporary, common meaning” at the time Congress enacted the statute).⁸

⁶ Because Section 7 does not make the provision of a voter registration application contingent upon an affirmative response (either written or verbal) from a public assistance client, HSD’s practice is not rendered legal by the fact that some persons who omit a checkmark on the voter information form may later be provided with a voter registration application, after they verbally indicate their desire to register to vote. As explained below, Congress specifically concluded that the registration opportunity should not be made dependent, to any extent, on verbal interactions between clients and public assistance caseworkers to avoid any possibility of agency coercion and to avoid any uncertainty as to whether the registration opportunity has been provided as Congress mandated.

⁷ *See also Robbins v. Chronister*, 402 F.3d 1047, 1049 (10th Cir. 2005) (“absent any indication that doing so would . . . yield patent absurdity, our obligation is to apply the statute as Congress wrote it”). The “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). In fact, when the plain meaning of a statute is unambiguous, “this first canon is also the last: judicial inquiry is complete.” *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

⁸ *See also Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998) (holding that if Congress does not explain the specific meaning of a statutory phrase or term, a court may assume Congress intended the words to be given their ordinary meaning and determine such meaning through the use of dictionaries). “When a word is not defined by statute, we normally construe it in accord with its ordinary or natural [language].” *Smith v. United States*, 508 U.S. 223, 228 (1993).

The NVRA does not define “in writing” for purposes of Section 7, however, “in writing” nonetheless has a clear and unambiguous meaning. Black’s Law Dictionary defines “writing” as “any intentional recording of words in a visual form, whether in the form of handwriting, printing, typewriting, or any other tangible form.” *Black’s Law Dictionary* 1603 (7th ed. 1999). A blank response (i.e., the absence of any markings) is not a tangible recording of intention and so, using the standard definition of “writing,” a blank response cannot be a statement “in writing.” Individuals who leave the voter information form blank, therefore, do not fall within Section 7’s narrow exception. Accordingly, Section 7 requires HSD to provide a voter registration application to those who leave the voter information form blank.

2. Section 7(a)(6)(B)(iii) of the NVRA pertains only to in-person registration with assistance, not the distribution of registration applications.

a. The plain language of Section 7(a)(6)(B)(iii) directs public assistance agencies that they may omit assistance in completing a voter registration application to clients who leave the voter information form blank.

Defendant HSD has argued that another provision of Section 7 of the NVRA, Section 7(a)(6)(B)(iii), 42 U.S.C. § 1973gg-5(a)(6)(B)(iii), permits HSD to treat a blank voter information form as a declination “in writing” for purposes of distributing voter registration applications under Section 7. See Memo in Support of Defendant HSD’s Motion for Summary Judgment, at 14 [Doc. 58]. Section 7(a)(6)(B)(iii), however, does not modify or construe the registration-application distribution requirement contained in paragraph (a)(6)(A) of Section 7, and so it does not allow HSD to withhold a voter registration application from clients who do not affirmatively request an application.

The meaning of Section 7(a)(6)(B)(iii) is established by its plain language. As described above, this subsection requires that HSD advise clients, on the voter information form, that if they do not check either the “yes” or the “no” box in response to the form’s voter registration

inquiry, HSD may assume that they do not want to register to vote “*at this time.*” 42 U.S.C. § 1973gg-5(a)(6)(B)(iii) (emphasis added). The meaning (for purposes of the voter registration process) of a blank voter information form, and this disclaimer, is specifically explained to public assistance agencies in the text of the statute: “failure to check either box [shall be] deemed to constitute a declination to register *for purposes of subparagraph (C).*” *Id.* (emphasis added). As explained above, subparagraph (C) deals solely with whether and in what circumstances public assistance agencies are required to provide assistance to clients in filling out a voter registration form. 42 U.S.C. § 1973gg-5(a)(6)(B)(iii)(C).

Accordingly, HSD must treat a blank declination form as a declination to register only for purposes of the subparagraph (C) assistance requirement. Subparagraph (B)(iii) of Section 7(a)(6) contains no textual basis for HSD, instead, to treat a blank declination as a “writing” or a “declination” for purposes of *subparagraph (A)* of Section 7(a)(6) (the subparagraph that sets forth the requirement registration applications be distributed to clients). If Congress wanted the omission of a client checkmark to serve as a constructive declination for purposes of the NVRA’s registration-application distribution requirement, Congress would have said exactly that (i.e., Congress would have said “failure to check either box [shall be] deemed to constitute a declination to register for purposes of subparagraph (A)”). Congress did not do that, however.

In sum, subparagraph (B)(iii) of Section 7(a)(6) only relieves HSD from providing assistance to clients who do not affirmatively indicate that they wish to register “at this time” at an agency office. Voter registrations applications still must be distributed to these individuals – since they did not decline to register “in writing” – leaving them free to complete the registration application on their own, either at an HSD office, at home, or at some other location.

b. HSD’s refusal to distribute registration applications to clients who leave the voter information form blank renders superfluous the plain language of Section 7(a)(6)(B)(iii).

Furthermore, HSD’s treatment of blank responses renders superfluous Congress’ directive, in subparagraph (B)(iii), that “failure to check either box [shall be] deemed to constitute a declination to register for purposes of subparagraph (C).” The Supreme Court has strongly cautioned against courts adopting any statutory construction that makes any statutory provision superfluous. *See Hohn v. United States*, 524 U.S. 236, 249 (1998).⁹

If HSD is correct that public assistance agencies are not required to provide registration applications to clients who leave the voter information form blank, these agencies – obviously – would not need to consider whether to provide such individuals with assistance in completing a voter registration application (since no application is being provided). Congress, therefore, would not need to instruct public assistance agencies as to whether to implement the subparagraph (C) assistance requirement for clients who leave the checkboxes blank. Since, Congress did provide that instruction, however, it necessarily follows that, in order not to render this instruction superfluous, Section 7 must be read as requiring public assistance agencies to distribute a voter registration application to clients who leave the voter information form blank.

⁹ *See also, United States v. Tsosie*, 376 F.3d 1210, 1217 (10th Cir. 2004) (courts are “guided by the traditional canon of statutory construction that courts should avoid statutory interpretations which render provisions superfluous”); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”); *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10th Cir. 2001) (“We must avoid, whenever possible, a statutory interpretation that would ‘render superfluous other provisions in the same enactment.’”); *N.M. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1285 (10th Cir. 2001) (“We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.”).

3. The purpose and legislative history of the NVRA support the plain language interpretation of Section 7.

The plain language meaning of Section 7 is supported and reinforced by Congress' purpose in enacting the NVRA and by Section 7's legislative history. Although it is not necessary to resort to these statutory interpretation guides to decide this case, they nonetheless further elucidate and confirm what Congress provided in Section 7.¹⁰

First, it is fully consistent with the purpose of the NVRA to find that blank checkboxes on voter information forms do not excuse public assistance agencies from distributing voter registration applications. The NVRA was designed to "increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). To that end, the NVRA includes numerous provisions aimed at simplifying the voter registration process and reducing the burdens involved in registering to vote, including requiring states to offer voter registration at motor vehicle offices (42 U.S.C. § 1973gg-3), requiring states to allow persons to register by mail (42 U.S.C. § 1973gg-4), and requiring states to designate a variety of public offices (including, but not limited to, public assistance agencies) as voter registration agencies (42 U.S.C. § 1973gg-5). By refusing to distribute a voter registration application to clients who leave the checkboxes blank – i.e., by requiring clients to affirmatively request voter registration

¹⁰ "When the meaning of the statute is clear, it generally is unnecessary to resort to legislative history to divine congressional intent." *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986). This principle prevents courts from "qualifying the statute so as to accommodate the perceived legislative intent." *Id.* However, this principle does not preclude a court from recognizing that canons of statutory interpretation, congressional purpose, and legislative history corroborate a statute's plain language meaning. *See, e.g., United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 243 (1989) (finding that "the statute's language is plain," but also stating that the plain language "does not conflict with any other section of the Code, or with any important state or federal interest; nor is a contrary view suggested by the legislative history"); *Mallard v. U.S. Dist. Court for the S. Dist. Of Iowa*, 490 U.S. 296, 301-03, 306 (1989) (finding that "[t]he import of the term seems plain," but recognizing that other sections of the statute, statutes enacted contemporaneously, and subsequent Congressional action all corroborate the plain language).

in order to be provided a registration application – HSD is acting at odds with the NVRA’s fundamental goal of simplifying the voter registration process.

The legislative history of Section 7 also reinforces the plain language understanding of the statutory plan. Specifically, the legislative history informs the meaning of the portion of the voter information form which advises 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.” 42 U.S.C. § 1973gg-5(a)(6)(B)(iii). The requirement that this advisory be provided appears in the statute immediately after the statutory instruction to public assistance agencies that a “failure to check either box [shall be] deemed to constitute a declination to register to vote for purposes of subparagraph (C).”

The House-Senate Conference Report finalizing the NVRA added the requirement that public assistance clients be provided with the voter information form specified in Section 7. H. R. Rep. No. 103-66, at 17 (1993). The Conference Report explains that the voter information form was added to guard against coercion of agency clients:

The [voter information form] is intended to deal with concerns raised about the inclusion of certain agencies in an agency-based registration program and the possibility of intimidation or coercion. Concern was expressed that in agencies that provide benefits, staff might suggest that registering to vote could have some bearing on the availability of services or benefits provided by that agency. In addition to the provisions in the House bill relating to coercion and intimidation, the conference substitute includes specific provisions that address that situation.

Id.

Thus, the voter information form was not added to Section 7 to define, clarify, or limit in any manner the responsibility of public assistance agencies to distribute voter registration applications, and utilizing blank voter information forms for that purpose would disregard Congress’ intent. Moreover, because the simple act of providing a voter registration application

is not, itself, coercive, Congress could not have inserted this anti-coercion measure as a means to restrict the distribution of voter registration applications.¹¹

Instead, Congress' apparent reasoning in drafting the wording of the information-form provision was that assistance need not be provided to clients who omit checking either of the checkboxes since providing assistance to such individuals might result in those individuals feeling coerced regarding voter registration. When a client has left the registration inquiry checkboxes blank, it may be because the client is uncertain or conflicted about voter registration, or because the client is reluctant to respond affirmatively for fear that the caseworker will pressure the client to register in a particular way or might retaliate against the client for registering to vote. Congress, accordingly, tailored Section 7 to balance its desire to have agencies provide assistance to those who desire assistance and need it, with the desire to also provide clients with a path to registration that will allay any concerns about coercion or intimidation and will allow clients any needed "breathing room" away from the agency official. Congress accomplished this by requiring that assistance generally be provided, by specifying that assistance should not be provided to those who refuse it, and by specifying that assistance need not be provided to those clients who omit checking either the "yes" or "no" boxes on the voter information form – while still requiring that these latter clients be provided with a voter registration form to be filled out at their convenience.

Finally, because Congress' insertion of the voter information form into Section 7 (via the Conference Report) was not meant to alter the threshold requirement of Section 7 regarding the distribution of voter registration applications (and because the Conference Report did not

¹¹ Indeed, interpreting the NVRA to allow caseworkers to not provide voter registration forms to clients who omit a checkmark could interfere with Congress' anti-coercion goal. An individual caseworker's ability to coerce clients not to register would be much simpler if all a caseworker needed to do was to simply have clients do nothing, i.e., leave the checkboxes blank. Thus, Congress required that caseworkers may decline to distribute voter registration applications only when a client provides a written declination.

otherwise alter the Section 7(a)(6)(A) distribution requirement), it is appropriate to examine the separate House and Senate reports for the NVRA with regard to what Congress said there concerning agency distribution of registration applications. Both reports identically state that Congress intended that agencies will “distribute *simultaneously* with each application for service or assistance, and with each recertification, renewal, or change of address, a mail voter registration application form,” and that agencies will, as well, provide “a means by which an applicant may decline in writing to register to vote.” H.R. Rep. No. 103-9, at 10 (1993); S. Rep. No. 103-6 at 25 (emphasis added). This congressional endorsement of simultaneous distribution of registration applications with other agency forms is not consistent with any intent to allow agencies to withhold a registration application from persons who do not, as an initial matter, affirmatively indicate that they wish to register to vote.

C. Defendant Herrera, in Addition to the HSD Defendants, is Liable for HSD’s Violation of Section 7

In order to ensure compliance with all aspects of the NVRA, including Section 7, Congress provided in Section 10 of the Act that each state must “designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act.” 42 U.S.C. § 1973gg-8. New Mexico has designated the Secretary of State as the “the chief election officer of the state.” N.M. Stat. Ann. § 1-2-1(A). New Mexico further has charged the Secretary of State with prescribing rules for the administration of voter registration activities under the NVRA, including at HSD offices. *See* N.M. Stat. Ann. § 1-4-48(A). Accordingly, Defendant Herrera, as the State’s “chief State election official” for purposes of Section 10 of the NVRA, is “responsible for coordination of State responsibilities under this Act.”

New Mexico’s designation of the Secretary of State carries with it specific responsibility

under the NVRA for ensuring compliance by the State with this statute. In the only appeals court decision to interpret what this designation signifies, the Sixth Circuit recently held that once an official is designated as the NVRA chief election officer, that official is “held responsible” under federal law for compliance. *Harkless v. Brunner*, 545 F. 3d 445, 451 (6th Cir. 2008). The Sixth Circuit rejected the view advocated by the Ohio Secretary of State – Ohio’s designated chief election official for NVRA enforcement – that if another state agency or official also is designated to implement a particular provision of the NVRA, then that agency or official, and not the State’s chief election official, shall be the only one held responsible for NVRA compliance. *Id.* at 452. Thus, the Sixth Circuit made clear that, regardless of state designations of responsibilities or duties to other state officials, once the chief election official is designated, that individual becomes jointly responsible for “implementation and enforcement [] of that program on behalf of [the state].” *Id.*¹²

It follows, therefore, that Defendant Herrera, in her capacity as New Mexico Secretary of State, is liable for the ongoing violation of Section 7 of the NVRA at HSD. She is liable in addition to Defendants Falls, (Fred) Sandoval, and Ingram, in their capacities as Secretary of HSD, Director of HSD’s Income Support Division, and Director of HSD’s Medical Assistance Division, respectively.

¹² Similarly, the Eighth Circuit recently held that if a state delegates to a local election official the authority to implement an aspect of the NVRA, the state nonetheless remains jointly responsible for NVRA compliance. *United States v. State of Missouri*, 535 F.3d 844, 849-851 (8th Cir. 2008). That case dealt with a provision of the NVRA, 42 U.S.C. § 1973gg-6(a)(4), which requires states to conduct a “general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of [death or change in residency].” The Eighth Circuit further held that non-compliance by delegated local agencies is relevant to determining whether or not the state is meeting its own obligations under the NVRA. *Id.*

V. CONCLUSION

For these reasons, Plaintiff is entitled to partial summary judgment that HSD's current policy regarding the distribution of voter registration applications, on its face, violates Section 7 of the NVRA. That policy is deficient because it fails to require HSD employees to distribute a voter registration application to all persons who appear at HSD offices to apply for public assistance benefits, recertify or renew their benefits, or submit a change of address, who do not check either the "yes" or the "no" box on HSD's voter information ("declination") form.

DATED this 2nd day of September, 2010.

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I certify that on the 2nd day of September, 2010, I served the foregoing by electronic means on:

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