

**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

**PLAINTIFF’S OPPOSITION TO DEFENDANT HSD’S MOTION FOR SUMMARY
JUDGMENT AND SUPPORTING MEMORANDUM OF LAW**

Defendant Hyde claims that the New Mexico Human Services Department (“HSD”) “meets its comprehensive obligation to distribute mail voter registration application forms, assist applicants in completing voter registration forms unless the applicant refuses such assistance, and accept completed voter registration applications (sic) forms and submit such forms to the appropriate voting official.” (Docket 58, Memorandum in Support of Defendant HSD’s Motion for Summary Judgment, at 13, “DSOF”.) Defendant Hyde asks this Court to find that it is “in full compliance with its responsibilities under the NVRA,” such that it is entitled to summary judgment on Plaintiff’s claims. *Id.*

To the contrary, there is abundant evidence that Defendant HSD has failed for years to meet its voter registration obligations under the National Voter Registration Act of 1993 (“NVRA”). Indeed, nowhere in Defendant’s motion does Defendant attempt to argue that HSD was in compliance with Section 7 at the time this lawsuit was filed. Moreover, the recently-

adopted changes upon which Defendant bases her summary judgment motion are not sufficient to bring HSD's offices into compliance with Section 7 today, nor are they adequate to ensure sustainable compliance. As a result, the recently-adopted changes are insufficient to obviate the need for Plaintiff's requested injunctive relief. At a minimum, the evidence creates issues of material fact that preclude the entry of summary judgment in HSD's favor. For these reasons, as discussed below, Defendant Hyde's Motion for Summary Judgment must be denied.

STANDARD OF REVIEW

The Court may grant summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In considering a motion for summary judgment, the Court must view evidence through the prism of the substantive evidentiary burden. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor. *Id.* The inferences to be drawn from the underlying facts must be reviewed in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment may not be granted where, viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor, a reasonable trier of fact could return a verdict for the non-moving party. *See Mares v. ConAgra Poultry Co.*, 971 F.2d

492, 494 (10th Cir. 1992). Applying these standards, Defendant has failed to meet her burden of proof.

ARGUMENT

Section 7 of the NVRA requires specific voter registration action to be taken at each HSD office with respect to each application for benefits, recertification, or change of address that the office processes. In addition, Defendant Hyde has a responsibility under Section 7 to effectively supervise the voter registration activities at HSD offices. As discussed below, HSD officials paid little or no attention to either of these requirements until -- in 2007 -- they received a notice letter from Plaintiff's counsel advising them that HSD was out of compliance with Section 7. Only then did HSD officials begin to undertake even minimal efforts to supervise voter registration activities at HSD offices.

HSD's own internal reports demonstrate that the corrective actions undertaken have largely been ineffective, and even through 2009 most offices in the State went for extended periods without a single voter registering. In stark contrast to the extensive management practices HSD employs for its benefits programs, HSD management did not issue any voter registration policies, HSD management did not conduct any voter registration training, and HSD did not take any corrective actions to address the failure to provide voter registration.

Since this lawsuit was filed in 2009, Defendant Hyde has recently adopted a handful of corrective measures, relying on same, and a resulting slight uptick in voter registration activity, Defendant Hyde now asks that summary judgment to be entered in HSD's favor. As a factual matter these corrective measures do not ensure either present-day or future compliance with Section 7, particularly in light of HSD's previous pervasive disregard for voter registration; or, at a minimum, create material fact issues precluding summary judgment in Defendant's favor. As a

legal matter, these measures are too little and too late for Defendant Hyde to evade either liability or injunctive relief. Defendant Hyde's Motion accordingly must be denied.

A. Failure to Offer Voter Registration at HSD Offices

Internal monthly reports circulated among HSD upper management make a *prima facie* case of long-standing violations of Section 7 by HSD offices. From 2005 forward, these internal HSD reports showed the number of voter registration applications forwarded by each HSD office on a monthly basis to its respective county election officials.¹ These reports show a stunning absence of voter registration activity at HSD offices.

In 2005, twenty-six of the thirty-two HSD offices failed to turn in any completed voter registration applications to the county clerk for at least three months in a row; the same deficiency occurred in twenty-one of the thirty-three HSD offices in 2006 and 2007, two offices out of thirty-three HSD offices in the Presidential election year of 2008, and fourteen out of thirty-four HSD offices in 2009. Overall, between 2005 and 2009, *nine HSD offices* reported *zero* completed voter registration applications submitted to county clerks for *at least three consecutive months*. See Plaintiff's Controverting and Separate Statement of Facts in Support of Plaintiff's Response to Defendant HSD's Motion for Summary Judgment ("PSOF") at ¶ 73. Defendant Hyde has offered nothing to refute the inference that these reports showing few² or no voter registration applications reflect a widespread failure of HSD offices to offer voter registration.

In January, February, and March 2010, the statewide total voter registration applications reported at HSD offices were 592, 618, and 1,067, respectively. Defendant Hyde implies that these monthly totals facially demonstrate compliance with Section 7, but offers no support for that

¹ There are also bi-annual reports issued by the Election Assistance Commission ("EAC") formerly by the Federal Election Commission ("FEC") that provide statistics for public assistance agencies in the State as a whole, which also show a comparable pattern of non-compliance. For purposes of this Motion, the HSD internal reports will be the primary focus.

² Of course, offices reporting *some* voter registration activity may very well be failing to offer registration as required by Section 7.

contention. (DSOF at 16.) Defendant Hyde does not place the totals in the context of the agency's overall caseload or provide any other benchmark. While these most recent totals do represent a modest increase over the average monthly totals in previous years,³ the totals are only three months of data and they occurred under the glare of this federal lawsuit. In short, Defendant Hyde does not attempt to demonstrate that the data for these three months reflects that voter registration is being offered consistently at HSD offices, or that this modest increase in the level of voter registration will not backslide in the absence of litigation. Indeed, Defendant Hyde does not demonstrate that there is any meaningful change in the HSD's NVRA compliance procedures or the mechanisms that are in place at HSD's office to ensure Section 7 compliance, as she must do to prevail on summary judgment. Because these recent data do not overcome the insidious pattern of widespread failure to offer voter registration from 2005 through 2009, Defendant Hyde is not entitled to summary judgment. At a minimum, material fact issues exist concerning the sustainability and effectiveness of the new remedial measures that preclude entry of summary judgment in Defendant Hyde's favor.

B. HSD Failure to Supervise Agency Officials

Plaintiffs' factual and legal contentions include the claim that Defendant Hyde, in her capacity as Director of HSD (and as well as Defendant Herrera in her capacity as Secretary of State and the chief election official of the State of New Mexico), has failed to adequately supervise the HSD staff to ensure that voter registration is offered at HSD offices as required by Section 7.⁴ (Docket 1, Complaint ¶ 59.)

³ The average monthly number of voter registration applications reported statewide from 2005 through 2009 were: 81 in 2005, 95 in 2006, 134 in 2007, 465 in 2008 and 283 in 2009.

⁴ HSD currently has 34 offices across the State of New Mexico. For internal administrative purposes the state is divided into five regions, each of which is supervised by a regional operations manager. Regional operations managers are supervised by a deputy director for operations, who is currently Mr. Ted Roth. Each office has its own manager, often referred to as a county director ("CD"), who is supervised by the regional manager to whom the office is assigned. A staff member is designated as a voter registration site coordinator within each office.

Public assistance agency directors have responsibilities for NVRA compliance that they cannot delegate. See *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008). In *Harkless*, the defendant public assistance agency director in that case denied that he was accountable for enforcing the NVRA because Ohio state law delegated responsibility for administration of public assistance programs to local entities.⁵ *Id.* at 457. However, the Sixth Circuit held that state-level officials could be held liable for failure to implement procedures to comply with Section 7 of the NVRA. *Id.* at 449. The *Harkless* court relied on *Robertson v. Jackson*, 972 F.2d 529 (4th Cir. 1992). In *Robertson*, the Fourth Circuit, in determining state responsibility for violations of food stamp assistance federal regulations, found the commissioner of the agency “fully responsible for ensuring compliance” with the federal law. The court then explained that the commissioner is expected to do everything within his power to “cause compliance” with the law and, without evidence of such efforts, the commissioner would not be immune to injunction “when a pattern of non-compliance has been shown to have existed.” *Id.* at 535. With no contrary law in the Tenth Circuit, the Sixth Circuit’s decision in *Harkless* and the Fourth Circuit’s decision in *Robertson* demonstrate that Defendant Hyde has a duty to supervise HSD’s compliance with Section 7 of the NVRA as a matter of law.

Prior to 2008, HSD state-level officials treated voter registration as less than a second-class program. Deposition testimony and Defendant Hyde’s responses to Plaintiffs’ discovery requests have yielded no material evidence of voter registration-related activity by HSD state officials prior to 2008. Specifically, during discovery, Defendant Hyde produced no documents showing: 1) any voter registration policy authored by HSD prior to January 2008; 2) any voter

⁵ In holding that the director could not delegate his statutory obligations under the NVRA, the *Harkless* court analogized an agency’s duty to ensure compliance with the NVRA to its duty to ensure compliance with the Food Stamp Act. Citing federal regulations, the court noted that it is the “single state agency” that “must distribute voter information and registration materials as specified in the NVRA.” *Harkless*, 545 F.3d at 458. The court held that the state agency and thus its director, was ultimately responsible for the distribution of voter registration materials as required by the law. *Id.*

registration training authored by HSD prior to March 2010; 3) any record of voter registration training actually having been conducted by agency officials; 4) records of any effort to monitor or review the number of voter registration applications reported by HSD offices prior to 2008; 5) any record of voter registration being included in any HSD evaluation prior to 2008; or 6) any record of any corrective action for failure to provide voter registration. All such types of documents would were responsive to Plaintiffs' requests for production of documents. The failure to produce such documents demonstrate a lack of any such records or an inference that any such documents would not support that Defendant Hyde took steps to ensure Section 7 compliance.

The only actions that HSD state-level officials appear to have actually taken prior to 2008 with respect to voter registration were to pass along the 1994 Secretary of State guidance document, have site coordinators appointed, and (beginning in 2005) circulate reports of voter registration applications by office on a monthly basis. This lack of action on the part of state-level HSD officials was especially harmful because it occurred while HSD offices were repeatedly reporting zero registrations, which should have triggered a response at the state level. Notably, it simply appears to have been of no consequence to top HSD officials whether office managers chose to have their offices conduct some form of voter registration or to ignore voter registration entirely. This lack of response by state-level HSD officials in turn condoned the failure of numerous offices to provide voter registration. Defendant Hyde's Motion concerns only the present and does not attempt to address whether HSD complied with Section 7 at the time this lawsuit was filed or at any other point in the past. Moreover, even if current compliance is sufficient to warrant entry of summary judgment in Defendant Hyde's favor, Defendant Hyde has failed to demonstrate that there are no material issues of fact concerning HSD's current Section 7 compliance and that it is therefore entitled to judgment as a matter of law.

Until this lawsuit was filed, HSD had not issued a single policy manual on voter registration. Defendant Hyde claims that HSD “utilized the New Mexico State Agency Voter Registration Manual...for meeting its responsibility under the NVRA” since 1995 (DSOF, p. 3, ¶1.) This effectively concedes that, prior to 2008, the only “procedure” that was “implemented” was the vaguely-worded 1994 New Mexico State Agency Voter Registration Agency Manual. *Id.* Only after this lawsuit was filed, did the agency draft any document that detailed HSD’s agency-specific procedure directing distribution of voter registration materials. (DSOF at ¶ 3-5.)⁶ Nor, before this lawsuit was filed, is there any evidence that HSD conducted NVRA compliance training sessions for all of its employees. (PSOF ¶ 66.)

Monitoring the activities of individual offices is a critical component of effective supervision. Yet, the lack of voter registration monitoring by HSD agency officials is striking. Deputy Director over Field Operations Ted Roth, Defendant Hyde’s 30(b)(6) designee, testified that he had no information regarding voter registration activity performed by his predecessor at HSD. (PSOF ¶ 41.) HSD later admitted that no current HSD official above the level of regional manager has any knowledge or recollection of HSD’s voter registration policies, practices, or procedures prior to 2008 superior to that of Mr. Roth. (Joint Stipulation Concerning HSD’s Implementation of the National Voter Registration Act Pre-2008, attached hereto as Exhibit 12.)

HSD managers admit that they went years without having any information on whether or not staff were distributing voter registration preference/declination forms to every individual who submitted an application or recertification for public benefits, or who changed his/her address with the agency. Regional Manager Cindy Salazar testified that she did not know whether HSD staff in the 11 offices she supervises used declination forms. (PSOF ¶ 63.) “The truth is,” she said, “if [caseworkers] didn’t have the [declination] form attached to the application, they would have just

⁶ As discussed below, the HSD-specific procedure that is now in place conflicts on its face with Section 7 because it places improper restrictions upon when a voter registration application should be provided to HSD clients.

gone with, you know, those little signs they put by their desk, ‘You can ask me to register to vote,’ or ‘Register to vote here.’” *Id.* Ms. Salazar testified that before January 22, 2010, she was not sure that all employees in her region were using declination forms or if they were using benefit application forms that did not include the declination language. *Id.* County Director Dorothy Fisher testified that she did not recall whether 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. (PSOF ¶ 58.) Mr. Roth admitted that not every client received a “declination” form during his tenure as manager of the Ruidoso office from 1990 to 2000 (PSOF ¶ 62.) “Sometimes it happened, sometimes it didn’t.” *Id.*

Although HSD has records of tracking monthly voter registration applications at its offices as far back as 2005, it produced no record of any state-level agency official reviewing the agency’s voter registration reports prior to 2007, let alone taking action to remedy noncompliance. (PSOF ¶ 42; 84.) This lack of oversight was remarkable in light of the information being reported from the county offices. Some offices went for months, even more than a year, without registering a single voter. (PSOF ¶ 68-73; 76.) For example, the Northeast Bernalillo office reported zero voter registrations for eight months in a row in 2005, and again reported zero voter registrations for six months in a row in 2006. The Southeast Bernalillo office reported zero voter registrations for eleven months in a row from 2005 through 2006, and another five months in a row in 2007. There is no evidence that any state-level staff investigated the reasons for such low voter registration numbers before 2007. (PSOF ¶ 84.) The Dona Ana East office reported zeros for the entire years of 2005 and 2006 and the first four months of 2007. The agency’s compliance with Section 7 thus defaulted to the regional and county managers, with poor results.

Regional Manager Salazar testified that although the monthly reports showed that her office did not transmit a single voter registration form to the county clerk for the entire year of

2006, she “didn’t even know [they] had zero [voter registrations.]” (PSOF ¶ 76.) When asked to explain the numbers, Ms. Salazar testified that those numbers were the result of “very poor counting” and that on the occasions when the offices in her region reported zero voter registrations, she simply “trust[ed]” that “no one wanted to register to vote.” (PSOF ¶ 77.) Albert Delgado, the Regional Operations Manager for Region 1, said that as far as voter registration applications are concerned, “anything other than zero is good.” (PSOF ¶ 78.) Regional Manger Rita Espinosa testified that she would “ask[] what’s going on” if there were zero voter registrations returned by an office in her region (Bernalillo County) for even one month. (PSOF ¶ 82.) Ms. Espinosa testified that she did not recall any instance in which an office in her region was identified as having a problem because of zero registrations prior to January 2008. *Id.* Yet, in fact the Northeast Bernalillo office reported zero voter registrations returned for at least six months in a row in 2005 and 2006 while the Southeast Bernalillo office reported zeros for eleven months in a row from 2005 through 2006, and another five months in a row in 2007 (PSOF ¶ 83.)

Dorothy Fisher, the County Director for the West Dona Ana Field Office, testified that zero voter registration forms completed and returned to the county clerk in a month would not indicate a problem and that she has “no idea” why her office returned zero voter registration forms for two full months. (PSOF ¶ 79.) Although her office reported zero registration applications for five straight months in 2007, Rochelle Radloff, the former County Director of the Southeast Albuquerque office, never determined that the office was deficient with regards to voter registration in any way, and never took any action in response to those numbers. (PSOF ¶ 80.) Roger Burton, the County Director for the San Juan County Field Office, agreed that any number of voter registrations higher than zero may not lead to any action on his part. (PSOF ¶ 81.)

Instead of responding to these glaring problems, HSD officials simply chose to treat voter registration – a federally-mandated activity – as either optional or a non-priority at their offices.

No other conclusion is possible given the utter absence of documented supervisory activity related to voter registration prior to 2008, and the halting, limited, and largely ineffectual efforts since 2008. If HSD officials had treated voter registration at the same level of priority as the other programs they administer, it is doubtful that there would have been any need for this litigation. This was not the case, however.

HSD state officials should have been doing at least the following with regard to voter registration: a) developing and issuing agency policies; b) developing and conducting office-level voter registration training; c) monitoring office activities; d) evaluating data reported by their offices; e) identifying offices with potential problems; and f) taking corrective actions where needed. None of these actions would have been outside the scope of state-level HSD officials' routine activities: they are a primary function of those officials' administration of programs such as Supplemental Nutrition Assistance Program and Temporary Assistance for Needy Families. (PSOF ¶ 84.)

By contrast, HSD managers have strict standards for detecting and rectifying any non-compliance with public benefits administration regulations. For example, Ms. Salazar testified that it was her job, as Regional Operations Manager to monitor the number of applications for public benefits processed at her offices and, if the number of applications dropped, she was responsible for contacting the office and finding out why the numbers were low. (PSOF ¶ 75.)

The set of 25 management evaluations for HSD offices produced by Defendant Hyde illustrate the discrepancy between the level of supervision given to HSD's high-priority programs and the negligible attention paid to voter registration. These Management Evaluation Reviews ("MERs") are conducted periodically at all HSD offices. (DSOF ¶ 47.) They are comprehensive assessments of each office's performance with regard to the administration of federal benefits programs. They include sections assessing the timeliness of benefits processing, and the accuracy

of application screening, approval, denial, and payment based upon examination of individual case files. The reviews even include a lengthy section assessing the “courteous[ness]” and responsiveness of the receptionists based upon follow-up calls to clients. Apart from an item concerning whether a sign is posted, the MERs contain no mention of voter registration activities. (Exhibit 11.)

Defendant Hyde’s Motion attempts to avoid the agency’s long-standing failures by focusing upon a handful of changes made since 2008. These changes may represent improvements to the agency’s voter registration program, but that says little in light of the agency’s previous non-existent supervision, and, in any event, the changes fall well-short of ensuring future compliance with Section 7. Indeed, HSD’s history alone demonstrates that future compliance is unlikely. At a minimum, material fact issues exist as to the effectiveness and sustainability of the new measures in place and whether they can ensure future Section 7 compliance.

Though the NVRA became effective in 1995, Defendant Hyde made no effort to enforce NVRA compliance at HSD until after she received a letter of intent from Plaintiff’s counsel in 2007, threatening to sue for Section 7 violations. (PSOF ¶ 74.) It was only after Hyde received the intent to sue letter that Mr. Roth, the self-described person with “ultimate responsibility” for providing voter registration services at HSD, began reviewing any data relating to the agency’s voter registration activities. (PSOF ¶ 3; 88.) As part of its Motion, Defendant Hyde asserts as an undisputed material fact that it “train[s] staff” and “review[s] reports.” (DSOF ¶¶ 36-47.) It contends that the Quality Assessment Bureau of ISD periodically reviews field offices to “ensure that offices have voter registration posters displayed in the lobby.” (DSOF ¶ 47.) Defendant Hyde further asserts the agency is “planning on” expanding the Quality Assessment Bureau’s reviews to include a sample of actual voter registration materials. (DSOF ¶ 48.) Such assertions

of future intentions are entitled to no weight. Indeed, the implicit acknowledgment that further quality assessments is needed demonstrates that HSD still is not compliant with Section 7.

HSD nonetheless rests its claim of compliance, in part, on its training program for which it first issued a manual only four months ago. (DSOF ¶2.) Defendant argues that it has “strengthened its training program” and “updated its training materials with the creation of the new NVRA training packet.” (DSOF at 16.) In fact, HSD “strengthened its training program” by first *creating* it just four months ago, in March 2010. (PSOF ¶ 55.) Likewise, HSD only “updated its training materials” by *creating* its first state-level training materials to dovetail with the new training program. (DSOF at ¶ 16.)

The extent to which HSD historically has ignored its duty to implement and enforce compliance with the NVRA should weigh heavily upon the Court’s consideration of the recently-adopted measures. Indeed, HSD’s historical non-compliance preclude entry of summary judgment here. *From 1995 when the law became effective until January 22, 2008, HSD had no voter registration policy.* The agency created its first training manual for staff on NVRA requirements on March 12, 2010. Defendant Hyde’s brand new training for new employees does not remedy the 15-year training vacuum that necessitated the filing of this lawsuit. Every existing agency employee who is responsible for administering the application, recertification, and change of address processes at the agency needs to be trained on their duties under Section 7 of the NVRA. Even today, Defendant HSD *still* has not fulfilled this basic requirement of training its staff. (PSOF ¶ 33.) The manual that finally does exist, moreover, is vague and inaccurate, and no HSD manager or director was able to confirm that staff are actually receiving the training Defendant claims to have implemented. *Id.* Without a system in place to document that HSD has provided comprehensive, clear, and detailed training on staff duties under the NVRA, Defendant

cannot make a credible showing that its “training program” will ensure immediate and sustainable compliance with the NVRA.

Defendant Hyde also cites its practice of tracking voter registration forms and compiling and reviewing related reports as evidence that it is “in full compliance with its responsibilities under the NVRA.” (DSOF at 13.) However, HSD’s data reporting and monitoring efforts, implemented in large part in conjunction with the training manual on March 12, 2010, are too new to be reliable, let alone demonstrably effective in preventing future lapses in compliance. Though the agency started making itself aware of individual office failures to register voters beginning in 2007, and it did nothing to remedy deficiencies for more than three years until the purported March 2010 panacea. (PSOF ¶ 3; 88) Defendant has offered no evidence to suggest that this long-standing pattern of indifference will change.

Finally, even if staff reported consistently and accurately under the new regime (and it is too soon to tell), and even if HSD management reviewed the data (which they have not been shown to do), Defendant Hyde has produced no evidence that HSD actually *does* anything with the data collected to address apparent compliance deficiencies. (PSOF ¶ 3; 88.) Specifically, Defendant Hyde has failed to identify any systematic or meaningful standards for assessing compliance, or consequences for apparent failure to offer voter registration.

Accordingly, Defendant Hyde’s motion itself shows that HSD still treats voter registration as no better than a second-class program, and the need for injunctive relief remains.⁷ Defendant Hyde is not entitled to summary judgment. The Court should deny Defendant Hyde’s Motion, making clear that the agency is required to adopt and implement administrative controls that will

⁷ In addition to injunctive relief, following a determination of liability, the Court also may find it necessary for Defendant Hyde to take temporary remedial measures. For example, some form of mailing or notice to affected clients and former clients might be required

ensure sustainable compliance with the NVRA, just as it ensures compliance with a host of other federal laws and regulations.

C. The Need for Declaratory and Injunctive Relief

Although HSD has taken some initial remedial steps in response to this lawsuit, such actions fail to rectify the agency's longstanding NVRA violations and are not sufficient to prevent their future recurrence. Thus, they do not moot the instant action. "[I]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. [I]f it did, the courts would be compelled to leave the defendant... free to return to his old ways.'" *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 289 (1983)). A defendant contending a case is moot due to its new behavior, as here, "must meet a 'heavy burden' of demonstrating that there is no reasonable expectation that the alleged wrongs will be repeated." *Blinder, Robinson & Co., v. SEC*, 692 F.2d 102, 106-07, (10th Cir. 1982) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

A defendant is required to meet this high threshold because its "voluntary conduct will not moot a case unless 'it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Bighorn Forest Users Coal., Inc. v. Thompson*, 170 F.Supp.2d 1091, 1093 (D. Colo. 2001) (quoting *Friends of the Earth*, 528 U.S. at 189) (emphasis added.) Thus, "[w]hen defendants are shown to have 'settled into a continuing practice ... courts will not assume that it has been abandoned without clear proof. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when ... there is probability of resumption.'" *McDonough v. Widnall*, 891 F.Supp 1439-1445 (D. Colo.

1995) (quoting *United States v. Or. State Med. Soc.*, 343 U.S. 326, 333 (1952) (citations omitted))⁸

The limited actions Defendant Hyde has begun to finally supervise NVRA compliance since this lawsuit was filed are both inadequate, as described above, and likely to fall by the wayside without oversight by the Court. For the past 15 years, the agency failed – unceasingly – to ensure that its offices provided voter registration services to the thousands of clients they served. This is evident in the agency’s ongoing failure to monitor its offices to ensure employees are providing voter registration services, its persistently low registration statistics, and its neglect in contacting offices to determine why they failed to report having received *any* completed voter registration applications from clients for months on end.

The fact that the agency issued a voter registration policy in 2008 – a full 13 years following the statute’s implementation – and a training manual in March of this year, does not undo its many years of shirking the law. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474-5 (6th Cir. 2008) (voluntary passage of legislation or issuance of directives cannot moot claims of failure to prevent and correct longstanding system-wide election chaos.) HSD has recently said it will include the declination form in all its benefits, but such measures simply do not suffice to bring the agency into compliance after years of violations. These minor changes fail to properly ensure that all employees will, going forward, comply with the NVRA’s requirement, precisely because they occur without the same oversight and monitoring the agency demands with respect to its employees’ benefits work. As a result, there is no guarantee in place that the agency

⁸ Earlier this year, the United States District Court for the Northern District of New York held that post-litigation changes did not foreclose courts from deciding NVRA claims. In *United States v. New York*, No. 5:04-CV-00428(NAM/DEP), 2010 WL 1063932, at *1 (N.D.N.Y. Mar. 22, 2010), the district court found that the state’s and city’s failures to appoint on-campus disability offices as voter registration agencies amounted to a violation of the NVRA. *Id.* at 16. Moreover, despite the entities’ agreeing to provide voter registration at those sites following the lawsuit’s filing, such new behavior did not moot out the case: “That the state has voluntarily or partially implemented the NVRA or is continuing in its effort to do so is *not dispositive* of the right of the Attorney General under 42 USC 1973gg-9 to sue for enforcement or declaratory relief under the Act.” *Id.* at 8 (emphasis added.)

will not “return to its old ways,” especially in light of its long-standing history of violations. Moreover, as discussed below, the refusal by HSD to provide every client who conducts a statutorily-covered transaction with a voter registration application, as required by the plain language of the NVRA and the recent guidelines issued by the Department of Justice, amounts to a current and ongoing violation of Section 7. As in *United States v. New York*, this issue presents a live controversy that requires adjudication by the Court.

D. Failure to Provide Voter Registration Applications

Section 7 of the NVRA contains several directive provisions requiring specific actions by public assistance agencies and offices with respect to voter registration. For purposes of Defendant Hyde’s Motion there is a disputed question of law with respect to Section 7(a)(6)(A), 7(a)(6)(B), and Section 7(a)(6)(B)(iii).

Section 7(a)(6)(A) of the NVRA requires, *inter alia*, that voter registration agencies distribute a voter registration application with each initial application for service or assistance, recertification, renewal, or change of address, unless the applicant, in writing, declines to register to vote. 42 U.S.C. § 1973gg-5(a)(6)(A) In addition to the voter registration application form, Section 7(a)(6)(B) of the NVRA also requires the agency to provide a form that includes the question, “if 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) The form must notify the applicant that the decision whether or not to register has no bearing on the amount of assistance provided by the agency, and the form must include boxes for the applicant to indicate whether she/he would like to register or decline to register to vote, with a “failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)” of the statute. 42 U.S.C. § 1973gg-5(a)(6)(B)(iii) Subparagraph (C) of the statute is the requirement that the agency provide each applicant who does not decline to register to vote the same degree of assistance with regard

to the completion of the registration application form as is provided with regard to the completion of the agency's own forms, unless the applicant refuses such assistance. 42 U.S.C. § 1973gg-5(a)(6)(C)

The current HSD policy with respect to providing voter registration applications was established in January 2008. The policy is that agency staff should provide voter registration application forms to only those benefits applicants who request them or who check "Yes" in response to the question on the declination form (which is now an item on HSD benefits forms) asking whether they want to register to vote. (Defendant's Ex. 1-B, ISD-GI 08-01 at 2.) Therefore, HSD does not distribute a voter registration application form with every application for benefits, recertification, or change of address – in particular, HSD does not distribute a voter registration application form to those benefits applicants who leave the declination item blank.

This directly conflicts with Section 7 of the NVRA, which provides in relevant part:

(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 the form . . . ***unless the applicant, in writing, declines to register to vote;***

42 U.S.C. § 1973gg-5(a)(6)(A) (emphasis added.) Defendant Hyde contends that Section 7(a)(6)(B)(iii), 42 U.S.C. § 1973gg-5(a)(6)(B)(iii) permits public assistance agencies to treat blank declination responses as being a declination "in writing," which excuses the agency from distributing a voter registration application form. (DSOF, p. 14.)

Neither the plain language of the NVRA, the canons of statutory construction, nor the legislative history supports Defendant Hyde’s interpretation.⁹ The plain language and common meaning of 42 U.S.C. § 1973gg-5(a)(6)(A) leaves no doubt that HSD must provide a voter registration application to every applicant that applies for service or assistance unless the applicant declines “in writing.”¹⁰ Section 7(a)(6)(B)(iii), on the other hand, by its own terms is explicitly limited to cases in which “failure to check either box [is deemed] to constitute a declination to register *for purposes of subparagraph (C)*” (emphasis added.)¹¹ Defendant Hyde’s partial quotation of Section 7(a)(6)(B)(iii) simply omits the emphasized text. Accordingly, the failure of a benefits applicant to check either the “Yes” or “No” declination item excuses HSD from providing that applicant with “the same degree of assistance with regard to the completion of the voter registration form as is provided by the office with regard to the completion of its own

⁹ When interpreting a statute, a court should enforce the statute according to its plain language so long as the disposition required by the text is not absurd. *See 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.”); *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.”.) Further, “[w]hen the meaning of the statute is clear, it is both unnecessary and improper to resort to legislative history to divine congressional intent.” *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986). Thus, 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) (citation omitted); *see also United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240 (1989) (Our inquiry must cease if the statutory language is unambiguous and “the statutory scheme is coherent and consistent”).

¹⁰ In construing the plain language meaning of 42 U.S.C. § 1973gg-5(a)(6)(A), 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); *see also Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998) (where 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.) Moreover, the proper breadth of such statutory terms is revealed by Congress’ inclusion of modifiers in the text that imply that its terms should be construed expansively—such as the word “any” or “all.” *Kelley v. City of Albuquerque*, 542 F.3d 802, 813-14 (10th Cir. 2008) (where Congress did not add language limiting the breadth of a word, it carries an expansive meaning when it is used without limitation.)

¹¹ Subparagraph C requires an employee to “provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.” 42 U.S.C. § 1973gg-5(a)(6)(C)

forms,” but it does *not* excuse HSD from providing the benefits applicant with a voter registration application as explicitly required by Section 7(a)(6)(A).

Defendant Hyde erroneously interprets “writing[s]” to include blank declination item responses.¹² The NVRA does not define “writing” for purposes of Section 7. “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). 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 does not fall within this or any other ordinary or natural use of the term “writing.”

Other canons of statutory construction lead to the same conclusion. Defendant Hyde’s interpretation of Section 7(a)(6)(B)(iii) would render the “in writing” requirement of Section 7(a)(6)(A)(ii) meaningless. The Supreme Court has been reticent to adopt a statutory construction that makes another statutory provision superfluous. *See Hohn v. United States*, 524 U.S. 236, 249 (1998).¹³ The Court should read the statute so that separate provisions are harmonious, not contradictory.¹⁴ In addition, the very specific provision in Section 7(a)(6)(B)(iii) excusing

¹² Defendant similarly misconstrues Section 7(a)(6)(B)(iii) to eclipse Section 7(a)(6)(A) and require that the declination form be distributed in lieu of the voter registration application, which would then only be distributed if the applicant affirmatively requested one. Defendant HSD does not ask this court to address this procedure as part of the instant motion; Plaintiff reserves its objection to a later date.

¹³ *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.”.)

¹⁴ *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”; *In re Duncan*, 329 F.3d 1195, 1203 (10th Cir. 2003) (When two statutes are capable of coexistence, it is our duty, “absent a clearly expressed congressional intention to the contrary, to regard each as effective”); *Chem. Weapons Working Group, Inc. (CWWG) v. U.S. Dept. of the Army*, 111 F.3d 1485, 1490 (10th Cir. 1997) (“We must also construe apparently

assistance for benefits applicants who leave the declination form blank cannot be read to invalidate the more general requirement that the agency provide a voter registration application form to everyone who applies, recertifies, and changes address, unless they record their intention to decline to register to vote in writing.¹⁵

The legislative history of Section 7 provides further support for the plain language interpretation of the statute, as outlined above. In fact, the original proposed Section 7 language did not include any requirement that states distribute a separate “declination form” at all. Rather, the Committee Report on the NVRA’s original proposed language reveals that the Committee on House Administration recommended the state simply find a means, to the greatest extent practicable, to allow the applicant to use agency forms to record a declination to register to vote, if she/he so chose. The originally proposed language is clear – just as it is in the current law – that Congress intended the agency to distribute the voter registration application forms with each benefits application, recertification, renewal, and change of address. The proposed language, as approved by the Committee in House Administration, read as follows:

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 described in section 9(a)(2);
or

(ii) the office's own form if it is equivalent to the form described in section 9(a)(2), including a statement that-

(I) specifies each eligibility requirement (including citizenship);

conflicting statutes harmoniously where possible.”); *Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir.1993) (“even where two statutes are not entirely harmonious, courts must, if possible, give effect to both, unless Congress clearly intended to repeal the earlier statute”).

¹⁵ “[W]hen there is an apparent conflict between a specific provision and a more general one, the more specific one governs, regardless of the priority of the provisions’ enactment.” *United States v. Castro-Rocha*, 323 F.3d 846, 851 (10th Cir. 2003) *abrogated on other grounds by Lopez v. Gonzales*, 549 U.S. 47 (2006); *see also Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1213 (10th Cir. 2005) (It is a “fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs”).

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(IV) unless the applicant, in writing, declines to register to vote;

(B) to the greatest extent practicable, incorporate in application forms and other forms used at those offices for purposes other than voter registration a means by which a person who completes the form may decline, in writing, to register to vote in elections for Federal office; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms.

139 Cong. Rec. 5287 (1993), 103rd Cong., 1st Sess., National Voter Registration Act Of 1993, February 4, 1993, Reference: Vol. 139, No. 14, Section: House (*emphasis added.*) The committee report¹⁶ describing the original language of the NVRA (then “H.R. 2”) is also instructive. The report, which outlines the substance of the bill along with relevant discussion, describes the intended requirement of distribution of the voter registration application as “simultaneous” with each benefits application, recertification, or renewal, and change of address in two places in the report. The report repeats Congress’ intention that the opportunity to decline in writing should be offered to the applicant, to the greatest extent practicable, but in no way suggests that it should stand as a substitute for simultaneous distribution of the voter registration application form:

“A voter registration agency that provides service or assistance in addition to conducting voter registration **shall distribute simultaneously** with each application for service or assistance, and with each recertification, renewal, or change of address, a mail voter registration application form...[t]he offices should to the greatest extent practicable, incorporate in application forms and other forms used for purposes other than voter registration, a means by which an applicant may decline in writing to register to vote...”

H.R. Rep. No. 103-9, at 10 (1993)

“Each agency voter registration office is required to provide the following services: **simultaneous distribution of mail voter registration application forms** (or the agency’s own form), assistance

¹⁶ H.R. Rep. No. 103-9 (1993)

to applicants in completing voter registration application forms, and acceptance of completed voter registration application forms for transmittal to the appropriate State election official.”

Id. at 11. Records of debate¹⁷ and the Conference Report of agreement on the bill’s language reveal that Congress intended the final inclusion of a declination form requirement to prevent coercion, not to obviate for voter registration form distribution:

“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....Section 7(a)(6)(B) would require an agency to include on a form the question: ‘If you are not registered to vote where you live now, would you like to register to vote here today?’ In response to that question, the form would include a box for the applicant to accept or decline to apply to register to vote....The conferees believe that based on the experience of these States, the inclusion of such questions and statements on the agency forms in an agency-based program would serve to deter coercion and intimidation in such a program.”

H. R. Rep. No. 103-66, at 17 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 140, 144-145.

The legislative history of Section 7 of the NVRA makes clear that Congress’ intent was to require agencies to distribute the voter registration application forms simultaneously with applications for benefits, recertification or renewal, and change of address. Congress also intended the applicant be provided with statutorily prescribed disclaimers that prevent coercion of the applicant, including the opportunity for the applicant to decline the offer to register to vote in writing. The Court should reject Defendant Hyde’s attempt to re-write the law such that the declination form becomes a substitute for the required distributions of voter registration applications.

Accordingly, for this separate and independent reason, Defendant Hyde’s motion for summary judgment should also be denied. HSD’s practice of withholding the voter registration

¹⁷ During congressional debate regarding the NVRA on May 5, 1993, Former Congressman Robert Livingston, asserted that “a welfare applicant must actively decline to accept the voter registration form.” 139 Cong. Rec. H2264-03 (daily ed. May 5, 1993) (statement of Rep. Livingston.)

applications unless and until they are affirmatively requested by the benefits applicant violates Section 7(a)(6)(A) of the NVRA.

CONCLUSION

For the preceding reasons, Plaintiff respectfully urges the Court to deny Defendant Hyde's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 9th day of July, 2010.

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I certify that on the 9th day of July, 2010, I served the foregoing by electronic means, on:

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