

**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

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT HERRERA'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs respectfully submit the following Memorandum in opposition to the motion for summary judgment filed by Defendant Mary Herrera, the Secretary of State for New Mexico [Doc. 111].

The National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg *et seq.*, requires that states' public assistance agencies and motor vehicle departments distribute voter registration applications to their clients during certain covered transactions. For many years, the State of New Mexico has failed to provide this federally-mandated service to its public assistance and motor vehicle office clients. The state officials responsible for these violations of federal law include Secretary Herrera, who is the state's chief election official, and the heads of the state agencies that manage New Mexico's public assistance and motor vehicle offices.

Secretary Herrera, in particular, failed to undertake any effective measures to remedy the deficiencies in the agencies' voter registration practices. Indeed, the Secretary has failed to even monitor the agencies' voter registration practices, so she has remained willfully unaware of

whether the State is complying with the NVRA at these agencies and remained willfully unaware of their registration deficiencies.

On July 1, 2010, Plaintiffs Valdez, Grajeda, and Rodriguez settled their claim under Section 5 of the NVRA, 42 U.S.C. § 1973gg-3, concerning voter registration at the state's motor vehicle offices, in an agreement signed by Secretary Herrera and by the heads of the state agencies that manage New Mexico's motor vehicle offices. [Doc. 84-1]. The litigation of Plaintiff Allers' claim under Section 7 of the NVRA, 42 U.S.C. § 1973gg-5, against Defendant Herrera and the heads of the state agencies that manage New Mexico's public assistance offices (collectively, the Human Services Department or "HSD"), is continuing. Plaintiff Allers has moved for partial summary judgment against Secretary Herrera and HSD [Doc. 109], and HSD has moved for summary judgment [Doc. 57]. Both motions are pending before this Court.

Defendant Herrera now also has moved for summary judgment but, for the reasons set forth below, her motion should be denied. Her core argument – that, despite being the state's chief election official, she is not required to ensure that New Mexico in fact complies with the NVRA – is contradicted by the federal law's specific mandate that she do so. 42 U.S.C. § 1973gg-8; *see also Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008). Because the Secretary is responsible for New Mexico's compliance with Section 7 of the NVRA, and because (as set forth in Plaintiff's pending summary judgment motion) the State of New Mexico is violating Section 7, she is not entitled to summary judgment with respect to Plaintiff's Section 7 claim. Moreover, the Secretary does not contend in her motion that, as to the State's compliance with Section 7, there is no genuine issue as to any material fact and that this Court may find for the state Defendants as a matter of law.

Secondarily, even if this Court were to accept the Secretary's core argument regarding the scope of her NVRA responsibility, the Court should deny her motion for summary judgment. The Secretary posits, in her motion, a number of types of actions that the NVRA does require she undertake with regard to the State of New Mexico providing voter registration services to public assistance clients served by HSD. However, the Secretary failed to take many of these actions. Thus, the Secretary has failed to satisfy even her limited benchmark for NVRA liability.¹

PLAINTIFF'S STATEMENT OF FACTS

This Court's Local Rules mandate that a party moving for summary judgment, as well as the opposing party, adhere to certain specific procedures in filing their memoranda. The purpose of these procedures is to permit this Court to determine whether a summary judgment motion encompasses "no genuine issue as to any material fact," a prerequisite for obtaining summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Thus, Local Rule 56.1(b) requires the moving party to include in its memorandum in support of its motion a numbered "statement of all the material facts as to which the movant contends no genuine issue exists." The opposing party then must include in its memorandum in opposition "a statement of the material facts as to which the party contends a genuine issue exists . . . and must state the

¹ Secretary Herrera is vague as to whether she is only seeking summary judgment with regard to Plaintiff Allers' Section 7 claim or is also seeking summary judgment with regard to the Section 5 claim of Plaintiffs Valdez, Grajeda, and Rodriguez (although, as noted, the Secretary recently entered into a settlement agreement that resolves the Section 5 claim). On the one hand, the Secretary notes that she is only asking for summary judgment "on any remaining claims in this litigation," Motion for Summary Judgment, at 10; on the other hand, her motion both discusses the scope of her responsibility regarding NVRA compliance at public assistance offices and the scope of her responsibility for NVRA compliance at motor vehicle offices. But since the Section 5 claim is not "remaining . . . in this litigation" given the July 1, 2010 settlement, her Motion for Summary Judgment can only apply to the Section 7 claim, and Plaintiff will address the motion in that light.

number of the movant's fact that is disputed." These are the standard procedures in most, if not all, district courts in this country.

Nonetheless, Secretary Herrera unaccountably has failed to include in her memorandum (or attach to her memorandum) any statement of facts at all. This is not because her motion does not rely on any factual assertions; the Secretary does include factual assertions in her brief and relies on them in arguing for summary judgment. Given this failure to comply with the Local Rules, Plaintiff cannot "state the number of the movant's fact that is disputed," and it is difficult overall for Plaintiff to fully identify the facts material to the Secretary's motion about which a genuine issue exists.

Notwithstanding this Local Rules violation, Plaintiff sets forth below, for the Court's convenience and to fully apprise the Court of the bases for Plaintiff's opposition to the pending motion, two statements of fact. The first includes the factual assertions made by the Secretary in her motion, and Plaintiff's statement as to whether these facts are disputed or not. The second is Plaintiff's supplemental statement of material facts.

A. Facts Asserted by Defendant Herrera in her Motion for Summary Judgment

1. Defendant Herrera, as the New Mexico Secretary of State, is designated as the state's chief election official for purposes of NVRA compliance (Defendant's Motion, at 1). § 1.10.8.15 NMAC. Plaintiff does not dispute this.

2. The State of New Mexico's public assistance offices are managed by the state Human Services Department and its constituent divisions (Defendant's Motion, at 3). Plaintiff does not dispute this.

3. The Secretary of State promulgated regulations in 1994 to implement Section 7 of the NVRA, as well as other sections of the NVRA (Defendant's Motion, at 9). 1.10.8 NMAC [notes]. Plaintiff does not dispute this.

4. On an unspecified date between 1994 and 2004, the Secretary of State "assigned a unique site code number to the individual office of each State agency responsible for registering voters under the NVRA enabling [the Secretary] to verify their efforts." (Affidavit of Denise Lamb, at par. 4, submitted by Secretary Herrera [Doc. 112-1]). Plaintiff cannot confirm or dispute that such site code numbers were assigned. However, Plaintiff disputes that any such assigned codes have "enabl[ed]" the Secretary to verify state compliance with Section 7 of the NVRA. The Secretary does not provide any facts to substantiate this claim, and the Secretary in fact has not engaged in any activities aimed at verifying Section 7 compliance (see Plaintiff's Supplemental Statement of Facts, par. 2).

5. On an unspecified date between 1994 and 2004, the Secretary of State "conducted training for the managers of the offices responsible for registering voters pursuant to the NVRA." (Affidavit of Denise Lamb, at par. 4.) Plaintiff cannot confirm or dispute that some form of training, that provided some information on some issue relating to voter registration, was provided to some persons on some date between 1994 and 2004. However, the Secretary does not provide any facts to substantiate that HSD officials were trained, that officials currently employed by HSD were trained, the content and length of the training, or the manner in which the training was provided.

6. The Secretary of State has issued a manual which discusses voter registration under Section 7 of the NVRA and has sent this manual to HSD; this manual was revised in January

2009. (Affidavit of Don Francisco Trujillo, submitted by Secretary Herrera [Doc. 112-2].) Plaintiff does not dispute that these manuals have been issued. Plaintiff, however, disputes that these manuals have been properly distributed to HSD. (Espinosa Dep 21:13-15; Salazar Dep. 72:22-73:2, attached hereto as Exhibits A and B, respectively.) Plaintiff also disputes that these manuals properly set forth the standards for compliance with Section 7 of the NVRA (*e.g.*, Doc. 112-3 fails to require distribution of voter registration applications at HSD in the manner described in Plaintiff's Motion for Partial Summary Judgment).

7. The Secretary of State has "acted as an ombudsman for NVRA issues as they have arisen in the past," and "has taken appropriate action [regarding NVRA compliance] when necessary" (Defendant's Motion, at 9). Plaintiff disputes that these assertions are true in any material sense. The assertions are not supported by citation to any evidence in the record, the Secretary does not know whether or not the State is acting in compliance with Section 7, and does not monitor Section 7 compliance (see Plaintiff's Supplemental Statement of Fact, pars. 1 & 2).

B. Plaintiff's Supplemental Statement of Facts

1. The Secretary of State does not know whether or not the State of New Mexico is acting in compliance with Section 7 of the NVRA as to public assistance clients served by HSD. (Defendant Mary Herrera's Response to Plaintiff's First Set of Interrogatories, Answer to Interrogatory No. 12, attached hereto as Exhibit C.)

2. Since January 1, 2000, the Secretary of State has not conducted any monitoring, reviews, or inquiries concerning the State of New Mexico's compliance with Section 7 of the NVRA as to public assistance clients who are served by HSD. There is no internal procedure within the Secretary of State's office to investigate voter registration compliance at HSD offices. The

Secretary of State's office receives data regarding the number of persons who complete voter registration applications each year at HSD offices, but does not require that anyone in the office review the data for purposes of assessing Section 7 compliance. (Defendant Mary Herrera's Response to Plaintiff's First Set of Interrogatories, Answer to Interrogatory No. 9, attached hereto as Exhibit C; Trujillo Dep. 54:19-55:25, 73:11-74:11, 76:11-77:1, attached hereto as Exhibit D.)

3. The Secretary of State has not provided any NVRA-related training to officials or employees of HSD since at least 2004, and does not require that HSD conduct its own NVRA training. (Trujillo Depo. 28:17-19; 29:19-25; 85:3-5, attached hereto as Exhibit D; Affidavit of Denise Lamb, at par. 4.)

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. 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 demonstrate 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 references are to be drawn in its favor. *Id.* The references 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 jury could return a verdict for the non-moving party. *See Mares v. Conagra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992).

ARGUMENT

Finding that it is the “duty of the Federal, State, and local governments to promote the exercise of [the] right [to vote],” Congress enacted the NVRA with the purpose of “establish[ing] procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” 42 U.S.C. § 1973gg(a)(2) & (b)(1).² To that end, the NVRA provides for a uniform, nationwide system of voter registration, including the use mail-in registration applications, 42 U.S.C. § 1973gg-4, and extensive distribution of voter registration applications at governmental offices, including state public assistance offices, 42 U.S.C. § 1973gg-5(a)(2)(A), state motor vehicle offices, 42 U.S.C. § 1973gg-3, certain state offices that provide services to persons with disabilities, 42 U.S.C. § 1973gg-5(a)(2)(B), and other state and local offices, 42 U.S.C. § 1973gg-5(a)(3). To ensure state compliance with these procedures, the NVRA requires each state to “designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under [the NVRA].” 42 U.S.C. § 1973gg-8.

² Although the NVRA, by its terms, applies to voter registration for elections in which a federal office is on the ballot, all states, including New Mexico, have implemented the NVRA for voting in all elections conducted by the states.

In New Mexico, the “chief State election official” for NVRA compliance is Secretary of State Herrera. As discussed below, the Secretary therefore is jointly responsible for the state’s conduct of voter registration at state public assistance offices in the manner prescribed by Section 7 of the NVRA. It follows, accordingly, that the Secretary may obtain summary judgment only if she demonstrates that there is no genuine issue of material fact regarding the State of New Mexico’s compliance with Section 7 at HSD offices and, further, that she is entitled to judgment as a matter of law regarding the State’s Section 7 compliance. The Secretary essentially argues that her obligation under the NVRA is merely to do something, at some point in time, to try to indicate to HSD what it should do to comply with Section 7, and that her obligation under the NVRA is fulfilled regardless of whether the State, in fact, complies with Section 7. This is an incorrect reading of the NVRA, and is contradicted by the one court of appeals decision that has decided this issue. Moreover, even if this Court were to adopt the Secretary’s cramped construction of what her obligations are under the NVRA, the Secretary also has failed to satisfy these obligations. For these reasons, the Secretary’s motion for summary judgment should be denied.³

³ It also would be appropriate for this Court to deny the Secretary’s motion based on her failure to comply with Local Rule 56.1(b). The Secretary’s violation of this rule goes to the heart of the summary judgment process since it directly undermines this Court’s ability to ascertain whether, as required by Rule 56, “there is no genuine issue as to any material fact,” and has prejudiced Plaintiff’s ability to contend that summary judgment should be denied on the ground that the Secretary’s motion does involve material facts as to which there are genuine issues. The Secretary, thus, has failed to meet her initial burden, as the moving party, of informing the Court of the basis for her motion. *See Celotex Corp*, 477 U.S. at 325.

I. Secretary of State Herrera, as the State's Chief Elections Official, is Required to Ensure Compliance by New Mexico with Section 7 of the NVRA

A. The NVRA Requires Secretary Herrera to Ensure NVRA Compliance

As Secretary Herrera recognizes in her motion, the leading case on construing the obligations the NVRA imposes on each state's chief election official is the Sixth Circuit's decision in *Harkless v. Brunner*, 545 F.3d 445 (2008). The issue presented in that case was whether the Ohio Secretary of State, as that state's chief election official, "may be held responsible for Ohio's NVRA [Section 7] violations." *Id.* at 451. The Sixth Circuit held that each state's NVRA chief election official is responsible for state compliance, and therefore the Ohio Secretary of State was liable for Ohio's compliance with Section 7.

In reaching this conclusion, the Sixth Circuit emphasized that it was relying on the clear language of the NVRA, which, as noted above, specifies that each state's chief elections official is "responsible for coordination of State responsibilities under [the NVRA]." *Id. citing* 42 U.S.C. § 1973gg-8. The court also pointed to the statute's legislative history, where Congress explained that the chief election official is "'responsible for implementing the state's function under the [NVRA],'" *id.* (quoting S. Rep. No. 103-6, at 39 (1993)); and to the construction of the statute provided by one of the federal agencies responsible for implementing the NVRA, the Federal Election Assistance Commission, which similarly concluded that each state's chief state election official is responsible for ensuring state compliance with the NVRA's voter registration requirements. *Id.*

Secretary Herrera states repeatedly in her motion that her obligation under the NVRA is to provide "coordination," and argues, without citation to any authority, that this should not mean that she is responsible for NVRA compliance by the State of New Mexico. However, that

precise argument was made in *Harkless* and was rejected by the Sixth Circuit, and the Secretary does not offer any reason for this Court to not follow the Sixth Circuit's reasoning. The *Harkless* court noted that "coordination" is defined as the "[h]armonious combination of agents or functions towards the production of a result." *Id.* at 452 (quoting Oxford English Dictionary (2d ed. 1989)). The court further pointed to the fact that the word "coordination" in the statute modifies the phrase "state responsibilities." Together, these indicia of statutory construction establish that each state's chief election official – here, Secretary Herrera – is responsible for state compliance with Section 7. As summarized by the Sixth Circuit, "the Secretary [of State], as Ohio's chief election officer, is responsible for 'harmonious combination' – or implementation and enforcement – of [the NVRA compliance] program on behalf of Ohio." *Id.*⁴

Secretary Herrera argues that the Sixth Circuit's holding – that each state's chief election official is responsible for the state's NVRA compliance – was dicta. Her argument in this regard is that the only issue presented in *Harkless* was whether state officials were liable for Ohio's compliance with the NVRA or whether the state could delegate its responsibilities to local officials, and that, once the court concluded that state officials were liable, it did not need to then decide which state officials were liable.

This is a misreading of *Harkless*. If the *Harkless* decision was driven merely by the need to hold some state actor liable, the court could have simply placed responsibility on the director

⁴ Other courts also have held that the "coordination" responsibility includes the obligation to ensure compliance. See, e.g., *Nat'l Coalition for Students with Disabilities and Legal Defense Fund v. Taft* (No. C2-00-1300), 2001 WL 1681115, *3 (S.D. Ohio, Sept. 24, 2001) ("Ohio's Secretary of State . . . has the duty and authority to implement *and enforce* the provisions of the NVRA") (emphasis added); cf. *Condon v. Reno*, 913 F. Supp. 946, 954 (D.S.C. 1995) (chief election official's "coordination" responsibilities include responsibility of "curing violations of the NVRA").

of Ohio's public assistance agency, who was a named defendant. But the court did no such thing. Rather, it held *both* state actors liable precisely because that is what the NVRA, by its clear language, requires. As noted above, the Sixth Circuit began its discussion of the liability issue by stating that the question presented was whether “the [Ohio] Secretary [of State] may be held responsible for Ohio's NVRA violations.” *Id.* at 451. The Sixth Circuit's answer to this question clearly was not dicta.⁵

Finally, the responsibility of each state's chief election official for ensuring NVRA compliance is buttressed by the NVRA's requirement that a person aggrieved by an NVRA violation must, in most circumstances, first “provide written notice of the violation to the chief election official of the State involved” before filing a civil action. 42 U.S.C. § 1973gg-9(b)(1). “Congress structured the notice requirement in such a way that notice would provide states in violation of the Act an opportunity to attempt compliance before facing litigation.” *ACORN v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997). *See also Condon*, 913 F. Supp. at 954 (chief election official's responsibilities include “curing violations of the NVRA”). As the Sixth Circuit explained in *Harkless*, “[r]equiring would-be plaintiffs to send notice to their chief election official about ongoing NVRA violations would hardly make sense if that official did not have the authority to remedy NVRA violations.” 545 F.3d at 453.

⁵ The approach of imposing joint and several liability under the NVRA – here, and in Ohio, as against the Secretary of State and the head of the state public assistance agency – is now well recognized in NVRA law. *See U.S. v. Mo.*, 535 F.3d 844, 849-851 (8th Cir. 2008) (holding that there was joint and several liability between state and local officials regarding compliance with NVRA requirements as to removing ineligible voters from the registration list, and noting that noncompliance by one set of liable officials is relevant in assessing the liability of a second set of officials).

For these reasons, Secretary Herrera, as the State of New Mexico's chief state election official, is responsible for the state's compliance with Section 7 of the NVRA as to the provision of voter registration services to HSD's public assistance clients.

B. New Mexico Law Grants Secretary Herrera the Authority to Ensure NVRA Compliance by the State of New Mexico

Secretary Herrera contends that the NVRA cannot designate her as a state official responsible for New Mexico's compliance with Section 7 of the NVRA because, according to the Secretary, she lacks authority under state law to "tell . . . HSD what to do." Defendant's Motion, at 7. There are two problems with this argument. First, Congress does have the authority, in regulating the manner in which states conduct federal elections – including the conduct of voter registration for federal elections – to specify that a particular state official shall be held responsible for the proper implementation of the procedures Congress has mandated.⁶ Second, the legal conflict that the Secretary posits between federal and state law does not exist here: New Mexico law does fully empower the Secretary of State to take measures to ensure compliance.

⁶ The Secretary argues in a footnote that "federalism" would prevent the NVRA from requiring the Secretary to direct the actions of state agencies such as HSD. However, this mandate, as the Sixth Circuit earlier held in *ACORN v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997) – and as it reiterated in *Harkless*, 545 F.3d at 454 – is in keeping with Congress' power under Article I, Section 4 of the U.S. Constitution (the Elections Clause) and thus does not impermissibly infringe on states' rights. Indeed, "it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-833 (1995)). Moreover, the "regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Id.* (internal quotation marks omitted); *see also ACORN*, 129 F.3d at 836 (the Elections Clause "specifically grants Congress the authority to force states to alter their regulations regarding federal elections"). So even if New Mexico law precluded Secretary Herrera from ensuring compliance by state agencies with the NVRA's requirements, the NVRA's mandates would nonetheless trump state law.

Secretary Herrera is explicitly vested by New Mexico law with broad authority to adopt and publish “rules for the *administration* of a state-agency based voter registration program.” N.M. Stat. Ann. § 1-2-1(A); 1-4-48 9(A) (emphasis added). The rules that she must adopt “shall provide for distribution of voter registration forms, provisions for the acceptance of voter registration forms and procedures for reporting voter registration activity in accordance with the federal National Voter Registration Act of 1993.” *Id.* Defendant Herrera further is responsible for preparing instructions for conducting election and registration matters in accordance with the state and federal law, N.M. Stat. Ann. §§ 1-2-1, 1-2-2; has overall responsibility for all provisions in the Election Code (which, in turn, includes provisions for implementation of the NVRA), N.M. Stat. Ann. § 1-2-1(A)(2); and “shall ... make rules and regulations pursuant to the provisions of, and necessary to carry out the purposes of the Election Code.” *Id.*⁷

Thus, the Secretary has full authority to prescribe the actions that the State of New Mexico must undertake, at HSD offices, to ensure compliance with Section 7. The Secretary may specify, in detail, the precise manner in which voter registration should be offered to HSD clients, the voter registration training that should be provided, and the monitoring that should be undertaken to assess compliance with Section 7.⁸

⁷ Other provisions of the Election Code also belie the Secretary’s argument that New Mexico law prevents her from directing compliance by other executive agencies. For example, New Mexico Code § 1-4-4 prohibits registration officers from charging a qualified elector any fee or sum in connection with registration. If registration officers in the state public assistance agencies were charging qualified voters a fee to register to vote, the Secretary would be required to remedy the violation. Moreover, the Secretary is required to report possible violations of the Election Code to the district attorney or the attorney general for prosecution. N.M. Stat. Ann. §1-2-2(E).

⁸ For example, as set forth in Plaintiff’s Motion for Partial Summary Judgment [Doc. 109], the State of New Mexico is violating Section 7 because HSD does not distribute voter registration applications to clients who do not provide a written response to the voter registration inquiry

Finally, the Secretary claims that she “lacks the resources” to effectively monitor voter registration procedures implemented by HSD. This is no excuse. Defendant’s Motion, at 8. As the district court in *U.S. v. N.Y.*, 700 F. Supp. 2d 186, 206 (N.D.N.Y 2010), observed, “Congress contemplated the financial and other burdens of state agency-based NVRA enforcement” when passing the NVRA. “In passing the NVRA, Congress balanced the potential financial burdens facing states against the right of eligible disabled voters to meaningful participation in the federal electoral process. The considerations favoring the enfranchisement of eligible federal voters prevailed.” *NCSD v. Scales*, 150 F.Supp.2d 845, 855 (citing 42 U.S.C. § 1973gg; H.R. Rep. 103-9, at 35-36 (1993), *reprinted in*, 1993 U.S.C.C.A.N. 105, 138-39).

For these reasons, there is no issue here as to whether the NVRA is imposing an obligation on Secretary Herrera which she is precluded from carrying out under state law.

II. Summary Judgment Must Be Denied Because Defendant Herrera Has Failed to Ensure State Compliance with Section 7 of the NVRA at HSD Offices

A. The Secretary’s Failure to Substantiate Section 7 Compliance Precludes Summary Judgment

Since the Secretary is responsible for the State of New Mexico’s compliance with Section 7 at the state’s HSD public assistance offices, it follows that the Secretary may obtain summary judgment on Plaintiff’s Section 7 claim only if she demonstrates that there is no genuine issue of material fact regarding the State of New Mexico’s compliance with Section 7 and that she is entitled to judgment as a matter of law. However, no such showing is contained in her motion.

contained in HSD’s voter information form, except if the client verbally requests an application. The Secretary, pursuant to her authority to administer agency-based registration, has clear authority to issue a regulation requiring that voter registration applications be distributed to all such HSD clients.

As noted at the outset of this memorandum, Plaintiff currently has pending a motion for partial summary judgment on her Section 7 claim. For the reasons set forth in that motion, Secretary Herrera cannot demonstrate that the State of New Mexico is complying with Section 7 at its HSD offices.

In addition, even if the Secretary were to adopt the arguments made by HSD in its pending motion for summary judgment, the HSD motion does not provide a basis for granting summary judgment to the Secretary. As Plaintiff has argued in other filings before this Court, the HSD motion should be rejected for two reasons. First, HSD's motion should be denied because the New Mexico is in violation of Section 7, for the reasons set forth in Plaintiff's Motion for Partial Summary Judgment. Second, as explained in Plaintiff's memorandum in opposition to HSD's motion [Doc. 88], there are genuine issues of material fact which preclude this Court from granting summary judgment as to issues not addressed in Plaintiff's Motion for Partial Summary Judgment.

B. Secretary Herrera Has Failed Even to Satisfy Her Proffered Standard as to the Scope of Her Obligations Under the NVRA

According to Secretary Herrera, the "coordination" responsibilities which the NVRA assigns to her "include many of the [following] things": "(1) consulting with the State agencies directly responsible for implementing the NVRA regarding compliance issues; (2) monitoring, evaluating, and coordinating compliance; (3) providing support and guidance to the State agencies responsible for implementing the NVRA; and (4) providing manuals and training regarding the requirements of the NVRA." Defendant's Motion, at 7. The Secretary also avers that she is "doing many of these things." *Id.* The evidence demonstrates, however, that she has undertaken very few tangible actions aimed at promoting Section 7 compliance. Thus, even if

this Court were to adopt the Secretary's limited definition of her duties under the NVRA, the Secretary's request for summary judgment should be denied.⁹

Item number two in the Secretary's list requires "monitoring" and "evaluating" Section 7 compliance.¹⁰ But, as set forth in Plaintiff's Supplemental Statement of Facts, the evidence demonstrates that the Secretary has not engaged in any such actions. Most tellingly, the Secretary conceded, in her December 2009 answers to Plaintiff's interrogatories, that she does not know whether or not the state is complying with Section 7 at HSD offices. Furthermore, her Rule 30(b)(6) designee testified in a deposition that the Secretary has not established any procedures for conducting any "monitoring" or "evaluating" of Section 7 compliance issues. The Secretary fails to offer any evidence whatsoever that she has engaged in any "monitoring" and "evaluating" of Section 7 compliance.¹¹

⁹ A conspicuous difficulty with the Secretary's effort to define the scope of her NVRA responsibility is the vague and ambiguous manner in which she does this. As noted, she proffers that her NVRA "coordination" obligation "would include many of the things" listed above, but does not say which are included and which are not. At another point in her motion, she contends that her obligation includes "disseminating and collecting information, providing voter registration forms . . . , and providing assistance to . . . agencies," (Defendant's Motion, at 3), but does not say, for example, what is meant by "assistance to . . . agencies." The Secretary's inability to set forth a clear, workable benchmark by which this Court should assess her NVRA performance underscores the straightforward nature of the standard offered by Plaintiff, that the Secretary is liable under the NVRA if Plaintiff demonstrates that the State of New Mexico is violating the statute. Furthermore, the vague and ambiguous nature of the Secretary's effort to define her liability threatens to devolve into an essentially meaningless standard that merely requires that the Secretary do something sometime, regardless of whether there is any substantive content to that effort and regardless of how long ago that effort occurred.

¹⁰ Item two also requires that she "coordinat[e] compliance," but since the Secretary is seeking through her listing to define her "coordination" responsibility, defining it as requiring that she "coordinat[e]" adds nothing.

¹¹ Thus, the Secretary's indifference to the State's compliance with Section 7 has meant that she undertook no inquiries or investigation, and asked no questions, in response to data showing a

Similarly, the facts contradict the Secretary's claim that she has provided training regarding Section 7 compliance. No such training has been provided since at least 2004. The only evidence that the Secretary could offer to the effect that her office ever has provided training to HSD is an extremely vague statement about some training offered to somebody in the past, a statement which is completely lacking in any substance.

The only other tangible things that the Secretary points to are her issuance of regulations and her issuance of a Section 7 manual. But those regulations were issued 16 years ago, immediately after the NVRA was adopted, and thus do not reflect any active "coordination" by the Secretary today. With regard to the manual, Plaintiff (as noted above) disputes that the Secretary has established that the manual has provided any real assistance to HSD, because the manual has not been properly distributed and is substantively deficient.

In sum, Plaintiff asserts in her Amended Complaint, in her Motion for Partial Summary Judgment, and in her response to HSD's Motion for Summary Judgment, that there exists a longstanding pattern of conduct by the State of New Mexico in failing to offer voter registration to the state's public assistance clients, in violation of the NVRA. The minimal actions the Secretary has undertaken to address Section 7 compliance are inadequate, and any effort by the Secretary to augment her efforts since the filing of Plaintiff's Complaint neither have rectified

pattern of very few persons completing voter registration applications at HSD offices. (Amended Complaint [Doc. 106], at pars. 56-57; Plaintiff's Controverting and Separate Statement of Facts in Support of Plaintiff's Response to Defendant HSD's Motion for Summary Judgment [Doc. 88-1], at pars. 68-84.) Underlying those numbers has been a pattern of conduct by HSD in failing to properly offer voter registration to public assistance clients. (*Id.* at pars. 49-67, 91-106; Plaintiff's Motion for Partial Summary Judgment.)

the violation nor do they hold any promise that the State will come into compliance in the future.¹²

CONCLUSION

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

Dated: September 24, 2010

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¹² To the extent there is any suggestion of mootness in the Secretary's arguments, the few actions she has taken to promote Section 7 compliance do not suffice. *See Friends of Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 174, 189 (2000) ("A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case" and "[t]he 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.").

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I certify that on the 24th day of September, 2010, I served the foregoing by electronic means on:

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