

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

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

**DEFENDANT MARY HERRERA’S MOTION FOR SUMMARY JUDGMENT**

The National Voter Registration Act, 42 U.S.C. § 1973gg, *et seq.* (“NVRA”), requires each State to designate a “chief State election official.” *See* 42 U.S.C. § 1973gg-8. That official is “responsible for coordination of State responsibilities” under the NVRA. *Id.* There is some question as to what, exactly, this language requires of a chief election official. Plaintiffs have not, at any point in this litigation, described what burden they believe such an official bears under this provision, and at the close of discovery there is no evidence that the Secretary of State (“Secretary” or “SOS”) has failed to meet that burden. In fact, the evidence demonstrates otherwise. There is no material question of fact regarding the Secretary’s compliance with the NVRA, and summary judgment in her favor is therefore appropriate.

**INTRODUCTION**

In this litigation, Plaintiffs have endeavored to prove that the Secretary, the Taxation and Revenue Department (“TRD”), and the Human Services Department (“HSD”) engaged in conduct violative of the NVRA. Plaintiffs, understandably, focused their efforts on the conduct of TRD and HSD because those are the agencies that interact directly with the public regarding voter registration activities under the NVRA. The SOS, as the chief election official of New Mexico, has different obligations under the NVRA than TRD and HSD.

In short, the Secretary's obligation is to coordinate NVRA compliance and other issues across the State. Plaintiffs have never been able to articulate precisely (or even generally) what concrete steps such coordination obligations require. Indeed, in their complaint, Plaintiffs request the same general relief from all Defendants, namely injunctive relief requiring Defendants to comply with the provisions of the NVRA. After the opportunity to conduct discovery, Plaintiffs have yet to explain how the SOS has violated the NVRA.

As the Court is aware, the parties have entered into a settlement agreement disposing of Plaintiffs' claims against TRD. In that settlement, the SOS has agreed to perform functions that could reasonably be described as "coordinating," but it is far from clear that such functions are required of the SOS by the NVRA, and many of the things the SOS has agreed to do the office was already doing. The material evidence set forth below establishes the Secretary's compliance with the NVRA and she is therefore entitled to summary judgment.

### **ARGUMENT**

The obligations of the Secretary of State – New Mexico's "chief State election official" under the NVRA – are, for purposes of this lawsuit, limited to coordinating the State's responsibilities under the NVRA.<sup>1</sup> The NVRA describes those responsibilities as follows: "Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this subchapter." 42 U.S.C. § 1973gg-8. Somewhat surprisingly, there is very little case law interpreting this provision, but the case law that does exist indicates that the Secretary has met her obligations.

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<sup>1</sup> The Secretary is also responsible for: (1) making voter registration forms available to the State agencies required by the NVRA to provide those forms to the public (42 U.S.C. § 1973gg-4(b)); (2) notifying the appropriate State voter registration officials of information regarding a voter's conviction in federal court (42 U.S.C. § 1973gg-6(g)(5)); (3) consulting with the Election Assistance Commission to develop a mail voter registration application form for federal elections (42 U.S.C. § 1973gg-7(a)(2)); and (4) accept notification from private parties of potential violations by the State of the NVRA (42 U.S.C. § 1973gg-9(b)(1)). Plaintiffs do not challenge any action or inaction of the Secretary of State under these provisions.

**I. THE NVRA DOES NOT TRANSFORM THE SECRETARY INTO A SUPER-ENFORCEMENT AGENCY.**

At the outset, it is important to recognize that the NVRA does not, through Section 1973gg-8, place ultimate responsibility on the Secretary to enforce the provisions of the NVRA in New Mexico. Given the structure of the NVRA, and the manner in which the State agencies in New Mexico are responsible for complying with the NVRA, the Secretary's role in coordinating State responsibilities is just that – coordinating, *i.e.* disseminating and collecting information, providing voter registration forms to New Mexico's voter registration agencies, and providing assistance to those agencies. The Secretary is not charged with enforcing the NVRA and does not bear responsibility for the failure of other State agencies to meet their obligations under the law. Additionally, neither the NVRA nor New Mexico law permit the Secretary to direct the actions of other executive agencies. In short, the Secretary fundamentally *cannot* enforce the NVRA.

**A. The State Agencies Charged Directly With Implementation Of The NVRA Bear The Burden Of Compliance.**

At issue in this lawsuit are the obligations of two State agencies under the NVRA –TRD and HSD. TRD is the agency responsible for offering voter registration forms and services pursuant to Section 5 of the NVRA, 42 U.S.C. § 1973gg-3. *See* NMSA 1978, § 1-4-47 (implementing Section 5 and requiring, in Subsection B, the Secretary of TRD to “select certain employees of the motor vehicle division of the taxation and revenue department . . . to provide assistance to any applicant requesting voter registration assistance.”). Similarly, HSD is the agency responsible for offering voter registration forms and services pursuant to Section 7 of the NVRA, 42 U.S.C. § 1973gg-5. *See* NMSA 1978, § 1-4-48 (implementing Section 7); 1.10.8.7(A) NMAC (promulgated pursuant to NMSA 1978, § 1-4-48(A) and defining as a

“designated agency” responsible for providing voter registration services “all offices in the state that provide public assistance.”).

The SOS is New Mexico’s chief election official for purposes of Section 1973gg-8. But, on a statewide basis, the agencies principally responsible for ensuring compliance with Section 5 and Section 7 of the NVRA are TRD and HSD, respectively. The fact that TRD and HSD are responsible on a statewide basis is crucial, and distinguishes the only case upon which Plaintiffs could possibly rely in an attempt to pin NVRA enforcement obligations on the SOS.

In *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008), the Sixth Circuit considered an argument by the Ohio Secretary of State that she was not liable under the NVRA for Ohio’s non-compliance because the Ohio legislature had delegated the state’s responsibilities under the NVRA to local authorities. The court rejected that argument:

The Secretary argues that once the state designates an office as a VRA [Voter Registration Agency], her responsibility ends, and it is up to the designated office to carry out the remaining tasks. According to this view, if every state passed legislation delegating NVRA responsibilities to local authorities, the fifty states would be completely insulated from any enforcement burdens, even if NVRA violations occurred throughout the state.

*Harkness*, 545 F.3d at 452. The court was particularly concerned that such delegation flew in the face of the language of the NVRA itself:

However, the entire Act, including other subsections, speaks in terms of state responsibilities; what is noticeably missing is any mention of county, municipal, or other local authorities. Indeed, Congress grafted the NVRA onto the existing public assistance structure, under which the fifty states, not their political subdivisions, have the ultimate accountability.

*Id.*

The Sixth Circuit’s notation that the NVRA “speaks in terms of state responsibilities” is significant. Section 5 provides that “[e]ach State motor vehicle driver’s license application . . . shall serve as an application for voter registration” and requires that “[e]ach State shall include a

voter registration application form for elections for Federal office as party of an application for a State motor vehicle driver's license." 42 U.S.C. §§ 1973gg-3(a)(1) and (c)(1). Similarly, Section 7 requires that each State designate "all offices in the State that provide public assistance" as a voter registration agency and requires public assistance offices to provide voter registration forms to applicants for public assistance. 42 U.S.C. §§ 1973gg-5(a)(2) and (a)(6).

Unlike the State of Ohio, the State of New Mexico has chosen to implement these provisions on a statewide basis. No entity – not the legislature, not TRD, not HSD, and not the Secretary – has attempted to delegate New Mexico's NVRA obligations to local authorities. This is significant in light of the Sixth Circuit's concerns about Ohio's NVRA compliance. In *Harkness*, the Ohio Secretary of State essentially argued that she had no responsibilities under the NVRA because the State of Ohio had chosen to delegate those responsibilities to local agencies. The court held that the NVRA specifically puts the burden of compliance on the states themselves, and that such responsibility was non-delegable. Because New Mexico has placed the burden of compliance on State agencies – TRD for Section 5 and HSD for Section 7 – the Sixth Circuit's delegation concern is entirely absent in this case.

Unfortunately, however, the Sixth Circuit's concern with Ohio's NVRA noncompliance (and, more importantly, the State of Ohio's attempts to avoid responsibility for that noncompliance) led the court to overstep itself in one portion of the opinion. After discussing the fact that the NVRA speaks in terms of state responsibility, the court noted, in dicta, that

the better interpretation of the statute reads these two provisions together – that each state shall designate voter registration agencies, and that each state shall ensure that the agencies complete the required tasks. And the Secretary, as Ohio's chief election officer, is responsible for "harmonious combination" – or implementation and enforcement – of that program on behalf of Ohio.

*Harkness*, 545 F.3d at 452.

The court was not content to stop there, feeling it necessary to explain how the NVRA could place a burden of enforcement on the Ohio Secretary of State when the plain language of the NVRA itself identifies the burden as one of coordination:

The Secretary also contends that Congress would have used the word “enforcement” had it meant to give the chief election officer enforcement power. “Enforcement” makes sense when an official is to ensure compliance from a third party, whether it be private citizens or political subdivisions. But because Congress intended the states themselves, and not some third party, to have the responsibility for implementing the statute, “coordination” is the more appropriate term.

*Id.* at n. 4.

In other words, the Sixth Circuit equated the word “coordination” in Section 1973gg-8 with “enforcement.” In so doing, the Sixth Circuit erred. This error was not, however, necessary for the court’s ultimate holding that the State of Ohio – not its local political subdivisions – was responsible for ensuring that Ohio complied with the NVRA. And, as noted above, New Mexico has established a framework in which the State, through TRD and HSD, is directly and ultimately responsible for NVRA compliance. Plaintiffs themselves recognize this fact, if only implicitly; if the SOS was responsible for the failures of other State agencies to comply with the NVRA, there would be no point in suing those other agencies. A simple lawsuit with the SOS as the solitary defendant would suffice.

To the extent the *Harkness* opinion stands for the proposition that the NVRA requires the SOS, as the chief election official, to enforce the State’s NVRA compliance, it is wrongly decided. To the extent, however, that it stands for the proposition that a State may not avoid the consequences of noncompliance through the expedient of delegating its obligations to local

agencies and authorities, the opinion is good law and the State of New Mexico has done what it should.<sup>2</sup>

What, then, does “coordination” under Section 1973gg-8 look like? The Secretary submits that such coordination would include many of the things that she has agreed to do in settling, with TRD, Plaintiffs’ Section 5 claims: (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.

As mentioned in the Secretary’s Response to Plaintiffs’ fee application, the Secretary is already doing many of these things and has since the effective date of the NVRA. Accordingly, as discussed in Section II below, summary judgment is appropriate in the Secretary’s favor.

**B. The NVRA Does Not Authorize The Secretary To Direct The Actions Of Coordinate Government Agencies.**

Another problem in applying to the SOS the Sixth Circuit’s dicta regarding the Ohio Secretary of State’s NVRA enforcement obligations is that it assumes the SOS has authority to essentially tell TRD and HSD what to do. She emphatically does not. TRD and HSD are both cabinet-level executive agencies. They operate under the umbrella of the Governor’s Office. The secretaries of both agencies are appointed, not elected like the Secretary, but each has exclusive authority over their agencies.

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<sup>2</sup> The other cases cited by the Sixth Circuit in support of its conclusion are also non-delegation cases. In *United States v. New York*, 255 F. Supp. 2d 73, 78 (E.D.N.Y.), the court held that two New York State agencies could not avoid their NVRA obligations by delegating “the rendering of [their] services to local municipal agencies.” The Fourth Circuit case cited in *Harkness* also held, in the context of the Food Stamp Act, that a State could not avoid compliance with federal law by delegating its responsibilities thereunder to local agencies. See *Robertson v. Jackson*, 972 F.2d 529, 533-35 (4th Cir. 1992).

Most importantly, each answers to the Governor, not to the SOS. The secretary of HSD “is responsible to the governor for the operation of the department.” NMSA 1978, § 9-8-6(A). TRD’s statute provides identical language. *See* NMSA 1978, § 9-11-6(A). Nothing anywhere in New Mexico’s statutes gives the Secretary authority over either department. Against this backdrop, problems quickly arise with the theory that the Secretary is responsible for enforcing HSD and TRD’s compliance with the NVRA. In short, there is no mechanism by which the Secretary can direct HSD or TRD to take any particular action, including actions that may be necessary for HSD and TRD compliance with the NVRA.<sup>3</sup> Accordingly, any theory of liability against the Secretary dependent on her alleged obligation to enforce the NVRA against other State agencies fails, and summary judgment is appropriate in favor of the Secretary.

## **II. THE SECRETARY OF STATE HAS FULFILLED HER COORDINATION OBLIGATIONS UNDER THE NVRA.**

As noted above, there is unfortunately little case law (and none in the Tenth Circuit) interpreting the “coordination of State responsibilities” language in Section 1973gg-8. In light of the practical limitations on the Secretary’s ability to direct TRD and HSD, there must also be a reasonable limitation on the duties of a “chief State election official” under the NVRA. The Secretary, for example, lacks the resources to send employees to HSD and TRD field offices to ensure that HSD and TRD employees are doing what the NVRA requires of them. Even if the Secretary had such resources, she lacks the ability to enforce, in any meaningful way, NVRA compliance. The Secretary’s role, then, must be something else.

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<sup>3</sup> Principles of federalism prevent the NVRA itself from conferring on the Secretary the authority to direct HSD and TRD. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass’n.*, 452 U.S. 264, 287 (1981) (noting that federal legislation violates the Tenth Amendment if it regulates the States as States, touches on an area that is an indisputable attribute of state sovereignty, and when compliance with the federal law would impair a State’s ability to structure integral operations in areas of traditional government functions).

Coordination principally involves facilitating the transmission of information. It also involves doing what the Secretary reasonably can to ensure that New Mexico's voter registration agencies have the resources they need – *i.e.* voter registration forms – to comply with the NVRA. There is no allegation that the Secretary has failed in either respect.

Indeed, the Secretary has met her obligations. First, the SOS assigned unique site code numbers to each individual office of each State agency tasked with voter registration pursuant to the NVRA that the SOS can use to verify voter registration efforts. *See* Exhibit 1, Affidavit of Denise Lamb (“Lamb Aff.”), ¶ 4. Second, the SOS promulgated regulations in 1994 to implement the NVRA. *Id.* Those regulations, compiled at 1.10.8.1 – 1.10.8.18 NMAC, codify many of the requirements of the NVRA itself and designate the SOS as New Mexico's chief election official for NVRA purposes. Third, the SOS has provided training to the managers of the offices responsible for registering voters under the NVRA. *Id.* Fourth, the SOS has issued, to all State agencies responsible for registering voters under the NVRA, manuals providing guidance to those agencies in meeting those obligations. Those manuals were most recently revised in 2009 and are attached to Exhibit 2 to the Declaration in support of this Motion.

The SOS has also acted as an ombudsmen for NVRA issues as they have arisen in the past. The SOS cannot be reasonably expected to proactively police NVRA compliance; her activity in resolving issues is necessary reactive, and the SOS has taken appropriate action when necessary. There is no evidence of widespread failure on the SOS's part concerning New Mexico's NVRA compliance. Indeed, the evidence indicates that New Mexico has not in the past had problems with wholesale noncompliance. *See* Lamb Aff., ¶ 5.

**CONCLUSION**

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

DATED: September 7, 2010.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing answer on Plaintiffs' counsel of record via electronic filing with the CM/ECF filing system on September 7, 2010.

/s/ Scott Fuqua  
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