

No. 11-2063

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

CECILIA VALDEZ,
et al.,

Plaintiff(s)/Appellee(s),

v.

SIDONIE SQUIER, in her official
capacity as Secretary of the
New Mexico Human Services
Department,
et al.,

Defendant(s)/Appellant(s).

On Appeal from the United States District Court
For the District of New Mexico

BRIEF OF APPELLANT HSD

GARY K. KING
New Mexico Attorney General
Elaine P. Lujan
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6990 (ph)

Attorneys for Appellant HSD

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF RELATED CASES1

JURISDICTIONAL STATEMENT1

ISSUES PRESENTED FOR REVIEW2

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS4

SUMMARY OF THE ARGUMENT7

ARGUMENT9

 A. The district court’s order should be reversed because its interpretation of Section 7 renders certain provisions of the statute superfluous, leads to an absurd result, and is inconsistent with legislative history.9

 1. The district court’s interpretation of subparagraph B renders superfluous the provision of the statute that inform applicants that failure to respond to the voter registration question means that they have decided to not register to vote.11

 2. The district court’s interpretation of the subparagraph B leads to an absurd result.....14

 3. The district court’s interpretation is inconsistent with the legislative history of Section 715

 B. Appellee’s counsel should be estopped from taking a position before the court below and this Court that is unequivocally inconsistent with the position it has taken before the Indiana Federal Court.18

 1. The positions taken before the court below and before this Court, and before the Indiana Federal Court are clearly inconsistent.21

 2. The district court accepted the position that the policy at issue was outside the bounds of the NVRA and although the Indiana Federal Court has not

approved the policy at issue yet, it likely will before the briefing on this case has concluded.....27

3. If Appellee’s counsel are successful in maintaining their inconsistent position in this case, they will derive an unfair advantage and impose an unfair detriment on HSD.29

CONCLUSION30

STATEMENT CONCERNING ORAL ARGUMENT31

TABLE OF AUTHORITIES

Cases

ACORN v. Edgar, 99 F.3d 261 (7th Cir. 1996)1

Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249 (10th Cir. 1998)..... 9, 11

Corley v. United States, 556 U.S. 303 (2009).....11

Eastman v. Union Pac. R.R. Co., 493 F.3d 1151 (10th Cir. 2007).....20

Gray v. Vity of Valley Park, Missouri, 567 F.2d 976 (8th Cir. 2009)29

Hansen v. Harper Excavating, 641 F.3d 1216 (10th Cir. 2011)25

Helfand v. Gerson, 105 F.3d 550 (9th Cir. 1997) 25, 26

In re Cassidy, 892 F.2d 637 (7th Cir. 1990)26

Indiana State Conference of the NAACP v. Michael A. Gargano et al., Case No. 1:09-cv-0849-TWP/DML6

Johnson v. Lindon City Corp., 405 F.3d 1065 (10th Cir. 2005).....24

Kaiser v. Bowlen, 455 F.3d 1197 (10th Cir. 2006).....24

Mock v. T.G. & Y. Stores Co., 971 F.2d 522 (10th Cir. 1992)1

New Hampshire v. Maine, 532 U.S. 7420 (2001)..... passim

Robbins v. Chronister, 402 F.3d 1047 (10th Cir. 2005)11

Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305 (7th Cir. 2002).....23

Thomas v. Metro. Life Ins. Co., 631 F.3d 1153 (10th Cir. 2011)10

Transclean Corp. v. Jiffy Lube Int’l Inc., 474 F.3d 1298 (Fed. Cir. 2007) 24, 25

U.S. v. Labonte, 520 U.S. 751 (1997)13

U.S. v. Villagrana-Flores, 467 F.3d 1269 (10th Cir. 2006)24

Statutes

28 U.S.C. § 12912
42 U.S.C. § 1973gg-33
42 U.S.C. § 1973gg-5 passim

Other Authorities

H.R. Rep. No. 103-66 15, 16, 17

Rules

Fed. R. Evid. 201(b)(2) 4, 21
Fed. R. Civ. P. Rule 23(e) 6, 7, 23
Fed. R. App. P. Rule 4(a)(1)(A).....2

STATEMENT OF RELATED CASES

Valdez, et al. v. Duran, Case No. 11-2084 is related to the instant case.

JURISDICTIONAL STATEMENT

Plaintiff/Appellee, Shawna Allers (hereafter “Appellee”) brought this action pursuant to Section 7 of the National Voter Registration Act, 42 U.S.C. § 1973gg-5. The district court therefore had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction). The district court entered its final judgment in the form of a consent order on February 24, 2011. *Aplt. App.* at 175. As part of the consent order Appellants/Defendants, Sidonie Squier, in her capacity as Secretary of the New Mexico Human Services Department (“HSD”), Ted Roth, in his capacity as Acting Director of the Income Support Division of HSD, and Julie Weinberg, in her capacity as Acting Director of the Medical Assistance Division of HSD (hereafter collectively referred to as “HSD”), reserved the right to appeal the portion of the district court’s December 21, 2010 Memorandum Opinion and Order, granting partial summary judgment in favor of Appellee. *Aplt. App.* at 176; *see Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 527 (10th Cir. 1992) (prior rulings merge into a consent judgment and cannot be appealed unless the right to appeal is explicitly reserved); *see also ACORN v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996) (“A party to a consent decree or other judgment entered by consent may not appeal unless it explicitly reserves the right to appeal.”).

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. HSD timely filed a notice of appeal on March 25, 2011, pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. Aplt. App. at 193.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in determining that HSD is required to provide a voter registration application to an individual who fails to indicate that they would like to register to vote when the NVRA mandates that HSD inform such individuals that failure to make such an indication means that the individual is “considered to have decided not to register to vote at this time”?
2. Whether Appellee’s counsel are judicially estopped from arguing that the NVRA requires HSD to provide a voter registration application to an individual who fails to indicate that they would like to register to vote when they have submitted for approval a proposed settlement agreement to another federal court in a parallel case that permits a public assistance agency in do just that?

STATEMENT OF THE CASE

This case arose out of alleged violations of Section 7 of the National Voter

Registration Act (“NVRA”), 42 U.S.C. § 1973gg-5.¹ Aplt. App. at 64. Section 7 of the NVRA generally requires public assistance agencies, such as HSD, to distribute voter registration applications, assist applicants in completing such applications, and accept completed applications and transmit them to the appropriate election official.

Appellee sought partial summary judgment on the narrow issue of whether HSD’s policy regarding the distribution of voter registration applications violated the applicable requirements of Section 7 of the NVRA. Aplt. App. at 33. The district court found in Appellee’s favor and thus granted her motion for partial summary judgment. Aplt. App. at 148-170.

After receiving the district court’s order and after considerable settlement negotiations, HSD and Appellee submitted a proposed consent order to the district court for approval. Aplt. App. at 171. The consent order provides specific procedures for distributing voter registration applications that are in line with the district court’s order. Aplt. App. at 175. HSD reserved the right to appeal the district court’s determination regarding the distribution of voter registration

¹ This case initially also concerned allegations under Section 5 of the NVRA, 42 U.S.C. § 1973gg-3. Aplt. App. at 64. Section 5 of the NVRA governs the requirement to provide voter registration services at state motor vehicle offices. This portion of the lawsuit was therefore brought against agency heads of the Motor Vehicle Division of the New Mexico Taxation and Revenue Department (“TRD”). The “TRD Plaintiffs” (Valdez, Grajeda, and Rodriguez) and Defendant TRD settled the Section 5 claim in full.

applications, and the consent order also provides for alternate procedures for the distribution of voter registration applications in the event that HSD is successful in this appeal. Aplt. App. at 176.

The district court approved and signed the consent order on February 17, 2011. Aplt. App. at 190. This appeal followed. Subsequent to the filing of this appeal, Appellee's counsel submitted a proposed settlement agreement for court approval in a parallel NVRA case filed in a federal district court in Indiana. *See* "Joint Motion for Class Notice of Proposed Class Action Settlement and Setting of A Fairness Hearing" attached hereto as Attachment B.² The proposed settlement agreement contains provisions that permit Indiana's public assistance agency to not provide a voter registration application to an individual who fails to indicate if they would like to register to vote, which is the very policy that is at issue in this case. *See* Indiana Settlement Agreement attached hereto as Attachment E at 6-7.

STATEMENT OF FACTS

HSD's policy regarding the distribution of voter registration applications is undisputed. Aplt. App. at 151 ("The parties do not dispute the material facts."). HSD provides every applicant for assistance, recertification, renewal, and clients

² HSD requests that this Court take judicial notice of documents filed in the NVRA case in Indiana pursuant to Rule 201(b)(2) of the Federal Rules of Evidence. *See Hansen v. Harper Excavating Inc.*, 641 F.3d 1216, 1220 n.2 (10th Cir. 2011) (taking judicial notice of documents from a case in the electronic database of a U.S. District Court).

who wish to change their address with the NVRA mandated voter “declination” provision. Aplt. App. at 5. The declination provision is incorporated as part of HSD’s benefit applications and change of address form. *Id.*; see 42 U.S.C. § 1973gg-5(a)(6)(B) (detailing the precise language and formatting requirements of the declination provision). The provision contains the following language and appears in substantially the same format in HSD’s forms:

Register to Vote

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

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

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

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

Signature	Date
-----------	------

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

Aplt. App. at 109 and 153.

HSD’s policy is that a voter registration application is provided to applicants who check “yes” or who verbally indicate that he or she would like to register to

vote. Aplt. App. at 154. Conversely, HSD does not provide a voter registration application to applicants who check “no” or who leave the form blank. *Id.*

Despite the fundamental dispute in this case over the above policy, the NVRA settlement agreement submitted to United States District Court for the Southern District of Indiana, Indianapolis Division (the “Indiana Federal Court”) for approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure sanctions the very same policy.³ *See* Attachment E at 6-7. That case, entitled *Indiana State Conference of the NAACP v. Michael A. Gargano et al.*, Case No. 1:09-cv-0849-TWP/DML, was brought against the State of Indiana the same day the case at hand was brought against the State of New Mexico and includes similar allegations under the Section 7 of the NVRA. *See* Aplt. App. at 1 (showing instant case filed on July 9, 2009); Docket Sheet from Indiana case attached hereto as Attachment F (showing Indiana case filed on July 9, 2009); *compare* Indiana Amended Complaint attached hereto as Attachment B, *with* New Mexico Amended Complaint, Aplt. App. at 63-103.

The settlement agreement was filed with the Indiana Federal Court on May 12, 2011, two months after this appeal was initiated. Attachment E. A fairness

³ Both the Indiana case and the case at hand did not originally include class action allegations. While Appellee’s counsel were able to amend their Indiana complaint to include class action allegations, their request in this case to do the same was denied. *See* Aplt. App. at 57-62; Attachment B (Indiana Amended Complaint including class allegations).

hearing on the proposed settlement agreement, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, is scheduled for August 25, 2011. Order Setting Fairness Hearing attached hereto as Attachment G. The proposed agreement “fully resolve[s] Plaintiff’s claim under Section 7 of the NVRA.” Attachment D at 1. The agreement contains provisions relevant to the instant case, namely it sets forth a policy that requires the public assistance agency in Indiana to provide a voter registration application only when an applicant affirmatively requests one, which is the very same policy at issue in this case. *See* Attachment E at 6-7.

SUMMARY OF THE ARGUMENT

The district court’s memorandum opinion and order granting partial summary judgment in favor of Appellee should be reversed. The district court’s conclusion that HSD’s policy that voter registration forms are not provided to individuals who fail to respond to a question asking if they would like to register, is contrary to the plain meaning of Section 7 of the NVRA and its legislative history. The plain language of Section 7 requires public assistance agencies, such as HSD, to inform applicants that if they do not respond to the voter registration question they are “considered to have decided to not register to vote at this time.”

The legislative history of Section 7 confirms that Congress meant what it said – an applicant can decline to register to vote for purposes of Section 7 of the NVRA by not responding to the voter registration question. According to

Congress, permitting applicants to decline to register by not responding to the voter registration question helps ensure that applicants do not feel coerced or intimidated in registering to vote.

Instead of giving effect to the plain language of Section 7, the district court interpreted the statute in such a way that entirely reads out the provision that informs applicants that failure to respond to the voter registration questions means they are declining to register. The district court instead interpreted Section 7 to mean that failure to respond to the voter registration questions means that a public assistance agency does not have to provide assistance to the applicant in filling out a voter registration application. This interpretation leads to an absurd result because applicants would be informed that failure to respond to the voter registration question means they are declining to register to vote and at the same would be presented with a voter registration application.

While the district court's order in this area should be reversed for the forgoing reasons, it should also be reversed on the grounds that Appellee's counsel can no longer maintain the position that HSD's policy is outside the bounds of the NVRA. In order to protect judicial integrity, Appellee's counsel should be estopped from continuing to argue before this Court that the policy at issue is illegal, when they have submitted the same policy to another federal court for approval on the grounds that the policy is fair, reasonable, and adequate.

ARGUMENT

A. The district court's order should be reversed because its interpretation of Section 7 renders certain provisions of the statute superfluous, leads to an absurd result, and is inconsistent with legislative history.

HSD's fundamental obligations under Section 7 the NVRA are clear. HSD is generally required to: (1) distribute voter registration applications; (2) assist applicants in filling out voter registration applications; and (3) accept completed voter registration applications and transmit them to the appropriate state election official. 42 U.S.C. § 1973gg-5(a)(4). While these comprehensive obligations are clear and undisputed, the execution of these obligations and particularly HSD's policy regarding the distribution of voter registration applications is the core of this dispute.

The district court granted partial summary judgment favoring Appellee's interpretation of the application of the NVRA to HSD's policy in this area. The Court reviews the district court's grant of summary judgment de novo, applying the same summary judgment standard used by the district court. *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1252 (10th Cir. 1998) . Where the facts are largely undisputed, the Court's duty is simply to discern whether the moving party is entitled to judgment as a matter of law. *Id.*

The requirement to distribute voter registration applications provides that public assistance agencies “shall distribute with each application for . . . service or

assistance, and with each recertification, renewal, or change of address form . . . the mail voter registration application form . . . unless the applicant, in writing, declines to register to vote.” 42 U.S.C. § 1973gg-5(a)(6)(A) (hereafter referred to as subparagraph A). In conjunction with this requirement, Section 7 requires public assistance agencies 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?”; . . . [T]he statement, “Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.”; boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), “IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED TO NOT REGISTER TO VOTE AT THIS TIME.”; the statement, “If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private.” . . .

42 U.S.C. § 1973gg-5(a)(6)(B) (hereafter referred to as subparagraph B).

In interpreting legislation, the analysis starts with the plain language of the statute. *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1161 (10th Cir. 2011). If the plain language is clear, the general rule is that the Court is bound by it, unless the application would lead to an absurd result. *Robbins v. Chronister*, 402 F.3d

1047, 1050 (10th Cir. 2005). In addition, “one of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant. *Corley v. United States*, 556 U.S. 303, 454 (2009) (second alteration in original).

1. The district court’s interpretation of subparagraph B renders superfluous the provision of the statute that inform applicants that failure to respond to the voter registration question means that they have decided to not register to vote.

HSD’s policy is to utilize the above referenced “declination” form for its intended purpose – to ask each applicant if they would like to register to vote and to provide a method by which applicants can decline, in writing, to register to vote. By its very terms, the form provides that an applicant can decline to register to vote by checking “no” in response to the voter registration question or by leaving the form blank, which means that the applicant “is considered to have decided to not register to vote at this time.” Subparagraph B therefore essentially defines “in writing” for purposes of declining to register to vote. *See Biodiversity Legal Found*, 146 F.3d at 1254 (In interpreting a statute words are given their ordinary meaning unless Congress defines or otherwise explains the meaning of a phrase).

Despite Congress’ express and unequivocal instruction to public assistance agencies to inform applicants that failure to check a box means that they have decided not to register to vote, the district court read this provision out of Section 7

and instead focused too narrowly on a separate provision in subparagraph B. The district court focused its attention to the provision that provides “failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C).” Subparagraph (C), in turn, requires public assistance agencies to provide assistance to applicants in completing voter registration applications.

This provision requires agencies to “provide to each applicant who does not decline in writing to register to vote the same degree of assistance with regard to completion of the registration application form as is provided by the office with regard to completion of its own forms, unless the applicant refuses such assistance.” 42 U.S.C. § 1973gg-5(a)(6)(C). According to the district court, the language specifically referencing Subparagraph (C) “is properly understood as addressing the effect of a blank declination form on agencies’ responsibilities to provide voter registration assistance.” Aplt. App. at 158. Therefore, under the district court’s interpretation, a blank response to the voter registration question means that the agency does not have to provide assistance to the applicant in filling out a voter registration form, despite the fact that an applicant is informed that a blank response means they are considered to have declined to register.

While the district court’s interpretation renders a provision of subparagraph B superfluous, a straightforward reading of the provisions at issue gives effect to all provisions of the statute. Instead of reading out the provision that informs

applicants that if they “do not check either box,” they are “considered to have decided to not to register to vote,” it can be given effect and can also be assumed that this provision means what it says. *See U.S. v. Labonte*, 520 U.S. 751, 757 (1997) (“[W]e assume that in drafting . . . legislation, Congress said what it meant.”). Thus, when Congress says that failure to check a box means that an applicant is considered to have decided not to register to vote, it means just that. An applicant who fails to respond to the question has decided not to register to vote.

Accordingly, a public assistance agency is not required to provide such individual a voter registration application. If a voter registration application is not being provided to an applicant it follows that the requirement to provide assistance in completing such applications is inapplicable. This is the meaning of the provision that informs agencies that failure to check either box constitutes a declination to register for purposes of Subparagraph (C). As a whole then the statute says that if an applicant does respond to the voter question, they have decided not to register to vote, and therefore assistance in filling out a voter registration application is not required. Not only is this the proper application of the plain meaning rule, it is the only construction of the statute that gives effect to all provision so that no part is inoperative, superfluous, void, or insignificant.

2. The district court's interpretation of the subparagraph B leads to an absurd result.

As explained above, the district court's construction of subparagraph B conflicts with the plain meaning of the statute. However, even if the district court's interpretation could be construed as consistent with the plain meaning of the statute, the application of it would lead to an absurd result.

The resulting absurdity may be best illustrated with a likely scenario: An applicant for public assistance receives the voter "declination" form from a public assistance agency. The applicant reads the provision informing her that if she does not respond to the question asking her if she would like to register to vote, she is considered to have decided not to register to vote. In light of this provision and in light of the fact that the applicant does not wish to register to vote, she chooses to not respond to the voter registration question. The public assistance agency caseworker then reviews her "declination" form and after seeing that she has not responded, is now required to provide her with a voter registration application, despite the fact that the applicant does not want to register to vote and believes that she has effectively indicated that by not responding to the voter registration question.

This sort of dysfunctional process and ensuing confusion surely was not what Congress intended in creating and mandating the use of a "declination" form.

It would be absurd for public assistance agencies to force voter registration applications upon applicants who simply do not want to register to vote and who have effectively communicated that by following the explicit instruction that failing to check a box means they are considered to have decided not to register to vote at this time.

3. The district court's interpretation of Section 7 is inconsistent with its legislative history.

Not only does the district court's interpretation lead to an absurd result, it is also at odds with the legislative history of Section 7. The legislative history of Section 7 supports the position that the declination form was created by Congress to, among other things, allow an applicant to decline to register to vote. And that by Congress' own terms, an individual can decline to register to vote by not responding to the voter registration question.

The original version of the NVRA bill did not include the requirement that public assistance agencies utilize the "declination" provision. *See* H.R. Rep. No. 103-66, at 17. The provision was later added by a conference substitute. *See id. at* 16-17. The House-Senate Conference Report explains various changes in the conference substitute and the reasoning behind them. Part of the changes were

intended to deal with concerns raised about the inclusion of certain agencies in an agency-based registration program and the possibility of intimidation or coercion. Concern was expressed that in agencies that provide

benefits, staff might suggest that registering to vote could have some bearing on the availability of services or benefits provided by that agency.

Id. at 17. To address such concerns, the conference substitute added a provision that “would prohibit a person providing services at an agency from making any statement to an applicant or taking any action that could lead the applicant to believe his or her decisions regarding registering to vote had any bearing on the availability of services or benefits.” *Id.*; see 42 U.S.C. §1973gg-5(a)(5)(D).

The declination provision was also added. See H.R. Rep. No. 103-66, at 17. This makes sense because if Congress was concerned about coercion and wanted to ensure that applicants did not believe that their decision concerning voter registration could affect the availability of public assistance, then allowing them to decline to register by simply not responding to the question meets this goal. An applicant would not feel coerced or intimidated to register if they knew that they could decline to register by simply not responding to the question; it’s the least invasive way an applicant can effectuate declining to register. In addition to the voter registration question, the declination provision also includes statements that explicitly inform applicants that the amount of assistance they receive will not be affected by their decision to register or not. *Id.*; see 42 U.S.C. § 1973gg-5(a)(6)(B)(ii). The Conference Report recognized that the inclusion of the [voter

registration] questions [sic] and statements . . . would serve to deter coercion and intimidation”

Furthermore, in explaining the declination provision the Conference Report provides that the provision:

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 to 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. *Failure to check either would be deemed a declination for purposes of this provision.*

H.R. Rep. No. 103-66, at 17. (emphasis added). Tellingly, the Conference Report does not indicate that the failure to check a box is deemed a declination for purposes of what is now subparagraph (C) – the provision requiring public agencies to provide assistance in filling out voter registration applications. In fact, the Conference Report does not anywhere specifically address subparagraph (C). This portion of the Conference Report discusses changes to Section 7 generally. Therefore in referring to “this provision,” the Report is likely referring to Section 7 generally.

Overall, the declination provision means what it says – an applicant’s failure to respond to the voter registration question means that they do not want to register to vote and correspondingly they will not be provided with a voter registration application. *See* 42 U.S.C. § 1973gg-5(a)(6)(B)(ii) (“If you do not check either

box, you will be considered to have decided not to register to vote at this time.”) If an applicant does not receive a voter registration application, then they also no longer need assistance in completing it, which is also what the declination provision points out to public assistance agencies. *See id.* (“failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)”). This is the plain meaning of the provisions at issue and is consistent with legislative history. It is also the only reading of the statute that does not render a provision superfluous and does not lead to an absurd result.

B. Appellee’s counsel should be estopped from taking a position before the court below and this Court that is unequivocally inconsistent with the position it has taken before the Indiana Federal Court.

Appellee’s counsel have consistently and forcefully argued and continue to argue that the NVRA prohibits public assistance agencies from treating blank responses on the declination form as a declination to register to vote, but at the same time, the settlement agreement that they have submitted to the Indiana Federal Court for approval permits the public assistance agency in Indiana to do just that. Thus, the settlement agreement that Appellee’s counsel have presented to the Indiana Federal Court for approval is outside the bounds of the law according to the position they have taken and continue to take in this case and according to the district court’s memorandum opinion and order.

The doctrine of judicial estoppel prohibits a party from taking such inconsistent positions. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). According to the Supreme Court, “[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *Id.* at 749 (internal quotation marks and citation omitted). The purpose of the doctrine is “to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Id.* “Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion.” *Id.* at 750 (internal quotation marks and citation omitted).

The Supreme Court has made clear that judicial estoppel is “probably not reducible to any general formulation or principle.” *Id.* (internal quotation marks and citation omitted). Though there is no precise formula, three non-exclusive factors “typically inform the decision whether to apply the doctrine in a particular case.” *Id.*

First, a party’s subsequent position must be “clearly inconsistent” with its former position. Next, a court should inquire whether the suspect party succeeded in persuading a court to accept that party’s former position,

“so that judicial acceptance of an inconsistent position in a later proceeding would create the *perception* that either the first or second court was misled[.]” Finally, the court should inquire whether the party seeking to assert an inconsistent position would gain an unfair advantage in the litigation if not estopped.

Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1156 (10th Cir. 2007) (alteration in original) (quoting *New Hampshire*, 532 U.S. at 750-51).

As a preliminary matter HSD recognizes that the actual named plaintiff in this case and in the Indiana case are technically not the same. However, both cases originally shared a plaintiff, the Association of Community Organizations for Reform Now (ACORN). *See* Aplt. App. at 28-32; Order from Indiana case dismissing ACORN attached hereto as Attachment C. In both cases, ACORN was dismissed as a plaintiff because ACORN closed its offices in both Indiana and New Mexico. *Id.*

In addition, the same core group of attorneys from Demos: A Network of Action and Ideas, Project Vote, and Lawyers Committee for Civil Rights Under Law, represent the plaintiffs in both cases. *Compare* Aplt. App. at 190-190 (signatures of Plaintiff’s attorneys in NM Consent Decree), *with* Attachment E at 11 (signatures of Plaintiff’s attorneys in Indiana settlement). In fact, these public interest lawyers and their organizations “have worked for the past several years to improve states’ compliance with the public assistance provisions of the NVRA through negotiation, technical assistance, and litigation.” Demos National Voter

Registration Act Implementation Project attached hereto as Attachment H.⁴ Thus, this case and the other related NVRA cases are as much, if not more, the attorneys' cases than the actual named plaintiffs.

While judicial estoppel is usually applied to prevent a "party" from asserting an inconsistent position, in light of the above facts and in light of the following analysis illustrating the necessity of the application of the doctrine in this instance, it matters little that the actual named plaintiffs are not the same in this case. The Supreme Court has made clear that beyond the normal considerations "[a]dditional considerations may inform the doctrine's application in specific factual cases." *New Hampshire*, 532 U.S. at 751. This is one of those cases.

1. The positions taken before the court below and before this Court, and before the Indiana Federal Court are clearly inconsistent.

In this case Appellee's counsel argue that HSD's "policy regarding the distribution of voter registration applications at New Mexico public assistance offices violates Section 7 because Defendants fail to distribute a voter registration application to all public assistance clients who do not decline in writing to register to vote." *Aplt. App.* at 33. Specifically, Appellee's counsel contend that HSD's policy of "provid[ing] a voter registration application only to clients who check 'yes' on their voter information form or who verbally respond 'yes'," is "[i]n

⁴ HSD requests that this Court take judicial notice, pursuant to Rule 201(b)(2) of the Federal Rules of Evidence, of Attachment H which is a print out from Demos' website.

violation of Section 7.” Aplt. App. at 41. They argue that “HSD’s failure to provide a voter registration application to clients who have left the voter information blank is contrary to Section 7’s plain language, the canons of statutory construction, and Section 7’s legislative history.” Aplt. App. at 41-42.

In contrast, Appellee’s counsel have asked the Indiana Federal Court to approve their settlement agreement with the public assistance agency in Indiana, which provides for the implementation of an NVRA policy equivalent to the policy that they claim is illegal in New Mexico. The Indiana settlement agreement provides that if an applicant for assistance who applies on-line “checks ‘yes’ in response to the voter registration inquiry, a voter registration application will be mailed to him or her.” Attachment E at 6, Article III.D.1. Importantly, the Indiana settlement does not require a voter registration application to be mailed to an individual who is nonresponsive to the voter registration inquiry. *See id.* In addition, the agreement directs the Indiana public assistance agency to provide a voter registration application “[i]f the client answers [the question of whether the client wants to register to vote] in the *affirmative*.” Attachment E at 7, Article III.D.5.a. (emphasis added).

This is the precise policy that Appellee’s counsel argued and continue to argue is in violation of Section 7. *See* Aplt. App. at 41 (“In violation of Section 7, HSD – a New Mexico public assistance agency – provides voter registration

applications only to clients who check ‘yes’ on their voter information form or who verbally response ‘yes.’”). These positions are clearly inconsistent and are the precise type of contradictions that threaten the integrity of the courts. In one instance Appellee’s counsel persuaded the court below that a specific policy was outside the bounds of the NVRA and in another instance is asking a different federal court to approve such a policy as consistent with Indiana’s obligations under the NVRA.

In the Indiana case, Appellee’s counsel is asking for approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. Attachment D. Before the Indiana Federal Court can approve the proposed settlement agreement, Rule 23(e) requires it to find that the agreement is fair, reasonable, and adequate. Thus, Appellee’s counsel have represented to the Indiana Federal Court that the policy at issue is fair, reasonable, and adequate, despite their position before the lower court and this Court that it is outside the bounds of the law. At the very least, this creates the perception that either the lower court and this Court or the Indiana Federal Court is being misled. *See New Hampshire*, 532 U.S. at 750.

While the positions taken by Appellee’s counsel are undeniably inconsistent, the positions are not purely factual in nature, but rather contain mixed law and fact. *See Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir. 2002) (A position of mixed law and fact “is the application of a legal standard (such as

negligence) to the pure facts (what the defendant did) to yield a legal conclusion (the defendant was or was not negligent).” The circuits are divided as to whether judicial estoppel only applies to purely factual inconsistencies. *See e.g. Transclean Corp. v. Jiffy Lube Int’l Inc.*, 474 F.3d 1298, 1307 (Fed. Cir. 2007) (“While some circuits have limited application of judicial estoppel to inconsistent factual assertions, others have applied the doctrine to legal conclusions as well.”).

This Court has never squarely addressed this issue. It has often stated that “the position to be estopped must *generally* be one of fact rather than law or legal theory.” *E.g. Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005) (emphasis added). Despite this Court’s continued declaration that judicial estoppel will *generally* apply to factual inconsistent positions, in practice it has taken a more mechanical approach, indicating its disapproval of the application of the doctrine to any non-factual position. For example, in *U.S. v. Villagrana-Flores*, 467 F.3d 1269, 1279 (10th Cir. 2006), this Court declined to apply judicial estoppel to an argument regarding the existence of a Fourth Amendment violation because *none* of the three judicial estoppel factors were met. As this Court explained, the first factor was not met because “the existence of a *Fourth Amendment* violation it is a legal position, not a factual one.” *Id.* Similarly in *Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006), this Court declined to

apply judicial estoppel, in part, because the inconsistent position was not purely factual.

While the Court has been quick to point out when an inconsistent position is not one of fact, it has never explained or addressed this issue head on. However, in probably its most recent decision on the subject, this Court appears to have departed from such a mechanical approach to this issue. In *Hansen v. Harper Excavating*, 641 F.3d 1216, 1227-28 (10th Cir. 2011), the Court declined to extend judicial estoppel to a party's inconsistent position regarding Article III standing and subject matter jurisdiction. However, rather than quickly and automatically dismissing judicial estoppel simply because the inconsistent position was not purely factual, it explained why in instances concerning subject matter jurisdiction, the application of judicial estoppel is inappropriate. *Id.* Because a court must have subject-matter jurisdiction to entertain a claim, the Court was unwilling to allow a party to establish such jurisdiction via judicial estoppel and instead independently analyzed the underlying standing and jurisdiction issue. *Id.*

“[T]he majority of circuits that have spoken on the issue have either squarely held that the doctrine [of judicial estoppel] may be applied to inconsistent legal positions or indicated that the doctrine would apply to questions of law, or at least the application of law to fact.” *Transclean Corp.*, 474 F.3d at 1307, *see also Helfand v. Gerson*, 105 F.3d 550, 535 (9th Cir. 1997) (“The greater weight of

federal authority . . . supports the position that judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion.""). In deciding to apply judicial estoppel to legal positions, the Seventh Circuit explained:

It has been said that judicial estoppel applies only to positions on questions of fact. We disagree. We note first that it may be advisable not to prescribe too many rules for the application of a doctrine designed to protect the integrity of the courts We also observe a trend away from strict limitation of the doctrine to positions on matters of fact In this case, we think that the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact."

In re Cassidy, 892 F.2d 637, 641-42 (7th Cir. 1990) (citations omitted). Other circuits have applied the same analysis in applying judicial estoppel to non-factual positions. *See Helfand*, 105 F.3d at 535 (9th Cir. 1997) ("The integrity of the judicial process is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal.").

In light of this Court's divergence in *Hansen* from a hard and fast rule in this area, and because the tactics in this case, if left unfettered, likely will result in one court being persuaded that a certain policy is outside the bounds of the NVRA and another court sanctioning that very same policy, this Court should apply the doctrine of judicial estoppel. As other circuits have emphasized, the principle concern in applying judicial estoppel is about protecting the integrity of the judicial

process and not about whether a certain position is purely factual or a mixed question of law and fact.

2. The district court accepted the position that the policy at issue was outside the bounds of the NVRA and although the Indiana Federal Court has not approved the policy at issue yet, it likely will before the briefing on this case has concluded.

This case presents a bit of a departure from the typical sequence of events in judicial estoppel cases. In this instance, Appellee's counsel asserted inconsistent positions almost simultaneously. There is no doubt that they argued successfully below that the policy at issue is outside the bounds of the NVRA. There is also no doubt that they will continue to make the same argument before this Court. The Indiana Federal Court, however, has not technically approved the proposed settlement agreement yet. This sort of timing issue seems inevitable given that this case and the Indiana case were filed simultaneously, on the exact same day.

While the Indiana Federal Court has not technically approved the proposed settlement agreement, it will likely approve the agreement before briefing on this case has concluded. It will formally consider the agreement at a fairness hearing on August 25, 2011. Further, there is no reason to believe that the Indiana Federal Court will not approve the proposed settlement. Appellee's counsel have represented to the Indiana Federal Court that the policy at issue, contained in the proposed settlement, is fair, reasonable, and adequate and that the proposed

agreement “fully resolves[s] Plaintiff’s claim under Section 7 of the [NVRA].”

Attachment D. The Indiana public assistance agency will obviously not challenge the legality of the policy because the policy is favorable to it (and because it, like HSD, likely believes that the policy is within the bounds of the NVRA). With the parties in agreement and with their representation that the policy at issue fully resolves the Section 7 claim and is fair, reasonable, and adequate, it is reasonable to believe that the Indiana Federal Court will approve the proposed settlement on or around August 25, 2011.

Despite the procedural disorder, the threat to judicial integrity in this instance is inevitable. This Court can still apply judicial estoppel to prevent the imminent perversion of the judicial process and to prevent Appellee’s counsel from “playing fast and loose with the courts.” *See New Hampshire*, 532 U.S. at 750 (internal quotation marks and citation omitted). For one it will know the outcome in the Indiana case before briefing here has been completed. In addition, there is an inherent flexibility in the application of judicial estoppel. *See id.* (“Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by the court at its discretion”) (internal quotation marks and citation omitted). “There is no mechanical test . . . and ultimately . . . the discretionary determination to apply the doctrine of judicial estoppel is made

on a case-by-case basis.” *Gray v. Vity of Valley Park, Missouri*, 567 F.2d 976, 981-82 (8th Cir. 2009) (citing *New Hampshire*, 532 U.S. at 750).

3. If Appellee’s counsel are successful in maintaining their inconsistent position in this case, they will derive an unfair advantage and impose an unfair detriment on HSD.

By incorporating the policy at issue into the proposed agreement with the Indiana public assistance agency, Appellee’s counsel have received a substantial benefit, the ability to settle the case. By taking the adverse position in this case, they have imposed an unfair advantage on HSD, the inability to settle on this issue and an adverse judgment. The benefit to Appellee’s counsel is similar to that of the state of New Hampshire in the *New Hampshire* case.

In that case, New Hampshire and Maine had previously entered into a consent decree setting the boundary of a river that flows between the two states. *New Hampshire*, 532 U.S. at 745. Over twenty years later, New Hampshire brought suit against Maine claiming a different river boundary than what was agreed upon in the original consent decree twenty years earlier. *Id.* at 745-46. New Hampshire argued that it “had compromised in Maine’s favor” when negotiating the consent order. *Id.* at 752. The Supreme Court, however, held that the “compromise enabled New Hampshire to settle the case” *Id.* Likewise, Appellee’s counsel have benefited by being able to settle with the state of Indiana. Having benefited from its acceptance of the NVRA policy at issue in Indiana,

Appellee's counsel now urges an inconsistent interpretation of the NVRA to the same policy to gain an additional advantage at HSD's expense.

Overall, this Court should exercise its discretion and apply judicial estoppel to prevent Appellee's counsel from taking indisputably inconsistent positions regarding the application of the NVRA to a specific policy in parallel and almost identical cases. The first factor, requiring clear inconsistent positions, is met. While the inconsistent position is not purely factual, the position nonetheless threatens the integrity of the federal judiciary justifying application of judicial estoppel in this instance. The second factor, requiring judicial acceptance of an inconsistent position can be expected to be met soon. Lastly, the third factor is met as Appellee's counsel has already realized an unfair advantage by convincing the court below of its position and by settling their case in Indiana pursuant to a different position. While these factors are persuasive, they are non-exclusive, and the Court should therefore consider the overall perversion of the judicial process and gamesmanship at play before this Court and before the Indiana Federal Court.

CONCLUSION

For the foregoing reasons HSD asks this Court to reverse the district court's memorandum opinion and order granting partial summary judgment in favor of Appellee.

STATEMENT CONCERNING ORAL ARGUMENT

Oral Argument is requested in order to provide the Court with a thorough understanding of the issues relevant to this matter. The case presents issues of first impression and the outcome will affect public assistance agencies throughout the United States.

Respectfully Submitted,

GARY K. KING
New Mexico Attorney General

/s/ Elaine P. Lujan
Elaine P. Lujan
Assistant Attorney General
New Mexico Attorney General's Office
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6990 (ph)
(505) 827-6478 (fax)

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitations set forth in Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. The brief contains 7,478 words, excluding those portions exempted by Rule 32(a)(7)(B)(iii). The brief was created using Microsoft Word 2010 and is written in Times New Roman, 14 point font.

I further certify that this brief complies with the requirements set forth in the Court's March 18, 2009 General Order regarding electronic filing: any necessary

redactions have been made; the hard copies of this brief mailed to the Clerk are identical to the ECF submission; and I scanned the ECF submission for viruses using ClamXav, Version 2.2 (245), last updated July 12, 2011, and, according to that program, the file is free of viruses.

/s/ Elaine P. Lujan

CERTIFICATE OF SERVICE

I, Elaine P. Lujan hereby certify that on July 13, 2011 I served a copy of the foregoing Brief in Chief, to all counsel of record via email by filing with the 10th Circuit ECF system on July 13, 2011.

/s/ Elaine P. Lujan

ATTACHMENT H



Home | About | Press | Publications | Contact Us | Events | Get Updates | Support Demos

Email this page | Search

Programs

Democracy Program

Issue: Election Day Registration

Issue: National Voter Registration Act

About NVRA

The Statute

Provisions of NVRA

News Archives

FAQ

Issue: Campaign Finance

Issue: Election Administration

Issue: Felon Disfranchisement

Issue: Voter Fraud and Election Integrity

Issue: Provisional Balloting

Other Election and Democracy Issues

Briefs: "Challenges to Fair Elections"

Publications: Reports, Briefing Papers and Toolkits

Economic Opportunity

Public Works: The Demos Center for the Public Sector

Fellows Program

eJournals

Around the Kitchen Table

Democracy Dispatches

Public Purpose

SIGN UP

Demos Events

VIEW ALL EVENTS

EVENTS CALENDAR

Partners

Building Movement

Business for Shared Prosperity

CivWorld

Inequality.org

National Voting Rights Institute

World Policy Institute

Democracy Program

National Voter Registration Act Implementation Project

Congress enacted the National Voter Registration Act in 1993 to increase the number of citizens who register to vote and therefore cast ballots in U.S. elections. Recognizing that the law's "motor voter" provision was unlikely to reach low-income citizens who are less likely to own automobiles, Congress also mandated in Section 7 of the NVRA that voter registration be offered at public assistance agencies. While most states have adopted programs for driver's license-based registration, an increasing body of evidence suggests many states have roundly ignored the public assistance provisions of the law.

Demos and our partners at *Project Vote*, *ACORN*, and the *Lawyers' Committee for Civil Rights Under Law* have worked for the past several years to improve states' compliance with the public assistance provisions of the NVRA through negotiation, technical assistance, and litigation. Our work indicates that full implementation of the NVRA can significantly increase the opportunities for low-income citizens to register to vote and participate in the democratic process.

Latest Developments

- Federal Court Orders Missouri Department of Social Services to Comply with the NVRA.
- Arizona's Settlement with the Department of Justice
 - May 21, 2008 (pdf)
- Complaint Filed Against Missouri Department of Social Services
 - April 23, 2008 (pdf)
- Testimony of Lisa J. Danetz before the House Subcommittee on Elections
 - April 1, 2008 (pdf)
- NVRA Intent to File Letter: Arizona and Florida
 - February 11, 2008 (pdf)
- Demos and Project Vote Inform New Mexico of Voting Rights Law Violations
 - July 16, 2007 (pdf)
- Statement on WA Gov Gregoire's July 4 Executive Order Regarding NVRA Section 7 Compliance
 - July 5, 2007
- Demos Statement on a New Election Assistance Commission Report Revealing a Dramatic Decline in Registrations Among Low-Income Voters
 - July 2, 2007
- Valuing the Votes of the Poor - Demos's Scott Novakowski's article on *tompaine.com* on NVRA in North Carolina
 - May 24, 2007
- Letter to Chairman of the House Judiciary Committee and Ranking Member urging Investigation of DoJ NVRA Enforcement.
 - May 7, 2007 (pdf)
- Registering Indifference - A *tompaine.com* article by Demos/NVRI attorney Lisa Danetz comparing NVRA progress in Ohio and North Carolina
 - October 30, 2006

Latest Reports

- Expanding Voter Registration for Low-Income Citizens: How North Carolina is Realizing the Promise of the National Voter Registration Act
 - April 2008 (pdf)
- Unequal Access: Neglecting the National Voter Registration Act, 1995-2007
 - February 11, 2008 (pdf)
- Maximizing Voter Registration Opportunities in Human Services Agencies - A step-by-step overview of how to improve compliance with the NVRA
 - November 30, 2005
- Ten Years Later, A Promise Unfulfilled - A report on state compliance with the NVRA ten years after it was implemented
 - September 14, 2005

[Privacy Policy](#) • [Reprint Permission](#)

Demos: 220 Fifth Ave, 5th Floor (between 26th and 27th St.), New York, NY, 10001
phone: 212.633.1405 fax: 212.633.2015

ATTACHMENT A

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

**CELIA VLADEZ, GRACIELA
GRAJEDA, SHAWNA ALLERS, and
JESSE RODRIGUEZ,**

Plaintiffs,

v.

Civ. No. 09-668 JCH/DJS

**MARY HERRERA, in her official capacity
as New Mexico Secretary of State;
KATHRYN FALLS, in her official capacity
as Secretary of New Mexico Human
Services Department; FRED SANDOVAL,
in his official capacity as the Director of the
Income Support Division of the New
Mexico Human Services Department;
CAROLYN INGRAM, in her capacity as
the Director of the Medical Assistance
Division of the New Mexico Human
Services Department; DOROTHY
RODRIGUEZ, in her capacity as the
Secretary of the New Mexico Taxation and
Revenue Department; and MICHAEL
SANDOVAL, in his capacity as the
Director of the Motor Vehicle Division of
the New Mexico Taxation and Revenue
Department,**

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants Kathryn Falls, Fred Sandoval, and Carolyn Ingram of the New Mexico Human Services Department's (hereinafter "HSD") *Motion for Summary Judgment*, filed May 13, 2010 [Doc. 57],¹ HSD's *Motion to Strike Plaintiff's*

¹ At the time the HSD Defendants filed their *Motion for Summary Judgment*, the caption and memorandum referred to Pamela S. Hyde as Secretary of HSD. That position is now held by Kathryn Falls, and the caption has been updated to reflect that change.

Response in Opposition to HSD's Motion for Summary Judgment, filed July 26, 2010 [Doc. 91], Defendant Mary Herrera's *Motion for Summary Judgment*, filed September 7, 2010 [Doc. 111], Plaintiff Shawna Allers' *Motion for Partial Summary Judgment*, filed September 2, 2010 [Doc. 109], and HSD's *Motion to Extend Time to Respond to Plaintiff's Motion for Partial Summary Judgment*, filed September 27, 2010 [Doc. 119].

The Court having considered the motions, briefs,² exhibits, and relevant law, and being otherwise fully informed, finds that HSD's *Motion for Summary Judgment* [Doc. 57] should be DENIED, that Defendant Mary Herrera's *Motion for Summary Judgment* [Doc. 111] should be DENIED, and that Plaintiff's *Motion for Partial Summary Judgment* [Doc. 109] should be GRANTED. In addition, the Court finds that HSD's *Motion to Strike* [Doc. 91] should be DENIED and that its *Motion to Extend Time* [Doc. 119] should be GRANTED.

BACKGROUND

This litigation concerns alleged past and continuing violations of a portion of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-5 (commonly known as

² HSD filed a *Motion to Strike Plaintiff's Response in Opposition to HSD's Motion for Summary Judgment* [Doc. 91] on July 26, 2010. HSD's contention is that Plaintiff's entire response to its motion for summary judgment should be struck because Plaintiff filed, as an attachment to her response, a "Controverting and Separate Statement of Facts," rather than incorporating this into her memorandum, thus exceeding the page limitation. Plaintiff contends that it made its filing in this manner after reviewing the relevant local rules, consulting with local counsel, and consulting with the Court Clerk's Office. HSD also filed a *Motion to Extend Time to Respond to Plaintiff's Motion for Partial Summary Judgment* [Doc. 119] on September 27, 2010. HSD filed this motion because it had been operating under the mistaken belief that it had twenty-one days to respond to Plaintiff's motion, when Local Rule 7.4 only provides fourteen days. Because both Plaintiff's filing and HSD's filing appear to have been based on good-faith interpretations of the rules, and because neither party nor the Court appears to have been greatly inconvenienced, the Court will accept and consider both filings. Thus, HSD's *Motion to Strike* [Doc. 91] is denied, and its *Motion to Extend Time* [Doc. 119] is granted.

“Section 7”). Section 7 mandates that all state offices which provide public assistance must distribute mail voter registration application forms, assist applicants in completing those forms if requested, accept completed voter registration forms, and transmit those forms to the appropriate state election official.³ Plaintiff alleges that, for years, New Mexico has failed to provide voter registration services at public assistance offices as required by the NVRA. She contends that, despite recent changes by HSD, HSD remains out of compliance with the NVRA and that its history of non-compliance requires injunctive relief and Court supervision to ensure meaningful relief in the future. HSD contends that it is currently in compliance with its obligations under the NVRA, and that summary judgment in its favor is therefore appropriate. Secretary Herrera contends that her office has different obligations under the NVRA than HSD has, that her office has met those obligations, and that her office cannot be held responsible for any noncompliance by HSD.

LEGAL STANDARD

Summary judgment is appropriate “[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). “[S]ummary judgment will not lie if the dispute is about a material fact that is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict

³ This litigation initially concerned allegations that the state had violated the requirements of Section 5 of the NVRA as well. Section 5 governs the obligation to offer voter registration services when a person applies for or renews a driver’s license or identification card, as overseen by New Mexico’s Taxation and Revenue Department (“TRD”). This portion of the litigation has been settled pursuant to a July 1, 2010 settlement agreement. *See* Doc. 84. Thus, the only Plaintiff remaining in the current portion of the litigation is Shawna Allers, and the only remaining Defendants are the HSD Defendants and Secretary Herrera.

for the non-moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (concluding that summary judgment is appropriate when the evidence could not lead the trier of fact to find for the nonmoving party).

In evaluating a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 1572 (1970). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In responding to a motion for summary judgment, the nonmoving party “may not rest upon its mere allegations ... but ... must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *see Celotex*, 477 U.S. at 324.

ANALYSIS

A. Plaintiff’s Motion for Partial Summary Judgment

Although Plaintiff’s Amended Complaint [Doc. 106] raises issues related to alleged past noncompliance with the NVRA, her motion for partial summary judgment concerns only the issue of an alleged instance of current noncompliance. This issue is well suited for summary judgment, because it concerns solely a question of law, and the parties do not dispute the material facts. *See* HSD’s Response in Opposition to Plaintiff’s Motion for Partial Summary Judgment (hereinafter “HSD Resp.”) [Doc. 120] at 3.

1. The Parties’ Positions

Section 7 of the NVRA requires public assistance offices in New Mexico to “distribute [a mail voter registration application] with each application for ... service or assistance, and with each recertification, renewal, or change of address ... unless the applicant, *in writing*, declines to register to vote.” 42 U.S.C. § 1973gg-5(a)(6) (emphasis added). HSD does not dispute that New Mexico is subject to the requirements of the NVRA, that HSD is a New Mexico state government agency responsible for providing assistance to qualifying residents of New Mexico,⁴ or that New Mexico has designated HSD as a voter registration agency pursuant to the NVRA. *See* Statement of Undisputed Material Facts 1-3, contained in Plaintiff’s Motion for Partial Summary Judgment (hereinafter “Pl. Mot.”) [Doc. 109] at 4-5. Thus, it is uncontested that the NVRA’s Section 7 requirements apply to each transaction conducted in an office overseen by HSD.

HSD’s current policy is that voter registration applications are not attached to applications for public assistance, recertification or renewal applications, or change of address forms, and that voter registration applications are not otherwise automatically distributed to public assistance clients. *See id.* at 5, ¶ 5. Instead, HSD includes, as part of most of its benefit application forms, a section that it refers to as a “declination provision.” *See* Memorandum in Support of Defendant HSD’s Motion for Summary Judgment (hereinafter “HSD Memo.”) [Doc.

⁴ The Income Support Division (“ISD”) of HSD is the State agency that administers public assistance throughout the State of New Mexico. Such assistance includes the Supplemental Nutrition Assistance Program (“SNAP”) (commonly know as the “Food Stamp” program), Temporary Assistance to Needy Families (“TANF” or “cash assistance”), and medical assistance through numerous categories of Medicaid, among others. While SNAP, TANF, and Medicaid are the larger and main categories of assistance programs, HSD administers approximately 76 different public assistance programs. *See* HSD Resp. at 3-4.

58] at 4. This provision, which is included as one section in the middle of a multi-page benefits application asks, *inter alia*, whether a client wishes to “register to vote here today.”

The current language of the declination provision on HSD’s benefit application forms is as follows:

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

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

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

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

Signature

Date

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

HSD Memo. [Doc. 58] at 5 (emphasis in original). For an indication of what the declination provision looks like in the context of a standard benefits application form, see Exs. 1-G, 1-H, and 1-L, attached to HSD Memo.⁵

⁵ Plaintiff contends that, for many years prior to HSD’s finalizing of its current policy in January 2010, HSD did not provide either voter registration forms or forms containing a declination provision to all eligible benefits applicants and clients. *See* Pl. Mot. at 6 n.4. Defendant disputes this. *See* HSD Memo. at 3 n.2. While such a question of fact may be material to Plaintiff’s broader claim for injunctive relief, based on her assertion that HSD’s years of noncompliance create a reasonable expectation that its wrongs will be repeated, it is not relevant to Plaintiff’s motion for partial summary judgment, which concerns only current policy.

Under HSD's policy, a client is provided with a voter registration application only if the client checks "yes" on the declination provision or verbally indicates that he or she would like to register to vote. Thus, HSD interprets Section 7 of the NVRA as requiring that voter registration applications be distributed only to those clients who affirmatively state that they desire to register to vote at the same time that they are applying for other benefits. Consequently, HSD does not provide registration applications to clients who leave the declination provision blank and who do not otherwise respond "yes" if a verbal inquiry regarding registration is made by an HSD employee. The Court will refer to this interpretation as an "opt in" provision, meaning that voter registration applications should only be provided to those who affirmatively request them.

Plaintiff contends that HSD's interpretation that clients must "opt in" to receive distribution of voter registration forms violates the plain language of Section 7, which requires that all public assistance clients who engage in any of the specified transactions receive a voter registration application unless they decline, "in writing." Under Plaintiff's interpretation, Section 7 requires that HSD distribute voter registration applications to clients who leave the declination provision blank, in addition to those who check "yes" or give their verbal assent. This interpretation is more in the nature of an "opt out" provision, meaning that registration applications should be given to everyone except those who affirmatively refuse them.

Plaintiff contends that the issue raised by her motion is one of first impression, and the Court has been unable to locate any decision definitively addressing whether the requirement that agencies distribute voter registration applications should be viewed as "opt in" or "opt out." After careful consideration, the Court concludes that the plain language of Section 7, as well as the NVRA's remedial purpose and legislative history, requires that public assistance agencies

provide benefits applicants with a voter registration application unless they explicitly refuse, and Plaintiff should prevail on her motion for partial summary judgment.

2. The Statutory Language

Section 7 provides that:

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

- (i) Distribution of mail voter registration application forms in accordance with paragraph (6).
- (ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.
- (iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

42 U.S.C. § 1973gg-5(a)(4)(A).⁶

Paragraph (a)(6) of Section 7 sets forth the manner in which public assistance agencies must distribute voter registration applications, and it is the key provision at issue in Plaintiff's motion. Subparagraph (A) of paragraph (a)(6) lays out the NVRA's requirement for distribution of voter registration applications. It provides:

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

42 U.S.C. § 1973gg-5(a)(6)(A) (hereinafter "subparagraph (A)").⁷

Separate from subparagraph (A)'s requirement that public assistance agencies distribute mail voter registration applications, subparagraph (B) requires the agencies to provide all clients

⁶ Only the requirement in (i), concerning distribution of mail voter registration applications, is at issue in this case. Plaintiff has not alleged any specific facts relating to deficiencies in assistance in completing forms or in transmittal of forms, as referred to in (ii) and (iii).

⁷ Plaintiff does not challenge the contents of the mail voter registration application form provided by HSD offices pursuant to (ii).

with a form. The form must ask the question “[i]f you are not registered to vote where you live now, would you like to apply to register to vote here today?” 42 U.S.C. § 1973gg-5(a)(6)(B) (hereinafter “subparagraph (B)”). The form must also notify the client that the decision of whether or not to register to vote “will not affect the amount of assistance that you will be provided by this agency,” must include a statement offering assistance in filling out the registration application if the client so desires, and must also include a statement regarding the client’s ability to file a complaint if he or she believes that his or her right to register or to decline to register or to choose a political affiliation was interfered with. Subparagraph (B) at (ii), (iv), and (v).

In addition, the form must include checkboxes for the client to indicate whether he or she would like to register to vote at the public assistance agency. *Id.* at (iii). Subparagraph (B)(iii) further specifies that the form should include a statement, in close proximity to the checkboxes, that “IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.” *Id.* (emphasis in original). With regard to what public assistance agencies should do when a client leaves both checkboxes blank, subparagraph (B)(iii) instructs that “failure to check either box . . . constitute[s] a declination to register for purposes of subparagraph (C).” *Id.* (emphasis added).⁸

Subparagraph (C) specifies that public assistance agencies are to provide clients who do not decline to register to vote the same degree of assistance in completing a voter registration application as they provide with completing the agency’s own benefits forms, subject to clients

⁸ The “form” referred to in section (a)(6)(B) is not distributed by HSD as a stand-alone form, but rather is inserted as one section in the middle of HSD’s standard forms. *See, e.g.*, Ex. 1-G, attached to Pl. Memo, at p. 4 of 6; Ex. 1-H at sec. 13. Plaintiff does not contend that the form’s requirements are not met or that its placement as part of HSD’s standard forms is improper.

refusing such assistance. 42 U.S.C. § 1973gg-5(a)(6)(C) (hereinafter “subparagraph (C)”).

Thus, subparagraph (C) solely addresses the issue of how much assistance an agency must provide to a client who fills out a voter registration application at the agency office. It does not address the threshold question of whether a voter registration application must be distributed to the client in the first place, or what constitutes a declination to register to vote for purposes of subparagraph (A).

3. Analysis

Defendants’ interpretation of Section 7’s requirements is not supported by the statute’s plain language. Absent an indication that applying the plain language of a statute would “yield patent absurdity, [the Court’s] obligation is to apply the statute as Congress wrote it.” *Robbins v. Chronister*, 402 F.3d 1047, 1050 (10th Cir. 2005) (citation omitted). If Congress does not explain the specific meaning of a statutory term, the Court should assume that Congress intended the word to be given its ordinary meaning, “which we may discover through the use of dictionaries.” *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998).

Section 7 does not make the provision of a voter registration application contingent upon an affirmative request, either written or verbal, from a client. Instead, it directs agencies to distribute voter registration applications to their clients as a part of every qualifying interaction, unless those clients “in writing, decline[] to register to vote.” Subparagraph (A). While the NVRA does not define “in writing” for purposes of Section 7, the ordinary use of the term “writing” does not include a blank response. For instance, Black’s Law Dictionary defines “writing” as “any intentional recording of words that may be viewed or heard with or without mechanical aids.” *Black’s Law Dictionary* at 1748 (9th ed. 2009). A blank response on the

declination provision does not constitute an “intentional recording of words” and so cannot be a statement “in writing” for purposes of subparagraph (A). Defendants interpret the language in subparagraph (B)(iii), which instructs that the declination form should state “if you do not check either box, you will be considered to have decided not to register to vote at this time,” as applying to subparagraph (A), and as enabling them to treat a blank declination form as a statement, in writing, that the client does not wish to receive a voter registration form at all.

This interpretation is undermined both by subparagraph (B)’s plain language and by its relationship to subparagraphs (A) and (C). The language relied on by Defendants requires that HSD advise clients that, if they do not check either box on the declination form, HSD will assume that the client has decided not to register to vote “*at this time.*” The declination form does not provide a client with a provision for receiving a mail voter registration form that the client could take with them and use to register at a later time. At the same time that it authorizes HSD to treat a blank declination form as a decision by the client not to register to vote at the HSD office, subparagraph (B)(iii) provides context for that authorization by explaining that “failure to check either box [shall be] deemed to constitute a declination to register *for purposes of subparagraph (C).*” *Id.* (emphasis added).

As previously explained, subparagraph (C) solely addresses the circumstances in which public assistance agencies are required to provide assistance to clients in filling out voter registration forms. Thus, subparagraph (B)(iii) is properly understood as addressing the effect of a blank declination form on agencies’ responsibilities to provide voter registration assistance. It pertains only to the circumstances under which assistance must be offered to persons who choose to register at the agency office, not to whether registration applications must be

distributed in the first place. Subparagraph (B)(iii) simply relieves HSD offices from the burden of providing assistance with voter registration to clients who have not affirmatively indicated that they wish to register in an agency office “at this time,” and protects agencies against potential grievances from clients who claim they were not adequately assisted by the agency but who had not affirmatively indicated that they desired assistance.

Moreover, if Congress had intended for a blank declination form, as referred to in subparagraph (B), to serve as a declination for purposes of subparagraph A’s application distribution requirement, the language in subparagraph (B)(iii) expressly referring to subparagraph (C) would be superfluous. If agencies were not still required to provide voter registration applications to clients who leave the declination form blank, then the agencies would not need to consider whether to provide such individuals with assistance in completing a registration application, because, by definition, no application would be provided. Courts should avoid adopting a statutory construction that would render any statutory provision superfluous. *See 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”) (internal quotation marks omitted). Defendants’ interpretation renders part of subparagraph (B)(iii) superfluous, and the Court declines to adopt it.

Congress could easily have written that failure to check either box on the declination form would be deemed to constitute a declination to register for purposes of subparagraph (A), but it did not do so. It also could easily have avoided making declination for purposes of subparagraph (A) dependant upon a “writing,” but it did not do that either. The interrelation of

subparagraphs (A), (B), and (C) make clear that receipt of a voter registration form is subject to a written “opt out” provision, and only the receipt of assistance in filling out the registration form is subject to an “opt in” provision.

Plaintiff’s interpretation of Section 7’s requirements is also supported by the NVRA’s remedial purpose and its legislative history. One of the stated purposes of the NVRA is “to establish procedures that will increase the number of eligible citizens who register to vote” and to enable governments to implement the statute’s requirements “in a manner that enhances the participation of eligible citizens as voters.” 42 U.S.C. § 1973gg(b). In enacting the NVRA, Congress found that federal, state, and local governments have a duty to promote the exercise of the right to vote and it sought to mitigate “discriminatory and unfair registration laws and procedures [that] can have a direct and damaging effect on voter participation in elections ... and [that] disproportionately harm voter participation by various groups, including racial minorities.” 42 U.S.C. § 1973gg(a). Defendants’ interpretation that Section 7 requires agencies to distribute voter registration forms only to those clients who affirmatively indicate that they want to register to vote at the time of service goes against the NVRA’s stated remedial purpose. Low income citizens, some of the very people that Congress intended to reach with Section 7’s mandates, may have reasons to decline to register to vote at a public assistance agency while still desiring to receive an application form that they can fill out later. Section 7 provides for this option.

Additionally, Section 7’s legislative history supports Plaintiff’s interpretation. The Conference Report provides the background of the declination form requirement, and demonstrates that the declination form was not meant to supersede or modify subparagraph (A)’s mandate. The House-Senate Conference Report finalizing the NVRA added the requirement that

public assistance clients be provided with the declination form specified in subparagraph (B).

See H. R. Rep. No. 103-66, at 17 (1993). The Conference Report explains that the declination form was added to guard against the possibility of coercion of agency clients:

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

Id.

Thus, the declination form was not added to Section 7 to define or limit the responsibility of agencies to distribute voter registration applications to clients, but rather to ensure that agents do not improperly influence clients' decisions about whether or not to register at that time, and to ensure that agents do not improperly influence a client's choice of political party. By ensuring that all clients receive a voter registration form, but making it so that only clients who affirmatively request assistance in filling out the form receive such assistance, Congress provided for its dual goals of increased participation and freedom from coercion.

For the foregoing reasons, the Court finds that HSD's current policy of distributing voter registration applications only to clients who affirmatively request them violates Section 7 of the NVRA, and that Plaintiff's motion for partial summary judgment should be granted. Section 7 requires that clients be provided with a mail voter registration form unless they affirmatively decline, in writing. HSD's current declination form and policy do not meet this requirement.

B. Defendant HSD's Motion for Summary Judgment

Defendant HSD contends that it is in compliance with all of its responsibilities under the NVRA so that Plaintiff's case must fail as a matter of law. In light of the Court's ruling that HSD offices are misinterpreting Section 7's requirements regarding distribution of voter registration forms, HSD cannot prevail on its motion.

In addition, even if HSD were in compliance regarding distribution of voter registration forms and every other requirement under the NVRA, Plaintiff has raised sufficient questions of fact regarding allegations of past noncompliance that HSD could not receive summary judgment. Even though HSD has apparently taken some remedial steps in response to this lawsuit, given the allegations of widespread past noncompliance, the Court finds that sufficient questions remain regarding the need to monitor future compliance, precluding summary judgment.

Voluntary cessation of unlawful conduct will not moot a case unless "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000). A defendant contending that a plaintiff has no cause of action because of the defendant's new behavior "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 *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). 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." *United States v. Or. State Med. Soc.*, 343 U.S. 326, 333 (1952) (citation omitted). Given Plaintiff's allegations of years of widespread failure to implement Section 7's requirements,

particularly with respect to monitoring or addressing apparent deficiencies, the Court cannot say as a matter of law that HSD has demonstrated that it has the tools in place to be compliant in the future without an injunction and Court monitoring. For the foregoing reasons, HSD's motion for summary judgment is denied.

C. Defendant Herrera's Motion for Summary Judgment

The NVRA requires that each state "designate a State officer or employee as the chief State election official." 42 U.S.C. § 1973gg-8. This designated official is "responsible for coordination of State responsibilities" under the NVRA. *Id.* New Mexico has designated the Secretary of State as its "chief State election official" for NVRA purposes. *See* Defendant Herrera's Motion for Summary Judgment (hereinafter "Def't. SOS Mot.") [Doc. 111] at 2; NMAC 1.10.8.15. Very little case law in general, and none in the Tenth Circuit, exists that interprets what duties a chief State election official must perform in order to be compliant with the NVRA. However, Defendant Herrera contends that there is no material question of fact regarding her compliance with the NVRA, so that summary judgment should be entered in her favor.⁹

Defendant Herrera's primary argument is that the NVRA does not place responsibility on the "chief State election official" to enforce provisions of the NVRA in the state, and that her role is simply to "coordinate" state responsibilities by disseminating and collecting information,

⁹ As an initial matter, Defendant Herrera's motion failed to follow Local Rule 56.1(b), which requires a party moving for summary judgment to include in its supporting memorandum a numbered "statement of all the material facts as to which movant contends no genuine issue exists." The numbered items on this list must "refer with particularity to those portions of the record upon which movant relies." *Id.* Defendant Herrera's motion failed to include any statement of facts, which makes it more difficult for the Court to evaluate which facts she alleges are uncontested. The Court is not denying Defendant Herrera's motion on these grounds, but it notes that future motions from Defendant's office should conform to the rules.

providing voter registration forms to agencies, and providing assistance to those agencies. *Id.* She contends that, because the NVRA does not charge her with enforcing its provisions, she does not bear responsibility for the failure of any other state agencies (including HSD) to meet their obligations under the law. *Id.* She further contends that no question of fact exists regarding whether she has fulfilled her coordination obligations under the NVRA. *Id.* at 8. However, because, as discussed below, Defendant Herrera has not demonstrated as a factual matter that she has complied with her obligations under the NVRA, her motion will be denied.

Defendant Herrera contends that the dispositive issue raised by her motion is solely a legal one, namely “does the NVRA require the Secretary to enforce compliance with the NVRA by other State agencies that bear clear burdens under the statute?” Defendant Herrera’s Reply in Support of Her Motion for Summary Judgment (hereinafter “Deft. SOS Rep.”) [Doc. 121] at 2. However, this is not the only issue on which Defendant Herrera must prevail in order for the Court to grant her motion. Defendant Herrera must also demonstrate that no question of material fact exists as to whether the actions her office has taken are sufficient to meet her obligations under the NVRA. Defendant Herrera acknowledges that this can be viewed as a mixed question of fact and law. *Id.* Even if Defendant Herrera were not responsible, as the state’s chief election official, for ensuring that the NVRA’s provisions were being met, she has not demonstrated as a matter of law that the actions she has taken are sufficient to meet the NVRA’s requirements.

1. Defendant Herrera’s Responsibility for State Compliance with the NVRA

The first argument that must be resolved in Defendant Herrera’s favor to enable her to prevail on her motion for summary judgment is whether she can be held responsible for the state’s failure to comply with the NVRA. Defendant Herrera contends that the statute makes her

responsible only for “coordination” of state responsibilities, and that responsibility for any failure to follow the NVRA’s dictates must lie with HSD, because HSD is the agency designated by the state to provide voter registration services to those receiving public assistance. *See* Deft. SOS Mot. [Doc. 111] at 3-4.

The principal case construing the obligations that the NVRA places on a state’s chief election official is *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008). The *Harkless* court addressed directly the question at issue in this case: “whether...the chief election official[] has a role in ensuring [the state’s] compliance with the NVRA.” *Harkless*, 545 F.3d at 449. The *Harkless* court held that each state’s NVRA chief election official is responsible for state compliance, and that Ohio’s Secretary of State was therefore liable for Ohio’s compliance with Section 7.

Harkless concerned an allegation that the State of Ohio failed to comply with Section 7 of the NVRA. The complaint named both Ohio’s Secretary of State (“SOS”) and its state Director of the Department of Job and Family Services (“DJFS”). It alleged that county DJFS offices were failing to distribute voter registration forms, and that neither the SOS nor the Director of DJFS monitored compliance with Section 7 or enforced its mandates. Similar to the instant case, the state DJFS and its local offices were designated as voter registration agencies under Section 7. The *Harkless* court rejected the SOS’s argument that she had no role in ensuring Ohio’s compliance with Section 7 because compliance was DJFS’s responsibility.

In doing so, the *Harkless* court pointed to the NVRA’s legislative history, where Congress explained that each state’s chief election official is “responsible for implementing the state’s function under the [NVRA]. 545 F.3d at 451 (quoting S. Rep. 103-6 at 39 (1993)). The

court also cited the construction of the statute by the Federal Election Assistance Commission, which similarly concluded that each state's chief election official is responsible for ensuring compliance with the NVRA's requirements. *Id.* The court specifically found that the "coordination" duties referenced in the statute include ensuring that the NVRA's requirements are met. *Id.* at 452 ("[T]he better interpretation of the statute [is] that each state shall designate voter registration agencies, and that each state shall ensure that the agencies complete the required tasks. And the [SOS], as Ohio's chief election officer, is responsible for 'harmonious combination'—or implementation and enforcement—of that program on behalf of Ohio.")

Defendant Herrera characterizes the *Harkless* court's finding regarding the Secretary of State's enforcement responsibilities as "dicta." Deft. SOS Mot. at 5. She argues that *Harkless* is distinguishable from this case because that case dealt with the issue of whether the state could delegate its responsibilities to local officials, and that the *Harkless* court's finding was only that some official at the state level had to be responsible for compliance. This fundamentally misreads *Harkless*. Although the *Harkless* court spoke at points about how certain provisions of the NVRA would be pointless if states could abdicate their responsibilities by delegating them to local officials, if the court's only concern had been that some state actor was responsible for ensuring NVRA compliance, it could have limited responsibility to the state's DJFS Director, who was also a named defendant. Instead, the court explicitly answered the question of whether the SOS was responsible for ensuring compliance, and held that both the SOS and the DJFS Director were liable. Its holding was not dicta.

In explaining the reasoning for its decision, the *Harkless* court also cited the requirement that a person alleging a violation of the NVRA must, in most circumstances, first "provide

written notice of the violation to the chief election official of the State involved,” before bringing a civil enforcement action. 545 F.3d at 452 (quoting 42 U.S.C. § 1973gg-9(b)(1)). The NVRA provides that, if the alleged violation is not corrected within a specified period after receipt of the notice of violation, the aggrieved person may then file suit. 42 U.S.C. § 1973gg-9(b)(2). This notice requirement was structured “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). As the *Harkless* court explained, “[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.” The Court agrees. Although, as a case from another Circuit, *Harkless* is not binding precedent, because of the dearth of case law interpreting this provision, and because the Court finds the *Harkless* court’s reasoning persuasive, it adopts its finding that a state’s chief state election official bears at least some responsibility for the state’s compliance with Section 7’s mandates.

2. Defendant Herrera’s Responsibilities under State Law

The concept that the chief election official has the ability and responsibility to ensure compliance with Section 7 is not only contained in the NVRA, but also in New Mexico law. State law grants Defendant Herrera the responsibility to “adopt and publish ... rules for the administration of a state-agency based voter registration program ... in accordance with the NVRA.” NMSA 1-4-48(A). Thus, Defendant Herrera has the obligation to prescribe the actions that the state, including HSD offices, must take to comply with Section 7. This includes specifying the manner in which voter registration applications must be offered to clients in HSD offices, and the degree of monitoring that should be undertaken to assess the state’s compliance

with Section 7. Because Defendant Herrera is responsible for issuing rules and training materials for Section 7 compliance, and, as the Court has already found, the state is not in compliance with Section 7's requirements because of the manner in which it distributes voter registration applications, Defendant Herrera bears some responsibility for any violations, and cannot receive summary judgment.

In fact, Defendant Herrera essentially admits that her office bears some responsibility for ensuring HSD offices' compliance with Section 7. In her motion for summary judgment, Defendant Herrera suggests that her "coordination" duties under section 1973gg-8:

include many of the things that she has agreed to do in settling ... 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 materials and training regarding the requirements of the NVRA.

Def't. SOS Mot. [Doc. 111] at 7.

These admitted responsibilities demonstrate that, contrary to her argument, the Secretary does bear some responsibility for the failure of other agencies to meet their obligations under the law, and does have some authority to direct the actions of other agencies. As the creator of training materials, the Secretary is presumably responsible for ensuring that the materials correctly state the law. Further, if the Secretary had no responsibility and authority for ensuring compliance, her compliance evaluations would serve no purpose.

3. Defendant Herrera's Actions

Finally, even if the Secretary bears no responsibility for ensuring that other agencies are meeting Section 7's requirements, she still has not demonstrated, as a matter of law, that she is entitled to summary judgment. In arguing that she has met all of her obligations to such a degree

that she should be awarded summary judgment, Defendant Herrera lists four actions she or prior Secretaries of State have performed. First, her office has “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.” Deft. SOS Mot. at 9. However, merely assigning unique code numbers to each agency appears to be of limited utility without active monitoring of registration data or follow-up in instances where the number of registrations fell far below what would have been expected given the number of HSD clients, as alleged by Plaintiff. *See* Plaintiff’s Controverting and Separate Statement of Facts, attached as Ex. 1 to Doc. 88, at 15-20, ¶¶ 68-90. Second, the Secretary points to the regulations that her office promulgated in 1994, to help implement the NVRA. *Id.* In light of Plaintiff’s allegations regarding the failure of HSD to register voters and the apparent lack of any evaluation by the Secretary of whether HSD is performing its responsibilities, it is not clear that leaving these sixteen year old regulations in place reflects any active “coordination” on the part of the Secretary. Third, the Secretary points to training her office has provided to managers of the offices responsible for registering voters. *Id.* However, this training has apparently not been conducted since at least 2004. The Secretary contends that this lack of training is of “no significance” because “[t]he NVRA does not require the Secretary to conduct training on any particular schedule.” Deft. SOS Rep. [Doc. 121] at 6. However, in light of all of Plaintiff’s allegations, it is at least a question of fact as to whether a failure to conduct training for at least six years constitutes “coordination” sufficient to meet the NVRA’s requirements. Finally, the Secretary contends that she has met her duties because she issued manuals that provide guidance in meeting NVRA obligations to all state agencies responsible for registering voters. However,

given the Court's finding that these agencies were incorrectly interpreting the law, it is far from clear that the Secretary's provision of manuals met her responsibilities. For the foregoing reasons, Defendant Herrera's motion for summary judgment is denied.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant HSD's *Motion for Summary Judgment* [Doc. 57] is DENIED, that Defendant Mary Herrera's *Motion for Summary Judgment* [Doc. 111] is DENIED, that Plaintiff's *Motion for Partial Summary Judgment* [Doc. 109] is GRANTED, that Defendant HSD's *Motion to Strike* [Doc. 91] is DENIED, and that Defendant HSD's *Motion to Extend Time* [Doc. 119] is GRANTED.



UNITED STATES DISTRICT JUDGE

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ASSOCIATION OF COMMUNITY)
ORGANIZATIONS FOR REFORM NOW)
("ACORN"), INDIANA STATE)
CONFERENCE OF THE NATIONAL)
ASSOCIATION FOR THE ADVANCEMENT)
OF COLORED PEOPLE ("NAACP"), and)
PARIS ALEXANDER, for themselves and all)
other persons similarly situated,)

Plaintiffs,)

v.)

No. 1:09-CV-849 WTL-DML)

ANNE W. MURPHY, in her official capacity)
as Secretary of the Indiana Family and)
Social Services Administration; CATHY)
BOGGS, in her official capacity as Director)
of Indiana Family and Social Services)
Administration, Division of Family Resources;)
J. BRADLEY KING and PAMELA POTESTA,)
in their official capacity as Co-Directors of)
the Indiana Election Division; THOMAS E.)
WHEELER, in his official capacity as Chair of)
the Indiana Election Commission; S. ANTHONY)
LONG, in his official capacity as Vice-Chair)
of the Indiana Election Commission; and)
DANIEL A. DUMEZICH and SARAH STEELE)
RIORDAN, in their official capacity as members)
of the Indiana Election Commission;)

AMENDED COMPLAINT --)
CLASS ACTION)

Defendants.)

Plaintiffs, ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM
NOW ("ACORN"), INDIANA STATE CONFERENCE OF THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE ("NAACP"), and PARIS ALEXANDER
("Alexander"), for themselves and all other persons similarly situated, for their complaint against
defendants ANNE W. MURPHY ("Murphy"), in her official capacity as Secretary of the Indiana
Family and Social Services Administration ("FSSA"); CATHY BOGGS ("Boggs"), in her
official capacity as Director of the Indiana Family and Social Services Administration Division
of Family Resources ("DFR"); J. BRADLEY KING ("King") and PAMELA POTESTA

("Potesta"), in their official capacity as Co-Directors of the Indiana Election Division; THOMAS E. WHEELER ("Wheeler"), in his official capacity as Chair of the Indiana Election Commission; S. ANTHONY LONG ("Long"), in his official capacity as Vice-Chair of the Indiana Election Commission; and DANIEL A. DUMEZICH ("Dumezich") and SARAH STEELE RIORDAN ("Riordan"), in their official capacity as members of the Indiana Election Commission, allege the following upon knowledge as to their conduct and upon information and belief as to the conduct of others:

Introduction

1. This action seeks declaratory and injunctive relief on behalf of the named plaintiffs and a class of similarly-situated persons to redress ongoing violations of the obligations imposed by the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §1973gg-5 ("Section 7"), for voter registration by public-assistance agencies in Indiana.

2. Section 7 of the NVRA mandates that all state offices that provide public assistance distribute voter registration application forms for voting in federal elections, assist applicants in completing them, accept completed voter registration applications, and transmit those applications to the appropriate state election official.

3. Section 7 requires all public assistance offices to distribute a voter registration application form with each application for assistance, and each recertification, renewal, or change of address relating to the receipt of public assistance.

4. Section 7 further requires that all public assistance offices provide a form that asks each client whether s/he is registered at his/her current address and if not, whether the applicant "would like to apply to register to vote here today" (the "voter notice form"). The voter notice form must also advise the applicant that "[a]pplying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency," and offer boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote. The form must include the statement, "IF YOU DO NOT CHECK

EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME" in close proximity to the boxes and in prominent type. The form must also advise the client that the office will provide assistance in filling out the voter registration form if the client would like such assistance, and that the client has the option to fill out the application in private. Finally, the form must include a statement, in language prescribed by the statute, that indicates how a client might file a complaint if that client believes that someone has interfered with his/her right to register or to decline to register to vote, or his/her right to privacy or political preference relating to the voter registration.

5. The requirements of Section 7 reflect Congress's intent to "increase the number of eligible citizens who register to vote in elections for Federal office," 42 U.S.C. §1973gg(b)(1), including "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with the other principal place to register under this Act [motor vehicle agencies]." H.R. Con. Rep. No. 103-66, at 19 (1993). The statute also reflects Congress's intent to combat the disproportionate harm to voter participation by racial minorities caused by discriminatory and unfair registration laws and procedures. 42 U.S.C. §1973gg(a)(3).

6. Despite these clear obligations under the NVRA, Indiana's FSSA offices routinely fail to distribute voter registration applications and provide assistance in completing those applications to persons who apply for public assistance, or who submit a recertification, renewal, or change of address form relating to public assistance, as required by Section 7 of the NVRA.

7. Indiana FSSA offices also fail to provide the voter notice form required by Section 7. 42 U.S.C. §1973gg-5(a)(6)(B). This includes, in certain instances, the failure to provide this form in connection with each public assistance transaction named by the statute and, in other instances, the failure to provide a form that comports in material respects with the requirements of the NVRA. Specifically, and with regard to the latter failure, Indiana FSSA offices offer a form whose content differs from that required under 42 U.S.C. §1973gg-5(a)(6)(B) and that fails in material respects to comply with the requirements of 42 U.S.C. §1973gg-5(a)(6)(B).

8. As a result of these ongoing violations, tens of thousands of low-income citizens in Indiana, including plaintiff Alexander and numerous ACORN and NAACP members, have been denied the opportunity to register to vote or to update their voter address upon moving to a new residence address, as is required by Section 7. 42 U.S.C. §1973gg-5(a)(6).

9. As a result of defendants' failure to provide voter registration services at FSSA offices in accordance with Section 7, ACORN, NAACP and their members have expended substantial resources, including staff time and volunteer allocation, in an effort to make voter registration available to minority and low-income citizens, particularly those who should be offered voter registration by FSSA at every public benefits transaction that includes an application, recertification, renewal, or change of address. Thousands of eligible low-income voters, including members of ACORN and NAACP, remain unregistered and effectively disenfranchised as a result of defendants' actions and inaction.

10. Upon information and belief, Indiana has partially delegated the administration of its public assistance program pursuant to a contract between the State and certain for-profit companies, including IBM and Affiliated Computer Services. The delegation process is incomplete, with a portion of the State's FSSA offices administering public benefits programs under the partially-delegated system and the remaining FSSA offices still operating under the prior, non-delegated public assistance administration system.

11. Indiana FSSA offices that have been delegated as well as those remaining under the prior, non-delegated system are operating in violation of Section 7 of the NVRA by failing to provide the required voter registration services to each person who applies, recertifies, renews, or changes an address in connection with public assistance benefits.

12. Defendants are the state officials responsible for ensuring Indiana's compliance with Section 7 of the NVRA.

Named Parties

13. Plaintiff ACORN is a non-profit organization incorporated in Louisiana with Indiana-based offices located in Indianapolis and Gary. ACORN is the nation's largest community organization of low- and moderate-income families, working together for social justice and stronger communities. Since 1970, ACORN has grown to more than 175,000 member families, organized in 850 chapters in 75 cities across the United States and other countries, including over ten thousand members in its two Indiana chapters. ACORN members participate in local meetings, actively work on public policy campaigns, and elect their own leaders from their neighborhoods. ACORN's membership includes Indiana citizens who have applied for public assistance and either are eligible to vote but are unregistered or who need to update their voter registration because they have moved.

14. Plaintiff ACORN and its members expend substantial resources, including staff time and volunteer allocation, to offer voter registration to low-income Indiana citizens. ACORN staff and volunteers expend resources to specifically target their voter registration efforts in high poverty areas in Indiana, including Gary, East Chicago, and Indianapolis. The U.S. Census Bureau reported that the median income of households in Gary was \$26,911, with 33% of people in poverty from 2005-2007.^{1/} In East Chicago, the median household income was \$27,612 with 29% of people in poverty from 2005-2007.^{2/} Indianapolis had a poverty rate of 16% from 2005-2007, with a median income of households in Indianapolis of \$43,687.^{3/} These figures reflect

1. U.S. Census Bureau American Community Survey, *Gary, Indiana, Population and Housing Narrative Profile: 2005-2007*, available at http://factfinder.census.gov/servlet/NPTable?_bm=y&-geo_id=16000US1827000&-qr_name=ACS_2007_3YR_G00_NP01&-ds_name=&-redoLog=false.

2. U.S. Census Bureau American Community Survey, *East Chicago City, Indiana, Population and Housing Narrative Profile: 2005-2007*, available at http://factfinder.census.gov/servlet/NPTable?_bm=y&-geo_id=16000US1819486&-qr_name=ACS_2007_3YR_G00_NP01&-ds_name=&-redoLog=false.

3. U.S. Census Bureau, American Community Survey, *Indianapolis, Indiana, Population and Housing Narrative Profile: 2005-2007*, available at http://factfinder.census.gov/servlet/NPTable?_bm=y&-geo_id=16000US1836003&-qr_name=ACS_2007_3YR_G00_NP01&-ds_name=&-redoLog=false.

very high poverty rates in comparison with a national poverty rate of 12.5% and a real median household income of \$50,233 in 2007.^{4/}

15. ACORN and its members have been forced to expend resources on voter registration in Indiana due to the failure of defendants to ensure compliance with the obligation under the NVRA to provide voter registration services to agency clients. These resources were thus diverted from other efforts that ACORN would have otherwise undertaken to offer voter registration to Indiana citizens and conduct other ACORN activities. These injuries to ACORN and its members will continue in the future so long as defendants fail to ensure compliance with their obligations under the NVRA.

16. Plaintiff Indiana State Conference of the NAACP is the umbrella organization for the 35 Indiana branches of the NAACP, the national civil rights organization. The Indiana State Conference is headquartered in Gary and consists of 4,000-5,000 members across the state in 22 branches with adult members, six to seven college chapters, and five to six high school chapters. NAACP has branches in minority and low-income communities including Gary and East Chicago. NAACP membership includes recipients of public assistance benefits in Indiana, some of whom are not registered to vote at their current addresses.

17. NAACP's mission is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination, as well as to advance the rights of its members and constituency to participate fully in the nomination and selection of candidates for elective office. In furtherance of its mission, NAACP engages in regular voter registration drives across the State of Indiana, with a particular emphasis on minority communities. Defendants' continued noncompliance with Section 7 results in some of NAACP's members being denied the opportunity to update their voter registration and ultimately cast a ballot that will be counted on Election Day, frustrating the very mission of the organization. As a result of defendants' violations, NAACP is forced to expend resources to

4. Carmen DeNavas-Walt, Bernadette D. Proctor, and Jessica C. Smith, U.S. Census Bureau, Current Population Reports, P60-235, "Income, Poverty, and Health Insurance Coverage in the United States: 2007," <http://www.census.gov/prod/2008pubs/p60-235.pdf>

assist people with voter registration, including their members, who should have been offered voter registration at the local FSSA office.

18. NAACP increases its voter registration efforts near the time of elections. NAACP allocates volunteers to do voter registration at a particular location based on the relative number of people at that location who are expected to need to register or update their voter registration. But for defendants' failure to offer voter registration services to every person who applies, recertifies, renews, and changes their address for the purpose of receiving public benefits, NAACP would not have been forced to allocate as many volunteers to the task of offering voter registration to people who should have been offered those services by FSSA. As a result of defendants' violations, NAACP has allocated volunteer time to voter registration that could have been devoted to other activities.

19. Defendant Murphy is the Secretary of Indiana's Family & Social Services Administration. The FSSA administers public assistance programs subject to the requirements of Section 7 of the NVRA, including but not limited to food stamps, Medicaid, and Temporary Assistance for Needy Families ("TANF"). Defendant Murphy is sued in her official capacity as Secretary of the FSSA.

20. Defendant Murphy is the Secretary of Indiana's Family & Social Services Administration. The FSSA administers public assistance programs subject to the requirements of Section 7 of the NVRA, including but not limited to food stamps, Medicaid, and Temporary Assistance for Needy Families ("TANF"). Defendant Murphy is sued in her official capacity as Secretary of the FSSA.

21. Defendant Boggs is the Director of the FSSA's Division of Family Resources. The DFR is the division of the FSSA responsible for public assistance programs subject to the requirements of the NVRA, including but not limited to food stamps, Medicaid, and Temporary Assistance for Needy Families ("TANF"). Defendant Boggs is sued in her official capacity as Director of the DFR.

22. Defendants King and Potesta are the Co-Directors of the Indiana Election Division ("Division"). In this capacity, they "are jointly designated under 42 U.S.C. §1973gg-8 [Section 10 of the NVRA] as the chief state election official[s] responsible for the coordination of state responsibilities under [the] NVRA." Ind. Code §3-7-11-1.^{5/} As such, they are required to undertake a variety of actions, Ind. Code §3-7-11-2, including "[c]oordinat[ing] with the [Indiana Election] commission to oversee the implementation and administration of [the] NVRA by the state, county, municipal, and nongovernmental offices designated as registration sites." Ind. Code §3-7-11-2(1). They also are generally responsible for carrying out the policies, decisions and recommendations of the Indiana Election Commission, and are responsible for maintaining an office for the Indiana Election Division. Ind. Code §3-6-4.2-3. The Indiana Election Division is responsible for providing information on voter registration and absentee ballot procedures, and assisting the Indiana Election Commission and the Secretary of State in the administration of elections. Ind. Code §§3-6-4.2-2, 3-6-4.2-12. The Division also is responsible for calling a meeting of county election boards and registration boards each year in which a general or municipal election is held to instruct them on their duties under the Indiana Elections Title and federal law, including the NVRA. Ind. Code §3-6-4.2-14. Defendants King and Potesta are sued in their official capacities as Co-Directors of the Indiana Election Division.

23. Defendants Wheeler and Long are the Chair and Vice-Chair of the Indiana Election Commission ("Commission") and defendants Dumezich and Riordan are additional members of the Commission. In this capacity, they are responsible for administering Indiana election laws, governing the fair, legal and orderly conduct of elections, prescribing a uniform set of election and registration forms for use throughout Indiana, and advising and supervising local election and registration officers. Ind. Code §3-6-4.1-14. This includes the responsibility for adopting "[r]ules (including joint rules with other agencies when necessary) to implement and administer [the] NVRA." Ind. Code §3-6-4.1-14(a)(2)(A)(ii). Defendants Wheeler and Long are sued in

5. Section 3-7-11-1 states that the officials jointly designated for this purpose are the "co-directors of the [Indiana Election] commission," however, the Indiana Secretary of State has advised that the officials so designated actually are the co-directors of the Indiana Election Division. See Exh. 1 to this complaint (attached to plaintiffs' original complaint as Exh. 1, and incorporated herein by reference).

their official capacities as Chair and Vice-Chair of the Indiana Election Commission, and defendants Dumezich and Riordan are sued in their official capacities as members of the Commission.

Jurisdiction and Venue

24. This case arises under the NVRA, a law of the United States. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(a).

25. This Court has jurisdiction to grant both declaratory and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202.

26. This Court has personal jurisdiction over each of the defendants because each is a citizen of the State of Indiana.

27. Venue is proper in this district pursuant to 28 U.S.C. §1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

Factual Allegations

National Voter Registration Act of 1993

28. The NVRA has 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(b)(1).

29. In furtherance of that goal, the NVRA mandates that "each state shall designate as voter registration agencies -- (A) all offices in the state that provide public assistance." 42 U.S.C. §1973gg-5.

30. The FSSA local offices are mandatory voter registration agencies under Section 7 of the NVRA.

31. The NVRA requires that "the following services shall be made available" at every public assistance agency:

- (a) "Distribution of mail voter registration application forms";

- (b) "Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance"; and
- (c) "Acceptance of completed voter registration application forms for transmittal to the appropriate State election official." 42 U.S.C §1973gg-5(a)(4)(A)(i)-(iii).

32. The NVRA requires that a voter registration agency that provides public assistance services distribute with each application for service, and with each recertification, renewal or change of address form, a mail-in voter registration application form. Each such voter registration agency must also provide, and clients must complete, a voter notice form that includes:

- (a) the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today";
- (b) the statement, "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency";
- (c) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote, together with the statement, in close proximity to the boxes and in prominent type, "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT REGISTER TO VOTE AT THIS TIME";
- (d) the statement, "If you would like help in filling out the voter registration form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private"; and
- (e) the statement, "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with _____," the blank being filled by the name, address, and telephone number of the appropriate official to whom such a complaint should be addressed.

42 U.S.C. §1973gg-5(a)(6)(B).

33. The NVRA requires that "[e]ach State shall 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.

34. In order to ensure state compliance, the NVRA provides a private right of action to "a person who is aggrieved by a violation" of the NVRA. 42 U.S.C. §1973gg-9. The NVRA generally requires that, at least 90 days prior to bringing an action to enforce the NVRA, an

aggrieved person or organization must provide written notice to the state-designated "chief election official" in order to identify the violation(s) and to provide the state an opportunity to cure the violation(s) prior to the commencement of litigation.

Indiana's Failure to Offer Voter Registration to Public Assistance Clients

35. Indiana has designated the Co-Directors of the Indiana Election Division as the "chief state election official responsible for the coordination of state responsibilities under [the] NVRA." Ind. Code §3-7-11-1. *See also* n. 5, *supra*. As such, they are responsible, together with the Indiana Election Commission, for the "implementation and administration of [the] NVRA by the state, county, municipal, and nongovernmental offices designated as registration sites under this article," including development of training programs, protection "of the fundamental rights of voters," and development of public awareness programs to assist voters in understanding the services available to them under the NVRA. Ind. Code §3-7-11-2. The Indiana Election Commission is responsible for issuing rules "to implement and administer [the] NVRA." Ind. Code §3-6-4.1-14(a)(2)(A)(ii).

36. Under Indiana law, all offices that administer the food stamps program, TANF, and Medicaid "provide public assistance within the scope of [the] NVRA," Ind. Code §3-7-15-2, and are required to have voter registration materials, including registration applications and voter notice forms to distribute to each person who applies, recertifies, renews, or changes an address in connection with public-assistance benefits. Ind. Code §§3-7-15-1, 3-7-15-2, 3-7-15-3. *See also* 42 U.S.C. §1973gg-5.

37. The FSSA, through its Division of Family Resources, administers public assistance programs in Indiana including, but not limited to, the food stamps program, Medicaid, and TANF. The Secretary of the FSSA, Anne W. Murphy, is accountable for the overall policy development and management of FSSA. The Director of the DFR, Cathy Boggs, is accountable for the administration of the state's food stamps, TANF, and Medicaid programs.

38. The FSSA has failed to comply and currently is not complying with its obligation under Section 7 of the NVRA to offer clients the opportunity to register to vote or to update their voter registration in conjunction with every application for public assistance benefits, and every renewal, recertification, and change of address relating to the receipt of public assistance benefits. The FSSA also is failing to provide the voter notice form required by Section 7 during each statutorily-covered transaction.

39. Defendants, through their actions and inaction, are responsible for the failure of FSSA to comply with its obligations under Section 7 of the NVRA.

40. The Indiana Election Commission has not adopted any rules to implement and administer the NVRA at Indiana public assistance offices. Likewise, the Co-Directors of the Indiana Election Division have not issued any rules, standards, procedures, or guidance to implement and administer the NVRA at Indiana public assistance offices.

41. The number of voter registration applications received from FSSA offices has declined sharply despite a substantial increase in participation in the Food Stamp program, one of the most widely used public assistance programs covered by Section 7 of the NVRA. The following table shows the average monthly number of adult citizen Food Stamp program participants in Indiana and the average monthly number of voter registration applications collected by public assistance offices in Indiana, since 1995.⁶ Even by this conservative count, which includes all voter registration applications collected from all public assistance offices, and not just applications collected from those persons participating in the food stamps program, the

6. Sources: U.S. Dep't of Agriculture, *Characteristics of Food Stamp Households* (FY1999 through FY2007); Fed. Election Comm'n, *The Impact of the National Voter Registration Act, 1995-1996* (1997); Fed. Election Comm'n, *The Impact of the National Voter Registration Act, 1997-1998* (1999); Fed. Election Comm'n, *The Impact of the National Voter Registration Act, 1999-2000* (2001); Fed. Election Comm'n, *The Impact of the National Voter Registration Act, 2001-2002* (2003); U.S. Election Assistance Comm'n, *The Impact of the National Voter Registration Act, 2003-2004* (2005); U.S. Election Assistance Comm'n, *The Impact of the National Voter Registration Act, 2005-2006* (2007); U.S. Election Assistance Comm'n, *The Impact of the National Voter Registration Act, 2007-2008* (2009); Douglas R. Hess & Jody Herman, Project Vote, *Performance Indicators for Section 7 of the NVRA* (2008), http://www.projectvote.org/images/publications/NVRA/Measuring_States_NVRA_Performance_5-1-08.pdf.

registration application numbers are dismal and declining rapidly. Voter registration applications originating in public assistance agencies in Indiana have declined 97% since 1995-1996.

Year	Average Monthly Adult Citizen Food Stamp Participation	Average Monthly Public Assistance Agency Registration Applications
1995/1996	N/A ^{7/}	3,494
1997/1998	N/A	1,073
1999/2000	144,500	775
2001/2002	186,500	553
2003/2004	242,500	628
2005/2006	279,500	251
2007/2008	286,000 ^{8/}	105

This decline in registration applications has occurred notwithstanding the fact that large numbers of low income Indiana citizens remain unregistered. In 2008, 41% of adult citizens in households making less than \$25,000.00 per year were not registered to vote compared to 20% of those in households making \$100,000.00 or more.^{9/}

42. As demonstrated by the above data alone, Indiana's FSSA offices are clearly failing in their obligation to provide the voter registration opportunities mandated by Section 7 to every individual who applies for public assistance benefits, and who renews, recertifies, or changes an address at an FSSA office relating to the receipt of public assistance benefits.

43. Interviews of clients leaving FSSA offices confirm what the data show, namely, that voter registration services are not being provided at each statutorily-covered transaction. In November 2008, Project Vote conducted interviews of 21 individuals exiting Indiana public

7. Data from 1995-1998 are unavailable.

8. Food stamp program participation data is unavailable for fiscal year 2008. This chart includes data for fiscal year 2007. Source: U.S. Dep't of Agriculture, *Characteristics of Food Stamp Households: Fiscal Year 2007* (2008), available at <http://www.fns.usda.gov/ora/menu/Published/SNAP/FILES/Participation/2007Characteristics.pdf>.

9. Source: U.S Census Bureau, *Current Population Survey, November 2008 Voting and Registration Supplement*.

assistance agencies who had conducted transactions triggering the NVRA's voter registration obligations. None of the 21 individuals interviewed were provided with a voter registration application. None of the 21 individuals interviewed were provided with a voter notice form asking the client if he/she would like to register to vote. Furthermore, 13 of the 21 individuals interviewed had met with a caseworker, yet none of these clients were asked by any FSSA employee, including their caseworker, whether they would like to register to vote. Seven of the 21 individuals were not registered to vote at their current address at the time of the interviews.

44. Project Vote also conducted investigations of seven FSSA offices in November 2008. Only one office out of the seven had voter registration forms available upon request. Staff in the six other offices reported that they had no voter registration application forms and referred the investigator to external agencies, such as the Department of Motor Vehicles, to register to vote. None of the investigated offices had voter registration forms available in the waiting area. Furthermore, FSSA staff in all seven offices admitted they did not provide clients with voter registration application forms with each application, recertification, renewal, and address change. None of the investigated offices offered the required voter notice form as part of the benefits application or along side it.

45. Indiana's failure to comply with Section 7 requirements is widespread. Project Vote's November 2008 investigation reveals that obvious violations are occurring in some of Indiana's most economically depressed cities, Gary, East Chicago, and Indianapolis.

Specifically:

- (a) At a Lake County FSSA office located at 110 W. Ridge Road in Gary, a staff person told the Project Vote investigator that the office "doesn't carry voter registration forms any more."
- (b) At a Lake County FSSA office located at 3714 Main Street in East Chicago, a staff person instructed the Project Vote investigator to go to the Driver's License Bureau to get a voter registration application.
- (c) At a Marion County FSSA office located at 3500 Lafayette Road in Indianapolis, an FSSA staff person responded to the Project Vote investigator's request for a voter registration application form by saying, "voting is over" and directing the investigator to the local precinct to register to vote.

- (d) At a Marion County FSSA office located at 1920 Morris Street in Indianapolis, an FSSA staff person told the Project Vote investigator that the office does not do voter registration and that the investigator should go somewhere else to register to vote. The staff person was unable to provide the investigator with any alternative location that would offer voter registration.

46. Other FSSA offices that have adopted the "partially delegated" system of public assistance benefits administration are failing to distribute voter registration application forms, and voter notice forms with the required statements, with each application for assistance, and each recertification, renewal, or change of address relating to an applicant's receipt of public assistance. All FSSA offices, including those with the "partially delegated" administration system, are failing in their duties despite the requirement that "all offices in the State that provide public assistance" must offer the above listed voter registration services required by the NVRA. 42 U.S.C. §§1973gg-5(a)(2)(A); 1973gg-5(a)(6).

47. Defendants are failing in their duties to coordinate Indiana's responsibilities under the NVRA. 42 U.S.C. §1973gg-8.

48. On January 29, 2009, Project Vote sent a letter on behalf of ACORN to defendants King and Potesta, in their capacity as Co-Directors of the Indiana Election Division, in order to "provide written notice of the violation to the chief election official of the State," as required by the NVRA. 42 U.S.C. §1973gg-9. This letter stated that in the absence of a plan to remedy Indiana's failure to implement the NVRA, Project Vote would have no choice but to commence litigation. A copy of the January 29, 2009 letter was attached to plaintiffs' original complaint as Exh. 2, and is incorporated herein by reference.

49. As of the date of this filing, defendants King and Potesta have provided no response to Project Vote's January 29, 2009 letter.

50. Plaintiff Alexander and members of plaintiffs ACORN and NAACP are not being offered the opportunity to register to vote, or update their voter registration information, in accordance with federal law as a result of defendants' noncompliance with Section 7.

51. Plaintiff Alexander is registered to vote at her previous address at 4141 Meander Bend, Indianapolis, Indiana, 46268. Plaintiff Alexander moved from Meander Bend to her new

residence at 5602 Whitcomb Court, Apt. A, Indianapolis, Indiana, 46224 during the first week of March 2009. Plaintiff Alexander first visited the FSSA office located at 3500 Lafayette Road in Indianapolis to apply for public assistance benefits (food stamps) the very next week.

52. Plaintiff Alexander met with her caseworker at the FSSA office at 863 Massachusetts Avenue in Indianapolis in April 2009. At no time during the application process did anyone ask her, verbally or in writing, if she wanted to register to vote or update her voter registration information. She was not given any document that inquired if she would like to register to vote at the FSSA office.

53. Plaintiff Alexander is not registered to vote at her current address. She receives public assistance (food stamps) and was not given the opportunity to update her voter registration when she applied for public benefits at the FSSA offices in Indianapolis. Plaintiff Alexander would have updated her voter registration during her benefits application process had FSSA staff offered the opportunity.

54. As a result of defendants' ongoing violation of the NVRA, plaintiffs ACORN and NAACP's members who apply, recertify, renew, or change their addresses for the purpose of receiving public assistance benefits are not being advised that they are able to register to vote, or update their voter registration, at that time. Consequently, defendants are not providing ACORN and NAACP members the opportunity to register to vote at their current address as required by Section 7 of the NVRA.

55. Due to the failure of defendants and the FSSA offices to provide voter registration services to individuals who submit applications for public assistance benefits, recertifications, renewals, and address changes, plaintiff ACORN has borne the burden of reaching out to these individuals to offer them voter registration opportunities. As a means of building stronger communities, ACORN is a strong advocate for broader voter participation and community engagement. More registered voters in an ACORN-served community means that ACORN can encourage more people to vote on Election Day and generate a higher amount of voters, strengthening the community. ACORN members who are registered to vote have a genuine

interest in other members of their community being registered to vote. Although ACORN encourages its members to register to vote, not all of its members are registered. Many of ACORN's members receive public assistance and would greatly benefit from being offered the opportunity to register to vote, or update their voter registration, during visits to FSSA offices to apply, recertify, renew, and change their address for public assistance benefits.

56. ACORN seeks to increase political participation in the communities it serves. As part of those efforts, ACORN conducts voter registration drives across the State of Indiana. As a result of defendants' ongoing violations of the NVRA, ACORN and its members have expended substantial resources, including staff time and volunteer allocation, to assist individuals with voter registration who were entitled by law to have been offered voter registration opportunities by staff at FSSA offices. ACORN is also hurt by having to allocate resources assisting people who should have been registered already and in communities where people should have been registered. These injuries to ACORN will continue in the future until defendants' noncompliance with their obligations under the NVRA is remedied.

57. NAACP works to support the civil rights efforts of all people in Indiana, particularly minorities. NAACP also works to encourage civil and electoral participation of traditionally underrepresented groups in the state. Defendants' continued noncompliance with Section 7 has frustrated these efforts, as many low-income and minority Indiana citizens have missed their chance to update their voter registration at FSSA offices as a result of the aforementioned violations. Moreover, but for defendants' violations, NAACP volunteers would not have had to spend time assisting Indiana citizens with voter registration who should have been offered voter registration opportunities by staff at FSSA offices.

58. Defendants' failure to offer voter registration to all people who apply, recertify, renew, and change their address for the purpose of receiving public benefits has had a direct effect on NAACP's volunteer allocation with respect to its voter registration efforts. NAACP sends its volunteers to do voter registration drives in areas where groups of people congregate. NAACP allocates increased numbers of volunteers to voter registration drives where the need for

voter registration services is greatest. Conversely, NAACP sends fewer volunteers to voter registration drive locations where more people are already registered. If FSSA were operating in compliance with the NVRA, NAACP would be able to send fewer volunteers to voter registration drives in communities where people are offered voter registration at regular intervals by FSSA. Defendants' continued noncompliance with the law has forced NAACP to send increased numbers of volunteers to assist people with voter registration who should have been offered those services by FSSA. As a result, NAACP is unable to allocate those volunteers to other activities central to the organization's mission. This unnecessary strain on NAACP's volunteer resource will continue unless and until defendants' violations are remedied.

Class Action Allegations

59. Plaintiffs bring their claims under the NVRA as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of themselves and all other individuals similarly situated, as more specifically described below.

60. Plaintiffs seek to represent the class of all residents of the State of Indiana, past, present, and future, who are eligible to register to vote in Indiana, are not registered to vote at their current residence address, have applied for public assistance through an FSSA office or have requested recertification or renewal or sought a change of address relating to public assistance through an FSSA office, and in that transaction were not provided by the FSSA with a voter registration application, were not offered assistance in completing a voter registration application by the FSSA to the same degree that the FSSA provides assistance in completing public assistance forms, were not provided such assistance (unless refused) by the FSSA, and/or were not provided with a voter notice form by the FSSA.

61. The named plaintiffs as class representatives, and the class as defined above, meet each of the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure for certification of this case as a class action, for the reasons stated below.

62. *Rule 23(a)(1) -- Numerosity.* The plaintiff class is so numerous that joinder of all members is impracticable. On information and belief, the class is believed to include tens of thousands of Indiana residents, although the exact size of the class is currently unknown. For example, as set forth above, the Indiana Food Stamp program, which is just one of the public assistance programs subject to Section 7 of the NVRA, had 286,000 adult citizen participants per month, on average, during fiscal year 2007 (the last year for which such data are available). If only a small percentage of these individuals were not registered to vote at their current address this would still mean that thousands of public assistance recipients are not registered to vote; in actuality, as set forth above, in 2008 41% of adult citizens in Indiana households making less than \$25,000.00 per year were not registered to vote.

63. *Rule 23(a)(2) -- Commonality.* There are numerous common questions of law and fact in this action that relate to and affect the claims of relief sought by the class. The common legal issue is whether defendants have complied with their responsibilities under Section 7 of the NVRA. The common factual questions include, for example: whether FSSA offices distribute a voter registration application with each application for public assistance, and with each recertification, renewal, and change of address request relating to public assistance; whether FSSA offices distribute a voter notice form with each application for public assistance, and with each recertification, renewal, and change of address request relating to public assistance; whether FSSA offices provide assistance in completing voter registration forms, to the same degree they provide assistance in completing FSSA public assistance forms, unless the public assistance applicant or recipient refuses such assistance; and whether the Indiana Election Division and the Indiana Election Commission take all actions necessary to ensure that FSSA offices are complying with the requirements of Section 7 of the NVRA.

64. *Rule 23(a)(3) -- Typicality.* The claims of the named plaintiffs, as class representatives, are typical of the claims of the class. The named plaintiffs have been affected by the same practices that plaintiffs allege in this complaint have harmed the class as a whole and other class members individually.

65. *Rule 23(a)(4) -- Adequacy.* The named plaintiffs will fairly and adequately represent the interests of the class. There is no conflict between any named plaintiffs and other members of the class with respect to this action or the claims for relief set forth in this complaint. In addition, plaintiffs' counsel will fairly and adequately represent the interests of the plaintiff class, considering: (a) the work counsel has done in identifying and investigating defendants' compliance with Section 7 of the NVRA; (b) counsel's knowledge of the NVRA and experience in handling litigation asserting violations of the NVRA; (c) counsel's experience in handling complex litigation, including complex voting rights litigation and class actions; and (d) the resources counsel will commit to representing the class.

66. *Rule 23(b)(2) -- Case Maintainable Under this Rule.* This action is properly maintained as a class action pursuant to subsection (b)(2) of Rule 23 in that the challenged conduct is generally applicable to the class such that final injunctive or declaratory relief will necessarily be classwide in scope and appropriate with respect to the class as a whole.

Claim for Relief
(Violation of Section 7 of the National Voter Registration Act of 1993)

67. Plaintiffs incorporate by reference the allegations contained in ¶¶1-66 as if fully set forth herein.

68. Because of the failure to provide the voter notice form and registration opportunities and assistance required by Section 7 of the NVRA, 42 U.S.C. §1973gg-5, defendants have violated and continue to violate the NVRA.

69. Plaintiffs have been aggrieved by this violation of the NVRA and have no adequate remedy at law for defendants' violation of their rights. Declaratory and injunctive relief are required to remedy defendants' violation of the NVRA and to secure ongoing compliance with the NVRA.

Prayer for Relief

WHEREFORE, plaintiffs respectfully request that the Court enter an order:

- (a) certifying a class under Rule 23(b)(2) defined as: "all residents of the State of Indiana, past, present, and future, who are eligible to register to vote in Indiana, are not registered to vote at their current residence address, have applied for public assistance through an FSSA office or have requested recertification or renewal or sought a change of address relating to public assistance through an FSSA office, and in that transaction were not provided by the FSSA with a voter registration application, were not offered assistance in completing a voter registration application by the FSSA to the same degree that the FSSA provides assistance in completing public assistance forms, were not provided such assistance (unless refused) by the FSSA, and/or were not provided with a voter notice form by the FSSA;
- (b) declaring, pursuant to 28 U.S.C. §2201 and 42 U.S.C. §1973gg-9(B)(2), that defendants have violated Section 7 of the NVRA, 42 U.S.C. §1973gg-5, by failing to provide voter registration services as required by the NVRA at offices that provide public assistance, including the FSSA;
- (c) permanently enjoining defendants, their agents and successors in office and all persons working in concert with them, from implementing practices and procedures that violate Section 7 of the NVRA, 42 U.S.C. §1973gg-5;
- (d) directing defendants, under a Court-approved plan with appropriate reporting and monitoring requirements, to take all appropriate measures necessary to remedy the harm caused by their non-compliance with Section 7 of the NVRA, including, without limitation, ensuring that individuals affected by defendants' non-compliance with Section 7 of the NVRA are provided immediate opportunities to register to vote or change their voter registration addresses;
- (e) directing defendants, under a Court-approved plan with appropriate reporting and monitoring requirements, to take all steps necessary to ensure ongoing compliance with the requirements of Section 7 of the NVRA, 42 U.S.C. §1973gg-5, including, without limitation, training and monitoring personnel to ensure that designated agencies are making voter registration materials available, inquiring of all applicants, in writing, whether they would like to register to vote or change their voter registration addresses, assisting applicants in completing the voter registration applications, and providing other voter registration services and assistance as required by the NVRA;
- (f) awarding plaintiffs costs and disbursements incurred in connection with this action, including, without limitation, reasonable attorneys' fees and costs pursuant to 42 U.S.C. §1973gg-9(c);
- (g) retaining jurisdiction over this action to ensure that defendants are complying with their obligations under the NVRA; and

- (h) awarding such other equitable and further relief as the Court deems just and proper.

DATED: September 14, 2009

Respectfully submitted,

/s/ Judson H. Miner
Judson H. Miner
One of the Attorneys for Plaintiffs

Judson H. Miner (jminer@lawmbg.com)
Robert S. Libman (rlibman@lawmbg.com)
Benjamin J. Blustein (bblustein@lawmbg.com)
Miner, Barnhill & Galland, P.C.
14 W. Erie St.
Chicago, IL 60654
(312) 751-1170
(312) 751-0438 (telefax)

American Civil Liberties Union of Indiana
Kenneth J. Falk (kfalk@aclu-in.org)
Gavin Rose (grose@aclu-in.org)
1031 E. Washington St.
Indianapolis, IN 46202
(317) 635-4059, ext. 104
(317) 635-4105 (telefax)

Project Vote
Nicole Kovite (nkovite@projectvote.org)
Yolanda Sheffield* (ysheffield@projectvote.org)
739 Eighth St., S.E., Ste. 202
Washington, DC 20003
(202) 543-4173, ext. 303
(202) 543-3675 (telefax)

Demos: A Network of Ideas & Action
Brenda Wright (bwright@demos.org)
358 Chesthill Ave., Ste. 303
Brighton, MA 02135
(617) 232-5885, ext. 13
(617) 232-7251 (telefax)

Allegra Chapman (achapman@demos.org)
220 Fifth Ave., 5th Fl.
New York, NY 10001
(212) 419-8772
(212) 633-2015 (telefax)

* Motion to appear *pro hac vice* pending

Lawyers Committee for Civil Rights Under Law
Jon M. Greenbaum (jgreenbaum@lawyerscommittee.org)
Mark A. Posner (mposner@lawyerscommittee.org)
1401 New York Ave., N.W., Ste. 400
Washington, DC 20005
(202) 662-8315
(202) 628-2858 (telefax)

National Association for the Advancement of Colored People, Inc.
Angela Ciccolo** (aciccolo@naacpnet.org)
Anson Asaka** (aasaka@naacpnet.org)
NAACP National Office
4805 Mt. Hope Dr.
Baltimore, MD 21215
(410) 580-5792
(410) 358-9350 (telefax)

Advocates for Justice and Reform Now, PC
Arthur Z. Schwartz (generalcounsel@acornmail.net)
Schwartz, Lichten and Bright
275 Seventh Ave., Ste. 1760
New York, NY 10001
(212) 228-6320
(212) 358-1353 (telefax)

** *Pro hac vice* applications to be filed

CERTIFICATE OF SERVICE

Lisa Mecca Davis certifies that she caused a copy of the foregoing Amended Complaint to be served upon all counsel of record, by this Court's electronic-filing system, this 14th day of September, 2009.

/s/ Lisa Mecca Davis
Lisa Mecca Davis

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ASSOCIATION OF COMMUNITY)
ORGANIZATIONS FOR REFORM NOW)
("ACORN"), *et al.*,)
)
Plaintiffs,)
)
v.)
)
ANNE W. MURPHY, in her official capacity)
as Secretary of the Indiana Family and)
Social Services Administration, *et al.*,)
)
Defendants.)

No. 1:09-CV-849 WTL-DML

PLAINTIFFS' NOTICE OF DISMISSAL OF PLAINTIFF ACORN

Pursuant to Fed.R.Civ.P. 41(a)(1)(A)(i), plaintiffs Indiana State Conference of the National Association for the Advancement of Colored People ("NAACP") and Paris Alexander notice the dismissal of plaintiff Association of Community Organizations for Reform Now ("ACORN").

As a result of unanticipated events, ACORN has closed its offices in Indiana and no longer plans to provide voter registration assistance in the state. At this time, ACORN is not an appropriate plaintiff in this case. Considering this change of circumstances, this Court should dismiss ACORN's claims with prejudice, leaving NAACP and Paris Alexander as the remaining plaintiffs in the case.

Respectfully submitted,

/s/ Benjamin J. Blustein
Benjamin J. Blustein
One of the Attorneys for Plaintiffs

Judson H. Miner (jminer@lawmbg.com)
Robert S. Libman (rlibman@lawmbg.com)
Benjamin J. Blustein (bblustein@lawmbg.com)
Miner, Barnhill & Galland, P.C.
14 W. Erie St.
Chicago, IL 60654
(312) 751-1170
(312) 751-0438 (telefax)

American Civil Liberties Union of Indiana
Kenneth J. Falk (kfalk@aclu-in.org)
Gavin Rose (grose@aclu-in.org)
1031 E. Washington St.
Indianapolis, IN 46202
(317) 635-4059, ext. 104
(317) 635-4105 (telefax)

Project Vote
Nicole Kovite (nkovite@projectvote.org)
Yolanda Sheffield (ysheffield@projectvote.org)
739 Eighth St., S.E., Ste. 202
Washington, DC 20003
(202) 543-4173, ext. 303
(202) 543-3675 (telefax)

Demos: A Network of Ideas & Action
Brenda Wright (bwright@demos.org)
358 Chesthill Ave., Ste. 303
Brighton, MA 02135
(617) 232-5885, ext. 13
(617) 232-7251 (telefax)

Allegra Chapman (achapman@demos.org)
220 Fifth Ave., 5th Fl.
New York, NY 10001
(212) 419-8772
(212) 633-2015 (telefax)

Lawyers Committee for Civil Rights Under Law
Jon M. Greenbaum (jgreenbaum@lawyerscommittee.org)
Mark A. Posner (mposner@lawyerscommittee.org)
1401 New York Ave., N.W., Ste. 400
Washington, DC 20005
(202) 662-8315
(202) 628-2858 (telefax)

National Association for the Advancement of Colored People, Inc.
Angela Ciccolo (aciccolo@naacpnet.org)
Anson Asaka (aasaka@naacpnet.org)
NAACP National Office
4805 Mt. Hope Dr.
Baltimore, MD 21215
(410) 580-5792
(410) 358-9350 (telefax)

Advocates for Justice and Reform Now, PC
Arthur Z. Schwartz (generalcounsel@acornmail.net)
Schwartz, Lichten and Bright
275 Seventh Ave., Ste. 1760
New York, NY 10001
(212) 228-6320
(212) 358-1353 (telefax)

CERTIFICATE OF SERVICE

Benjamin J. Blustein certifies that he caused a copy of the foregoing Notice to be served upon all counsel of record, by this Court's electronic-filing system, this 26th day of February, 2010.

/s/ Benjamin J. Blustein
Benjamin J. Blustein

ATTACHMENT D

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INDIANA STATE CONFERENCE OF THE)	
NAACP, for itself and all persons similarly)	
situated,)	
)	
Plaintiff,)	
)	
v.)	CASE NO: 1:09-cv-0849-TWP-DML
)	
MICHAEL A. GARGANO, in his official)	
capacity as Secretary of the Indiana Family)	
and Social Services Administration, et al.,)	
)	
Defendants.)	

**JOINT MOTION FOR CLASS NOTICE OF PROPOSED CLASS ACTION
SETTLEMENT AND SETTING OF A FAIRNESS HEARING**

Plaintiff and Defendants hereby jointly move this Court to direct that notice be provided of the proposed class action settlement of this lawsuit to the class, as required by Rule 23(e)(1) of the Federal Rules of Civil Procedure, and that the Court set a date and time for a fairness hearing on the proposed settlement, as required by Rule 23(e)(2). The proposed settlement includes an award of attorneys' fees and costs to Plaintiff's counsel, and the proposed notice includes notice to the class of the proposed award, in compliance with Rule 23(h). The instant motion is being filed contemporaneously with the parties' Joint Motion to Certify Class Action.

In support of this motion, the parties respectfully state as follows:

1. Plaintiff and Defendants have negotiated and signed a Settlement Agreement which will fully resolve Plaintiff's claim under Section 7 of the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg-5. Section 7 requires, *inter alia*, that states provide voter registration services to public assistance applicants and recipients. The Agreement provides that, in order to facilitate a full and final settlement of Plaintiff's claim, the parties shall seek to have

this action certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. A Joint Motion to Certify Class Action has been filed contemporaneously with the instant motion. The proposed Settlement Agreement is attached.

2. The parties propose that notice of the settlement be provided to class members in the form set forth in the second attachment to this motion.

3. The parties propose that notice be given by: a) posting in the largest newspapers of general circulation in Indianapolis, Fort Wayne, Evansville, Gary, New Albany, and Richmond; b) posting in all offices of the Indiana Division of Family Resources at which public assistance clients appear to apply for public assistance benefits, re-determine and recertify benefits, and submit changes of address with regard to their receipt of public assistance benefits; and c) on the website of the Indiana Department of Family and Social Services. The newspaper posting would occur once a week for three consecutive weeks; the other postings would begin within one week of the date of the Court's Order directing posting, and would continue until the date of the fairness hearing.

4. The parties request that this Court set this case for a Rule 23(e)(2) fairness hearing on a date approximately 60 days from the date on which the Court approves the form and manner of notice to the class.

5. Plaintiff's counsel will report to the Court at least ten days prior to the fairness hearing regarding any comments received from class members pursuant to the notice of the proposed settlement.

Based on the foregoing, the parties respectfully request that this Court approve the attached class notice and the proposed manner of providing the notice, and set this matter for a fairness hearing. A proposed Order is attached.

May 12, 2011

Respectfully submitted,

FOR PLAINTIFF:

s/ Mark A. Posner

LAWYERS COMMITTEE FOR CIVIL RIGHTS
UNDER LAW

Jon M. Greenbaum

Robert A. Kengle

Mark A. Posner

1401 New York Avenue, N.W., Suite 400

Washington, DC 20005

Telephone: (202) 662-8389

Facsimile: (202) 628-2858

Email: jgreenbaum@lawyerscommittee.org

Email: bkengle@lawyerscommittee.org

Email: mposner@lawyerscommittee.org

PROJECT VOTE

Nicole Kovite Zeitler

Niyati Shah

737 ½ 8th Street SE

Washington, DC 20003

Telephone: (202) 543-4173 ext. 303

Facsimile: (202) 543-3675

Email: nzeitler@projectvote.org

Email: nshah@projectvote.org

DEMOS: A NETWORK OF IDEAS & ACTION

Brenda Wright

358 Chestnut Hill Avenue

Suite 303

Brighton, MA 02135

Telephone: (617) 232-5885 Ext. 13

Facsimile: (617) 232-7251

Email: bwright@demos.org

Allegra Chapman

220 Fifth Avenue, 5th Floor

New York, NY 10001

Telephone: 212 419-8772

Facsimile: 212 633-2015

Email: achapman@demos.org

MINER, BARNHILL & GALLAND

Judson H. Miner

Benjamin Blustein
14 West Erie Street
Chicago, Illinois 60654
Telephone: (312) 751-1170
Facsimile: (312) 751-0438
Email: jminer@lawmbg.com
Email: bblustein@lawmbg.com

AMERICAN CIVIL LIBERTIES UNION OF
INDIANA

Kenneth J. Falk
Gavin Rose
1031 E. Washington St.
Indianapolis, IN 46202
Telephone: (317) 635-4059 ext. 104
Facsimile: (317) 635-4105
Email: kfalk@aclu-in.org
Email: grose@aclu-in.org

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, INC.

Anson Asaka
NAACP National Office
4805 Mt. Hope Drive
Baltimore, MD 21215
Telephone: 410-580-5792
Facsimile: 410-358-9350
Email: aasaka@naacpnet.org

FOR DEFENDANTS:

GREGORY F. ZOELLER
INDIANA ATTORNEY GENERAL

Consented to Motion

David A. Arthur
Betsy M. Isenberg
Alex O. James
Deputy Attorneys General
I.G.C.S. – 5th Floor
302 W. Washington St.
Indianapolis, IN 46204

ATTACHMENT E

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INDIANA STATE CONFERENCE OF THE)
NAACP, for itself and all persons)
similarly situated,)
)
Plaintiff,)
)
vs.) CASE NO: 1:09-cv-0849-TWP-DML
)
MICHAEL A. GARGANO, in his official)
capacity as Secretary of the Indiana Family and)
Social Services Administration, et al.)
)
Defendants.)

SETTLEMENT AGREEMENT

I. Introduction

- A. In this action, Plaintiff alleges that Defendants are in violation of Section 7 of the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg-5. The parties have reached an agreement, as set forth herein, which settles this claim.
- B. Upon approval of this Agreement by the Court, Plaintiff shall file an unopposed motion to dismiss the Defendant Commissioners of the Indiana Election Commission with prejudice.
- C. The parties have agreed that this lawsuit should be certified as a class action, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The parties recognize that Rule 23(e) requires that, to settle this action as a class action, notice of the Agreement must be provided to the class and this Court thereafter must find that the Agreement is fair, reasonable, and adequate. The parties agree that the class should be defined as follows:

All residents of the State of Indiana who have applied for public assistance through FSSA/DFR, or who have requested recertification or renewal or submitted a change of address relating to public assistance through FSSA/DFR, and who claim that they were not offered the opportunity to register to vote in that transaction or claim that they were not offered assistance in

completing a voter registration application, in accordance with 42 U.S.C. § 1973gg-5.

- D. Notwithstanding that Rule 23(e) will require Court approval of the settlement of this action as a class action, the parties agree that Defendants shall begin implementation of sections II and III of this Agreement immediately upon the parties signing the Agreement, except that, as provided in section III, Defendants shall implement certain provisions within specified time periods following the signing of this Agreement.

II. Indiana Election Division (“IED”)

- A. IED shall continue to coordinate the State of Indiana’s compliance with Section 7 of the NVRA, as required by Section 10 of the NVRA, 42 U.S.C. § 1973gg-8, and state law.
- B. IED shall continue to provide a toll-free number for Indiana residents. This number shall be publicized on the IED website.
- C. IED shall, quarterly, forward the following data (by county) for the preceding quarter to FSSA/DFR and Plaintiff’s counsel: (1) the number of VRG-6 applications (form 46914) that were received; (2) the number of such applications that resulted in new registrations; (3) the number which resulted in updated registrations; (4) the number which were refused; and (5) the number that were duplicates.

III. Family and Social Services Administration (“FSSA”) and Division of Family Resources (“DFR”)

A. Staffing Structure

1. FSSA/DFR shall continue to designate a statewide NVRA coordinator to coordinate and oversee the agency’s compliance with the NVRA and the provisions of this Agreement.
2. FSSA/DFR shall continue to designate a local NVRA coordinator for each local and/or county office to coordinate and oversee voter registration activities in that office. The local coordinator’s duties shall include transmittal of voter registration forms and declinations to the county clerk and/or voter registration office, gathering and reporting voter registration data, providing support and guidance to office employees and contract personnel regarding NVRA compliance and the provisions of this Agreement, ensuring that employees and contract personnel receive required NVRA training, ensuring that voter registration signs are posted as required, and ensuring that the office maintains or has available an adequate supply of voter registration applications. Each State Eligibility Manager (“SEM”) and other management

employees responsible for managing a particular FSSA/DFR office shall continue to be responsible for ensuring that their office operates in compliance with the NVRA, and shall be responsible for ensuring that the office operates in compliance with the provisions of this Agreement.

3. FSSA/DFR shall provide Plaintiff's counsel with the name of the statewide coordinator and update Plaintiff's counsel whenever a change occurs; and shall provide Plaintiff with the names and offices of the local NVRA coordinators and shall update this at the request of Plaintiff's counsel, provided that such requests may not be made more frequently than once a year.

B. Compliance Manual and Training

FSSA/DFR shall develop and implement a training policy for all employees and contract personnel with voter registration duties. In conjunction with this policy, the agency shall do the following:

1. Prepare an NVRA compliance manual outlining the agency's requirements (in accord with this Agreement) concerning Section 7 of the NVRA and all related Indiana statutes which describe the procedures to be used by FSSA/DFR offices to fulfill their voter registration requirements. Prior to implementation of the manual, FSSA/DFR will submit the manual to the IED and to Plaintiffs' counsel for review and comment. The manual shall be finalized by FSSA/DFR within 60 days of the execution of this Agreement.
2. Provide NVRA training and a copy of the NVRA compliance manual (hard copy or electronic copy) to the designated NVRA coordinator for each county office or site, and the SEM or other management employee in charge of each county office or site, within 120 days of the execution of this Agreement. Each designated NVRA coordinator shall ensure that all employees and contract personnel responsible for voter registration activities at the coordinator's office are adequately trained and provided with a copy of the NVRA compliance manual (hard copy or electronic copy). Approximately one year after the execution of this Agreement, and annually thereafter, refresher guidance on the procedures for complying with the NVRA and this Agreement (as set forth in the compliance manual) shall be provided to all employees and contract personnel responsible for voter registration activities by making this an agenda item for a SEM unit meeting at each FSSA/DFR office. New SEMs and other management employees in charge of a county office or site, new local NVRA coordinators, and new employees and contract personnel responsible for voter registration activities shall receive the mandatory NVRA training and be provided a copy (hard copy or electronic copy) of the compliance manual as part of the agency training otherwise provided for the new position or new personnel.

3. FSSA/DFR shall place the NVRA compliance manual on its website after it is finalized, and forward it to Plaintiff's counsel.
4. FSSA/DFR shall notify all FSSA/DFR management officials, all contractor management officials, and all employees and contract personnel responsible for voter registration activities of the execution of this Agreement, including:
 - a) a statement that compliance with the NVRA and the provisions of this Agreement is mandatory; and
 - b) a statement detailing the procedures to be followed for on-premises and remote provision of registration forms and assistance (see subsections III.C and III.D below). A copy of this notification shall be provided to Plaintiff's counsel.

C. Provision of Forms and Assistance at FSSA/DFR Offices

As set forth herein, FSSA/DFR shall continue and supplement its procedures for distributing a combined voter registration application and notice-declination form to all individuals who visit a FSSA/DFR office to apply for benefits, seek a recertification or redetermination of benefits, or report a change of address, and offering voter registration assistance to such individuals. In implementing this policy, the agency shall do the following:

1. Continue to forward completed voter registration applications and notice/declination forms to the county clerk and/or voter registration office within the time prescribed by law, and utilize the Indiana Voter Registration Material Receipt or Transmittal forms (VRG-8 or VRG-9) as appropriate.
2. Develop uniform signage or posters to advertise the availability of voter registration opportunities and assistance. Such signage or posters shall be placed, in a clear and conspicuous manner, in the waiting room of each FSSA/DFR office visited by members of the public to apply for benefits, recertify or renew benefits, or report a change of address.
3. Receptionist/front desk:
 - a. When a client presents to a FSSA/DFR office, the client shall be asked to complete an individual sign-in sheet and take it to the receptionist. The sign-in sheet is attached as Exhibit A; the highlighted portion of the sign-in sheet (both as to language and layout) is mandated by this Agreement; the non-highlighted portion includes checkboxes which FSSA/DFR may alter without Plaintiff's consent (however, these checkboxes shall not refer to a client being at the office to conduct an interview for benefits). On the sign-in sheet, each client shall be asked to check boxes indicating whether she/he is there for to apply for benefits, report a change of address, or for a recertification/ redetermination, as applicable. If the client does not check any of these boxes and does not check any of the other boxes on the sign-in sheet indicating the reason for the visit, the receptionist shall ask the

client why she/he is at the office and the receptionist shall ensure that the appropriate box on the sign-in sheet is checked.

- b. If the check box for “apply,” the check box for “report a change of address,” or the check box for “recertification/redetermination” is checked (by the client or the receptionist), the receptionist shall distribute (i.e., hand) to the client the VRG-6 voter registration application, indicate to the client that the form is a voter registration application, and offer assistance with voter registration (as required by law).
 - c. If the client does not wish to register to vote, the receptionist shall ask the client to complete the notice/declination portion of the form. If the client does not want to register to vote and also declines to complete the notice/declination portion of the form (a “blank notice/declination form”), the receptionist shall note that on the sign-in sheet, at the bottom, by checking the statement “the client declined a VR form.”¹
 - d. Registration applications filled out by clients shall be checked for legibility and completeness by the receptionist, and completed and signed registration applications, as well as notice/declination forms completed by clients, shall be forwarded to the local NVRA coordinator for transmission to the county voter registration office as required by law.
4. In-person client interviews: During in-person client interviews in connection with a benefits application or a redetermination or recertification, the caseworker shall ask the client whether the client was offered the opportunity to register to vote by a receptionist in connection with the current application for benefits or the current recertification/redetermination of benefits. If not, the caseworker shall distribute the VRG-6 form to the client, offer assistance with voter registration (as required by law), and ask the client to complete the notice/declination portion of the form if the client does not wish to register to vote. Registration applications filled out by clients shall be checked for legibility and completeness by the caseworker, and completed and signed registration applications, as well as notice/declination forms completed by

¹ For purposes of implementing this Agreement, receptionists will treat notice/declination forms as having been “completed” by clients who do not wish to register to vote so long as one of the “no” boxes on the form has been checked, regardless of whether or not a client has provided some or all of the other information requested (such as identification information). Accordingly, notice/declination forms that only have a “no” box checked by the client, as well as forms which have a “no” box checked and also have other requested information provided, will be forwarded to the county registration offices pursuant to paragraph 3.d above, and will not be counted as blanks in implementing paragraph 3.c. Should a county clerk for a particular county express a concern to FSSA/DFR about this procedure, the IED will consult with the clerk to resolve the concern.

clients, shall be forwarded to the local NVRA coordinator for transmission to the county voter registration office as required by law.²

5. Any client who is not at a FSSA/DFR office to apply/interview for benefits, obtain a recertification or redetermination, or report a change of address may request a voter registration application and, if requested, FSSA/DFR will provide an application and accept completed applications for transmittal to the county registration office.

D. Remote Provision of Voter Registration Applications

FSSA/DFR shall continue and supplement its procedures for providing a voter registration application to individuals who are not present in a FSSA/DFR office and shall do so as follows:

1. FSSA/DFR shall provide Indiana Voter Registration by Mail (VRG-7) forms via mail to applicants for public assistance who indicate on an online application for assistance that they would like to register to vote. The voter registration language included on the online application was modified such that the revised online application is placed into full field operation on December 20, 2010. The modifications shall be as follows. The voter registration question included in the online application shall be modified to state "If you are not registered to vote where you live now, would you like to apply to register to vote?", and the advisory following that question shall be modified to state "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency." Further, the online application shall be modified to include an advisory to the user that if the user checks "yes" in response to the voter registration inquiry, a voter registration application will be mailed to him or her, and that voter registration applications also may be obtained at FSSA/DFR offices.
2. FSSA/DFR shall, on its website, attach a downloadable PDF of the VRG-7 voter registration application to the downloadable PDF of the benefits application used in the "as-is" FSSA/DFR offices.
3. FSSA/DFR shall, on its website, provide a link to the State of Indiana's online system for voter registration, and shall publicize the IED toll-free number on its website.
4. Telephone client interviews: During telephone client interviews in connection with a benefits application or a redetermination or recertification, the

² Caseworkers will follow what is specified in footnote 1 as to when notice/declination forms have been "completed" by clients who do not wish to register to vote (however, caseworkers are not required by this Agreement to record or track the number of blank notice/declination forms).

caseworker shall ask the client whether the client was offered the opportunity to register to vote in connection with the current application for benefits or the current recertification/redetermination of benefits. If not, the caseworker shall ask whether the client wishes to have FSSA/DFR mail a voter registration application to the client and, if yes, the caseworker shall cause a VRG-7 voter registration application to be promptly mailed to the client.

- 5 Voter registration also shall be offered as follows:
 - a. The documentation sent to public assistance clients for any redetermination or recertification of benefits which does not require a client interview shall include the question whether the client wants to register to vote, and a statement indicating that the client's answer will not affect the provision of public assistance benefits. If the client answers in the affirmative, FSSA/DFR shall cause a VRG-7 voter registration application to be mailed to the client promptly after the completed redetermination/recertification documentation is received by FSSA/DFR back from the client.
 - b. All public assistance clients who report a change of address by telephone shall be asked whether they wish to register to vote or update their prior voter registration. If the client answers in the affirmative, FSSA/DFR shall cause a VRG-7 voter registration application to be promptly mailed to the client.
6. VRG-7 registration applications mailed to clients pursuant to paragraphs 1, 4, and 5 of this section shall be accompanied by the cover letter attached as Exhibit B, which was implemented on December 20, 2010.

E. Remedial Mailing

If FSSA/DFR learns that a specific client was not given the opportunity to register to vote as described in sections C and D above, FSSA/DFR shall promptly mail a VRG-7 voter registration application to the individual, offering the individual the opportunity to register to vote. The mailing shall include the cover letter attached as Exhibit C. The statewide NVRA coordinator shall maintain copies of all letters mailed pursuant to this paragraph.

F. Quality Assurance Measures

FSSA/DFR shall evaluate and monitor the agency's compliance with the NVRA, the provisions of this Agreement, and related Indiana statutes, as set forth below. If the agency determines that individual offices or employees are not complying or that action otherwise is needed to better assure compliance, the agency shall take appropriate action. FSSA/DFR shall:

1. Implement the tracking and reporting procedures set forth in Section G. below.
2. Incorporate NVRA compliance into the performance reviews of designated FSSA county or site NVRA coordinators, the statewide NVRA coordinator, and SEMs.
3. Conduct random spot checks of FSSA offices, with each office spot checked at least once a year, with the results of spot checks provided to Plaintiff's counsel in those instances where those results are provided to the FSSA/DFR statewide NVRA coordinator.
4. Incorporate NVRA compliance into the management evaluation process for the Supplemental Nutrition Assistance Program (SNAP), with reports prepared of these evaluations of NVRA compliance forwarded to Plaintiff's counsel; a summary of any corrective actions taken as a result of a SNAP management evaluation also shall promptly be forwarded to Plaintiff's counsel.
5. Review and analyze the data set forth in sections II.C and III.G, and take appropriate action pursuant to these analyses, if needed.
6. Plaintiff's counsel may identify to Defendants' counsel any offices they believe may not be in compliance with the provisions of sections III.C and III.D. Defendants' counsel shall promptly advise whether FSSA/DFR will conduct an investigation or review of any such offices to determine whether corrective actions are needed, and will communicate the results of any such investigation or review to Plaintiff's counsel. The provisions of this paragraph do not modify or limit the provisions of section VII regarding enforcement of the terms of this Agreement. Complaints from any member of the public regarding NVRA compliance also will be duly reviewed and considered by FSSA/DFR.
7. In addition to the summaries of corrective actions provided pursuant to paragraphs F.4 and F.6 above, FSSA/DFR shall promptly forward to Plaintiff's counsel a summary of any corrective actions taken pursuant to this Agreement when the FSSA/DFR statewide NVRA coordinator is notified of such corrective actions.

G. Tracking and Reporting

FSSA/DFR shall develop and implement procedures for tracking and reporting data as follows.

1. Distribution of registration applications at FSSA/DFR offices:

- a. Retain copies of Indiana Voter Registration Material Receipt or Transmittal forms (VRG-8 or VRG-9) transmitted by each office reflecting the number of voter registration forms and/or declinations submitted to the applicable county clerk and/or board of voter registration.
 - b. Compile, by office and statewide, on a monthly basis, i) the total number of voter registration applications and the total number of completed notice/declination forms (see footnotes 1 and 2) transmitted with the VRG-8's and VRG-9's; ii) the total number of clients whose sign-in sheet at a county or local office indicated that they were there to apply for benefits, report a change of address, or request a recertification/redetermination; ; and iii) the total number of instances where a receptionist recorded that the client declined to register and also declined to complete the notice/declination section (see footnote 1). This information shall be provided to FSSA's statewide NVRA Coordinator on a monthly basis.
 - c. Compile, by office and statewide, on a monthly basis, the number of remedial mailings sent pursuant to section III.E.
 - d. Report the data compiled pursuant to paragraphs 1.b and 1.c to Plaintiff's counsel on a monthly basis in Excel spreadsheet format, with the report for a particular month provided no later than the end of the following month.
2. Remote Distribution of Registration Applications
- a. Compile monthly, on a statewide basis, the number of voter registration forms sent in response to a "yes" answer on an on-line application requesting a voter registration form, the number of clients who checked "no" in response to the voter registration question on the on-line application, and the number who did not respond to that question by checking "yes" or "no" (i.e., blanks). This information shall be provided to FSSA's statewide NVRA Coordinator on a monthly basis.
 - b. Report the data compiled pursuant to paragraph 2.a. above to Plaintiff's counsel on a monthly basis in Excel spreadsheet format, with the report for a particular month provided no later than the end of the following month.

IV. Term

This Agreement will remain in effect until April 1, 2014.

V. No Admission of Liability

By entering into this Agreement, Defendants do not admit any liability or any violation of the NVRA or any other laws.

VI. Attorneys' Fees and Expenses

Within twenty-one (21) days after the approval of this Agreement by the Court, Defendants will pay Plaintiff's counsel \$350,479.77 in full settlement of Plaintiff's claims for attorneys' fees and expenses.

VII. Enforcement

- A. The United States District Court for the Southern District of Indiana, Indianapolis Division shall have continuing jurisdiction to enforce the terms of this Agreement for its duration.
- B. Before bringing an enforcement action, Plaintiff shall provide Defendants with written notice of any claim of breach of this Agreement. Defendants shall have 30 days to respond to such notice. The parties shall then attempt to resolve Plaintiff's concerns within the following 30 days. In the event that the parties are not able to resolve their dispute within 30 days, the parties shall submit the dispute to mediation by U.S. Magistrate Judge Debra McVicker Lynch (or a mediator designated by Magistrate Judge Lynch or, if Judge Lynch is unavailable, the mediator shall be the District Judge assigned to this case or an individual designated by the District Judge). If the parties are unable to resolve the dispute through mediation, Plaintiffs may file a motion for specific performance of the Agreement within 30 days of the determination that the matter cannot be resolved by mediation.

Approved on behalf of Plaintiff, Indiana State Conference of the NAACP
on this 18 day of April 2011:

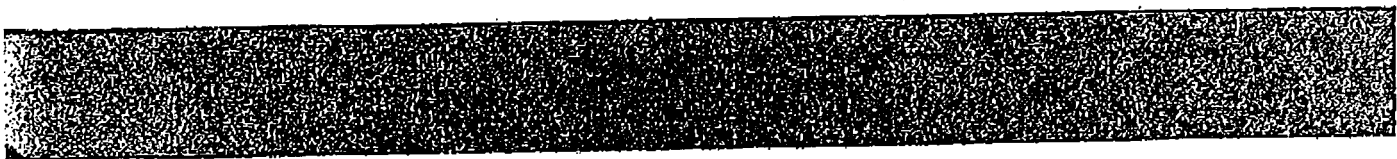
By: *Nicole Kovite Zeitler*
PROJECT VOTE
Nicole Kovite Zeitler
Niyati Shah
737 1/2 8th Street SE
Washington, DC 20003

By: *Jon M. Greenbaum*
LAWYERS COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
Jon M. Greenbaum
Mark A. Posner
1401 New York Avenue, N.W., Suite 400
Washington, DC 20005

By: *Judson H. Miner*
MINER, BARNHILL & GALLAND
Judson H. Miner
Robert S. Libman
Benjamin Blustein
14 West Erie Street
Chicago, Illinois 60654

By: *Brenda Wright*
DEMOS: A NETWORK OF IDEAS &
ACTION
Brenda Wright
358 Chestnut Hill Avenue
Suite 303
Brighton, MA 02135

Allegra Chapman
220 Fifth Avenue, 5th Floor
New York, NY 10001



By: 

AMERICAN CIVIL LIBERTIES UNION
OF INDIANA
Kenneth J. Falk
Gavin Rose
1031 E. Washington St.
Indianapolis, IN 46202

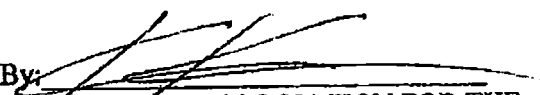
By: _____

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE, INC.
Kim Keenan
Anson Asaka
NAACP National Office
4805 Mt. Hope Drive
Baltimore, MD 21215

By: 

ADVOCATES FOR JUSTICE,
CHARTERED ATTORNEYS
Arthur Z. Schwartz
275 Seventh Avenue, Suite 1760
New York, N.Y. 10001

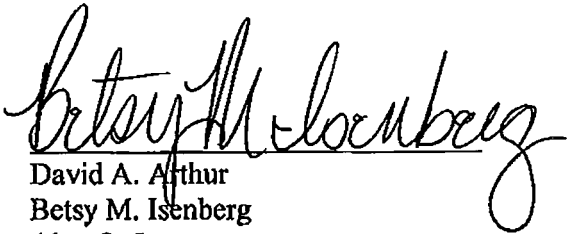
By: _____
AMERICAN CIVIL LIBERTIES UNION
OF INDIANA
Kenneth J. Falk
Gavin Rose
1031 E. Washington St.
Indianapolis, IN 46202

By:  _____
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE, INC.
Kim Keenan
Anson Asaka
NAACP National Office
4805 Mt. Hope Drive
Baltimore, MD 21215

By: _____
ADVOCATES FOR JUSTICE AND
REFORM NOW, PC
Arthur Z. Schwartz
Schwartz, Lichten, and Bright
275 Seventh Avenue Suite 1760
New York, N.Y. 10001

On behalf of the Defendants A. Gargano, Mike Carr,³ J. Bradley King, Trent Deckard,⁴ Daniel A. Domezich, Chair of the Indiana Election Commission, S. Anthony Long, Sarah Steele Riordan, and Jonathan J. Myers, members of the Indiana Election Commission:

Date: 4/26/2011

By: 
David A. Arthur
Betsy M. Isenberg
Alex O. James
Deputy Attorneys General
I.G.C.S. – 5th Floor
302 W. Washington St.
Indianapolis, IN 46204

³ Mr. Carr has replaced Ms. Boggs as Director of the Division of Family Resources.

⁴ Mr. Deckard has replaced Ms. Potesta.

EXHIBIT A

Sign-In Sheet

Please Print

Name: _____ Date: _____
Time of Arrival: _____ Social Security Number (Last 4 Digits Only): _____

<input type="checkbox"/> Check this box if you are visiting the office for one of the following reasons: <input type="checkbox"/> Apply for Benefits <input type="checkbox"/> Report a Change of Address <input type="checkbox"/> Recertification/Redetermination If you have checked any of these boxes, the receptionist will provide you with a Voter Registration Application. You may receive assistance in filling out the application.

Otherwise, please check one of the below reasons for your visit:

- Use Resource Room:
 - Phone (Community Resources or Job Search)
 - Computer Use (Community Resources or Job Search)
 - Make Copies
- HIP Application
- Send Documents to the Service Center
- Pick up Verification or Printout
- Check on Status of Case
- Appeal Hearing
- Reschedule Appointment
- Sign Rights and Responsibilities or Summary of Eligibility
- EBT Card or Medicaid Card

- Scheduled Appointment:
 - Eligibility – Appointment Time: _____
 - With State Staff Only:
 - Second Part of Interview with SEC
 - Phone Appointment with Service Center – Appointment Time: _____

- IMPACT:
 - IMPACT Orientation – Appointment Time: _____
 - IMPACT Workshop – Appointment Time: _____
 - IMPACT Network Center – Appointment Time: _____
 - IMPACT Follow-Up – Appointment Time: _____
 - Impact Walk-In – Appointment Time: _____
 - Child Care Referrals
 - Bus Passes or Other Transportation Needs
 - Supportive Services – Other
 - Turn in Job Search, Attendance Records or Other IMPACT Documents

- Other – Please Provide Reason: _____

FOR OFFICE USE ONLY:

Client Declined VR Form

Time Client Served: _____ Staff Initials: _____

DFR Sign-In Sheet

CONFIDENTIAL

Sign-In Sheet

Please Print

Name: _____ Date: _____
Time of Arrival: _____ Social Security Number (Last 4 Digits Only): _____

Check this box if you are visiting the office for one of the following reasons:

- Apply for Benefits
- Report a Change of Address
- Recertification/Redetermination

If you have checked any of these boxes, the receptionist will provide you with a Voter Registration Application. You may receive assistance in filling out the application.

Otherwise, please check one of the below reasons for your visit:

- Use Resource Room:
 - Phone (Community Resources or Job Search)
 - Computer Use (Community Resources or Job Search)
 - Make Copies
- HIP Application
- Send Documents to the Service Center
- Pick up Verification or Printout
- Check on Status of Case
- Appeal Hearing
- Reschedule Appointment
- Sign Rights and Responsibilities or Summary of Eligibility
- EBT Card or Medicaid Card

- Scheduled Appointment:
 - Eligibility – Appointment Time: _____
 - With State Staff Only:
 - Second Part of Interview with SEC
 - Phone Appointment with Service Center – Appointment Time: _____

- Other – Please Provide Reason: _____

FOR OFFICE USE ONLY:

Client Declined VR Form

Time Client Served: _____ Staff Initials: _____

DFR Sign-In Sheet

CONFIDENTIAL

EXHIBIT B

Cover Letter Pursuant to Section III.D.6 of the Settlement

It was indicated that you or someone in your household would like to register to vote. For that reason, attached is the Indiana Agency Voter Registration Application, which is also available at: <http://www.in.gov/fssa/files/VRG-7.pdf>.

If you are not registered to vote, you may complete, sign, and send this form to the Voter Registration Office in the county where you live or to the Indiana Election Division at:

Indiana Election Division
302 West Washington Street
Room E204
Indianapolis, IN 46204-2743

Please do not send this form to Family and Social Services Administration.

Thank you for your interest!

EXHIBIT C

Remedial Mailing Cover Letter

It has come to our attention that you may not have been offered the opportunity to register to vote in connection with your application for public assistance, recertification or redetermination, or report of change of address.

For that reason, attached please find the Indiana Agency Voter Registration Application, which is also available at: <http://www.in.gov/fssa/files/VRG-7.pdf>.

If you are not registered to vote where you live now and would like to register to vote, you may complete, sign, and send this form to the Voter Registration Office in the county where you live or to the Indiana Election Division at:

Indiana Election Division
302 West Washington Street
Room E204
Indianapolis, IN 46204-2743

Please do not send this form to Family and Social Services Administration. The receipt of this mailing does not indicate any information about your eligibility to register to vote.

Thank you for your interest!

ATTACHMENT F

U.S. District Court
Southern District of Indiana (Indianapolis)
CIVIL DOCKET FOR CASE #: 1:09-cv-00849-TWP-DML

INDIANA STATE CONFERENCE OF THE NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE v. MURPHY et al
Assigned to: Judge Tanya Walton Pratt
Referred to: Magistrate Judge Debra McVicker Lynch
Cause: 42:1983 Civil Rights Act

Date Filed: 07/09/2009
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

Plaintiff

**INDIANA STATE CONFERENCE OF
THE NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED
PEOPLE**
(NAACP)

represented by **Allegra Alejandrea Chapman**
DEMOS: A NETWORK FOR IDEAS
AND ACTION
220 Fifth Avenue, 5th Floor
New York, NY 10001
212-419-8772
Fax: 212-633-2015
Email: achapman@demos.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

Anson Carlton Asaka
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215
410-580-5789
Fax: 410-358-9350
Email: aasaka@naacpnet.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

Arthur Z. Schwartz
SCHWARTZ LICHTEN & BRIGHT, P.C.
275 Seventh Ave., 17th Floor
New York, NY 10001
PRO HAC VICE
ATTORNEY TO BE NOTICED

Benjamin Blustein
MINER BARNHILL & GALLAND, P.C.
14 W. Erie Street
Chicago, IL 60654
312-751-1170

ATTACHMENT G

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INDIANA STATE CONFERENCE OF THE NAACP, for itself and all persons similarly situated,)	
)	
Plaintiff,)	
)	
v.)	CASE NO: 1:09-cv-0849-TWP-DML
)	
MICHAEL A. GARGANO, in his official capacity as Secretary of the Indiana Family and Social Services Administration, et al.,)	
)	
Defendants.)	

ORDER DIRECTING NOTICE TO CLASS OF PROPOSED CLASS ACTION SETTLEMENT AND SETTING CASE FOR FAIRNESS HEARING

The parties having filed their Joint Motion for Class Notice of Proposed Class Action Settlement and Setting of a Fairness Hearing, and the Court having read and reviewed the same and being duly advised, hereby finds that the Motion should be GRANTED.

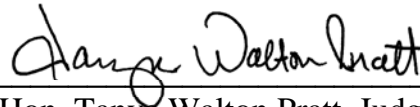
IT IS ORDERED that notice of the proposed settlement, attached as Exhibit 2 to the Motion, be given to the class by: a) posting in the largest newspapers of general circulation in Indianapolis, Fort Wayne, Evansville, Gary, New Albany, and Richmond; b) posting in all offices of the Indiana Division of Family Resources at which public assistance clients appear to apply for public assistance benefits, re-determine and recertify benefits, and submit changes of address with regard to their receipt of public assistance benefits; and c) on the website of the Indiana Department of Family and Social Services. The newspaper posting shall occur once a week for three consecutive weeks; the other postings shall begin within one week of the date of this Order, and shall continue until the date of the fairness hearing.

IT IS FURTHER ORDERED that this case is set for a fairness hearing on the proposed settlement, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, on August 25, 2011, at 9:00 a.m. in Courtroom 344, Birch Bayh Federal Building and United States Courthouse.

IT IS FURTHER ORDERED that Plaintiff's counsel report to the Court at least ten days prior to the fairness hearing regarding any comments received from class members pursuant to the notice of the proposed settlement.

05/18/2011

Date



Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

Distribution List:

Allegra Alejandrea Chapman
DEMOS: A Network for Ideas & Action
achapman@demos.org

Anson Carlton Asaka
NAACP
aasaka@naacpnet.org

Benjamin Blustein
MINER, BARNHILL & GALLAND, PC
bblustein@lawmbg.com

Brenda Wright
DEMOS
bwright@demos.org

Gavin M. Rose
ACLU of INDIANA
grose@aclu-in.org

Jon M. Greenbaum
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
jgreenbaum@lawyerscommittee.org

Kenneth J. Falk
ACLU of INDIANA
kfalk@aclu-in.org

Mark A. Posner
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
mposner@lawyerscommittee.org

Nicole Kovite Zeitler
PROJECT VOTE
nzeitler@projectvote.org

Niyati Shah
PROJECT VOTE
nshah@projectvote.org

Judson H. Miner
MINER, BARNHILL & GALLAND, PC
14 W. Erie Street
Chicago, IL 60654

Robert A. Kengle
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
bkengle@lawyerscommittee.org

David A. Arthur
Deputy Attorney General
David.Arthur@atg.in.gov

Betsy M. Isenberg
Deputy Attorney General
Betsy.Isenberg@atg.in.gov

Alex O. James
Deputy Attorney General
Alex.James@atg.in.gov

Arthur Z. Schwartz
275 Seventh Avenue, 17th Floor
New York, NY 10001

Laura D. Blackburne
4805 Mt. Hope Drive
Baltimore, MD 21215

** This party was crossed out from the distribution list because they are not counsel of record in this case.