IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02992-PAB-KLM

JUDICIAL WATCH, INC., et al.,

Plaintiffs,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacities,

Defendant.

MOTION TO ALTER OR AMEND THE JUDGMENT
IN LIGHT OF NEWLY DISCOVERED EVIDENCE

Plaintiffs Judicial Watch, Inc. ("Judicial Watch"), Elizabeth Miller, Lori Hovey, Mark Sutfin, the American Constitution Party of Colorado, and the Libertarian Party of Colorado ("Plaintiffs") respectfully move the Court, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment, and in particular to reconsider its Minute Order (Doc. 107), dated May 8, 2023, denying the joint request by the parties that the Court retain jurisdiction to enforce the terms of the Settlement Agreement if such enforcement becomes necessary (Doc. 105), dated March 30, 2023. Defendant Griswold states that she **takes no position** on this motion at this time, but reserves the right to respond after viewing this motion.

Plaintiffs submit that new evidence, discovered after the Settlement Agreement resolving this matter was signed and the case dismissed, warrants reconsideration of this Court's order denying the request that it retain jurisdiction. Specifically, Plaintiffs recently learned from Defendant that the actual number of registrations removed from 2020 to 2022 was about *one half* of what Defendant reported in sworn interrogatory responses and documents produced in

discovery while the lawsuit was still pending. The removals involved those registrants who were sent a forwardable confirmation notice and had not responded to the notice or voted in two consecutive federal elections, a critical provision of the National Voter Registration Act (NVRA), which was the subject of Plaintiffs' lawsuit. As set forth below, Plaintiffs can show the "extraordinary circumstances" that justify the Court's retaining jurisdiction to enforce the terms of the Settlement Agreement.

BACKGROUND FACTS

The complaint in this action was filed in October 2020 (Doc. 1) on behalf of Judicial Watch and three Colorado voters. It contained a single count, alleging a violation of Section 8(a)(4) of the NVRA, which requires states to "conduct a general program that makes a reasonable effort to remove … from the official lists of eligible voters" the names of voters who have become ineligible by reason of death or a change of residence. 52 U.S.C. § 20507(a)(4); Doc. 1, ¶¶ 70-76.

In August 2021, Defendant's motion to dismiss was granted in part and denied in part (Doc. 57). In August 2022, Defendant's motion for reconsideration or for certification of an interlocutory appeal was denied (Doc. 87). On September 21, 2022, the Court entered an order lifting the discovery stay in this case (Doc. 90). On September 27, 2022, Plaintiffs served their first sets of interrogatories and requests for production on Defendant.

Plaintiffs also filed an amended complaint in October 2022, again alleging a single count asserting a violation of Section 8(a)(4) of the NVRA, updating the data supporting this claim, and adding plaintiffs the American Constitution Party of Colorado and the Libertarian Party of Colorado. (Doc. 95, ¶¶ 87-93). Like the original complaint, the amended complaint focused on voters who had become ineligible due to a change of address. In particular, the allegations focused on Defendant's failure to remove the registrations of voters who had moved, failed to respond to

an address confirmation notice, and failed to vote for two general federal elections. *Id.*, ¶¶ 12, 30, 44-50, 51, 57. These removals are known as "Section 8(d)(1)(B) removals" in reference to the NVRA provision that governs them. *See* 52 U.S.C. § 20507(d)(1)(B). They are also known as "A9e removals" in reference to a particular question that asks about them in an NVRA survey conducted by the Election Assistance Commission (EAC). Ex. 1 (Popper Declaration), ¶ 4.

Plaintiffs' interrogatory no. 1 sought the following information:

> 1. How many voter registrations were removed in each Colorado county pursuant to Section 8(d)(1)(B) during the period from November 2, 2020 to the present[?]

Ex. 2 at 2.

Plaintiffs' production request no. 2 likewise demanded:

> 2. Documents sufficient to show how many voter registrations were removed pursuant to Section 8(d)(1)(B) in each Colorado county during the period from November 2, 2020 to the present.

Ex. 3 at 1.

Defendant responded on November 3, 2022. In response to interrogatory no. 1, Defendant averred that the "summary of registrations canceled in each county is provided in the spreadsheet produced in response to Plaintiffs' first Request for Production #2." Ex. 2 at 2. The spreadsheet produced in response to production request no. 2 purported to list the number of Section 8(d)(1)(B) removals by county for the relevant two-year period. Ex. 3 at 1; Ex. 4.

In the aggregate, that spreadsheet showed 306,303 Section 8(d)(1)(B) removals for all of Colorado's counties during the two-year reporting period from November 2020 to November 2022. Ex. 1, ¶ 9. Judicial Watch possessed comparable data for the preceding reporting periods, which showed 210,941 Section 8(d)(1)(B) removals from 2018 to 2020, and 172,379 such

removals from 2016 to 2018. *Id.*, ¶ 10. The spreadsheet provided in discovery last November suggested that one key metric for measuring Colorado's NVRA compliance was improving.

In the next few months the parties concluded a Settlement Agreement (Doc. 105-1). Among other things, that agreement included a provision obligating Defendant to provide the data "described in question[]…A9e" of the EAC's survey (in other words, the Section 8(d)(1)(B) removals) in April of each year, through 2028. Doc. 105-1 at 2 (¶ 7).

The first data under the Settlement Agreement was sent by Defendant in April 2023. It covered the period from November 2020 through November 2022. Judicial Watch suggested that the data provided should extend at least through April, pointing out that it had already received removal data from November 2020 through November 2022 in discovery. Ex. 1, ¶ 16.

Judicial Watch also noticed, however, a more disturbing problem with the new data: it was completely different from the data for the same period provided by Defendant in discovery five months earlier. In particular, the data provided in discovery was far higher—that is, better, and more suggestive of compliance—than the data recently provided under the Settlement Agreement. Ex. 1, ¶ 15. Asked about this discrepancy, Defendant's counsel ultimately informed Judicial Watch that the data provided in discovery was erroneous, in that it included irrelevant removal data, and that the lower data for the same period provided under the Settlement Agreement was correct. *Id.*, ¶ 17. Judicial Watch simply did not have this information when it settled the case or when the Court issued its Minute Order on May 8, 2023 declining to retain jurisdiction to enforce the terms of the agreement. *Id.*, ¶ 18, Doc. 107.

The difference between the two datasets is dramatic. The actual, total number of Section 8(d)(1)(B) removals in Colorado during the relevant two-year period was revealed to be 161,607. Ex. 1, ¶ 14; Ex. 6. This is lower than the data for the two previous reporting periods ending in

2020 and 2018. *See* Ex. 1, ¶ 10. More to the point, it is about half (52.76%) of the 306,303 total removals Defendant erroneously reported during discovery for the same period ending in 2022. Ex. 1, ¶ 14, Ex. 6.

As set forth below, this new information warrants a reconsideration of the Court's denial of the parties request that it retain jurisdiction to enforce the terms of the Settlement Agreement.

LEGAL STANDARDS

"Grounds warranting a motion to reconsider include … new evidence previously unavailable …." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *see also Ybarra v. Doe*, No. 19-cv-01828-PAB-NRN, 2020 U.S. Dist. LEXIS 212086 at *3 (D. Colo. Nov. 13, 2020) (a motion to reconsider filed within 28 days is treated as a Fed. R. Civ. P. 59(e) motion).

If settling parties agree, and if a dismissal order appropriately provides, a court's decision whether to "retain jurisdiction over the settlement contract" is a matter of discretion. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994). However, "[e]xcept in extraordinary circumstances, the Court will not retain jurisdiction . . . over cases that have been settled." Practice Standards (Civil Cases), Judge Philip A. Brimmer § I.H.5. "Any motion or stipulation for dismissal requesting that the Court retain jurisdiction after dismissal shall explain in detail the extraordinary circumstances necessitating such an approach." *Id.*

ARGUMENT

Defendant's error was egregious. The misreported data was badly incorrect, on the most critical issue in the case, for every county in the state and for the state as a whole, uniformly in the "wrong" direction (making the state look better), and by a very wide margin. It was submitted, moreover, under oath in discovery, and in circumstances where the Defendant actually possessed the correct data. The incorrect data helped to persuade Plaintiffs that Defendant's list maintenance

efforts had improved since the filing of the complaint and that settlement was appropriate. Ex. 1, ¶ 11.

These circumstances have forced Plaintiffs to reassess the value of the Settlement Agreement and to weigh all of their legal options, including the possibility of seeking to have it set aside. Plaintiffs hope to avoid this. But Defendant's error here is one in a string of relatively recent public data failures.[1] And Plaintiffs have previously confronted the difficult situation where a secretary of state was reluctant to enforce an NVRA settlement agreement. *See Judicial Watch v. Adams*, 485 F. Supp. 3d 831, 842 (E.D. Ky. 2020) (extending term of NVRA agreement due to breaches by prior administration); *see also* Phillip M. Bailey, *GOP demands feds investigate Alison Grimes over abuse of power claims*, COURIER JOURNAL, Aug. 28, 2018 (available at https://www.courier-journal.com/story/news/politics/2018/08/28/republicans-demand-federal-investigation-kentucky-secretary-state-alison-lundergan-grimes/1117804002/) (describing claims by Secretary Grimes' subordinates that they "were told to 'slow walk' the process" of complying with a court-ordered NVRA settlement). In such situations, it is important to be able to enforce the agreement in federal court.

To be blunt, Plaintiffs are attempting to determine, two months into the parties' settlement, whether they face an unwilling secretary of state or are likely to end up in litigation. Certainly, in her public statements, Secretary Griswold has taken a confrontational tone regarding this lawsuit. After it settled, she publicly stated that that she does "not believe that this litigation is about anything based in fact," and accused Judicial Watch of sharing responsibility for "[e]lection

[1] In the lead up to both the 2022 and 2020 federal elections, Secretary Griswold relied on erroneous voter registration data to target non-citizen residents with materials encouraging them to register to vote for the then-upcoming federal elections. *See* Bente Birkeland, *Colorado accidentally sent voter registration notices to 30,000 residents who are not citizens*, CPR NEWS, Oct. 7, 2022 (available at https://www.cpr.org/2022/10/07/colorado-voter-registration-notices-non-citizens/).

disinformation [that] continues to plague the nation and Colorado," which statements now seem ironic. Matt Bloom, *Colorado Secretary of State settles lawsuit with conservative watchdog over voter roll maintenance practices*, CPR NEWS, Mar. 31, 2023 (available at https://www.cpr.org/2023/03/31/colorado-secretary-of-state-settles-lawsuit-with-conservative-watchdog-over-voter-roll-maintenance-practices/). On the other hand, on June 2, 2023, upon Plaintiffs' request, Defendant provided further information and more recent county data through April, showing additional removals since November 2022. Ex. 1, ¶ 19. Plaintiffs appreciate the provision of this data and are reviewing it.

In any case, Defendant's failure to provide accurate removal information suggests that enforcement may become necessary. Where this is so, Plaintiffs respectfully submit that it is important to be able to enforce the agreement in federal court. The NVRA is a complex, 30-year-old federal statute, and the federal case law concerning it continues to evolve. There is, moreover, little state court authority interpreting and enforcing the NVRA. Indeed, a Lexis search reveals that no state court case in Colorado has ever mentioned the NVRA. A federal court is best able to adjudicate NVRA-related disputes. *This* Court, moreover, is best able to consider the complex facts and history of this case, if the need ever arises. Plaintiffs respectfully submit that it would be contrary both to the interests of justice and judicial economy to have to relitigate the relevant provisions and workings of the NVRA, along with the unusual data issues involved, to a state court that may have a less detailed knowledge of the statute and no previous knowledge of this case.

D.C. Colo. L. Civ. R. 7.1(a) Certification

Plaintiffs' counsel conferred in good faith with Defendant's counsel on May 25, 2023 regarding the filing of this motion. Counsel for Defendant Griswold has indicated that she **takes no position** on this motion at this time, but reserves the right to respond after viewing this motion.

Respectfully submitted this 5th day of June, 2023.

JUDICIAL WATCH, INC.

s/ Eric W. Lee

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2023, I served a true and complete copy of the foregoing **MOTION TO ALTER OR AMEND THE JUDGMENT IN LIGHT OF NEWLY DISCOVERED EVIDENCE** upon all parties through ECF:

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s/ Eric W. Lee
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