

**No. 11-2063**

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

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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).

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

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**REPLY BRIEF OF APPELLANT HSD**

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## ARGUMENT

### **A. Despite the NVRA's simple and straightforward requirements for distribution of voter registration applications, Appellee's interpretation of the NVRA creates confusion and voids certain provisions of the NVRA.**

HSD's obligation under Section 7 of the NVRA to distribute voter registration applications is straightforward. HSD is required to "distribute with each application for . . . service or assistance, renewal, or change of address form . . . the mail voter registration form . . . unless the applicant, in writing, declines to register to vote." 42 U.S.C. § 1973gg-5(a)(6)(A). In order to meet this obligation, Congress mandated the distribution of a voter "declination" provision. This provision asks applicants if they would like to register to vote, provides check boxes for applicants to check "yes" or "no" in response to the question, and also informs them that "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED TO NOT REGISTER TO VOTE AT THIS TIME." 42 U.S.C. § 1973gg-5(a)(6)(B).

Accordingly, by the NVRA's own terms, if an applicant does not check a box, they are considered to have decided to not register to vote, and are therefore not provided a voter registration application. Congress, in essence, created the mechanism for applicants to decline to register to vote "in writing." If an applicant declines to register to vote, it follows that the agency is relieved from its obligation to assist applicants in completing the voter registration application. Congress

points this out by instructing agencies that “failure to check either box [is] deemed to constitute a declination for purposes of subparagraph (C)”. 42 U.S.C. § 1973gg-5(a)(6)(B). While it may seem intrinsic and therefore potentially gratuitous for Congress to point this out, it did so anyway. This is also the *only* reading of the statute that gives meaning and effect to all provisions of the NVRA at issue here. *See Corley v. United States*, 556 U.S. 303, 454 (2009) (“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”) (second alteration in original).

Under Appellee’s reading of the statute, certain provisions of the NVRA are entirely voided. First, the provision that informs applicants “IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED TO NOT REGISTER TO VOTE AT THIS TIME,” is completely read out of Section 7. Appellee contends that this language does not mean what it says and instead means that if an applicant fails to check either box, they will still be given a voter registration application, but will not be provided assistance in filling it out. *See Resp. Br.* at 15, 19. Thus, Appellee’s argument is that the Court should rewrite this provision to say “If you do not check either box, we will not help you in filling out a voter registration application.” If this is what Congress intended, it would

have said so, but it did not. Not only is this not what Congress drafted, it is the opposite of what the remainder of the declination provision provides.

The remainder of the declination provision informs applicants: “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.” 42 U.S.C. § 1973gg-5(a)(6)(B) (emphasis added). However under Appellee’s interpretation, the agency can decline to assist an applicant if the declination provision is left blank, despite the fact that applicants are unequivocally informed that they will receive help if they so choose.

Of course, this is not a problem if the NVRA is simply read to mean what it says – if an applicant fails to check a box they are considered to have decided not to register to vote and will therefore not be provided with a voter registration application. If they do not have a voter registration application, then there is no need for the agency to provide assistance or for the applicant to request assistance. However, Appellee’s urge this Court to read the NVRA to require agencies to give a voter registration application to an applicant who left the voter declination provision blank, despite the fact that the applicant has been informed that doing so means that they have decided to not register to vote. As if this isn’t confusing enough, if the applicant then asks for assistance in completing the voter registration application, the agency can decline to provide it, despite the fact that the applicant

was also informed that agency would help them. This is not only inconsistent with the explicit language of the NVRA, it creates confusion and is absurd.

**B. Despite Appellee's insistence that this Court cannot consider HSD's estoppel claim, it is well settled that the Court has wide discretion in hearing such a claim and has considered judicial estoppel arguments for the first time on appeal.**

In arguing that this Court cannot consider HSD's estoppel claim because it was not raised below, Appellee conveniently fails to recognize three important factors: (1) it was effectively impossible for HSD to raise this issue in the district court; (2) it is well established that this Court has discretion to hear questions for the first time on appeal, especially questions which concern an equitable doctrine such as judicial estoppel; and (3) this Court has repeatedly heard judicial estoppel claims for the first time on appeal.

HSD did not learn about the inconsistent position taken in the parallel NVRA case in Indiana until the proposed settlement agreement in that case was filed with the Indiana Federal Court on May 12, 2011, two months after this appeal was initiated. The settlement agreement, which was recently approved by the Indiana Federal Court on August 25, 2011, sanctions the very same policy at issue in this appeal. It was therefore simply not possible to raise this issue below.

Further, even if HSD had the opportunity to raise the issue of judicial estoppel below but failed to do so, this Court could still consider it. "The matter of what questions may be taken up and resolved for the first time on appeal is one left

primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.” *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). “Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where injustice might otherwise result.” *Id.* (internal quotation marks and citation omitted).

This Court has exercised this discretion where the argument “involves a pure matter of law and the proper resolution of the issue is certain.” *United States v. Jarvis*, 499 F.3d 1196, 1202 (10th Cir. 2007). The justification for exercising discretion in these situations was that “no additional findings of fact or presentation of evidence were required for the issue’s disposition and both parties had the opportunity to address the issue in their appellate briefing.” *Id.* The Court’s discretion is even greater when the issue involves an equitable doctrine such as judicial estoppel. *See Kaiser v. Bowlen*, 455 F.3d 1197, 1203-1204 (10th Cir. 2006).

In *Kaiser*, this Court addressed a party’s judicial estoppel argument despite the fact that the party had waived it. *Id.* This Court reasoned that despite the waiver, “judicial estoppel is an ‘equitable doctrine invoked by a court at its discretion.’” *Id.* at 1204 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). Hence, the Court is “not bound to accept a party’s waiver of a judicial

estoppel argument and may consider the issue at [the Court's] discretion.” *Kaiser*, 455 F.3d at 1204. Other circuits have held the same about the ability of appellate courts to address judicial estoppel whenever they see fit. *See Bethesda Lutheran Homes & Servs. v. Born*, 238 F.3d 853, 858 (7th Cir. 2001) (the doctrine of judicial estoppel “is for [the court's] protection as well as that of the litigants, and so [the court] is not bound to accept a waiver of it”); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 530 (5th Cir. 2000) (“because that doctrine protects the judicial system . . . we can apply it sua sponte in certain circumstances”).

Indeed this Court has, without hesitation, addressed judicial estoppel claims for the first time on appeal. *See Hansen v. Harper Excavating Inc.*, 641 F.3d 1216, 1226-1228 (10th Cir. 2011) (considering an argument that a party should be judicially estopped from making a specific argument on appeal); *United States v. Villagrana-Flores*, 467 F.3d 1269, 1278-79 (10th Cir. 2006) (addressing a judicial estoppel argument for first time on appeal after the appellant raised it by way of supplemental authority); *Bhd of Maint. of Way Employes Div./IBT v. Union Pac. R.R. Co.*, 460 F.3d 1277, 1286 (10th Cir. 2006) (considering a judicial estoppel argument for the first time on appeal); *Pallotino v. City of Rio Rancho*, 2009 U.S. App. LEXIS 22940, \*\*5-8 (10th Cir. 2009) (considering the defendant/appellee's argument that the plaintiff/appellant was judicially estopped from taking a specific position on appeal).

In light of the above, it is clear that this Court has wide latitude in addressing HSD's judicial estoppel argument. The ability of the Court to protect the integrity of the judicial system itself provides justification for addressing this issue. In addition, the Court can address the judicial estoppel argument without additional presentation of evidence or factual findings. The position regarding whether or not the NVRA permits a 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 is unequivocal in this case and in the Indiana case.

This Court need only compare the arguments made by Appellee's counsel in this appeal and the relevant provisions of the court-approved settlement agreement filed in the Indiana Federal Court. *See Hansen*, 641 F.3d at 1220 (taking judicial notice of documents from a case in the electronic database of a U.S. District Court); *Bhd of Maint. of Way Employes Div./IBT*, 460 F.3d at 1286 (declining to take judicial notice of an answer filed in separate lawsuit only after reviewing the answer first and concluding that judicial estoppel did not apply under the circumstances in that case). The facts are straight-forward -- the position here is that the NVRA does not permit a 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 and the position in the Indiana case is the opposite as the court-

approved settlement agreement permits just that. Thus, the only task left is the application of the law.

**C. Appellee's contention that HSD's judicial estoppel argument has no merit ignores the unique circumstances in this case and the inherent flexibility built into the doctrine in order to protect judicial integrity.**

HSD, in all candor, has recognized that the current precise named plaintiff in this suit and in the Indiana suit are not technically the same. *See* Aplt. Brief at 20. Nonetheless, the unique circumstances in this case warrant the application of judicial estoppel in order to uphold the integrity of the judicial system. *See New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (“Additional considerations may inform the doctrine’s application in specific factual contexts.”). HSD is not asking for a blanket holding that judicial estoppel applies across the board to any inconsistent statement, made by an attorney, in any case. Instead, HSD is asking the Court to look at the specific and unique circumstances in this case and prevent the improper use of judicial machinery, even though Appellee’s counsel, at this point in both cases, have differently named plaintiffs.

This suit and the Indiana suit are in almost all respects identical. In fact, they were initiated on the same day, by the same attorneys, with a common plaintiff, the Association of Community Organizations for Reform Now (ACORN). One need only compare the complaints and the settlement agreements in both cases to see their equivalence. The one key difference is the position taken

regarding the obligation of an agency to distribute a voter registration application when the declination provision is left blank. Appellee's counsel acknowledge that in the Indiana case they "compromised" on this issue. Resp. Br. at 30-31, n. 17.<sup>1</sup> However, it is either a violation of the NVRA to not provide a voter registration application under these circumstances, or it is not.

### 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.

Respectfully Submitted,

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<sup>1</sup> Appellee contends that it informed the Indiana District Court Judge of the district court's decision in this case. That disclosure, however, was made on August 19, 2011, after HSD raised its estoppel argument in this case. In any event, it matters little that Appellee's counsel informed the Indiana Court of its position in this case, because the application of estoppel is being sought here, to prevent this Court from being misled.

**CERTIFICATE OF COMPLIANCE**

I certify that the hard copies of the foregoing brief mailed to the Clerk are identical to the ECF submission. In addition, I certify that the foregoing brief has been scanned for viruses using Symantec Endpoint Protection, Version 11.0.3001.224, last updated on October 14, 2011, and according to that program, is free of viruses. I further certify that all necessary redactions have been made.

/s/ Elaine P. Lujan

**CERTIFICATE OF SERVICE**

I, Elaine P. Lujan hereby certify that on October 14, 2011 I served a copy of the foregoing Reply Brief, to all counsel of record via email by filing with the 10th Circuit ECF system on October 14, 2011.

/s/ Elaine P. Lujan