

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

CELIA VALDEZ, *et al.*,

Plaintiffs,

v.

DIANA J. DURAN, *et al.*,

Defendants.

No. 1:09-cv-00668 JCH/DJS

EMERGENCY MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

COMES NOW GARY K. KING, Attorney General of New Mexico, by Elaine P. Lujan, Assistant Attorney General, on behalf of the named defendants from the New Mexico Human Services Department (“HSD”), and hereby moves the Court to certify for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), the portion of the Court’s December 21, 2010, Memorandum Opinion and Order [Doc. 131] granting Plaintiff’s Motion for Partial Summary Judgment (the “Order”), and to also stay proceedings pending such appeal. Counsel for Plaintiff opposes this motion. In light of upcoming court deadlines, including trial set for February 14, 2011, as well as a settlement conference with the Magistrate scheduled for January 26, 2011, HSD respectfully requests an expedited ruling on this motion. Without an expedited ruling, there will be uncertainty regarding the need to proceed with trial preparation and with the necessity of continuing with settlement negotiations.

BACKGROUND

On December 21, 2010, the Court issued its Memorandum Opinion and Order (the “Order”) [Doc. 131] that, among things, granted Plaintiff’s Motion for Partial Summary Judgment [Doc. 109]. While the Order resolved other motions and issues involved in the case at hand, the portion of the Order granting partial summary judgment dealt with one sole, key legal issue. Specifically, the Court interpreted Section 7’s¹ requirements regarding the distribution of voter registration applications, and based on such interpretation, found that HSD is currently misinterpreting Section 7 of NVRA and is thus out of compliance with its requirements.

The precise requirements for distributing voter registration applications turns on an interpretation of the language of NVRA; the issue is one of statutory interpretation. The specific issue concerns HSD’s responsibility when an applicant for public assistance fails to check a box on the statutorily mandated form in response to 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?”. *See* 42 U.S.C. 1973gg-5(a)(6)(B)(i). HSD’s interpretation gave effect to the provision of the NVRA that informs applicants, “IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.” 42 U.S.C. 1973gg-5(a)(6)(B)(iii). Plaintiff’s and the Court’s interpretation gave effect to a different provision of the NVRA, which states, “failure to check either box [is] deemed to constitute a declination to register for purposes of subparagraph (C).” *Id* (alteration added). As the Court pointed out in its order, Plaintiff concedes this is an issue of first impression and the Court was unable to locate any decision addressing this issue. [Doc. 131 at 7]

¹ Section 7 refers to 42 U.S.C. § 1973gg-5 of the National Voter Registration Act of 1993 (“NVRA”).

ARGUMENT

28 U.S.C. 1292(b) requires a district court to certify an order for appeal, not otherwise appealable, when the district court is of the opinion that “such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” When an original order does not contain a Section 1292(b) certification, the district court may supplement that order to include an appropriate certification. *Houston Fearless Corp. v. Teter*, 313 F.2d 91, 92 (10th Cir. 1962). Once an order is certified, an application to the Court of Appeals may be made within ten days, and the Court of Appeals may, in its discretion, hear the appeal. § 1292(b).

1. An interpretation of the specific statutory requirements under the NVRA for distributing voter registration applications is a controlling question of law, because this lawsuit is premised on violations of such requirements.

There is no doubt that the core of this litigation surrounds the execution of HSD’s obligations under the NVRA. The Court’s Order involves HSD’s fundamental obligation under the NVRA to distribute voter registration applications and the manner in which HSD must distribute such applications. Because HSD’s interpretation of the law in this area and its policy reflecting that interpretation is set and undisputed, HSD cannot prevail on the merits given the Court’s contrary interpretation of the provisions of the NVRA at issue. If this case proceeds forward to trial HSD will not prevail on the merits and will have to change its policy regarding the distribution of voter registration applications pursuant to the Court’s Order and a final judgment. In essence the Court’s Order, if erroneous, would be reversible error on final appeal. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.1974) (recognizing that orders that

would lead to reversal on appeal contain a controlling question of law.) Even if it were not reversible on appeal, the Court's Order, interpreting the very provisions of the NVRA that this case is premised on, is at the very least "serious to the conduct of the litigation, either practically or legally." *Id.* (stating that "controlling" in this context means serious to the conduct of the litigation, either practically or legally); *see also Johnson v. Burken*, 930 F.2d 1202, 1205-1206 (7th Cir.1991).

2. There is substantial ground for difference of opinion with the Court's Order, because it addresses a matter of first impression, leads to an absurd result, and renders certain provisions of the NVRA meaningless.

As the Court recognized in its Order and as Plaintiff has conceded, this is an issue of first impression. There is no authority from other circuits or other district courts on this issue. *See Young v. Nationwide Life Ins. Co.*, 2 F. Supp. 2d 914, 930 (S.D. Tex. 1998) (no direct ruling by circuit court and paucity of case law on the issue creates substantial ground for difference of opinion). Further, the Court's interpretation leads to an absurd result and renders certain provisions of the NVRA meaningless.

The Order leads to an absurd result because under the Court's interpretation, failing to check a box in response to the question asking if an applicant would like to register to vote, means that HSD is relieved of *assisting* the applicant in completing the voter registration application. Yet at the same the NVRA requires that HSD explain to applicants that failure to check a box has a different meaning: that they have decided not to register to vote. Under this interpretation, applicants can leave the check boxes blank but otherwise ask for a voter registration application or answer in the affirmative when asked orally if they would like to register to vote, but not receive assistance in filling out the application. HSD could effectively

condition its assistance on whether or not the applicant checked a box, regardless of whether the applicant requested an application and/or requested assistance. Not only is this absurd, but as discussed more fully below, it is in direct conflict with another required disclosure under the NVRA. *See* § 1973gg-5(a)(6)(B)(iii) (“If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek help is yours”).

For similar reasons, the Order renders certain provisions of the NVRA meaningless, namely, the provision that informs applicants that failing to check a box means that they are considered to have decided not to register to vote. *See* § 1973gg-5(a)(6)(B)(iii). If the intent of Congress was that failure to check a box relieves an agency of its responsibility in assisting applicants, it could have informed applicants of that fact. Instead, Congress chose to inform applicants that failing to check a box means they are considered to have decided not to register to vote, *and at the same time* inform applicants, “*If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek help is yours.*” *See* § 1973gg-5(a)(6)(B)(iii) (emphasis added). Under the Court’s interpretation, this provision is also rendered meaningless, because if an applicant requests help, HSD can decline despite the clear language offering assistance to applicants.

There is an alternative reading of the NVRA that would not lead to an absurd result or render provisions meaningless. Under the alternate reading, Congress essentially defines “in writing” for the purposes of the NVRA. An applicant can decline to register to vote “in writing” by failing to check a box. *See* § 1973gg-5(a)(6)(B)(iii) (“IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME”). Aside from this alternate reading, the Order failed to address whether having

an applicant place his or her signature under this disclosure, constitutes a declination “in writing,” even under the Court’s interpretation of the NVRA.

3. An immediate appeal from the order may materially advance the ultimate termination of the litigation, because it will facilitate settlement of the case.

In all candor, HSD concedes that in the past it may have had issues with oversight and enforcement of its obligations under the NVRA. HSD takes its responsibility under the NVRA seriously and has taken measures to improve oversight and enforcement and has already realized success in these areas. HSD would now like to resolve this case by entering into a settlement agreement with the Plaintiff. Needless to say, entering into such an agreement will have a huge and long-term impact on HSD. The main point of contention in settlement negotiations with Plaintiff has concerned the very issue involved in the Court’s Order and here – that is, HSD’s obligation when an applicant does not check a box on the statutorily mandated form.

HSD cannot bind itself to an agreement pursuant to an Order that addresses a controlling question of law for which there is substantial ground for difference of opinion and effectively lose any opportunity for appeal. HSD’s only alternative would be to bear the expense, time, and burden of going to trial, only to lose, for the sole purpose of then having the opportunity to appeal the Court’s decision in this area. While the specific legal issue involved is narrow and as a result, may seem insignificant, it impacts HSD’s core policy regarding the NVRA. A ruling from the Tenth Circuit on this issue would resolve any uncertainty in law regarding the specific requirements for distributing voter registration applications and would therefore allow the parties to enter into a settlement agreement pursuant to terms that are definitely in line with the requirements of the NVRA.

CONCLUSION

For the foregoing reasons, HSD respectfully requests that this Court certify for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the portion of its December 21, 2010 Memorandum Opinion and Order [Doc. 131] granting Plaintiffs Motion for Partial Summary Judgment and to stay proceedings pending such appeal.

DATED: January 18, 2011

Respectfully Submitted,

/s/ Elaine P. Lujan
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all parties of record via the CM/ECF case management system for the United States District Court for the District of New Mexico this 18th day of January, 2011.

/s/
Elaine P. Lujan