

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

CELIA VALDEZ, *et al.*,

Plaintiffs,

v.

MARY HERRERA, *et al.*,

Defendants.

CIVIL ACTION NO. 1:09-cv-668 JCH/DJS

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Shawna Allers respectfully submits this Reply in support of her Motion for Partial Summary Judgment and her accompanying memorandum in support thereof (the “Motion”). [Doc. 109.] Plaintiff’s Motion addresses the State of New Mexico’s failure to distribute voter registration applications to public assistance clients through its public assistance offices, in violation of Section 7 of the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg-5.

Plaintiff’s Motion concerns the failure of the State of New Mexico to implement the central tenet of Congress’ scheme for providing public assistance clients the opportunity to register to vote: states are to presumptively distribute voter registration applications to all clients, as a matter of course, subject only to individual clients stating, “in writing,” that they do not wish to register to vote. 42 U.S.C. § 1973gg-5(a)(6)(A). The policy of the State of New Mexico is the reverse: registration applications are presumptively not to be distributed; instead, public assistance clients are to be provided a voter registration application only if they affirmatively indicate that they want to register to vote.

The specific deficiency with the New Mexico policy, as adopted by the State’s Human Services Department (“HSD”), is that the State refuses to distribute voter registration

applications to clients who do not respond either positively or negatively to the voter registration inquiry contained in HSD's voter information form (*i.e.*, clients who leave the "yes/no" checkboxes blank on their voter information form), and who do not otherwise indicate verbally that they wish to register to vote. Focusing solely on one clause of Section 7, and disregarding the other provisions of the statute, HSD asserts that its policy is permitted by the NVRA.¹ However, as explained in Plaintiff's Motion and as further addressed below, the Court is required to give full weight to the entirety of Section 7 in determining the State of New Mexico's obligations under the NVRA. Doing so demonstrates that the State is required to distribute voter registration applications to public assistance clients who omit checking either "yes" or "no" in response to the voter registration inquiry included in the State's information form.²

I. THE STATE OF NEW MEXICO IS VIOLATING SECTION 7 OF THE NVRA

A. New Mexico Fails to Justify its Refusal, Based Upon the Language of the NVRA, to Distribute Voter Registration Applications to Public Assistance Clients Who Leave the Voter Information Form Blank

HSD agrees that Section 7 of the NVRA permits the State of New Mexico to withhold voter registration applications only from those public assistance clients who state, "in writing," that they do not wish to register. HSD also does not dispute that, in general, a blank form cannot constitute a statement "in writing." HSD contends, however, that Section 7 includes a

¹ This Reply will continue the convention followed by all parties in this case of collectively referring to the named defendants who are officials with the New Mexico Human Services Department as "HSD."

² The Secretary of State, in her response to Plaintiff's Motion [Doc. 118], does not contend that the State policy at issue here complies with the NVRA, but instead again argues that regardless of whether the State is in compliance, she should not be held liable. The Secretary refers the Court to the arguments she made in this regard in her Motion for Summary Judgment [Doc. 111], and Plaintiff likewise refers the Court to Plaintiff's memorandum in opposition to the Secretary's Motion [Doc. 115] for an analysis and discussion of the reasons why the Secretary, as the State of New Mexico's chief election official, is among the state officials who are responsible for the State's violation of Section 7.

special definition of “in writing” such that a client’s non-response to the voter registration inquiry contained on the voter information form does represent a written declination to register to vote. As discussed in Plaintiff’s Motion and as set forth below, Section 7 provides no such special definition of “in writing” and thus HSD’s argument should be rejected.³

At the center of this dispute are two adjacent clauses or directives included in paragraph (B)(iii) of subsection (a)(6) of Section 7. These directives are preceded in paragraph (B)(iii) by the requirement that voter information forms include “boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote.” The paragraph then provides as follows:

(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 NOT TO REGISTER TO VOTE AT THIS TIME.”;

42 U.S.C. § 1973gg-5(a)(6)(B)(iii) (emphasis in original).

HSD’s argument is that the Court should ignore the “for purposes of subparagraph (C)” directive (“failure to check either box [is] deemed to constitute a declination to register for purposes of subparagraph (C)”) – according it no meaning at all – and should read the subsequent directive as providing a constructive written declination to register to vote for all purposes. HSD asks this Court to essentially write the first directive out of the NVRA because,

³ The parties agree that there are no issues of fact material to Plaintiff’s Motion which would preclude the Court from granting the Motion under Fed. R. Civ. P. 56. HSD does not dispute the factual assertions contained in the seven numbered paragraphs in Plaintiff’s Statement of Undisputed Material Facts. Although HSD does dispute the facts Plaintiff set forth in a footnote at the conclusion of her statement of facts, Plaintiff included these additional facts to provide historical context only (as Plaintiff explained in the footnote in question), and thus these facts do not purport to modify in any way the content of the HSD policy at issue here. As such, they are not necessary for resolution of Plaintiff’s Motion, and HSD agrees. HSD Response, at 3 n.2. HSD also seeks, in its Response, to include several additional facts to provide its version of the appropriate context for its policy. But these additional facts likewise do not modify the HSD policy in any respect, and thus they also are not material to this Motion.

as is discussed below, the only way to give meaning to that directive is to find that Congress does require that voter registration forms be distributed to public assistance clients who do not “check either box.”⁴ HSD offers no legal basis for its selective construction of congressional legislation, a construction which significantly distorts the language and intent of Section 7.

As set forth in Plaintiff’s Motion, this Court’s responsibility in construing Section 7 is to harmonize all its provisions, including giving full force to both of the directives at issue here and ignoring neither. Numerous decisions of the Supreme Court and the Tenth Circuit strongly caution this Court against adopting any construction of Section 7 that would render superfluous any of its provisions. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *United States v. Tsosie*, 376 F.3d 1210, 1217 (10th Cir. 2004).

Plaintiff’s construction of the statute gives full weight to each directive, relying on both the language of Section 7 and the NVRA’s underlying purposes and legislative history. First, as Plaintiff explained in her Motion, the “for purposes of subparagraph (C)” directive necessarily is premised upon voter registration applications being provided to public assistance clients who leave their voter information form blank. The referenced subparagraph (C) of section 7(a)(6) specifies the circumstances in which Section 7 agencies, including HSD, must provide assistance to their clients in completing registration forms. Thus, the “for purposes of subparagraph (C)” directive addresses the effect of a blank voter information form on the provision of voter registration assistance.

⁴ Although HSD does not explicitly say that the Court should completely disregard the first (“for purposes of subparagraph (C)”) directive, it is clear from its brief that that is what it is arguing. HSD’s initial discussion of paragraph (B)(iii) leads with a long quotation that purports to set forth this paragraph as well as adjacent provisions. However, the quotation misleadingly – and tellingly – carefully excises, with ellipses, the “for purposes of subparagraph (C)” clause. HSD’s Response, at 8. This calculated omission is a tacit yet unmistakable admission that HSD cannot reconcile its position with the full provisions of Section 7. Two pages later in its Response, HSD belatedly acknowledges the existence of this directive and – again, tellingly – does not dispute that the directive clearly denotes that voter registration applications shall be distributed to persons who leave the voter information form blank. *Id.* at 10.

But Congress, plainly, would not have concerned itself with the effect of a blank form on the provision of voter registration assistance if Congress intended that Section 7 agencies, such as HSD, could rely on a blank form to withhold distribution of a registration application in the first instance. Accordingly, this directive clearly contemplates that HSD and other Section 7 agencies *will* distribute registration applications to clients who fail “to check either box.”⁵

The second directive at issue (“if you do not check either box, you will be considered to . . .”) merely addresses whether the client intends to complete the voter registration application provided by HSD at the HSD office or, instead, may complete it at another time. The directive provides that the omission of a check in either the “yes” or the “no” voter registration box constitutes a statement that the client does not wish to register to vote “*at this time.*” (Emphasis added.) As indicated by this critical modifier, a client who omits a checkmark is to be provided a voter registration application which the client then may complete *at another time*, at his or her convenience, at a location other than the agency office.⁶

Thus, these two directives, in tandem, provide that Section 7 agencies, including HSD, are not required to provide assistance in completing a voter registration application when the client leaves the voter information form blank, since the client may be

⁵ Put differently, if Congress had wanted to specify that states may withhold a registration application from those clients who leave the voter information form blank, Congress would have said that “failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (A),” since it is subparagraph (A) of Section 7(a)(6) that sets forth the requirement that applications must be distributed, except to clients who state, “in writing,” that they do not wish to register.

⁶ HSD wrongly claims that Plaintiff “reads out of the statute” this second directive, and that Plaintiff’s interpretation “is in direct conflict” with that directive and “renders [it] meaningless.” HSD Response, at 10. However, as explained above, Plaintiff’s construction of Section 7 (unlike HSD’s) gives full effect to *both* directives and, as explained, accords the second directive the requisite meaning.

completing the registration application at another time and another place.⁷ In its response, HSD does not dispute that this is the only way in which the two directives may be read to give full effect to each.

This construction of Section 7 comports fully with the section's most basic directive, that voter registration applications are to be presumptively distributed to public assistance clients, except when a client declines "in writing."⁸ See *Nat'l Coalition for Students with Disabilities Educ. and Legal Defense Fund v Scales*, 150 F.Supp.2d 845, 853-54 (D. Md. 2001) (rejecting claim that persons protected by Section 7 of the NVRA may be required to affirmatively request a voter registration application in order for the application to be provided).

This construction of Section 7 also comports fully with Congress' purpose in requiring the use of a voter information form. See Plaintiff's Motion, at 15-17. Congress inserted the information form into the agency registration process not to further define the circumstances in which voter registration applications are to be distributed but, instead, to guard against the possibility that agency officials might seek to intimidate or coerce agency clients. In this regard, Congress could well have reasoned that clients who leave

⁷ Contrary to what HSD suggests, this construction of Section 7 is fully consistent with another statement that the NVRA requires be included in the voter information form, that the client be informed that "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)(iv). By leaving the checkboxes blank, the client has indicated that he or she has decided that registration is not desired "at this time" and that assistance also therefore is not required.

⁸ Given that the ordinary and usual meaning of the word "writing" plainly indicates that a blank form cannot qualify as a statement "in writing," it would have been contradictory for Congress to have followed this statutory directive with an instruction that a blank voter information form does, in fact, constitute a statement "in writing" by a public assistance client that he or she does not want a voter registration application. See Plaintiff's Motion, at 10-11.

the registration checkboxes blank, and who thus “in writing” do not respond either positively or negatively as to whether they wish to register, may be particularly vulnerable to coercion by agency officials (with regard to whether to register or not, or with regard to selecting a political party).⁹ These individuals, accordingly, are to be provided with a voter registration application that may be filled out at another time and another place, without agency assistance. HSD does not dispute this legislative history.

Moreover, the inclusion of both directives on the voter information form should be considered beneficial to Section 7 agencies. While subparagraph (C) makes it clear that agency staff must provide equal assistance with filling out the voter registration application to those clients who indicate in writing they would like to register to vote at the time of service (just as it is clear such assistance is *not* necessary for those who provide a written declination), the absence of either directive might leave agency staff vulnerable to impossible assistance requirements. The disclaimer to clients (“if you do not check either box, you will be considered to . . .”) lets clients know that if they decide not to check any box, the agency will deem that person to have decided not to fill out the voter registration application form at the time of service, thereby relieving agency staff from needing to offer assistance with the form. The first directive (“for purposes of subparagraph (C)”) protects the agency against grievances from clients who believe they were not adequately assisted by the agency, but who refused to indicate that they would be attempting to fill out the voter registration application form at the time of service and therefore could need assistance.

⁹ In this regard, a client’s indecision as to whether to register, or the omission of a checkmark due to a lack of understanding of the voter registration system, combined with a client’s possible perception of lessened political power owing to his or her socioeconomic status, could offer an opportunity for client coercion.

Finally, Plaintiff's construction of Section 7 comports fully with Congress' overall purpose in enacting the NVRA and Section 7. The NVRA has the clearly stated purpose of, among other things, "establish[ing] procedures that will increase the number of eligible citizens who register to vote." 42 U.S.C. § 1973gg(b). The statute also includes stated "findings" that reveal Congress' intended effect of States' implementation of the NVRA: the mitigation of "discriminatory and unfair registration laws and procedures [that] can . . . disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a). As Congress recognized, this is effectively accomplished by requiring that voter registration applications be presumptively distributed to public assistance clients, subject only to an affirmative written declaration by a client that voter registration is not desired.

HSD's suggestion that Congress would only have required Section 7 agencies to distribute a voter registration form to clients who affirmatively indicate that they want to register to vote at the time of service goes against the very purpose of the NVRA and a basic understanding of the struggles of low income citizens with respect to voter registration. There are numerous reasons why low income individuals might shy away from registering to vote at a public assistance agency at the time of service, including the potential embarrassment of struggling with literacy problems or language barriers (even with translated documents). As indicated above, clients also may be concerned about possible intimidation or coercion by agency officials. Or clients may simply wish to consult with a family member or friend as to whether or not to register, or whether to register as a member of a political party or register as someone who declines to state a party. Accordingly, it should be expected that some notable percentage of low income and minority individuals – *i.e.*, the persons who Congress intended to reach with Section

7 – may choose to navigate completing the voter registration application in the privacy of their homes rather than at the agency at the time of service.

B. HSD’s Other Justifications for Withholding Registration Applications Are Invalid

HSD, secondarily, argues that its policy is compliance with the NVRA because HSD has “added additional safeguards”: clients are to be verbally asked whether they wish to register and are to be given a registration application if they verbally respond “yes”; and clients are to be required to sign the voter information form. Neither of these asserted actions, however, rescues HSD’s policy.

Including a verbal “ask” is a positive step, but the NVRA allows HSD to withhold distributing a voter registration application only when a client declines to register “in writing.” A verbal “ask” by an agency official and a verbal response by the client cannot satisfy that requirement. Likewise, a blank voter information form, even if it is signed, is still a blank voter information form (in that neither the “yes” nor the “no” box is checked), and for the reasons set forth above and in Plaintiff’s Motion, a blank voter information form does not constitute a tangible statement – *i.e.*, a statement “in writing” – that the client does not want a registration application to be provided.¹⁰

Lastly, HSD attempts to argue that its interpretation of Section 7 is more “effective” and “meaningful” than Plaintiff’s. Yet, Plaintiff’s construction of Section 7 will result in a larger number of clients being provided a voter registration application,

¹⁰ HSD argues that, with the client signature, “[b]lank checkboxes then truly demonstrate that an individual did not simply miss or skip over them, but that the individual read the provision, considered and chose to leave the boxes blank....” HSD Response, at 9. But, at most, client signatures merely indicate that clients are knowingly indicating that they have not yet made a decision (or one that they are willing to record in front of agency personnel) as to whether or not to accept or reject the opportunity to register to vote. At the same time, these clients, at most, are knowingly acknowledging that the agency will consider their omission to mean they are not interested in taking advantage of the registration opportunity *at the time of service*.

which clearly better fulfills Congress' purpose in enacting the NVRA and establishing the Section 7 voter registration scheme. In any event, however, the issue that must be decided here is whether New Mexico is complying with the voter registration procedures that Congress adopted in Section 7, not whether New Mexico might design a different set of procedures which it claims are of equal or better quality.

II. Conclusion

Section 7 of the NVRA establishes a simple, straightforward, and easily administered requirement that state public assistance agencies, including New Mexico's HSD, must, as a matter of course, distribute voter registration applications to their clients whenever the clients engage in a covered transaction, subject to a narrowly defined exception. New Mexico's attempt to rewrite the NVRA, to shift the burden to clients to affirmatively request a voter registration application in order to be provided one, should be rejected. Plaintiff respectfully requests that its Motion for Partial Summary Judgment be granted.

DATED this 14th day of October, 2010.

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I certify that on the 14th day of October, 2010, I served the foregoing by electronic means on:

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