

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CELIA VALDEZ, *et al.*,

Plaintiffs-Appellees

v.

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

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE JUDITH C. HERRERA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLEES AND URGING AFFIRMANCE

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STATEMENT OF THE ISSUE

The United States will address the following issue:

Section 7 of the National Voter Registration Act, 42 U.S.C. 1973gg-5(a)(6), states that a voter registration agency must provide an applicant a voter registration form in certain circumstances, unless “the applicant, in writing, declines to register to vote.” The issue is whether defendants have violated Section 7 because they do

not provide a voter registration form to an applicant who does not indicate, in writing, that she declines to register to vote.¹

INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

The National Voter Registration Act (NVRA), 42 U.S.C. 1973gg *et seq.*, *inter alia*, expands the opportunity for voter registration at certain offices that provide public assistance, which are designated voter registration agencies. The Attorney General has enforcement responsibility for the NVRA, 42 U.S.C. 1973gg-9(a). This appeal raises a question concerning the interpretation of Section 7 of the NVRA, 42 U.S.C. 1973gg-5. Resolution of this issue may affect the Department of Justice's (Department's) enforcement responsibilities, states' obligations under the NVRA, and opportunities for citizens to receive voter registration forms.

¹ The United States takes no position on the related appeal, No. 11-2084, concerning the district court's award of attorney's fees, or appellants' argument regarding judicial estoppel, which is presented in this appeal. See HSD Br. 18-30.

Citations to "HSD Br. ___" refer to New Mexico Human Services Department's (HSD's) opening brief and the original page number, rather than this Court's pagination. "Aplt. App. ___" refers to the Appellants' Appendix, by page number.

STATEMENT OF THE CASE

1. Statutory Framework

In 1993, Congress enacted the NVRA to expand the voter registration opportunities of United States citizens. Pursuant to the NVRA, citizens now may register to vote (1) at the time they obtain a driver's license, (2) by mail, or (3) in interactions with certain state-designated offices, which are designated voter registration agencies (VRAs). 42 U.S.C. 1973gg-3 –1973gg-5. Mandatory VRAs include “all offices in the State that provide public assistance.” 42 U.S.C. 1973gg-5(a).

Section 7 of the NVRA sets forth the duties of a VRA. 42 U.S.C. 1973gg-5(a)(4)-(6). When an applicant seeks public services from a VRA, including an initial request for benefits, a renewal of benefits, or notice of a change of address (*i.e.*, a qualifying interaction or event), the VRA must (1) provide the applicant a voter registration form unless the applicant declines, in writing, the opportunity to register to vote; (2) provide the applicant a voter information form; (3) provide the applicant assistance in completing the voter registration form to the same extent the agency provides assistance in completing all other forms, unless the applicant declines such assistance; and (4) submit all voter registration forms to local election boards. 42 U.S.C. 1973gg-5(a)(6). VRA staff are prohibited from engaging in activity that has the “purpose or effect of * * * discourag[ing] the

applicant from registering to vote.” 42 U.S.C. 1973gg-5(a)(5)(C); see 42 U.S.C. 1973gg-5(a)(6)(B)(v) (notice to the applicant of her right to file a complaint based on certain actions of a VRA official); 1973gg-10(1) (criminal penalties for interference with rights protected by this statute).

The voter registration form is distinct from the voter information form; each form has different content and serves different purposes.² See 42 U.S.C. 1973gg-5(a)(6)(A) and (B). A voter registration form, as its name reflects, is required for a citizen to register to vote.³ 42 U.S.C. 1973gg-7. Significantly, a VRA must provide a voter registration form to each applicant who has a qualifying interaction “*unless the applicant, in writing, declines to register to vote.*” 42 U.S.C. 1973gg-5(a)(6)(A) (emphasis added).

As noted, a VRA also must provide a voter information form to all applicants who engage in a qualified event with the agency. 42 U.S.C. 1973gg-5(a)(6)(B). Subparagraph 5(a)(6)(B), 42 U.S.C. 1973gg-5(a)(6)(B), identifies the

² While New Mexico and the district court refer to the second form described herein as a “declination provision” or a “declination form” (see Aplt. App. 152-153, 158), we refer to this document as an “information form.”

³ Under Section 7 of the NVRA, a VRA may use a national voter registration form that is developed by the Election Assistance Commission or its own version that requires the equivalent information. 42 U.S.C. 1973gg-5(a)(6)(A)(i) and (ii); see 42 U.S.C. 1973gg-7 (mail registration form).

requisite contents and instructions regarding this form. The voter information form must include:

(i) the question, “If you are not registered to vote where you live now, would you like to apply to register to vote *here today?*”; [and]

* * *

(iii) 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 NOT TO REGISTER TO VOTE *AT THIS TIME.*”

42 U.S.C. 1973gg-5(a)(6)(B) (emphasis added by italics).

Subparagraph (C), 42 U.S.C. 1973gg-5(a)(6)(C), states that a VRA must “provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.”

The information form also advises the applicant that she may receive assistance in completing the form or she may complete the form “in private.” 42 U.S.C. 1973gg-5(a)(6)(B)(iv). The form further informs an applicant that she may file with a designated point of contact a complaint alleging interference with her rights to register or not register to vote, her right to privacy in making this decision, or her right to choose a political party. 42 U.S.C. 1973gg-5(a)(6)(B)(v).

2. *Facts And Procedural History*

On August 27, 2010, four residents of New Mexico filed an amended complaint alleging, *inter alia*, that officials of New Mexico's Human Services Department (HSD) and its component offices failed to comply with their obligations as VRAs under the NVRA. Aplt. App. 63-103. New Mexico agrees that all offices of the State's HSD, which operates the food stamp and Medicaid programs, the Supplemental Nutrition Assistance Program, and other public benefit programs, are VRAs. See HSD Br. 3, 9; Aplt. App. 105-107. New Mexico also accepts, generally, its obligations as a VRA, including the obligation to provide voter registration forms to persons who engage in a qualifying event with an HSD official. HSD Br. 9. The issue is whether HSD's policy and practice of determining whether it will provide an individual a voter registration form is consistent with its obligations under Section 7 of the NVRA.

The HSD uses a generic, five-page application for applicants who seek public assistance under the various programs operated by HSD. Aplt. App. 109, 115-120; see HSD Br. 5. The requisite text of the NVRA's voter information form is included in this generic benefits application. See HSD Br. 5; Aplt. App. 117. New Mexico added a signature line for the applicant in the application's voter information section. Aplt. App. 108, 117.

HSD explains its practices as follows (HSD Br. 5-6):

HSD's policy is that a voter registration application is provided to applicants who check "yes" [on the information form] 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" [on the information form] *or who leave the form blank*. [Aplt. App. at 154] (emphasis added).

In the spring of 2010, the parties filed cross-motions for partial summary judgment. Aplt. App. 33-56, 104-147. The plaintiffs asserted that HSD has violated 42 U.S.C. 1973gg-5(a)(6)(A) because it does not provide a voter registration form to all applicants except those who have specifically declined, in writing, to register to vote. Aplt. App. 40-49, 136-145. HSD responded that its practice of providing voter registration forms only to persons who specifically *request* the form, in writing or orally, fulfills their obligations under the NVRA, as set forth in 42 U.S.C. 1973gg-5(a)(6)(B)(iii). Aplt. App. 104-135.

On December 21, 2010, the district court issued a Memorandum Opinion and Order that granted the plaintiffs' motion for partial summary judgment and ruled that the HSD's practices did not comply with the NVRA. Aplt. App. 148-170. The district court concluded that the plain meaning of Section 7 of the NVRA required that VRAs must provide an applicant for services a voter registration form unless the applicant specified, in writing, that he did not want to register to vote. Aplt. App. 157-163. First, the district court held that "Section 7 does not make the provision of a voter registration application contingent upon an affirmative request, either written or verbal, from a client." Aplt. App. 157.

Quoting subparagraph 5(a)(6)(A), the district court held that the phrase “in writing” is an “intentional recording,” and did not include a blank response. Aplt. App. 157-158. The district court further held that the text of subparagraph 5(a)(6)(B)(iii) unequivocally states that failure to check either box on the information form constitutes a declination to register “*for purposes of subparagraph (C).*” Aplt. App. 158. Thus, a blank response only declines assistance from an HSD representative to register to vote, as set forth in subparagraph (C), not a declination of the opportunity to receive a voter registration form. Aplt. App. 158-159. Thus, according to the district court, the terms of the NVRA require an applicant to “opt out” of receiving a voter registration form, and “opt in” to receive an official’s assistance with completing the form at the voter registration agency. Aplt. App. 159-160. The district court further held that the statutory policies underlying the NVRA and its legislative history support its interpretation, which also maximizes the opportunity for voter registration. Aplt. App. 160-161.

SUMMARY OF ARGUMENT

The NVRA requires that a voter registration agency distribute to an applicant at a qualifying event a voter registration form unless the applicant, “in writing, declines to register to vote.” 42 U.S.C. 1973gg-5(a)(6)(A). A declination in writing requires an intentional and affirmative act: a notation by words or

symbols. An individual's mere failure to act is insufficient. Thus, in the absence of a specific, written declination, HSD must give an applicant a voter registration form.

A voter information form has different content than a voter registration form, and it serves a different purpose. The voter information form, *inter alia*, asks an applicant whether she wants to register "*here today?*", *i.e.*, when she is interacting with a VRA official, and advises her of her right to register to vote "in private." See 42 U.S.C. 1973gg-5(a)(6)(B).

An applicant who passively declines to mark a response on the information form has declined assistance from a VRA official at that moment, and nothing more. Congress's use in 42 U.S.C. 5(a)(6)(A) and 5(a)(6)(B) of the phrases "in writing," "at this time," "here today," and "for purposes of subparagraph (C)" was specific and deliberate. A failure to mark a response on the information form does *not* constitute a declination, in writing, of the opportunity to register to vote. Rather, by its terms, it declines only immediate assistance in completing the form at that time. This interpretation gives meaning to all statutory text.

In contrast, HSD's interpretation is contrary to principles of statutory construction because it ignores and nullifies substantive statutory text, and should be rejected.

In addition, the NVRA's objective of expanding voter registration opportunities and its legislative history support the interpretation set forth herein. Congress developed the voter information form to minimize the risk or appearance of intimidation and coercion by VRA officials. Treating an applicant's passivity as the equivalent of an affirmative act of declination is contrary to the goal of providing and maximizing new opportunities for voter registration.

The district court's decision, therefore, is correct and should be affirmed.

ARGUMENT

NEW MEXICO VIOLATES THE NVRA BY WITHHOLDING A VOTER REGISTRATION FORM FROM APPLICANTS FOR SERVICES WHO HAVE NOT INDICATED, IN WRITING, THEIR DECLINATION OF THIS FORM

The plain language of the NVRA requires that a voter registration agency provide a voter registration form to any person who seeks specific services unless that person, in writing, declines to register to vote. 42 U.S.C. 1973gg-5(a)(6)(A). The NVRA's statutory objective and legislative history, moreover, support the same interpretation. Accordingly, HSD's practice violates the NVRA because the agency does not provide a voter registration form to all persons who should receive it.

A. *Principles Of Statutory Interpretation*

This Court reviews the grant of summary judgment and an issue of statutory interpretation *de novo*. *Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir. 2006); *Robbins v. Chronister*, 435 F.3d 1238, 1240 (10th Cir. 2006) (en banc).

The principles of statutory construction are well-established. The starting point for statutory interpretation is the statute itself. See *Dodd v. United States*, 545 U.S. 353, 357 (2005). The Court “must presume that [the] legislature says in a statute what it means and means in a statute what it says there.” *Ibid.* (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Words should be interpreted in light of their “ordinary, everyday” meaning. *Toomer*, 443 F.3d at 1194. Dictionaries provide courts guidance to the meaning of words considered plain, obvious, as well as ambiguous. See, e.g., *Dodd*, 545 U.S. at 358 (dictionary meaning of “if” considered); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998) (dictionary meaning of “maximum” and “practicable” considered).

In addition, a court “should give effect, if possible, to every clause and word.” *Toomer*, 443 F.3d at 1194; see *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (text should be construed so that no word or phrase is rendered superfluous). This Court explained statutory analysis as follows:

If the statutory text is not ambiguous, and the statutory scheme is coherent and consistent, further inquiry is unneeded. The plainness or

ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

Anderson v. United States Dep't of Labor, 422 F.3d 1155, 1177 (10th Cir. 2005) (quoting *In re Wise*, 346 F.3d 1239, 1241 (10th Cir. 2003)). Moreover, if Congress used specific text in one provision, yet not another, “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Ibid.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

When statutory text is ambiguous, legislative history may provide guidance on Congress’s intended meaning of the challenged phrase. See *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 728-729 (10th Cir. 2006), cert. denied, 550 U.S. 969 (2007); *Biodiversity Legal Found.*, 146 F.3d at 1254.

B. The NVRA Requires An Applicant To Decline A Voter Registration Form By An Affirmative Act, “In Writing”

The plain language of subparagraph 5(a)(6)(A) of the NVRA, when examined individually and in the context of section 5(a)(6) as a whole, requires that HSD and all offices that implement its programs provide a voter registration form to any person who engages in a qualifying event unless the person, in writing, states his declination to register to vote. See 42 U.S.C. 1973gg-5(a)(6)(A).

While the NVRA has not defined the phrase “in writing,” the plain or ordinary meaning of that phrase is an “intentional recording” by words or symbols. *Black’s Law Dictionary* 1748 (9th ed. 2009); see *Webster’s Third New*

International Dictionary 2641 (1993) (“letters or characters * * * that serve as *visible* signs of ideas, words, or symbols”) (emphasis added). A failure to record any word or notation is not a response “in writing.” See *ibid.* The district court correctly concluded that the *absence* of a written notation is not a declination, in writing, any more than it is an acceptance, in writing. See Aplt. App. 157-158. Thus, HSD’s assertion (HSD Br. 11) that an individual’s *failure to make a notation* on the information form constitutes a declination *in writing* is inconsistent with the dictionary and plain meaning of a “writing.” See *Black’s Dictionary* 1748.

C. *The Failure To Complete The Voter Information Form Does Not Constitute A Declination Of A Voter Registration Form*

Congress used specific, different language in 42 U.S.C. 1973gg-5(a)(6)(A), (B), and (C) to address the distinct content of the voter registration form and the voter information form, and a VRA’s obligations regarding these forms. Subparagraph 5(a)(6)(A) is limited to the registration form and states that a VRA “shall” distribute a voter registration form to all individuals at a qualifying event unless the individual, “in writing, declines to register to vote.” 42 U.S.C. 1973gg-5(a)(6)(A). Subparagraph 5(a)(6)(B) addresses the text of the voter information form, and the consequences that apply in a moment in time; *i.e.*, when an applicant is engaged in a qualifying event with the VRA. These provisions are internally consistent and consistent with each other. Moreover, the district court correctly interpreted the text of these provisions. See Aplt. App. 158-160. Giving meaning

to *all* statutory text, an applicant's failure to complete the voter information form does not constitute a declination, in writing, to register to vote.

The voter information form includes the query, “[i]f you are not registered to vote where you live now, would you like to apply to register to vote *here today*?” and boxes to check “yes” or “no.” 42 U.S.C. 1973gg-5(a)(6)(B)(i) and (iii) (emphasis added). Subparagraph 5(a)(6)(B)(iii) explains that “failure to check either box [is] deemed to constitute a declination to register for purposes of subparagraph (C),” and subparagraph (C) addresses an applicant's right to assistance from a VRA official in completing the voter registration form. 42 U.S.C. 1973gg-5(a)(6)(B)(iii) and (a)(6)(C). That assistance is available when the applicant has contact with the VRA. The capitalized sentence of subparagraph 5(a)(6)(B)(iii) states that an applicant who does not indicate a preference on the voter information form has declined to register to vote *at this time*. See p. 5, *supra*. The phrases “at this time” and “here today” focus on the applicant's opportunity to register to vote at the moment she is in contact with the VRA, just as the opportunity to receive a VRA official's assistance is when the applicant is in contact with the VRA. Thus, the failure to indicate a response on the voter information form is a declination to register “at this time” and a declination of a VRA official's aid, at that time.

The temporal limitations “here today” and “at this time” are included in subparagraph 5(a)(6)(B) and the information form, yet are not included in subparagraph 5(a)(6)(A)’s command that an applicant must receive a registration form “unless the applicant, in writing, declines to register to vote.” In sum, these provisions impose different consequences depending on whether an applicant is passive (*i.e.*, she does not indicate, in writing, her voter registration preference at a particular time), or an applicant is affirmative (*i.e.*, she declines, in writing, not to register to vote). See *Anderson*, 422 F.3d at 1177 (Congress’s use of different text reflects a purposeful distinction). Thus, when an applicant does not make any notations on the voter information form, she should receive a voter registration form, yet a VRA official need not provide any assistance in completing that form.

The district court correctly concluded that the distinct text for these provisions does not support an interpretation that inaction addressed in subparagraph (5)(A)(6)(B)(iii) fulfills the “in writing” requirement of subparagraph (5)(A)(6)(A). See *Aplt. App.* 157-159. The court aptly described the statutory scheme as an applicant’s choice to “opt out” of receiving a voter registration form, and “opt in” to receive assistance from a VRA official in completing the registration form. *Aplt. App.* 159-160. This characterization is consistent with the text and gives full meaning to every term. An “opt out” approach ensures that an applicant for public services will receive a voter

registration form unless she affirmatively declines, in writing, to register to vote.

In contrast, an applicant must “opt in,” *i.e.*, complete the information form, to receive assistance from a VRA official with the voter registration form.

As noted, HSD claims (HSD Br. 11) that the text of subparagraph 6(B)(iii) defines subparagraph 5(a)(6)(A)’s phrase “in writing.” HSD’s assertion (HSD Br. 11) that an applicant has rejected the opportunity to receive a voter registration form by not checking a box on the voter information form is without merit. HSD’s interpretation wholly ignores the different text that comprise subparagraphs 5(a)(6)(A) and 5(a)(6)(B). See HSD Br. 11. Indeed, HSD’s interpretation renders the phrases “in writing,” “here today,” “for purposes of subparagraph (C)” and “at this time” superfluous. But courts reject, as this Court should, an interpretation that ignores or nullifies statutory text, particularly different text that does not share the same interpretation. Cf. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226-227 (2008); *Ramadan v. Gonzales*, 479 F.3d 646, 655-656 (9th Cir. 2007) (phrases “in his discretion” and “to the satisfaction of” have different meanings in 8 U.S.C. 1182(h); to interpret otherwise would render the second phrase superfluous); *DePaoli v. C.I.R.*, 62 F.3d 1259, 1262-1264 (10th Cir. 1995) (rejecting claim that an “heir” is the same as a “son,” given other statutory requirements for the former).

D. The NVRA's Objectives And Legislative History Support The Conclusion That HSD's Practices Violate The NVRA

Even if the text or statutory structure of Section 7 were ambiguous or inconsistent, this Court may consider the NVRA's legislative history to see if it provides guidance on the intended interpretation. See *Toomer*, 443 F.3d at 1195. In fact, the NVRA's purposes and its legislative history further demonstrate that HSD's practices are contrary to the terms and objectives of the NVRA. See also Aplt. App. 160-161.

Two primary objectives of the NVRA are to “establish procedures that will increase the number of eligible citizens who register to vote” and “enhance[] the participation” by eligible voters by expanding the opportunities for voter registration. See 42 U.S.C. 1973gg(b)(1)-(2), 42 U.S.C. 1973gg-3 – 1973gg-5; H.R. Rep. No. 66, 103d Cong., 1st Sess. 16 (1993) (H. Conf. Rep. 66). The Conference Committee resolved the House and Senate's disagreement on whether state agencies that provide public assistance should be designated mandatory or voluntary VRAs in favor of mandatory designation. See *id.* at 18-19. The Conference Committee concluded that a primary purpose of expanding voter registration opportunities would be unmet if these agencies were not mandatory VRAs. See H. Conf. Rep. 66 at 19. A substantial percentage of eligible voters seek and receive public services, do not drive, and often have no other contact with

public agencies; thus, these agencies are a primary avenue for voter registration for many individuals. See *ibid.*

At the same time, Congress was concerned about the potential for intimidation by public officials, whether real or perceived by applicants for public benefits. See H. Conf. Rep. 66 at 19. Thus, the Conference Committee added a provision to address the prohibition on intimidation by VRA officials. See 42 U.S.C. 19733gg-5(a)(5)(D); see H. Conf. Rep. 66 at 19. Significantly, Congress also modified subparagraph 5(a)(6)(B), which originally referred to a VRA's voluntary obligation to provide a form that would accompany the voter registration form, to require distribution of the voter information form and to specify its content. See H. Conf. Rep. 66 at 19-20. In recognition of the applicant's potential fear and discomfort, Congress explained:

the [information 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 to address that situation.

Ibid.

An applicant for services may be embarrassed or have other reasons that would inhibit her interest in registering to vote at a VRA, or receiving assistance

from a VRA representative. That same applicant, however, may feel comfortable completing a voter registration form at a later time, in her home, or somewhere away from the perceived, conspicuous eye of an agency that is determining her eligibility for public benefits. Thus, there is a significant purpose underlying the voter information form and subparagraph 5(a)(6)(B)'s focus on an offer of assistance at the time the applicant is in contact with the VRA, and its notice to the applicant that the opportunity to register extends beyond that moment should she wish to complete the voter registration form "in private," and at another time. 42 U.S.C. 1973gg-5(a)(6)(B)(iv). Because there is no time limit on completing the registration form, an individual may well decide she does not want to register at the VRA "today," but still wants the voter registration form to take home or elsewhere to complete. Allowing an applicant's failure to respond on the voter information form, which may be due to ambivalence, confusion or other concerns, to constitute a declination of a registration form is contrary to the statutory goals of expanding and maximizing opportunities for voter registration. The district court correctly concluded that the Conference Report "demonstrates that the declination form was not meant to supersede or modify subparagraph (A)'s mandate." Aplt. App. 160; see Aplt. App. at 161.

The significance of the text of subparagraph 5(a)(6)(B), and its distinction from subparagraph 5(a)(6)(A), is highlighted when the enacted version of

subparagraph 5(a)(6)(B) is compared to its earlier drafts. Earlier versions of the NVRA, H.R. 2, that were considered by the 103d Congress preceding the Conference Committee included the following text for Subparagraph 5(a)(6)(B):

[A VRA shall,] to the greatest extent practicable, incorporate in application forms and other forms used at those offices for purposes other than voter registration *a means by which a person who completes the form may decline, in writing, to register to vote* in elections for Federal office.

E.g., H.R. 2, 103d Cong., § 7(a)(6)(B) (as passed by S. Comm. on Rules, Mar. 17, 1993); H.R. 2, 103d Cong., § 7(a)(6)(B) (as passed by House, Feb. 4, 1993) (emphasis added).⁴ Thus, earlier versions of subparagraph 5(a)(6)(B) tracked the text of subparagraph 5(a)(6)(A) and suggested that a VRA provide a means for an applicant to decline, *in writing*, the opportunity to register to vote. The Committee's decision to eliminate the original text that parroted subparagraph 5(a)(6)(A)'s language; its concern with the potential for voter intimidation; and its distinction between an applicant's immediate opportunity to register to vote (when the applicant is in contact

⁴ Earlier versions of H.R. 2 had the same relevant text of subparagraph 5(a)(6)(A) that was ultimately enacted; that is, a voter registration agency shall distribute with its application for services (or at other qualifying events), the national voter registration form or its equivalent "unless the applicant, in writing, declines to register to vote." *E.g.*, H.R. 2, 103d Cong., § 7(a)(6)(A) (as passed by S. Comm. on Rules, Mar. 17, 1993); H.R. 2, 103d Cong., § 7(a)(6)(A) (as passed by House, Feb. 4, 1993).

with the VRA), and an applicant's future opportunity to register to vote "in private," collectively support the interpretation that an applicant's failure to respond to the information form's temporal query is not a declination, in writing, of the opportunity to register to vote.

Finally, we note that New Mexico's citation (HSD Br. 17) to the Conference Report to support its claim that the voter information form constitutes a written declination for subparagraph 5(a)(6)(A) is misplaced, and based on an incomplete citation to the Report. The full text at issue reads:

Another provision (Section 7(a)(6)(B)[]) 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 apply to register to vote 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. Conf. Rep. 66 at 19-20. The phrase "this provision" refers back to "Section 7(a)(6)(B)," 42 U.S.C. 1973gg-5(a)(6)(B), which addresses the voter information form, and not, as HSD suggests, the general opportunity to register to vote. This commentary makes no connection between inaction on the voter *information* form for purposes of an applicant's receipt of the *registration* form, which is addressed in subparagraph 7(a)(6)(A).

In sum, Congress made clear that designated voter registration agencies must provide individuals who engage in a qualifying interaction a voter registration

form, except when a voter affirmatively, in writing, states she does not want to register to vote. The statutory mandate that expands opportunities for voter registration is unduly and unlawfully restricted in New Mexico if an individual will only receive a voter registration form by affirmatively requesting the same.

CONCLUSION

This Court should affirm the district court's ruling in favor of appellees' motion for partial summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief For The United States As Amicus Curiae Supporting Appellees And Urging Affirmance complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains 4951 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF DIGITAL SUBMISSION

I further certify that with respect to the foregoing Brief For The United States As Amicus Curiae Supporting Appellees And Urging Affirmance:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) the ECF submission is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals and counsel whom are not registered ECF users;

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(3) the digital submission of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2011, I electronically filed the foregoing Brief For The United States As Amicus Curiae Supporting Appellees And Urging Affirmance with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system for those counsel who are registered CM/ECF users.

In addition, I hereby certify that on September 23, 2011, seven copies of the foregoing Brief For The United States As Amicus Curiae Supporting Appellees And Urging Affirmance were sent to the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by Federal Express, overnight mail.

Finally, I hereby certify that a copy of the foregoing Brief For The United States As Amicus Curiae Supporting Appellees And Urging Affirmance was sent by certified, first class mail, postage prepaid, on the following counsel of record who are listed as non-ECF participants on the Tenth Circuit Service Method Report for Case No. 11-2063 as of September 23, 2011:

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