No. 11-2063

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CELIA VALDEZ, *et al*.,

Plaintiffs-Appellees,

vs.

SIDONIE SQUIER, *et al*.,

Defendants-Appellants.

On Appeal from the United States District Court
For the District of New Mexico
Assigned to District Court Judge Judith C. Herrera

BRIEF OF APPELLEE

APPELLANTS' REQUEST FOR ORAL ARGUMENT NOT OPPOSED

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STATEMENT OF RELATED APPEALS

Now pending before the Tenth Circuit Court of Appeals is *Valdez, et al. v. Duran*, Case No. 11-2084, an appeal that originated from the same district court action as the instant appeal. The two appeals were filed by different Defendants/Appellants and do not have any legal or factual issues in common.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The first issue presented for review by the Defendant/Appellant officials of the New Mexico Human Services Department ("HSD") is in error. The correct issue for review is: Whether the United States District Court for the District of New Mexico (the "District Court") correctly held that HSD's policy of distributing voter registration applications only when public assistance clients would make an affirmative request to register to vote violates the National Voter Registration Act's requirement that such applications be distributed as a matter of course to all clients who engage in transactions covered by the Act, except when a particular client explicitly opts out of voter registration by declining in writing to register to vote.

2. HSD's second issue presented for review is also in error as that issue was not presented to or decided by the District Court. However, if this Court concludes that this issue may be addressed on appeal, the correct statement of the issue would be: Whether the doctrine of judicial estoppel may be applied where it

is agreed that the individual allegedly estopped – Plaintiff-Appellee in this appeal – is not a party to the separate litigation claimed to be the basis for applying the estoppel doctrine and has no relationship to the parties in that separate litigation.

STATEMENT OF THE CASE

A group of Plaintiffs (one of which, Plaintiff Shawna Allers, is the Appellee here) filed the instant lawsuit in July 2009 to remedy the failure of the State of New Mexico to offer voter registration to its citizens in the manner required by the National Voter Registration Act of 1993 ("NVRA"). 42 U.S.C. § 1973gg *et seq.* As set forth in the Amended Complaint, Plaintiffs challenged New Mexico's ongoing statewide violation of two sections of the NVRA: (i) Section 5, 42 U.S.C. § 1973gg-3, which requires that New Mexico and other States offer voter registration simultaneously with applications for a driver's license or state identification card; and (ii) Section 7, 42 U.S.C. § 1973gg-5, which requires that States offer voter registration when residents conduct certain transactions related to the application for, or receipt of, public assistance benefits. 42 U.S.C. § 1973gg-7; Appellant's Appendix ("App.") at 64. The instant appeal concerns the Section 7 portion of the litigation and does not involve or relate to the separate Section 5 claim.

Plaintiff Shawna Allers ("Ms. Allers") is a New Mexico resident who was not offered voter registration, in violation of the NVRA, when she visited an HSD

office in connection with her receipt of public assistance benefits. App. at 68.[1] Ms. Allers alleged a statewide violation of Section 7 of the NVRA by Defendants in failing to regularly and consistently offer voter registration to public assistance clients ("clients") in the day-to-day transactions conducted by public assistance offices. App. at 79-85. Ms. Allers sought injunctive and declaratory relief, as allowed by Section 11 of the NVRA, 42 U.S.C. § 1973gg-9, regarding Defendants' statewide systemic violation. App. at 86-88. Although this case is not a class action, the District Court found this matter to be in the nature of a class action with regard to the relief Plaintiffs could obtain. App. at 62.[2] The Section 7 Defendants include several HSD officials and the New Mexico Secretary of State, sued in their official capacities.[3]

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[1] Ms. Allers was substituted in as a plaintiff by the Amended Complaint. App. at 58. The original Complaint also included as a plaintiff the Association of Community Organizations for Reform Now ("ACORN"); however, ACORN subsequently ceased to exist in New Mexico and so was voluntarily dismissed in June 2009. App. at 28-32. The other Plaintiffs sued regarding the State of New Mexico's separate violation of Section 5 of the NVRA. App. at 75-78.

[2] Plaintiffs, in their proposed Amended Complaint, sought to re-allege the case as a class action as to both the Section 5 and the Section 7 claims. The Magistrate Judge, in his Report and Recommendation, concluded that the proposed amendment should be denied because "[i]n the event the Court finds in favor of Plaintiffs and grants the requested relief, the same relief would be afforded to all potential class members. Thus, proceeding as a class action would serve no useful purpose." App. at 60. The District Court agreed, noting that if the Court "grants the requested relief, the same relief would be afforded to all potential class members." App. at 62.

[3] The Secretary of State is the chief elected official of the state, N.M. Stat. Ann. § 1-2-1(A), has state law responsibility for the proper conduct of voter registration at

In 2010, HSD filed a motion for summary judgment and Ms. Allers filed a motion for partial summary judgment. App. at 33-49, 148. HSD claimed that, as a matter of law, its policies and practices were in full compliance with Section 7. App. at 110-14. Ms. Allers sought judgment that HSD was violating Section 7, in part, through its policy of providing a voter registration application (an "Application") only to clients who made an affirmative request for an Application. App. at 49.

In its December 21, 2010, Memorandum Opinion and Order ("Opinion"), the District Court granted Ms. Allers' motion for partial summary judgment and denied HSD's motion.[4] App. at 149. The Court made a number of factual findings and held that the policy implemented by the Defendant state officials at HSD offices, which restricted the circumstances in which Applications were distributed to clients, violated Section 7 of the NVRA. App. at 157-61.

The NVRA requires public assistance offices, including HSD offices, to offer clients an opportunity to register to vote by distributing Applications whenever clients conduct certain assistance-related transactions, except in the limited circumstance where a client declines registration "in writing." 42 U.S.C. §

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state public assistance and motor vehicle offices, N.M. Stat. Ann. § 1-4-48(A), and is "responsible for coordination of State responsibilities under [the NVRA]." 42 U.S.C. § 1973gg-8.

[4] The Secretary of State also filed a summary judgment motion. The District Court denied that motion as well. App. at 149.

1973gg-5. Thus, the statute ensures that clients will receive an Application (whenever they conduct a covered transaction) unless they "opt out" by declining in writing. *Id.*

The District Court held that Defendants failed to comply with this obligation by reversing the voter registration presumption and creating an "opt-in" procedure, whereby HSD would distribute an Application only to those who specifically and affirmatively requested an Application (hereinafter, the "Distribution Policy"). App. at 157-61. The Court found that Defendants' interpretation of Section 7, as reflected in the Distribution Policy, is not supported by the NVRA's plain language, or by the statute's purpose or legislative history. App. at 158-61.

Thereafter, on February 24, 2011, the District Court approved and signed the parties' Consent Order Regarding Plaintiffs' Claims Asserting Violations of Section 7 of the National Voter Registration Act (the "Consent Decree") resolving the Section 7 portion of this case. App. at 175-90. The Consent Decree specifies the procedures the State is to use to distribute Applications to clients and also specifies a variety of measures to ensure compliance with the NVRA's voter registration procedures, including training, data collection, data reporting and analysis, and compliance monitoring. App. at 175-90.

The procedures specified in the Consent Decree for distributing Applications comply with the District Court's Opinion and the District Court's interpretation of

the NVRA. App. at 175-76. However, the Consent Decree also permits Defendants a limited right of appeal, as to the District Court's holding regarding the legality of the Distribution Policy, and further provides for an alternative set of distribution procedures if the District Court's finding that the Distribution Policy violates Section 7 of the NVRA is reversed. App. at 176. HSD (but not the Secretary of State) now appeals the District Court's holding that the Distribution Policy contravenes Section 7 of the NVRA. Appellants' Brief ("Aplt. Brief") at 2. HSD does not appeal nor dispute the District Court's findings of fact. Aplt. Brief at 2, 4, 7, 9.[5]

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.[6] Ms. Allers requests that this Court affirm the District Court's holding that the Distribution Policy violates Section 7 of the NVRA and the District Court's grant of partial summary judgment in Ms. Allers' favor.

STATEMENT OF RELEVANT FACTS

New Mexico is subject to the requirements of the NVRA and, as required by the NVRA, 42 U.S.C. § 1973gg-5(a)(2)(A), HSD has been designated as a voter

[5] The separate claim under Section 5 of the NVRA, regarding voter registration at motor vehicle offices, has been settled through a settlement agreement filed with the District Court on July 1, 2010. App. at 35.

[6] Ms Allers does not disagree with HSD's Jurisdictional Statement insofar as the Court has jurisdiction to hear the first issue identified above. HSD's second identified issue was waived and thus is not properly before this Court and should not be considered.

registration agency. N.M. Stat. §§ 1-4-5.2, 1-4-48; N.M. Code R. §§ 1.10.8.2, 1.10.8.7, 1.10.8.8, 1.10.8.9.

The Distribution Policy implemented at HSD offices was that an Application should be distributed only to those clients who affirmatively and explicitly requested an Application. Aplt. Brief at 7 ("HSD does not provide a voter registration application to applicants who check 'no' or who leave the form blank."); App. at 154. HSD did not attach Applications to public assistance applications, to the paperwork required for recertification or renewal of public assistance benefits, or to change of address forms, and did not otherwise automatically provide Applications to clients. Aplt. Brief at 4-6; App. at 152.

Instead, HSD's Distribution Policy was to utilize a standard form (herein referred to as a "voter information form") – which HSD placed in the middle of a multi-page benefits application – that asked: "If YOU are NOT registered to vote where you live now, Would you like to register to vote here today? (Please check one) □ YES □ NO." Aplt. Brief at 5; App. at 153 (emphasis in original). The voter information form further stated: "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME." Aplt. Brief at 5; App. at 153 (emphasis in original). If a client left the voter information form blank by not checking a box, then HSD did not offer or provide an Application to the client, unless the client verbally requested an

Application. Aplt. Brief at 6; App. at 154. This is what the District Court referred to as HSD's "opt-in" provision, and the legality of this provision is what is at issue in this appeal. App. at 154.

HSD improperly includes within its Statement of Facts a recitation of certain purported facts, not in the District Court record, relating to the settlement of a separate NVRA lawsuit filed in the United States District Court for the Southern District of Indiana, captioned as *Ind. State Conference of the NAACP v. Gargano*, Case No. 1:09-cv-0849 (the "Indiana lawsuit"). Aplt. Brief at 6-7, 18-30. HSD did not raise any issue relating to the Indiana lawsuit before the District Court. *See generally* App. Accordingly, for the reasons set forth below, any issue that allegedly might be posed by the settlement in the Indiana lawsuit is not before this Court.

SUMMARY OF THE ARGUMENT

In accord with Congress' purposes in enacting the NVRA, Section 7 of the statute establishes a simple, direct, and easily-administered requirement regarding the distribution of voter registration applications to clients: Applications must be provided to all clients who engage in certain transactions identified in Section 7, subject to the narrow exception that an Application need not be distributed if a particular client explicitly declines to register to vote "in writing." In other words,

the NVRA ensures that clients presumptively receive Applications as a matter of course, unless the client declines to register to vote "in writing."

HSD's Distribution Policy is contrary to this presumption; it presumes, instead, that Applications should *not* be distributed to clients. Specifically, HSD distributes an Application only to clients who make an affirmative request and does not provide an Application to clients who are silent as to whether they wish to register to vote – *i.e.*, clients who do not check either "yes" or "no" on the HSD voter information form (and who do not verbally request an Application). HSD justifies its Policy by claiming that, by not checking either "yes" or "no," the client has declined "in writing" to register to vote. Aplt. Brief at 7-8, 10. As the District Court correctly found, HSD's claim contravenes the plain language, express purpose, and legislative history of the NVRA. App. at 157-61. Thus, the District Court's grant of partial summary judgment in Ms. Allers' favor should be affirmed.

The NVRA explicitly states that HSD may refrain from distributing an Application only upon a written declination of the voter registration offer and silence plainly is not a statement "in writing." HSD's attempt to find an exception to this explicit requirement in a separate provision of Section 7, 42 U.S.C. § 1973gg-5(a)(6)(B), is without merit. The provision upon which HSD relies addresses the circumstances in which public assistance agencies must assist a client

in *completing* an Application, not the circumstances in which Applications must be distributed in the first instance.

HSD's estoppel argument, based on mischaracterizations and misunderstandings of an entirely separate NVRA lawsuit – the Indiana lawsuit – is neither properly before this Court nor legally cognizable. HSD's estoppel argument was not raised or considered by the District Court. Therefore, HSD has waived any such claim it may have had. Moreover, even if HSD did not waive any such claim (and even if its recitation of the Indiana lawsuit was accurate, which it is not), HSD's estoppel argument is meritless. There is no basis in American jurisprudence for claiming that a party in one federal case may be estopped from making a legal argument based on the position taken by a different party in a different federal case, simply because the two parties share some attorneys in common. Adoption of such a rule here would effect a radical change in the practice of law in this country.

LEGAL ARGUMENT[7]

I. CONGRESS ENACTED THE NVRA TO PROMOTE VOTER PARTICIPATION BY ERADICATING ARTIFICIAL BARRIERS TO VOTER REGISTRATION

Congress initially sought to remedy discrimination in voting by enacting the Voting Rights Act of 1965. 42 U.S.C. § 1973 *et seq*. However, Congress

[7] Ms. Allers agrees with HSD's statement of the standard of review and for that reason does not repeat that standard here.

subsequently concluded that the Voting Rights Act did not sufficiently address voter registration procedures, which involved a "complicated maze of local laws and procedures, in some cases as restrictive as the out-lawed practices, through which eligible citizens had to navigate in order to exercise their right to vote." H.R. Rep. No. 103-9, at 3 (1993).

In enacting the NVRA, Congress recognized that "the right of citizens of the United States to vote is a fundamental right," and determined that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a). Thus, Congress sought "to establish procedures that will increase the number of eligible citizens who register to vote" and to enable "Federal, State, and local governments to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters." 42 U.S.C. § 1973gg(b).[8]

[8] *See Welker v. Clarke*, 239 F.3d 596, 598-99 (3d Cir. 2001) ("[o]ne of the NVRA's central purposes was to dramatically expand opportunities for voter registration . . . ."); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 285 (4th Cir. 1998) ("Congress passed the NVRA . . . to encourage increased voter registration for elections involving federal offices" and "to make it easier to register to vote."); *Assoc. of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997) ("[i]n an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA]."); *see also* App. at 160.

The NVRA includes numerous provisions aimed at simplifying and streamlining the voter registration process, and at reducing the burdens involved in registering to vote. Among other things, the NVRA expands the methods by which persons may register to vote by requiring that States offer voter registration at motor vehicle offices (42 U.S.C. § 1973gg-3); provides that persons may register by mail (42 U.S.C. § 1973gg-4); and designates a variety of agencies (including, but not limited to, public assistance and disability offices) as voter registration agencies (42 U.S.C. § 1973gg-5).

The NVRA further seeks to guarantee access to voter registration by ensuring that citizens have full access to the expanded voter registration methods so that these methods actually result in the distribution of Applications. 42 U.S.C. § 1973gg *et seq*. Thus, at motor vehicle offices, Applications must be "offered simultaneously with an application for a motor vehicle driver's license," 42 U.S.C. § 1973gg-2(a)(1), and an application for a driver's license must "serve as an application for voter registration . . . unless the applicant fails to sign the voter registration application." 42 U.S.C. § 1973gg-3(a)(1). Mail Applications must be made "available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs." 42 U.S.C. § 1973gg-4(b). Finally, as indicated, Applications must be distributed at voter registration agencies (including public assistance agencies) as a

matter of course, except when a client declines voter registration "in writing."[9] 42 U.S.C. § 1973gg-5(a)(6)(A).

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S HOLDING THAT HSD'S DISTRIBUTION POLICY VIOLATES SECTION 7 OF THE NVRA

A. The NVRA Specifically Requires The Presumptive Distribution Of Voter Registration Applications To Public Assistance Clients, Subject To A Written Opt-Out Procedure

1. Section 7's statutory requirements.

Section 7 requires that public assistance agencies provide the following voter registration services to their clients:

> (i) Distribution of mail voter registration application forms in accordance with paragraph (6).
> (ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.
> (iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

42 U.S.C. § 1973gg-5(a)(4)(A); *see also* App. at 155.

Paragraph (a)(6) of Section 7 delineates agencies' specific obligations. Most importantly, subparagraph (A) of paragraph (a)(6) sets forth the requirements for distribution of Applications. Public assistance offices must "distribute" an Application "with each application for . . . assistance, and with each recertification, renewal, or change of address form relating to such . . . assistance . . . *unless the*

[9] The NVRA, by its terms, only applies to registration to vote "in elections for Federal office." 42 U.S.C. § 1973gg-2(a). However, New Mexico (like all States that are subject to the NVRA) applies the NVRA's provisions to voter registration for all elections in the State. *See generally* N.M. Stat. § 1-4-1 *et seq.* (statutory provisions governing the registration of electors in the State).

applicant, in writing, declines to register to vote." 42 U.S.C. § 1973gg-5(a)(6)(A) (emphasis added) (hereinafter "Subparagraph (A)"); *see also* App. at 155.

Under subparagraph (B) of paragraph (a)(6), public assistance agencies also must distribute a standard form, the aforementioned "voter information form." 42 U.S.C. § 1973gg-5(a)(6)(B) (hereinafter, "Subparagraph (B)"). The form provides clients with a variety of information about the voter registration process.[10] The form further includes an inquiry regarding voter registration that asks: "If you are not registered to vote where you live now, would you like to apply to register to vote here today?" *Id.*; *see also* App. at 155-56. The form must include checkboxes for a client to indicate whether or not the client would like to register to vote at the office "today." 42 U.S.C. § 1973gg-5(a)(6)(B)(iii); *see also* App. at 156. In close proximity to the checkboxes, the form also must include a statement that "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); *see also* App. at 156. Finally, Subparagraph (B) is explicit that "failure to check either box [on the voter

[10] The voter information form must notify clients that (i) the decision of whether or not to register to vote "will not affect the amount of assistance that you [the client] will be provided by this agency," (ii) assistance in filling out an Application is available if the client so desires, and (iii) if there is interference with the client's right to register or to decline to register or to choose a political affiliation, the client may file a complaint. 42 U.S.C. § 1973gg-5(a)(6)(B)(ii), (iv), and (v); *see also* App. at 156.

information form]. . . constitute[s] a declination to register for *purposes of subparagraph (C)*." 42 U.S.C. § 1973gg-5(a)(6)(B)(iii) (emphasis added); App. at 156.

Subparagraph (C) addresses the assistance an agency may be required to provide in connection with the voter registration process. 42 U.S.C. § 1973gg-5(a)(6)(C) (hereinafter, "Subparagraph (C)"); App. at 157. Subparagraph (C) specifies that an agency should provide clients with the same degree of assistance in completing Applications as is provided in completing benefits forms, unless the client refuses such assistance. App. at 156-57. Thus, Subparagraph (C) does not address the threshold question of whether a client must be given an Application but, instead, focuses on the agency requirements when a client already has been given an Application. 42 U.S.C. § 1973gg-5(a)(6)(C); *see also* App. at 157.

2. Section 7's plain language requires HSD to distribute Applications to all clients who leave the voter registration inquiry checkboxes blank.

As the District Court properly determined, the fundamental question presented by HSD's opposition to Ms. Allers' motion for summary judgment – and, now, by this appeal – is what constitutes a declination to register "in writing" by a client (*i.e.*, does a blank response to the voter registration inquiry on the voter information form constitute a statement "in writing"?). Since Section 7 does not define the term "in writing," the District Court properly looked to the ordinary use

of the term "writing." *Perrin v. U.S.*, 444 U.S. 37, 42 (1979) ("words [in statutes] will be interpreted as taking their ordinary, contemporary, common meaning" at the time Congress enacted the statute).[11]

The District Court properly concluded that a blank response is not a statement "in writing." App. at 157. Black's Law Dictionary defines "writing" as "any intentional recording of words that may be viewed or heard with or without mechanical aids." *Black's Law Dictionary* at 1748 (9th ed. 2009); *see also* App. at 157. Plainly, a blank response on the voter information form is not an "intentional recording of words." App. at 158. Thus, HSD's "opt-in" requirement, whereby a client only is provided an Application if the client affirmatively requests "in writing" an Application, directly contravenes the NVRA. *See Nat'l Coal. for Students with Disabilities Educ. & Legal Def. 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 an Application in order for the Application to be provided).

[11] *See also Robbins v. Chronister*, 402 F.3d 1047, 1050 (10th Cir. 2005) (absent an indication that applying a statute's plain language would "'yield patent absurdity, [the Court's] obligation is to apply the statute as Congress wrote it.'") (*quoting Hubbard v. U.S.*, 514 U.S. 695, 703 (1995)); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998) (holding that if Congress does not explain the specific meaning of a statutory phrase or term, a court may assume Congress intended the words to be given their ordinary meaning and determine such meaning through the use of dictionaries).

3. HSD's reliance on Subparagraph (B) is contradicted by that Subparagraph's plain language, and would render language within Subparagraph (B) superfluous.

HSD is plainly wrong when it asserts that its "opt-in" requirement is validated by language included in Subparagraph (B) relating to the voter registration inquiry contained in the voter information form. Aplt. Brief at 10-13. As discussed above, Congress explicitly instructed agencies in Subparagraph (B) as to the sole consequence of a client not responding to the standard voter registration inquiry: "[F]ailure to check either box [shall be] deemed to constitute a declination to register *for purposes of subparagraph (C)*." 42 U.S.C. § 1973gg-5(a)(6)(B)(iii) (emphasis added). As also discussed above, Subparagraph (C) deals exclusively with the extent to which an agency must provide assistance in completing an Application to a client to whom the agency has distributed an Application; it does not address the circumstances in which Applications should be distributed in the first instance (which, as indicated, is governed by Subparagraph (A)). Accordingly, Subparagraph (B) of Section 7(a)(6) does not authorize HSD to withhold an Application from a client who does not affirmatively respond to the voter registration inquiry.

The thrust of HSD's argument is that the Court should rewrite Subparagraph (B) to include words that Congress did not include or to ignore words that Congress explicitly chose to include. Aplt. Brief at 12-14. HSD thus essentially

argues that the Court should rewrite Subparagraph (B) to say that "failure to check either box [shall be] deemed to constitute a declination to register" for purposes of *Subparagraph (A)*. Aplt. Brief at 12-14. But that, of course, is not what Congress said. App. at 159.

Put differently, HSD's interpretation requires that the entire "for purposes of subparagraph (C)" directive be treated as superfluous and, in effect, written out of Section 7. Such an interpretation, however, is contrary to the fundamental rules of statutory construction. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks omitted); *Hohn v. U.S.*, 524 U.S. 236, 249 (1998); *U.S. v. Tsosie*, 376 F.3d 1210, 1217 (10th Cir. 2004) (courts are "guided by the traditional canon of statutory construction that courts should avoid statutory interpretations which render provisions superfluous"); *OXY USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10th Cir. 2001) ("[w]e must avoid, whenever possible, a statutory interpretation that would 'render superfluous other provisions in the same enactment.'"); App. at 159.

Specifically, if HSD were correct that public assistance agencies are not required to provide Applications to clients who do not respond to the registration inquiry in the voter information form, these agencies – most certainly – would not

need to consider whether to provide such individuals with assistance in completing an Application. Congress, therefore, would not have needed to instruct agencies concerning the Subparagraph (C) assistance requirement for clients who leave the checkboxes blank. 42 U.S.C. § 1973gg-5(a)(6)(C). Because Congress did provide that instruction, it is axiomatic that, for this instruction to have meaning, Section 7 must be read to require agencies to distribute an Application to clients who leave the voter information form blank (but not provide assistance to such clients in completing the Applications). 42 U.S.C. § 1973gg-5(a)(6)(A).

The logic underlying Congress' instruction concerning Subparagraph (C)'s implementation also is apparent from the face of the statute. 42 U.S.C. § 1973gg *et seq.* The voter information form asks whether the client wishes to register "today," and the form then tells the client that not checking either box will be understood to mean that the client does not wish to register "at this time". 42 U.S.C. § 1973gg-5(a)(6)(B)(iii). In other words, a client may obtain an Application and register to vote "today," *i.e.*, "at this time" while at the agency office; alternatively, the client may obtain an Application and choose to register at another time, *e.g.*, the client may take the Application home, complete it there, and then submit it. App. at 158. If the client does not respond to the inquiry about registering "today" (by leaving the checkboxes blank), Subparagraph (B) appropriately provides that the agency is

relieved of its Subparagraph (C) obligation to provide assistance in completing the Application.

Thus, contrary to what HSD asserts, the District Court's Opinion does not render superfluous the provision of the voter information form that informs clients of the consequence of leaving the checkboxes blank. Aplt. Brief at 11-13. Instead, this provision provides appropriate guidance regarding the extent of the agency's responsibility to assist the client in completing an Application "at this time," *e.g.*, during a client's visit to the office that day – "today."

B. The NVRA's Purpose, Structure, And Legislative History Fully Support The District Court's Holding That HSD May Not Condition Distribution Of A Voter Registration Application On A Client's Affirmative Request

Section's 7's plain language requirements, as discussed above, are supported and reinforced by Congress' purposes in enacting the NVRA, the statutory structure, and Section 7's legislative history. H.R. Rep. No. 103-9, at 3 (1993). Although it is not necessary to resort to these statutory interpretation guides to decide this case, they nonetheless further confirm that Congress intended Section 7's plain language to govern the distribution of Applications.[12]

[12] "When the meaning of the statute is clear, it is both unnecessary and improper to resort to legislative history to divine congressional intent." *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986). This principle prevents courts from "qualifying the statute so as to accommodate the perceived legislative intent." *Id.* However, this principle does not preclude a court from recognizing that congressional purpose and legislative history corroborate a statute's plain language meaning. *See*, *e.g.*, *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 243 (1989) (finding that "the

1. HSD's Distribution Policy conflicts with Congress' intent to "increase the number of eligible citizens who register to vote" by simplifying and streamlining the voter registration process.

As described above, Congress sought to eradicate existing barriers to voter registration both by expanding the methods by which persons may register and by requiring that, as a matter of course, voter registration applications are distributed to citizens pursuant to the expanded registration methods. 42 U.S.C. § 1973 *et seq.* In particular, Congress singled out certain state offices as being advantageous venues for distribution of Applications and adopted a uniform requirement of presumptive distribution of Applications, tailored to the somewhat different procedures employed at different types of state offices. *Id.* At motor vehicle offices, an application for a driver's license or state identification card must also "serve as an application for voter registration," except where an individual "fails to sign the registration application" (42 U.S.C. § 1973gg-3(a)(1)); likewise, at public assistance and other voter registration agencies, Applications shall be distributed, except where an individual "in writing, declines to register to vote" (42 U.S.C. § 1973gg-5(a)(6)(A)).

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statute's language is plain," but also stating that the plain language "does not conflict with any other section of the Code, or with any important state or federal interest; nor is a contrary view suggested by the legislative history"); *Mallard v. U.S. Dist. Court for S. Dist. Of Iowa*, 490 U.S. 296, 301, 306 (1989) (finding that "[t]he import of the term seems plain," but recognizing that other sections of the statute, statutes enacted contemporaneously, and subsequent Congressional action all corroborate the plain language).

There are a variety of reasons for Congress to require the presumptive distribution of Applications. First and foremost, because Congress sought to make routine the wide dissemination of Applications, a presumption in favor of distribution clearly serves this purpose whereas a presumption against distribution (HSD's position) clearly does not.[13] In addition, a client might leave the voter registration inquiry on the voter information form blank because he or she does not see or notice it, or may not fully comprehend it, and an "opt-in" system therefore would tend to restrict the availability of voter registration and the distribution of Applications.

Thus, as the District Court correctly concluded, the HSD policy of withholding an Application, unless there is an affirmative request for an Application, is inconsistent with, and finds no support in, the manner in which Congress sought to remedy the voter registration problems it identified. If upheld, the HSD policy would frustrate the clear Congressional purposes underlying the NVRA and would be contrary to the NVRA's statutory structure. App. at 160-61.

[13]In general, social science research indicates that when a decision-maker wishes to promote or support a particular course of action (here, the distribution of Applications), an "opt-out" system will be significantly more effective in accomplishing this than an "opt-in" system. *E.g.*, Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not An Oxymoron*, 70 U. Chi. L. Rev. 1159, 1174-77 (2003).

2. The HSD Distribution Policy conflicts with Section 7's legislative history.

When the NVRA was considered and enacted, it was the uniform understanding of both the House of Representatives and the Senate that public assistance agencies presumptively would distribute Applications, rather than waiting to see if a client thought to ask for an Application. H.R. Rep. No. 103-9, at 10 (1993); S. Rep. No. 103-6 at 25 (1993). Both the House and Senate committee reports for the NVRA identically state that Congress intended that agencies "shall distribute *simultaneously* with each application for service or assistance, and with each recertification, renewal, or change of address, a mail voter registration application form" and should also provide "a means by which an applicant may decline in writing to register to vote." H.R. Rep. No. 103-9, at 11 (1993); S. Rep. No. 103-6 at 27 (1993) (emphasis added).[14] The Consent Order provisions, which HSD seeks to overturn through this appeal, do just this: they provide for simultaneous distribution of Applications with each public assistance application and recertification and provide for distribution pursuant to address change forms subject to a client specifically stating, in writing, that an Application is not desired. App. at 181-83.

[14] This description of the Section 7 distribution requirements closely tracks the language Congress used with regard to the distribution of Applications at motor vehicle offices, 42 U.S.C. § 1973gg-2(a)(1). This, in turn, further underscores Congress' intent that a single principle should govern the requirements for distribution of Applications at the various state governmental offices the statute covers. *See supra* at 21.

The House-Senate Conference Report for the NVRA explains the Congressional intent underlying the voter information form, which was not to supersede or modify the Subparagraph (A) mandate concerning the distribution of Applications. H. R. Rep. No, 103-66, at 17 (1993); App. at 160. The Conference Report explains that the voter information form guards against the possibility of coercion of clients:

> The [voter 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 that address that situation.

H. R. Rep. No, 103-66, at 17 (1993); App. at 161. Because the simple act of providing an Application is, of course, not coercive – rather, it implements the statute's essential purpose – there is no credible argument that Congress inserted this anti-coercion measure as a means of restricting the distribution of Applications.[15]

[15] There are several policy reasons for distributing an Application but excusing assistance when a client has left the registration inquiry checkboxes blank. For example, it may be that the client is uncertain or conflicted about voter registration, or the client is reluctant to respond affirmatively for fear that the caseworker will pressure the client to register in a particular way or might retaliate against the client for registering to vote. App. at 160. Low income individuals might shy away from registering to vote at an agency because of the potential embarrassment of struggling with literacy problems or language barriers (even with translated

III. HSD'S ESTOPPEL ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND, IN ANY EVENT, THE PROCEEDINGS IN A SEPARATE NVRA CASE CANNOT ESTOP MS. ALLERS WHO IS NOT A PARTY TO THAT LITIGATION

HSD's attempt, in this appeal, to introduce a new legal argument (judicial estoppel) and new purported facts (regarding the settlement of the unrelated Indiana lawsuit) is entirely improper and, in any event, has no basis in law, equity, or fact. Accordingly, HSD's estoppel argument should be summarily rejected.

A. The District Court Did Not Consider The Indiana Lawsuit And Thus This Court May Not Properly Consider It Now

Neither HSD nor any other party here made any mention of judicial estoppel before the District Court nor any mention of the Indiana lawsuit. *See generally* App. The District Court thus did not consider any estoppel claim or any issue related to or concerning the Indiana lawsuit. App. at 148-70.

Accordingly, HSD is barred from raising the estoppel argument before this Court now. *See Rivers v. Jones*, 2011 U.S. App. LEXIS 5698, *4 (10th Cir. Mar. 21, 2011) (Tenth Circuit does not address issues raised for the first time on appeal) (*citing U.S. v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002)); *Rhine v. Boone,* 182 F.3d 1153, 1154 (10th Cir. 1999) (refusing to consider an issue not raised in the district court habeas proceeding "[b]ecause we will generally not consider issues

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documents). App. at 160. Clients also may simply wish to consult with a family member or friend as to whether or not to register, whether or not to register as a member of a political party, or whether or not to register as someone who declines to state a party.

raised on appeal that were not first presented to the district court") (*citing Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992)); *Tele-Commc'ns, Inc. v. Comm'r.*, 104 F.3d 1229, 1233 (10th Cir. 1997) ("[a]n issue must be presented to, considered and decided by the trial court before it can be raised on appeal.") (brackets and internal quotations marks omitted); *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 814 n.22 (10th Cir. 1995); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (explaining that appellate courts should generally decline to reach newly argued issues so that "litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence").

Likewise, HSD cannot submit new documents and new alleged facts – in the form of pleadings from the Indiana lawsuit – for this Court's consideration when such documents and alleged facts were neither presented to, nor relied upon, in the District Court. Long-standing precedent prevents this Court from considering these new documents and new alleged facts. *See John Hancock Mut. Life Ins. Co. v. Weisman*, 27 F.3d 500, 506 (10th Cir. 1994) ("[t]his court has held that it cannot, in reviewing a ruling on summary judgment, consider evidence not before the district court.") (*citing Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1475 (10th Cir. 1993)). For these reasons, this Court should not consider HSD's judicial estoppel claim.

B. HSD's Estoppel Argument Has No Merit

Even if HSD's estoppel argument is considered, there is no legal, equitable, or factual basis for invoking judicial estoppel against Ms. Allers. Ms. Allers is not a party to the Indiana lawsuit, has no relationship to the parties in that case, has not filed any document in that case, is not subject to the settlement of that case, and has taken no position in that case. Attachments B-G to Aplt. Brief (making no mention of Ms. Allers). HSD does not claim otherwise. *See* Aplt. Brief at 18-30; Attachments B-G to Aplt. Brief.[16]

Because there is no identity of parties between the two cases, HSD's estoppel claim lacks the most basic ingredient for invocation of judicial estoppel – that the party against whom estoppel is asserted must be the *same* party who made the allegedly inconsistent claim in a prior case or previously in the same case. *N.H. v. Me.*, 532 U.S. 742, 750 (2001) (outlining the factors for application of the judicial estoppel doctrine, stating that estoppel can only apply where "a *party's* later position [is] clearly inconsistent with *its* earlier position") (emphasis added; internal quotation marks omitted); *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) (judicial estoppel "generally prevents a *party* from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in

[16] Likewise, HSD has not identified any other New Mexico citizen who will be affected by the settlement in the Indiana lawsuit or who otherwise has any legally cognizable interest in the Indiana lawsuit. *See generally* Aplt. Brief.

another phase" (emphasis added)); 18 Moore's Federal Practice § 134.30, pp. 134-62 (3d ed. 2000) ("[t]he doctrine of judicial estoppel prevents a *party* from asserting a claim in a legal proceeding that is inconsistent with a claim taken by *that party* in a previous proceeding") (emphasis added). *Accord Estrella v. Fed. Ins. Co.*, 2011 U.S. Dist. LEXIS 15491, **3-4 (S.D. Fla. Feb. 16, 2011); *Kirby v. U.S.*, 2009 U.S. Dist. LEXIS 8981, **33-34 (N.D. Okla. Feb. 6, 2009); *Sadri v. Apana*, 2007 U.S. Dist. LEXIS 46789, **31-32 (D. Haw. June 27, 2007).

Because Ms. Allers had no role in the Indiana lawsuit, HSD resorts to the bizarre assertion that Ms. Allers can be estopped based upon a position her counsel allegedly took on behalf of a different client in a different case. Aplt. Brief at 18, 20-21. This radical expansion of the judicial estoppel doctrine, if it were to be accepted, clearly would necessitate a wholesale revision of the practice of law in the United States. On the few occasions that others have put forward this argument, courts have summarily rejected it. *See Estrella*, 2011 U.S. Dist. LEXIS 15491, **3-4 (S.D. Fla. Feb. 16, 2011) (court denied application of the judicial estoppel doctrine because the allegedly inconsistent statements were made by an attorney who represented different parties in the two cases at issue; applying judicial estoppel in this context would be "absurd"); *Sadri*, 2007 U.S. Dist. LEXIS 46789, **31-32 (statements made by counsel in different cases, in which counsel represented different parties, are not appropriate for the application of judicial

estoppel). Accordingly, even if the Court were to consider HSD's new facts and legal argument, the judicial estoppel doctrine is inapplicable and does not change the result here.

HSD suggests that Ms. Allers' counsel may be "playing fast and loose with the courts," Aplt. Brief at 28 (citation and internal quotation marks omitted), and that there may be a "perception that either the [district] court [below] and this Court or the Indiana Federal Court is being misled." Aplt. Brief at 23. This assertion has no basis in fact. In the instant litigation, Ms. Allers' legal position as to the application of Section 7 of the NVRA to HSD's Distribution Policy has been straightforward and constant – the HSD's Policy violates Section 7. Ms. Allers has done nothing to mislead the District Court or this Court in any way.

Likewise, when the plaintiff in the Indiana lawsuit sought judicial approval of the settlement in that case, it informed Indiana District Court Judge Pratt (who presides over the Indiana lawsuit) of the New Mexico District Court's opinion and explained the reasons why the plaintiff had not sought to re-open the completed

Indiana settlement after the New Mexico District Court issued its Opinion.[17]

Based on this information and other presentations made in the Indiana lawsuit, on

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[17] The statement in the Indiana lawsuit is set forth in the Memorandum in Support of Joint Motion for Approval of Class Action Settlement and Award of Attorney's Fees and Costs [Doc. 148 in the Indiana lawsuit]. That statement (in full) is as follows (with parenthetical citations to the Indiana Settlement Agreement [Doc. 143-1 in the Indiana lawsuit]):

> Three months after the parties reached their agreement in principle regarding the substantive terms of the settlement agreement (in September 2010), a district court in New Mexico issued a summary judgment ruling (in December 2010) in NVRA litigation concerning public assistance offices in that state, in which the plaintiffs are represented by many of the same counsel who represent Plaintiff in this case. *Valdez v. Herrera*, 2010 U.S. Dist. LEXIS 142209 (D. N.M. 2010). The ruling, which of course is not binding on this Court, dealt with a narrow issue of first impression: whether the NVRA requires that an application be distributed when a client neither checks "yes" nor "no" in response to the registration preference question which appears on the standard information/preference form. The district court held that the NVRA requires that a voter registration application be distributed to the client in this circumstance.
>
> The proposed Indiana settlement requires that voter registration applications be distributed to *all* clients who engage in a covered transaction at a FSSA office [Settlement Agreement at 4-6], and so, in this regard, is fully consistent with the New Mexico ruling. With regard to remote transactions, the settlement provides for the conditional distribution of registration applications [Settlement Agreement at 6-7] and, to that extent, it could be argued that the agreement does not go as far as the New Mexico ruling. This does not, however, detract from the fairness of the settlement. First, it is entirely uncertain how this Court might rule on the issue litigated in New Mexico, and resolving the issue here likely would be further complicated by an assertion by Defendants that the NVRA does not apply to remote transactions. Second, any effort to rely on the New Mexico decision in this case would have required Plaintiff to re-open

August 25, 2011, Judge Pratt approved the settlement of the Indiana lawsuit. *See* Order Approving Class Action Settlement and an Award of Attorney's Fees and Costs [Doc. 152 in the Indiana lawsuit].

For these reasons, even if HSD can raise its estoppel argument for the first time on appeal, the argument has no merit and should be rejected.

CONCLUSION

Ms. Allers respectfully asks this Court to affirm the District Court's Opinion, affirm the District Court's grant of partial summary judgment in her favor, and find that HSD's Distribution Policy violates Section 7 of the NVRA.

STATEMENT CONCERNING ORAL ARGUMENT

Ms. Allers does not oppose HSD's request for oral argument.

> the September agreement which, in turn, could have undermined the settlement itself and delayed the granting of relief to class members. In these circumstances, it was entirely reasonable to resolve this case through compromise, so as to provide substantial relief to the Plaintiff class.

Memorandum in Support of Joint Motion for Approval of Class Action Settlement and Award of Attorney's Fees and Costs" [Doc. 148 in the Indiana lawsuit], at 7-8 n.2 (emphasis in original).

Respectfully submitted,

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I hereby certify that a copy of the foregoing Brief, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the McAfee software version 4.5.0.1852 (last updated September 15, 2011) and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

s/Allison L. Kierman

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Date: September 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Brief on Appellant's counsel of record via filing with the 10th Circuit CM/ECF filing system on September 16, 2011.

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