

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 16-30908

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF LOUISIANA, *et al.*,

Defendants-Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF LOUISIANA

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UNITED STATES' MOTION TO DISMISS

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Pursuant to Federal Rule of Appellate Procedure 27, the United States respectfully moves to dismiss each of the notices of appeal filed in this case for lack of jurisdiction. The district court decision at issue is not a final judgment under 28 U.S.C. 1291. Moreover, the district court properly denied a request to certify its interlocutory ruling for immediate appeal under 28 U.S.C. 1292(b). This Court thus lacks jurisdiction to decide these appeals under either 28 U.S.C. 1291 or 28 U.S.C. 1292. And contrary to defendants' position, characterizing the district court's liability determination as a declaratory judgment does not transform a non-

final order into a final judgment, nor does the Declaratory Judgment Act, 28 U.S.C. 2201, grant this Court jurisdiction to decide a premature appeal.

### **PROCEDURAL BACKGROUND**

1. On July 12, 2011, the United States filed a complaint in the United States District Court for the Middle District of Louisiana against the State of Louisiana, the Louisiana Secretary of State, the Louisiana Department of Health and Hospitals (DHH) and its Secretary, and the Louisiana Department of Children and Family Services and its Secretary (DCFS), for violation of Section 7 of the National Voter Registration Act (NVRA), 52 U.S.C. 20506. Section 7 of the NVRA requires States and state agencies to provide certain voter registration opportunities to applicants for public assistance and disabilities services. 52 U.S.C. 20506(a)(6). Although the United States' complaint alleges that defendants have violated their NVRA obligations in multiple ways, all of the alleged violations are part of a single cause of action against each defendant for violation of Section 7 of the NVRA. Doc. 1, at 3.<sup>1</sup> The complaint seeks the imposition of a range of declaratory and injunctive relief, including an injunction enjoining defendants from further violating their Section 7 responsibilities and imposing a court-monitored remedial plan to ensure defendants' future compliance. Doc. 1, at 8-9. The United

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<sup>1</sup> "Doc. \_\_\_, at \_\_\_" refers to the docket entry and relevant page number(s) filed in *United States v. Louisiana*, No. 3:11-cv-470 (M.D. La.).

States' complaint cites the Declaratory Judgment Act, 28 U.S.C. 2201, in support of its request for declaratory relief. Doc. 1, at 1. Extensive discovery and motions practice has taken place.

2. On July 26, 2016, the District Court entered an opinion and order resolving six pending motions. See Order and Ruling on the Motions to Dismiss Filed by Defendants And the Motions For Summary Judgment Filed by the Secretary of State and the United States of America, Doc. 456.

2a. In this opinion and order, the district court, first, denied four separate motions to dismiss filed by various defendants. See Doc. 456, at 4-5, 59-83, 110-111 (denying motions to dismiss filed at Docs. 340, 341, 342, and 345). These motions addressed potential immunity from suit, as well as arguments concerning mootness and *res judicata* as a result of another NVRA Section 7 case filed by private parties against some of the same defendants in *Scott v. Schedler*, No. 11-cv-926, 2013 U.S. Dist. LEXIS 9302 (E.D. La. Jan. 23, 2013), *aff'd in part and rev'd in part*, 771 F.3d 831 (5th Cir. 2014).

2b. Second, the district court denied a motion for partial summary judgment filed by Secretary Schedler. See Doc. 456, at 84-97, 110-111 (denying motion for partial summary judgment filed at Doc. 336). Schedler's motion for partial summary judgment concerned the applicability of Section 7(a)(6)'s requirements to applications for public assistance and disability services submitted remotely, *i.e.*,

by phone, internet, telephone and mail. Schedler had argued that Louisiana's public assistance and disability services agencies could lawfully refuse to offer voter registration opportunities to persons who apply for services and assistance by phone, internet, telephone or mail. The district court rejected Schedler's reading of the statute and held instead that Section 7(a)(6) of the NVRA "must be read to encompass remote transactions" Doc. 456, at 8.

2c. Third, the district court granted in part and denied in part the United States' motion for summary judgment. See Doc. 456, at 98-107, 111 (addressing United States motion for summary judgment filed at Doc. 346). The district court held that defendants have "violated Section 7 of the NVRA, but the nature and extent of those violatio[ns] remain issues to be tried." Doc. 456, at 111. Thus, while the district court found certain violations of Section 7, including based upon facts adjudicated in the *Scott* litigation, the district court concluded that, post-*Scott*, "the degree of [defendants'] noncompliance remains disputed," and that further proceedings would be required in order to fully resolve the litigation and craft an appropriate remedy. Doc 456, at 113.

2d. Finally, the district court ordered the parties to submit further briefing "regarding the remedies that they propose and how they propose to adjudicate any and all remaining issues." See Doc 456, at 111. The district court also required the parties to submit "a single joint document specifically listing and succinctly

describing *every* alleged violation of the NVRA that either post-dates [the litigation in] *Scott* or was not adjudicated by [ ] *Scott*.” Doc. 456, at 111.

3. The additional briefing ordered by the district court was filed on September 30, 2016. See Doc. 473 (Chart of Alleged NVRA Violations); Docs. 472, 474-476 (parties’ briefs on proposed remedies and further proceedings). The district court has not yet acted on this briefing, either by making supplemental legal determinations, as requested by the United States, or by setting the remaining issues for trial, as requested by defendants. A telephone status conference before the district court is scheduled for October 26, 2016. Doc. 467.

4. In the meantime, on August 2, 2016, Secretary Schedler filed a motion requesting that the district court certify “a discrete legal claim” from its July 26, 2016, ruling (Doc. 456) as a final and appealable order pursuant to 28 U.S.C. 1292(b). See Doc. 457. Secretary Schedler requested that the district court certify for immediate appeal the question of whether Section 7 imposes voter registration obligations in connection with remote transactions by public assistance and disability services agencies. On August 29, 2016, the district court denied the request for certification. See Doc. 465. The district court held that the issue, which Schedler had raised in his unsuccessful motion for partial summary judgment, did not present a controlling question of law, that there was not a substantial basis for a difference of opinion on this issue, and that immediate

appeal would not materially advance the resolution of this litigation. Doc. 465 at 4-8.

5. On August 9, 2016—after moving for certification of the July 26, 2016 opinion and order pursuant to 28 U.S.C. 1292(b)—Secretary Schedler filed a Notice of Appeal as to the exact same July 26, 2016, decision. Secretary Schedler’s Notice of Appeal states that he appeals:

Those portions of “Order and Ruling on the Motions To Dismiss Filed By Defendants and the Motions For Summary Judgment Filed by the Secretary of State and the United States of America” (Doc 456) entering declaratory judgment, including paragraph 2 of the Order declaring Defendants to have violated Section 7 of the NVRA, and paragraph 1 of the Order denying the Motion For Partial Summary Judgment by the Secretary of State (Doc 336) as part and parcel of the district court’s declaratory judgment.

Doc. 458, at 1.

6. In a letter to the Clerk of this Court docketed on August 25, 2016, counsel for Secretary Schedler states that the August 9, 2016, Notice of Appeal is a “distinct appeal action[.]” from the request to the district court for interlocutory certification. Schedler’s letter further states that the August 9, 2016, Notice of Appeal is an appeal “from a declaratory judgment as a final judgment under 28 U.S.C. 2201.”

7. On September 22, 2016, defendants State of Louisiana and DHH and DCFS also filed Notices of Appeal. These defendants appeal the “July [26], 2016

*'Order and Ruling on the Motions To Dismiss Filed by Defendants and the Motions for Summary Judgment Filed by the Secretary of State and the United States of America'* (R. Doc 456), declaring that Defendants have violated the NVRA." Docs. 469, 470.

## ARGUMENT

1. The district court has not yet issued a final appealable order in this case. Thus, this court lacks jurisdiction over these appeals. Section 1291 provides for jurisdiction for appeal to the courts of appeals only from "final decisions of the district courts of the United States." 28 U.S.C. 1291. Under Section 1291, a final judgment is generally regarded as "a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (citations omitted). No appeal lies from "tentative, informal or incomplete" decisions and decisions that are "but steps towards final judgment in which they will merge." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

2. The district court's July 26, 2016, order neither ended this litigation on the merits nor "le[ft] nothing for the court to do but execute the judgment." *Midland*, 489 U.S. at 798 (citations omitted). In briefing still pending before the district court, the parties dispute what remedies may be warranted, and indeed, whether certain conduct that the United States alleges to violate the NVRA is in

fact prohibited at all by the statute. Thus for example, in their post-summary judgment briefing, DHH and DCFS maintain that some allegations that the United States relies on to demonstrate its entitlement to further injunctive relief are “not \* \* NVRA violation[s].” See Doc. 475, at 3. These ongoing disputes are consistent with the district court’s recognition in its July 26, 2016, order that it has yet to fully rule on the nature and scope of defendants’ NVRA violations based on the record already before it.

3. That the district court declared in its July 26, 2016, opinion that defendants “have violated Section 7 of the NVRA,” (Doc. 456, at 111), does not convert the opinion into a final judgment. Again, in the same sentence, the district court states that further proceedings would be needed in order to determine “the nature and extent of those violatio[ns].” Doc. 456, at 111. Among the district court’s remaining tasks is to determine the appropriate remedy in this case. It is well-established that orders granting summary judgment on liability, but not fully deciding the question of remedy, are not final orders for purposes of appellate jurisdiction. See *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) (“[W]here assessment of damages or awarding of other relief remains to be resolved,” judgments “have never been considered to be ‘final’ within the meaning of 28 U.S.C.[] 1291.”); *Marshak v. Treadwell*, 240 F.3d 184, 190 (3d Cir. 2001)



(same); *Ruiz v. Blentech Corp.*, 89 F.3d 320, 323 (7th Cir. 1996) (same); *In re Martin-Trigona*, 763 F.2d 135, 138 (2d Cir. 1985) (same).

4. Defendants cannot avoid the requirement of finality by characterizing the district court's liability determination as a declaratory judgment pursuant to 28 U.S.C. 2201. It is black letter law that the Declaratory Judgment Act at 28 U.S.C. 2201 is not a grant of jurisdiction to the federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667, 671 (1950). Instead, it makes available an additional remedy in cases where a court already has subject matter jurisdiction. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993); *McCarthy v. Marshall*, 723 F.2d 1034, 1036-37 (1st Cir. 1983). Under defendants' theory of appellate jurisdiction, any time a district court "declares" liability or decides an issue of law, it has issued an automatically appealable ruling under the Declaratory Judgment Act. Not so. Because Section 2201 "merely defines the scope of available declaratory relief," this statute "cannot itself create a basis for appellate jurisdiction." *Watchtower Bible & Tract Soc'y of N.Y., Inc., v. Colombani*, 712 F.3d 6, 11 (1st Cir. 2013) (citation omitted).

5. Finally, as to the additional issue raised in Secretary Schedler's Notice of Appeal, there is no appealable order with respect to the denial of Schedler's motion for partial summary judgment. Denials of such motions for summary judgment are generally not appealable final orders under Section 1291. *Lemoine ex rel. Lemoine*

v. *New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 633 (5th Cir. 1999). Secretary Schedler recognized as much insofar as he sought and was denied a certificate of appealability for this interlocutory ruling. Under Section 1292(b), Schedler had ten days to seek written permission from this Court to proceed after the district court denied his certification motion. He did not do so. As such, there is no appellate jurisdiction under either Section 1291 or Section 1292.

6. Counsel for the United States contacted Ms. Celia Cangelosi, counsel for Secretary Schedler, and Mr. Harry J. “Skip” Philips, Jr., counsel for DHH and DCFS. Ms. Cangelosi and Mr. Philips indicated that their clients oppose this motion and that they will be filing oppositions.

7. Counsel for the United States attempted to contact counsel for the State of Louisiana, Ms. Angelique Freel. Counsel was unable to speak with Ms. Freel but given the nature of this motion, counsel for the United States assumes that Ms. Freel’s client will oppose this motion.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on October 21, 2016, I electronically filed the foregoing UNITED STATES' MOTION TO DISMISS with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that participants in this case who are registered CM/ECF users will receive service by the appellate CM/ECF system.

s/ Anna M. Baldwin  
ANNA M. BALDWIN  
Attorney