

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-30908

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF LOUISIANA, *et al.*,

Defendants-Appellants

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

REPLY IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS

The United States respectfully submits this reply in support of its motion to dismiss the notices of appeal filed by each defendant in this case for lack of jurisdiction. Contrary to defendants' arguments, the district court's July 26, 2016, order (Doc. 456) is not a final judgment.¹

¹ "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.). "Opp. ___" refers to the Joint Opposition by the State Defendants to the United States' Motion to Dismiss, filed in this Court on October 31, 2016.

1. In their joint brief in opposition to the United States' motion to dismiss, defendants repeatedly claim that the district court has already "conclusively determined the rights and legal relation between the parties with respect to [National Voter Registration Act (NVRA)] compliance and implementation." Opp. 8; see also Opp. 11. That is not the case. In the July 26, 2016, order that defendants are appealing, the district court stated that defendants have "violated Section 7 of the NVRA," 52 U.S.C. 20506, but also that "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, the district court found that the "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 106.

2. The ongoing district court proceedings make it abundantly clear that the July 26, 2016, order was not a final judgment. As part of its July 26, 2016, order, the district court directed the United States to list "every alleged violation of the NVRA that either post-dates [the litigation 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)] or was not adjudicated by [] *Scott*." Doc. 456, at 111. Further, the district court ordered defendants to respond to each such allegation. Doc. 456, at 111. Accordingly, the United States provided 40 specific

allegations of NVRA violations by defendants that were not adjudicated in *Scott*. See Doc. 473. Notably, and in direct opposition to defendants' claim to this Court that all liability-related issues below have been resolved (Opp. 9), one or more defendants contested each and every one of those 40 alleged violations. For example, defendants asserted that the conduct at issue does not violate the NVRA, that there was no record evidence to support the alleged violation, or that the violation was moot because the underlying practice has been corrected. See Doc. 473. Similarly, the United States' brief acknowledged the need for the district court to provide further clarification or guidance relating to various disputed legal issues in advance of issuing a final order in this case. See Doc. 474.

3. Moreover, at a status conference held on October 26, 2016, after the United States had filed its motion to dismiss these appeals, the district court scheduled this case for a three-week bench trial in September 2017. Doc. 485. The district court further noted that additional proceedings would be scheduled between now and the scheduled trial date to discuss further "the proposed remedy *and adjudication of outstanding issues.*" Doc. 485 (emphasis added). In short, this is not a case in which there is "nothing for the [district] court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (citation omitted).

4. Defendants fail to provide any support for their core argument that pleading a request for relief under the Declaratory Judgment Act, 28 U.S.C. 2201, will result in turning an otherwise non-final, non-appealable judgment into a final one. The single D.C. Circuit case that defendants rely on is wholly inapposite. *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir.), cert. denied, 488 U.S. 849 (1988), concerned whether the district court had lost its jurisdiction to consider a request for relief including attorneys fees while an appeal was pending. That case did not involve the question of whether the appellate court properly had jurisdiction over the appeal. Defendants do not provide a single citation in support of their claim that any time a plaintiff files a complaint seeking both declaratory and injunctive relief, as the United States did here, every interim declaration of law or liability by the district court becomes immediately appealable by virtue of the Declaratory Judgment Act. That is not the case. See, e.g., *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)

5. Finally, defendants provide no argument at all as to why appeal of the remote transactions issue—which is the first issue presented in Secretary Schedler’s opening merits brief to this Court, and as to which Secretary Schedler requested and was denied a certificate of appealability by the district court (Docs.

457, 465)—could be properly before this Court now. This Court lacks jurisdiction to decide that interlocutory issue at this time.

6. Wherefore, the United States respectfully requests that this Court grant its motion to dismiss these appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, I electronically filed the foregoing REPLY IN SUPPORT OF THE 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
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