

NEW MEXICO SUPREME COURT

State ex rel. League of Women Voters v. Herrera

145 N.M. 563 (2009) · Decided February 9, 2009

SUMMARY

The New Mexico Supreme Court held that NMSA 1978, § 1-9-4.2(B)(4), which permits hand-tallied ballots to be counted when election judges unanimously find the voter's intent clearly discernable, is constitutional on its face. The court concluded that the statute, together with the Secretary of State's Instruction 2008-10, provides sufficiently uniform and nondiscriminatory standards under *Bush v. Gore* and the Help America Vote Act. The court issued a writ of mandamus directing the Secretary of State to enforce the statutory provision.

CASE DETAILS

COURT	New Mexico Supreme Court
WRITING FOR THE COURT	Bosson, Justice; Edward L. Chávez, Chief Justice; Patricio M. Serna, Justice; Petra Jimenez Maes, Justice; Charles W. Daniels, Justice
JURISDICTION	New Mexico
DECIDED	February 9, 2009
DISPOSITION	writ_granted
PROCEDURAL POSTURE	The League filed an emergency petition for a writ of mandamus directly in the New Mexico Supreme Court before the November 2008 general election, seeking to compel the Secretary of State to enforce the statutory provision requiring election judges to count ballots when they unanimously agree that voter intent is clearly discernable.
STANDARD OF REVIEW	The court reviewed the Secretary's legal duty to enforce the Election Code and considered the facial constitutionality and federal-law compliance of the challenged statutory provision and implementing guidelines.
PRECEDENTIAL VALUE	Published precedential opinion of the New Mexico Supreme Court
PARTIES	State ex rel. League of Women Voters of New Mexico v. Mary Herrera, New Mexico Secretary of State

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QUESTIONS PRESENTED

1. Whether the League had standing to seek mandamus in the public interest concerning the validity and counting of individual votes.
2. Whether mandamus was appropriate to compel the Secretary of State to perform the statutory duty imposed by the Election Code.
3. Whether the voter-intent provision in NMSA 1978, Section 1-9-4.2(B)(4), as implemented by Instruction 2008-10, violated equal protection principles under *Bush v. Gore*.
4. Whether the voter-intent provision and implementing guidelines complied with the Help America Vote Act's requirement for uniform and nondiscriminatory standards defining what constitutes a vote.

HOLDINGS

1. The League may be granted standing to vindicate the public interest in a matter of great public importance, and mandamus is an appropriate remedy to compel the Secretary of State to perform her mandatory statutory duty to enforce the Election Code.
2. NMSA 1978, Section 1-9-4.2(B)(4), as implemented by the Secretary's Instruction 2008-10, is facially consistent with equal protection principles because the statute's requirement of unanimous agreement by election judges, combined with detailed statewide guidelines, supplies sufficient uniformity while preserving limited discretion to recognize clear voter intent.
3. The voter-intent provision, together with Instruction 2008-10, satisfies HAVA's requirement that states adopt uniform and nondiscriminatory standards defining what constitutes a vote and what will be counted as a vote.

KEY QUOTATIONS

"We hold that this provision of the Election Code, as supported by certain guidelines and instructions promulgated by the New Mexico Secretary of State ("the Secretary"), is consistent with the U.S. Supreme Court's equal protection analysis in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (per curiam), to the limited extent that that opinion has bearing here, as well as the federal Help America Vote Act ("HAVA") of 2002, 42 U.S.C. §§ 15301-15545 (2005)." (¶ 2)

"Section 1-9-4.2, including Subsection (B)(4), as implemented by the Secretary's Instruction 2008-10, is constitutional on its face." (¶ 32)

"HAVA, then, is a floor beneath which the states are not permitted to go." (¶ 27)

FACTUAL BACKGROUND

New Mexico law required hand-tallied ballots to be counted when the presiding judge and election judges unanimously agreed that the voter's intent was clearly discernable. The Secretary of State, relying on an Attorney General opinion, refused to enforce that provision and issued an emergency rule limiting countable

marks primarily to crosses, checks, and circles. The Secretary had previously issued Instruction 2008-10, which provided detailed, statewide guidance and examples for determining whether unconventional ballot markings expressed a valid voter intent.

PROCEDURAL HISTORY

The Secretary of State declined to enforce the voter-intent provision after an Attorney General advisory letter concluded that it conflicted with federal law and equal protection principles. She promulgated an emergency rule that effectively excluded consideration of voter intent. After expedited oral argument, the Supreme Court granted the writ on October 28, 2008, and issued this opinion explaining its order.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The Secretary of State was ordered to enforce NMSA 1978, Section 1-9-4.2(B)(4), as written and as interpreted by Instruction 2008-10. No further remand was specified.

CASES CITED

- Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) (per curiam)
- Calkins v. Stearley, 2006-NMCA-153, 140 N.M. 802, 149 P.3d 118
- State ex rel. Read v. Christ, 25 N.M. 175, 179 P. 629 (1919)
- Darr v. Village of Tularosa, 1998-NMCA-104, 125 N.M. 394, 962 P.2d 640
- State ex rel. Walker v. Bridges, 27 N.M. 169, 199 P. 370 (1921)
- State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974)
- State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995)
- Weldon v. Sanders, 99 N.M. 160, 655 P.2d 1004 (1982)
- League of Women Voters v. Brunner, 548 F.3d 463 (6th Cir. 2008)
- Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2002)
- Common Cause/S. Christian Leadership Conference of Greater L.A. v. Jones, 213 F. Supp. 2d 1106 (C.D. Cal. 2001)
- Big Spring v. Jore, 326 Mont. 256, 109 P.3d 219 (2005)
- Dolan v. Powers, 260 S.W.3d 376 (Mo. Ct. App. 2008)