

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

_____		x
)	
AMERICAN ASSOCIATION OF PEOPLE)	
WITH DISABILITIES, FEDERATION OF)	
WOMEN'S CLUBS OVERSEAS, INC., NEW)	
MEXICO PUBLIC INTEREST RESEARCH)	
GROUP EDUCATION FUND, and)	
SOUTHWEST ORGANIZING PROJECT,)	
)	
Plaintiffs,)	No. CV 08-702 JOB/WDS
)	
v.)	
)	
MARY HERRERA, in her capacity as Secretary)	
of State,)	
)	
Defendant.)	
)	
_____		x

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR A PRELIMINARY INJUNCTION**

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Dated: August 18, 2008

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ARGUMENT

Defendant fails to rebut Plaintiffs' clear showing that they satisfy all of the elements required for preliminary injunctive relief. Plaintiffs have ceased or substantially curtailed their voter-registration activity during this presidential election year as a result of the burdens and chilling effect of New Mexico's voter-registration law and will continue to suffer irreparable harm unless the Court grants injunctive relief.

I. THE STATE FAILS TO ADEQUATELY JUSTIFY THE CHALLENGED LAW, WHICH VIOLATES THE FIRST AMENDMENT

The parties agree that election ordinances such as this one are subject to the balancing framework set forth in Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), and that Defendant therefore must justify the challenged law under a heightened level of scrutiny. (See Def.'s Opp'n Mem. at 12.) The only dispute between the parties with respect to the legal standard appears to be the level of such scrutiny: whether it is "intermediate" or "strict." When a state's election law directly or indirectly regulates core political speech and association—as the challenged law unambiguously does (see Pls.' Mem. Supp. at 14-17)—the restriction is subject to strict scrutiny, meaning that it can be upheld only if it is narrowly tailored to serve a compelling governmental interest. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 192 & n.12 (1999); see also McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) (applying exacting scrutiny); Meyer v. Grant, 486 U.S. 414, 420 (1988) (regulation of the payment of petition circulators "involves a limitation on political expression subject to exacting scrutiny"). This is because "restrictions on core political speech so plainly impose a severe burden." Buckley, 525 U.S. at 207-08 (Thomas J., concurring). Notwithstanding

Defendant's claims to the contrary (see Def.'s Opp'n Mem. at 8-12), as recently as last Term, the United States Supreme Court reaffirmed in Crawford v. Marion County Election Board that strict scrutiny is available under the Anderson balancing test. See 128 S. Ct. 1610, 1616 (2008) (“[S]evere restrictions” must be “justified by a narrowly drawn state interest of compelling importance.”).

Regardless of the applicable standard, Defendant has manifestly failed to explain how the challenged law furthers its proffered interests or to justify the burdens indisputably imposed on Plaintiffs.

A. The Burdens on Plaintiffs Are Real and Severe

Defendant asserts that fears of criminal prosecution for violating the law are “not entirely reasonable.” (See Def.'s Opp'n Mem. at 13.) But the “danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.” See Virginia v. Am. Booksellers Ass'n., 484 U.S. 383, 393 (1988) (allowing pre-enforcement suit where the law is aimed directly at plaintiffs who would have to take significant and costly compliance measures or risk criminal prosecution). Plaintiffs have already self-censored, and continue to do so, because of fear of the penalties under the challenged law, especially the risk of criminal prosecution and the risk of substantial fines on low-income volunteers or groups with small budgets. So long as Defendant remains capable of enforcing the challenged law—and nothing in

Defendant's papers suggests that she is not—the threat of enforcement is real and, in this case, unconstitutionally burdensome.¹

In addition, Defendant fails to recognize that compliance with the requirement of “attend[ing] a short training session” (see Def.’s Opp’n Mem. at 6)—a requirement that appears nowhere in the challenged law and which the Defendant and the County Clerks have simply created from whole cloth—is impossible for out-of-state Plaintiffs such as Federation of Women’s Clubs Overseas, Inc. (“FAWCO”) to satisfy. Defendant is not entitled to ignore this and the other burdens experienced by Plaintiffs in this case by merely suggesting that differently situated organizations do not suffer the same impact.²

¹ In our moving papers, Plaintiffs demonstrated that the challenged law is also unconstitutionally vague and overbroad, particularly in its failure to explain what it means to “assist” with registration efforts under NMSA 1-4-49. (See Pls.’ Mem. Supp. at 31-34.) Defendants’ response itself amply illustrates the vagueness and overbreadth of the statute. (Def.’s Opp’n Mem. at 28.) Without reference to any authority, Defendant indicates that “hand[ing] out” forms is not assisting, but that “facilitate[ing] the registration process” is. (*Id.* at 29.) One wonders what distribution of registration forms might possibly be, if not facilitation of registration. In any event, Defendant’s argument presupposes that Plaintiffs (and others) can hand out forms without complying with the challenged law. Of course, they cannot. Under the challenged law, the only way to get forms from a County Clerk to hand out to others is to pre-register, attend training, and obtain the numbered forms. Thus, on its face the law reaches conduct—the simple distribution of forms—that Defendant apparently believes it should not. Moreover, if Plaintiffs handed out forms bearing their registration numbers to registrants who then submitted the forms more than forty-eight hours after completion, Plaintiffs would risk prosecution under the law.

² Defendant refers on several occasions to the apparent success of registration drives sponsored by an entity that employs and pays registration agents for their work. (See, e.g., Def.’s Opp’n Mem. at 3-4.) Defendant fails to refer to a single organization that relies on volunteers—as do each of the Plaintiffs—that has had similar, supposed success. Of course, even if Defendant could demonstrate through reliable evidence that one or more organizations have found a way to undertake significant voter-registration drives notwithstanding the challenged law, this would do nothing to reduce the burdens currently being suffered by Plaintiffs and like organizations, many of which cannot easily

B. The Burdens Are Not Sufficiently Tailored to Compelling or Important State Interests

Beyond its vague general interest in “the protection of [New Mexico’s] electoral system,” Defendant attempts to justify the challenged law on the basis of its interests in protecting against (1) disenfranchisement caused by the failure to return completed voter-registration forms to the County Clerk or Secretary of State and (2) voter fraud. (See Def.’s Opp’n Mem. at 24.) It is insufficient for Defendant merely to announce these interests. Given the law’s severe restriction on core political speech, Defendant must demonstrate precisely how each provision is narrowly tailored to promote them. See Buckley, 525 U.S. at 206-07 (Thomas J., concurring); Burdick v. Takushi, 504 U.S. 428, 434 (1992); McIntyre, 514 U.S. at 346. Even in the case of lesser burdens, the state must still demonstrate that its law is tailored to its asserted interests, which must be “sufficiently weighty to justify the limitation.” Crawford, 128 S. Ct. at 1616; see also Anderson, 460 U.S. at 789 (a court must consider the extent to which those interests make it necessary to burden a plaintiff’s rights). In this case, however, Defendant has failed to provide any explanation as to how the individual requirements of the challenged law are in any way tailored to promote the stated interests.

First, while the state has a legitimate interest in ensuring that completed registration forms are returned to the Secretary of State or County Clerk, Defendant provides no explanation for why forms must be returned within forty-eight hours to protect against disenfranchisement or fraud. That New Mexico has no law that would comply with the challenged law’s strictures or convince their volunteers to bear the risk of criminal prosecution or civil fines.

punish the failure to submit a completed voter-registration form at all does not justify penalties for failure to submit completed forms within forty-eight hours. (See Def.'s Opp'n Mem. at 23.) And even if Defendant could demonstrate an interest in requiring the return of forms before the book-closing deadline, it cannot justify the incredibly short period provided for in the challenged law and the complete absence of a safe-harbor in cases of good cause or impossibility of compliance.³ Administrative burden is insufficient justification for burdening First Amendment rights. Tashjian v. Republican Party, 479 U.S. 208, 217-18 (1986).

Second, Defendant does not and cannot explain how the training requirement that the Defendant and certain County Clerks unilaterally have created is necessary to promote the interest in quashing disenfranchisement or fraud. Although Defendant contends that justification for the training requirement is "self-evident" (Def.'s Opp'n Mem. at 25), it apparently was not self-evident to the legislature, which nowhere required such training. Regardless of the standard of review, it is difficult to see how a

³ In its attempt to justify the forty-eight-hour return requirement and accompanying civil and criminal penalties, Defendant points to the law upheld in League of Women Voters v. Browning, No. 08-21243 (S.D. Fla., Aug. 6, 2008). Tellingly, however, the law in that case only required that completed voter-registration forms be returned within ten days and instructed that, "[t]he secretary shall waive the fines described in this subsection upon a showing that the failure to deliver the voter registration application promptly is based upon a force majeure or impossibility of performance." Fla. Stat. §§ 97.0575(3)(a)-(c) (2007). In contrast, the challenged law here provides no safety valve for individuals who cannot comply with its arbitrary forty-eight-hour deadline. Defendant puts forward no justification for why this is so.

requirement that demonstrably burdens Plaintiffs and that the legislature elected not to impose possibly could be upheld.⁴

Third, Defendant concedes that the basis for the fifty-form limit apparently is financial, rather than fraud- or voter-protection-related. (Def.'s Opp'n Mem. at 3, 25.) While saving money is no doubt an interest of the State, that interest obviously pales in comparison to Plaintiffs' First Amendment rights. See Tashjian, 479 U.S. at 217-18.

Fourth, it bears repeating that the challenged law is not necessary to prevent fraud insofar as numerous other procedures that do not burden First Amendment rights already prevent it. As both Denise Lamb (Director of the Bureau of Elections for the State of New Mexico circa 2004, and one of the affiants for Defendant in this matter) and Jamie Diaz (Bernalillo County Elections Administrator circa 2004) have previously testified, under oath, Defendant and the County Clerks of New Mexico have in place systems, separate and apart from the challenged law, that are designed to prevent (and have the effect of preventing) the registration process from becoming a mechanism for fraudulent voting. For example, the County Clerks apply rigorous and thorough checks to verify that applications for registration entitle applicants to be registered. A statewide on-line database allows County Clerks' staff, as part of their entry of a registrant onto the voter rolls, to determine what other county the registrant was previously registered in (if any) and verify the registrant's Social Security number, address, name, and date of birth. (See

⁴ Nor can Defendant explain why it is necessary for each volunteer participating in a voter registration drive to personally attend a training by a County Clerk, as opposed to just the drive organizer, or for its trainings to be in person, as opposed to by telephone or on the Internet.

Sept. 2, 2004 Tr., Larranaga v. Herrera, No. 04 Civ. 5391 (N.M. 2d Dist.) (Urias Decl. Ex. A), at 262:23-263:18 (Lamb Test.); Sept. 4, 2004 Tr., Larranaga v. Herrera, No. 04 Civ. 5391 (N.M. 2d Dist.) (Urias Decl. Ex. B), at 45:17-47:1 (Lamb Test.); id. at 234:14-17 (Diaz Test.) Further, the state and each county are notified from the Vital Statistics Office of the deaths of registrants such that the names and Social Security numbers of people who have died are pulled from the voter rolls. (Id. at 112:8-18 (Lamb Test.), 231:8-16 (Diaz Test.)

II. THE CHALLENGED LAW IS PREEMPTED BY THE NATIONAL VOTER REGISTRATION ACT OF 1993

The challenged law plainly runs afoul of the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg et seq., especially as applied to use of the federal voter-registration form. Because the challenged law conflicts with the NVRA, it must yield to the federal law. See Charles H. Wesley Educ. Found., Inc. v. Cox, 324 F. Supp. 2d 1358, 1366 (N.D. Ga. 2004), aff’d, 408 F.3d 1349 (11th Cir. 2005).

It is uncontroverted that Defendant seeks to apply the challenged law not only to voter registration activities undertaken using the New Mexico voter registration form, but also to activities undertaken using the federal voter-registration form. (See Def.’s Opp’n Mem. at 31; Potischman Decl. ¶ 11.) In a startling assertion perhaps borne of Defendant’s efforts to navigate its fundamentally untenable position, Defendant contends that Plaintiffs “are free to use the federal registration form so long as the individual submitting the form includes his or her registration number on that form.” (See Def.’s Opp’n Mem. at 31; see also id. at 33 (“To comply with Section 1-4-49, [Plaintiffs] only need include their registration number on each [federal] form they submit.”).) Of course,

to get that registration number, the registration agent must comply with the pre-registration, disclosure, and training requirements of the challenged law. Thus, Defendant apparently believes both (1) that it is proper for New Mexico to require any registration agent seeking to register voters with the federal registration form to clear a number of hurdles, culminating in writing an assigned number on each registration application; and (2) that, by the same token, it is a violation of New Mexico law for any registration agent to register voters using the federal registration form without fully complying with all aspects of the challenged law, including providing an assigned number on each registration application.

That the NVRA prohibits this—both in letter and in spirit—could scarcely be more obvious. First, the federal voter-registration form developed by the Election Assistance Commission does not require the inclusion of any information from any person other than the applicant. See 42 U.S.C. § 1973gg-7(b). Moreover, the NVRA mandates that the federal form “may require only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process” and “may not include any . . . other formal authentication.” Id. § 1973gg-7(b)(1)-(3) (emphasis added).⁵ By suggesting that registration agents may use the federal registration form so long as they take all necessary steps to secure a New Mexico

⁵ In addition, it is beyond serious dispute that the challenged law’s fifty-form limitation cannot apply to the federal forms. The NVRA requires that voter-registration forms to be made readily available without quantity limitation. See 42 U.S.C. § 1973gg-4. Any suggestion that the challenged law limits distribution of federal voter-registration forms is clearly impermissible.

registration number and furnish that number on the registration form, Defendant is requiring registration agents to choose between complying with federal law or complying with New Mexico law.⁶ The Supremacy Clause obviously does not allow this.

Second, beyond the express violation of the NVRA that Defendant seeks to require, Defendant's position also is at odds with the purpose of the NVRA. (See Pls.' Mem. Supp. at 34-35.) See also H.R. Rep. No. 103-9, at 3 (1993), reprinted in 1993 U.S.C.C.A.N. 105, 106-07 (Congress intended, through the passage of the NVRA, to eliminate the "complicated maze of local laws and procedures" surrounding voter registration and "to reduce these obstacles to voting to the absolute minimum"). Against this backdrop, Defendant's effort to layer additional requirements on top of those specified by Congress—including by threatening non-compliance with criminal prosecution and significant civil fines—is plainly impermissible.

Defendant also violates the NVRA by seeking to regulate the manner in which federal voter-registration forms may be submitted, particularly with respect to the forty-eight hour return requirement. Defendant argues, without citing any authority, that because the challenged law technically does not bar New Mexico from "accept[ing] and us[ing]" the federal voter-registration form as required by 42 U.S.C. § 1973gg-4(a), but

⁶ It is notable that Denise Lamb, the former Director of the Bureau of Elections, a supporter of the challenged law and an affiant proffered by Defendant, apparently believed as late as last month (and may still believe) that the challenged law cannot apply to registration efforts undertaken using the federal registration form. See, e.g., Sue Major Holmes, Groups sue over New Mexico voter registration law, Las Cruces Sun News, July 24, 2008 (Urias Decl. Ex. C) (quoting Lamb and referring to her disappointment at the loophole created because, under the challenged law, New Mexico lacked "control over people using a federal voter registration form").

“simply regulates the conduct of a third party registration agent using such a form,” the challenged law does not violate the NVRA. (Def.’s Opp’n Mem. at 31.) This highly formalistic argument—that there is no conflict between the NVRA (which requires states to accept all forms received at or before the book closing deadline) and the challenged law (which creates criminal and civil penalties for anyone who fails to return a form within forty-eight hours, regardless of how long it is before the election)—does not withstand scrutiny. By enacting the NVRA, “Congress has effectively prevented the states from imposing restrictions on the manner in which applicants (or anyone else) may submit timely voter registration applications to appropriate state officials.” Charles H. Wesley Educ. Found., Inc., 324 F. Supp. 2d at 1367-68 (emphasis added).

The NVRA “impliedly encourages” and “protect[s]” voter-registration drives, Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1353 (11th Cir. 2005), yet the challenged law has had and, barring injunctive relief, will continue to have the effect of chilling registration of New Mexico citizens to vote. The challenged law thus “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of the NVRA and is preempted. See Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996).

CONCLUSION

Plaintiffs respectfully request that this Court grant a preliminary injunction enjoining New Mexico's third-party voter-registration statute, NMSA 1978, § 1-4-49, administrative rules, 1.10.25.7-10 NMAC, and requirements imposed pursuant thereto.

Dated: Albuquerque, New Mexico
August 18, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 18th day of August, 2008, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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