

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

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS’ APPLICATION FOR A PRELIMINARY INJUNCTION**

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(pro hac vice applications pending)

Counsel for Plaintiffs

Dated: August 11, 2008

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PRELIMINARY STATEMENT

The freedom to communicate with would-be voters about political issues and ideas, to assist them in registering to vote, and to organize them into social and political coalitions all lie at the core of American democracy. Because of the inextricable linkages between voter-registration drives and the freedom of speech and association, the United States Constitution, the New Mexico Constitution, and the National Voter Registration Act of 1993 (“NVRA”), each vigorously protects the rights of citizens to conduct voter-registration drives.

In 2005, the New Mexico legislature passed a law, later supplemented by certain administrative regulations and other de facto requirements (collectively, “New Mexico’s voter-registration law” or the “challenged law”), that makes it substantially more difficult to register new voters and to communicate and associate with would-be voters. Specifically, before an individual in New Mexico can assist in registering a single person to vote, the challenged law requires that he or she first pre-register with the Secretary of State and attend mandatory in-person training. In addition, the challenged law strictly limits access to voter-registration forms; vests unfettered discretion with the Secretary of State and local officials regarding exceptions to the access limits; and requires that all forms be submitted within forty-eight hours of completion, an unforgiving deadline that can fall months prior to the deadline for registering to vote in a particular election, also known as the “book closing date.” (This year, New Mexico’s book-closing date is October 7, 2008.) The challenged law also imposes chilling criminal and civil penalties for noncompliance, including imprisonment and fines of up to \$5,000, both on

individuals and on organizations that sponsor registration efforts. Each of these requirements unconstitutionally infringes on the rights of free speech and free association, and violates the NVRA.

Plaintiffs are four organizations that regularly participate in voter-registration activities. They rely upon voter-registration drives not only to promote participation in American democracy and to enhance the political power of their members and the communities that they serve, but also to recruit new members who support the issues and causes in which they believe. In connection with prior elections, Plaintiffs have registered substantial numbers of citizens to vote in New Mexico and elsewhere. In advance of the 2008 general election, however, each of the Plaintiffs either has suspended voter-registration activities in New Mexico altogether or has substantially reduced those activities, registering many fewer New Mexico voters than it otherwise could absent the excessive burdens imposed by the challenged law. To the extent that the Secretary of State continues to enforce New Mexico's voter-registration law, Plaintiffs will be irreparably injured. Accordingly, Plaintiffs respectfully request that this Court enjoin further enforcement of the challenged law.

STATEMENT OF FACTS

I. THE CHALLENGED LAW

The challenged law—consisting of NMSA 1978, § 1-4-49 (2008), the regulations implementing the statute, 1.10.25.7-10 NMAC (2008), and the requirements imposed by New Mexico officials pursuant thereto—restricts voter-registration activity in several significant ways.

A. Pre-Registration, Disclosure, and Training Requirements

Section 1-4-49(a) of the New Mexico Statutes provides that “[r]egistration agents who either register or assist persons to register to vote” on behalf of nongovernmental organizations must themselves pre-register with the Secretary of State. NMSA 1978, § 1-4-49(a). An organization that employs registration agents who register third parties to vote must also pre-register with the Secretary of State, and must provide the Secretary with certain information. Id. Neither the statute nor any of the regulations implementing it define what it means to “assist persons to register to vote,” and it is therefore not clear whether assistance consists of (i) mere distribution of voter-registration forms; (ii) distribution and collection of such forms; (iii) distribution and collection, plus help in completing forms; or (iv) some other combination of these activities.

Section 1.10.25.8 of the New Mexico Administrative Code requires that individuals complete the required pre-registration process prior to registering any individual to vote. 1.10.25.8 NMAC. An individual’s pre-registration form must identify the name and address of the organization for which he or she is working, as well as the individual’s own name, address, date of birth, and Social Security number. Id. 1.10.25.9(a)-(g). The form must also include a signed, sworn statement by the individual that he or she will obey all state laws and rules regarding the registration of voters. Id. 1.10.25.9(i). Except for the date of birth and Social Security number, the form is a public record. Id. 1.10.25.9(k).¹

¹ The statute does not on its face require the disclosure of the registration agent’s Social Security number, but the regulations and the registration form itself require this information. (See 1.10.25.9(G) NMAC; New Mexico “Voter Registration Agent

Certain New Mexico County Clerks have advised registration agents that they must participate in a mandatory, state-run training class before they can complete the pre-registration process. Although the training requirement does not appear on the face of the statute or the regulations, see NMSA 1978, § 1-4-39; 1.10.25.9 NMAC, et seq., training is a de facto requirement in many parts of the state, including in Albuquerque. (See Affidavit of Robert Rodriguez (Potischman Decl. Ex. A) (“Rodriguez Aff.”) ¶ 31; Affidavit of Katryn E. Fraher (Potischman Decl. Ex. B) (“Fraher Aff.”) ¶ 18; Affidavit of Jamison Tessneer (Potischman Decl. Ex. C) (“Tessneer Aff.”) ¶ 9.)

B. Fifty-Certificate Limit

Sections 1.10.25.8(c) and 1.10.25.10(b) of the New Mexico Administrative Code provide that registration forms are to be distributed in quantities of fifty per organization or individual. 1.10.25.8(c), 1.10.25.10(b) NMAC. The New Mexico voter-registration forms distributed to each organization or individual are accompanied by a traceable number, so that election officials may retain a record of each form. Id. 1.10.25.8(c). (See also “State of New Mexico Voter Registration Application” (Potischman Decl. Ex. D).) The County Clerk and the Secretary of State retain “discretion to increase these quantities for special events or circumstances.” Id. Neither the statute nor the implementing regulations specifies the criteria that the country clerk or the Secretary of State should apply in determining whether to exercise such discretion. See id.; see also NMSA 1978, § 1-4-49(a).

Identification Form” (Potischman Decl. Ex. E).) References to the “Potischman Decl.” are to the Declaration of Neal A. Potischman, dated August 4, 2008, filed herewith.

C. Forty-Eight-Hour Return Requirement

Section 1-4-49(b) of the New Mexico Statutes provides that “[o]rganizations employing registration agents or using volunteer registration agents shall deliver or mail a certificate of registration to the Secretary of State or County Clerk within forty-eight hours of its completion by the person registering to vote or deliver it the next business day if the appropriate office is closed for that forty-eight hour period.” NMSA 1978, § 1-4-49(b). No exception is provided for exigent or other special circumstances that might make return of a form within forty-eight hours impracticable or for organizations that receive forms from applicants more than forty-eight hours after completion. See id.

D. Criminal and Civil Penalties

Section 1-4-49(d) of the New Mexico Statutes provides that “[a] person who intentionally violates the provisions [of the challenged statute] is guilty of a petty misdemeanor” and shall have his or her status as a third-party registration agent revoked. NMSA 1978, § 1-4-49(d). The penalties for a petty misdemeanor include imprisonment for up to six months and fines up to \$500. See id. § 31-19-1 (2008). The statute does not specify what constitutes an “intentional” violation, nor does it carve out any defense based on good-faith conduct. See id. § 1-4-49(d).

The statute also provides for an assessment of civil penalties, including fines of “[\$250] for each violation, not to exceed [\$5,000],” on any person whom the Secretary of State “reasonably believes” has “committed a violation of the provisions [of the challenged statute].” Id. § 1-4-49(e). If a person who violates the statute is “an employee of an organization and has decision-making authority regarding the organization’s voter

registration activities or is an officer of the organization,” then the organization itself is strictly liable for civil penalties. Id. § 1-4-49(d).

II. PLAINTIFFS

Each of the four Plaintiffs in this action seeks, as part of its mission, to assist individuals in New Mexico and elsewhere to register to vote. Plaintiffs rely principally on volunteers to conduct voter registration and have been devastated by the requirements of the challenged law because those requirements render impossible the kinds of community-based voter-registration drives that these organizations previously conducted and would like to conduct this year. The impact of New Mexico’s voter-registration law on each Plaintiff is described below.

A. American Association of People With Disabilities

American Association of People With Disabilities (“AAPD”) is a nonpartisan advocacy organization dedicated to ensuring the economic self-sufficiency and increasing the political power of the more than 56 million Americans with disabilities. (See Affidavit of James Dickson (Potischman Decl. Ex. F) (“Dickson Aff.”) ¶ 3.) AAPD has approximately 86,500 active and inactive individual members nationwide (including New Mexico). (Id. ¶ 4.) AAPD registers its members to vote by communicating with them directly. (Id. ¶ 9.) In addition, AAPD runs large-scale voter-registration programs through coalitions with state-based disability organizations. (Id.) AAPD encourages its members and coalition member groups to focus their voter-registration message on political issues that are central to that particular group’s constituency, such as lobbying for accessible housing or audible traffic lights for the blind. (Id. ¶¶ 5, 15-16, 20.)

As a result of the challenged law, AAPD has decided not to establish a voter-registration coalition of disability-rights organizations in New Mexico in 2008. (Id. ¶ 21.) According to United States Census data, there are over 300,000 voting-age people with disabilities residing in New Mexico. Only 37.9% of those individuals voted in 2000. (Id. ¶ 29.) AAPD officers do not want to run the risk of legal liability for AAPD volunteers, nor do they wish to expose affiliated disability-rights organizations and their volunteers to risk for civil and criminal penalties for any mistakes made in the course of registering individuals to vote. (Id. ¶ 22.) AAPD believes that the risk of making errors under the law while trying to register disabled voters is particularly acute because of the disabilities of some of the registrants involved. (Id.; see also id. ¶ 14.)

Moreover, due to lack of adequate transportation for many disabled citizens, AAPD believes that it is impracticable for all of its potential affiliated registration volunteers to attend in-person training and ensure that each and every completed voter-registration form is submitted within forty-eight hours of completion. (Id. ¶¶ 23-24.)

Finally, the fact that the challenged law treats as public records the certifying information of third-party registrants—including their names and organizational affiliations, 1.10.25.9(k) NMAC—is particularly burdensome for AAPD and its coalition groups because many volunteers do not wish to be identified as disabled or to publicly associate with a disability-rights organization. (Id. ¶ 25.)

B. Federation of Women’s Clubs Overseas, Inc.

The Federation of Women’s Clubs Overseas, Inc. (“FAWCO”) is an international network of seventy-eight independent American women’s organizations located in thirty-

nine different countries. (Affidavit of Lucy Stensland Laederich (Potischman Decl. Ex. G) (“Laederich Aff.”) ¶ 6.) FAWCO serves as an informational resource for its member organizations, providing support for American women abroad. (Id. ¶ 9.) FAWCO assists its member organizations in registering their own members to vote and in conducting voter-registration drives. (Id. ¶¶ 10-11.) The members of FAWCO’s constituent organizations typically assist Americans abroad to vote by volunteering to help them to fill out the Federal Postcard Application Card (“FPAC”), which must be accepted by states pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”). (Id. ¶ 12.) FAWCO frequently addresses issues of importance to the expatriate community while conducting voter-registration drives at locations that Americans living abroad are known to frequent. (Id. ¶¶ 11, 18.)

Before New Mexico’s voter-registration law was enacted, FAWCO helped to register voters from all fifty states, including New Mexico. (Id. ¶ 20.) Upon learning of New Mexico’s third-party registration statute, FAWCO sent out an e-mail alert advising its volunteers not to assist any New Mexico residents to register to vote because of potential liability under the challenged law. (Id. ¶ 21.) Many of the members of FAWCO’s member organizations have thus declined to register any New Mexico voters and will not do so unless the law is changed. (Id. ¶ 22.) The principal problem for FAWCO’s members is that it is impossible for FAWCO volunteers living abroad to travel to New Mexico to be trained and certified to register New Mexico voters. (Id. ¶ 23.) FAWCO is unwilling to subject its volunteers to potential civil and criminal penalties for helping to register New Mexico voters abroad. (Id. ¶¶ 23, 25, 27-28.)

FAWCO is aware of no exception to the New Mexico law that would permit uncertified persons operating abroad to help register New Mexico voters using the FPAC. (Id. ¶ 23.)

C. New Mexico Public Interest Research Group Education Fund

The New Mexico Public Interest Research Group Education Fund (“NMPIRG Education Fund”) is a nonpartisan, nonprofit organization that seeks to provide a voice on behalf of the New Mexico public interest, as opposed to special interests. (Fraher Aff. ¶¶ 2, 5.) The NMPIRG Education Fund and its sister organization, the New Mexico Public Interest Research Group (“NMPIRG”), both conduct a series of issue-oriented campaigns in which members of the group Students for New Mexico Public Interest Research Group (“Students for NMPIRG”) at the University of New Mexico in Albuquerque participate. (Id. ¶ 2.) One of the campaigns conducted by the NMPIRG Education Fund is the “New Voters Project,” a nonpartisan voter-registration campaign organized by the Student PIRGs, a national federation of the Student PIRG organizations in various states. (Id. ¶ 11.) Since 2004, Students for NMPIRG is the sole organization that has conducted voter registration for the NMPIRG Education Fund. (Id. ¶ 4; Tessneer Aff. ¶ 6.) As part of the New Voters Project, Students for NMPIRG runs voter-registration drives conducted by student volunteers. (Fraher Aff. ¶¶ 9, 11.) Students for NMPIRG explains facts about the voting process and why it is important to vote. (Id. ¶¶ 7-8, 12-14.) Students for NMPIRG also tells prospective voters about their various issue-oriented campaigns to get them to volunteer for and to join the organization. (Id.)

The challenged law has caused Students for NMPIRG and the NMPIRG Education Fund to engage in less voter registration activity and to register fewer voters

than they otherwise would have. (*Id.* ¶ 15; *Tessneer Aff.* ¶¶ 7-8.) The most significant burden is that the law’s pre-registration and training requirements make it difficult to use the casual volunteers that they would otherwise rely upon for voter-registration drives. (*Fraher Aff.* ¶ 16; *Tessneer Aff.* ¶ 11.) Moreover, fear of the civil and criminal penalties associated with the failure to return registration forms within forty-eight hours has reduced the number of volunteers willing to participate in voter-registration drives. (*Fraher Aff.* ¶¶ 25-26; *Tessneer Aff.* ¶¶ 17-19.) Apart from the number of volunteers, the time and resources that volunteers devote to meeting the forty-eight-hour return requirement and complying with the fifty-form limit significantly detract from time and energy that could be focused on communicating with, associating with, and registering more voters. (*Fraher Aff.* ¶¶ 21-24; *Tessneer Aff.* ¶¶ 14-16.) Students for NMPIRG has specifically been told by the County Clerk’s office not to use the federal voter-registration form as a substitute for the restricted New Mexico voter-registration forms. (*Fraher Aff.* ¶ 21; *Tessneer Aff.* ¶ 15.)

D. SouthWest Organizing Project

SouthWest Organizing Project (“SWOP”) is a nonpartisan organization dedicated to empowering disenfranchised communities in New Mexico—primarily Latinos and other people of color, low-income communities, and young people—to realize racial and gender equality and social and economic justice. (*Rodriguez Aff.* ¶ 4.) SWOP has approximately 600 members across New Mexico. (*Id.* ¶ 3.) As part of its mission, SWOP undertakes large-scale volunteer-driven efforts to register New Mexico voters and has registered over 30,000 New Mexico voters since 1983. (*Id.* ¶¶ 4, 7-10.) As part of

past voter-registration efforts, SWOP employees and volunteers distributed nonpartisan educational materials, discussed the importance of voting, discussed SWOP's views on controversies at issue in the election, and enlisted new SWOP members. (Id. ¶¶ 14-19.) In advance of the 2004 presidential election, SWOP registered approximately 5,000 people to vote in New Mexico. (Id. ¶ 9.)

Since New Mexico's voter-registration law was enacted, SWOP has significantly reduced its volunteer-based voter-registration activity. (Id. ¶ 23.) SWOP did not undertake any organized voter-registration drives in 2005, and registered less than 100 people in 2006, a substantial reduction from the 5,000 people that SWOP registered in 2004 (before the legislation was enacted). (Id. ¶¶ 24-25.) SWOP has no plans to undertake a full-scale voter-registration drive in New Mexico in 2008. (Id. ¶¶ 26-27.) But for the requirements and penalties imposed by the challenged law, SWOP would be undertaking large-scale efforts to register voters—and simultaneously broadcasting its organizational message—in New Mexico in 2008. (Id. ¶¶ 39-40.)

The principal reasons that SWOP has cut back on its registration activities are (i) without volunteers, it is impossible for SWOP to undertake an organized voter-registration effort (id. ¶ 28); (ii) the challenged law's training requirement is inconvenient and intimidating for volunteers and inhibits spontaneous registration (id. ¶¶ 25, 30, 32); (iii) the penalties associated with the law reduce the willingness of volunteers to participate in voter-registration drives (id. ¶¶ 28, 32); (iv) the restricted availability of voter-registration forms has made volunteer-driven voter-registration drives vastly more complicated (id. ¶ 33); and (v) the requirement that forms be returned within forty-eight

hours would force SWOP to direct additional resources to ensure quality control within a compressed time period (id. ¶¶ 37). SWOP Executive Director Robert Rodriguez was told during his training session that SWOP could not use the federal form to register voters. (See id. ¶ 34.). Mr. Rodriguez does not feel comfortable encouraging SWOP workers or volunteers to register voters because of what he perceives to be an unreasonable amount of risk involved, both for those individuals and for the organization itself. (Id. ¶ 29.)

ARGUMENT

New Mexico's voter-registration law severely and impermissibly burdens Plaintiffs' rights to speak and to associate by limiting their ability to conduct voter-registration drives. These burdens have shut down or limited each of Plaintiffs' voter-registration drives, reducing the speech and association that are part of those drives. No legitimate state interest justifies the particular burdens imposed by the law; even if some state interest is served by any of the law's provisions, they are not tailored to serve that interest. Because the law imposes burdens that violate the United States Constitution, the NVRA, and the New Mexico Constitution, this Court should enjoin its enforcement.

As set forth below, Plaintiffs have made each of the following required showings necessary to obtain a preliminary injunction, namely: "(1) the moving party will suffer irreparable injury unless the injunction issues; (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood that the moving party will eventually prevail on the merits." Tri-

State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986); see also ACLU v. Johnson, 194 F.3d 1149, 1155 (10th Cir. 1999).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

Plaintiffs are likely to succeed on the merits of their instant application for a preliminary injunction because the challenged law violates Plaintiffs' rights under (i) the First Amendment to the United States Constitution; (ii) the NVRA; and (iii) the New Mexico Constitution.

A. The Challenged Law Violates the First Amendment of the U.S. Constitution

The challenged law has already burdened, and continues to interfere on a daily basis with, Plaintiffs' constitutionally protected rights under the First Amendment.² The mere existence of the harsh rules and criminal and civil penalties for their violation has caused Plaintiffs either to engage in less protected speech and association or to refrain from speaking and associating at all—causing them present injury that must be remedied. See League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314, 1338-39 (S.D. Fla. 2006) (holding that a challenge is appropriate where “the threat of fines has rationally chilled Plaintiffs' exercise of free speech and association, as well as that of Plaintiffs' volunteers”). Accordingly, the law should be stricken as applied to Plaintiffs.

The unconstitutionality of the law is not limited to the manner in which the Secretary of State has applied it to Plaintiffs; rather the law is also invalid on its face

² Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, which provides a federal statutory remedy for state violations of the U.S. Constitution.

because “in all its applications [it] directly restricts protected First Amendment activity.” See Sec’y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 968 & n.13 (1984); see also id. at 967-68 (where law restricts “protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State’s objective are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack”).³ As there is no way that the Secretary of State can simultaneously enforce the law and adhere to the Constitution, the law is facially invalid and should be struck down.

1. The Challenged Law Is Subject to Strict Scrutiny as a Severe Burden on Core Political Speech and the Right to Association

Plaintiffs’ voter-registration drives involve the communication and expression of political ideas: core political speech that lies at the heart of the First Amendment. When Plaintiffs go out into their communities and offer to register citizens to vote, they inevitably spark conversations concerning issues of the day, political change, and the reasons why it is important to register and to vote. Plaintiffs discuss with potential registrants the importance of political participation in general and also their views on particular controversies at issue in the election and the importance of joining groups engaged in meaningful political action. (See, e.g., Fraher Aff. ¶¶ 13-14; Rodriguez Aff. ¶¶ 15-18.) Because this kind of core political speech and association is characteristically

³ While the law in this case is unconstitutional in all its applications, a facial challenge here would further be appropriate because the law does not have a “plainly legitimate sweep,” Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008), and because, at a minimum, “a substantial number of its applications are unconstitutional,” id. at 1190 n.6.

intertwined with Plaintiffs' voter-registration drives, laws that restrict those drives are subject to scrutiny under the First Amendment. See League of Women Voters of Fla., 447 F. Supp. 2d at 1339; Ass'n of Cmty. Orgs. for Reform Now v. Cox, No. 06-CV-1891, slip op. at 16 (N.D. Ga. Sept. 27, 2006); Project Vote v. Blackwell, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006); see also Meyer v. Grant, 486 U.S. 414, 422 (1988); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632-33 (1980).

Regulation of voter registration thus must be undertaken with due regard for the fact that voter-canvassing activity is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues" and that without such activity "the flow of such information would likely cease." Village of Schaumburg, 444 U.S. at 632 (discussing the speech intertwined with charitable solicitation); see also Hernandez v. Woodard, 714 F. Supp. 963, 973 (N.D. Ill. 1989) ("Where groups, formal or informal, seek to advance their goals through the electoral process, regulations preventing their members from [registering voters] impair their ability effectively to organize and make their voices heard.").

The challenged law is subject to scrutiny not only because it restricts Plaintiffs' right to free speech, but also because it restricts Plaintiffs' core right of association. Organized voter-registration activities necessarily involve political association, both within the voter-registration organizations themselves and with the citizens they seek to register. Some Plaintiffs actively solicit new members through their registration drives, either directly or indirectly through follow-up activity with new registrants. (See, e.g.,

Fraher Aff. ¶¶ 8, 14; Rodriguez Aff. ¶¶ 19-20.) An organization’s attempt to broaden the base of public participation in and support for its activities is conduct “undeniably central to the exercise of the right of association.” Tashjian v. Republican Party, 479 U.S. 208, 214-15 (1986). Indeed, “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); see also NAACP v. Button, 371 U.S. 415, 430 (1963); Bates v. Little Rock, 361 U.S. 516, 522-23 (1960).

State election laws that burden First Amendment rights are subject to the balancing test first laid out in Anderson v. Celebrezze, 460 U.S. 780, 788-90 (1983), and recently reaffirmed in Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1616 (2008). In deciding whether a state election law violates the First Amendment, courts must:

[f]irst consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.

Anderson, 460 U.S. at 789. As the severity of the burden imposed increases, so must the level of scrutiny rise. “Severe restriction[s]” must be “justified by a narrowly drawn state interest of compelling importance.” Crawford, 128 S. Ct. at 1616 (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992)). Even lesser burdens, though, “[h]owever slight

[they] may appear, . . . must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” Id.

In determining the level of scrutiny that is appropriate under Anderson, the Court should be mindful that “restrictions on core political speech . . . plainly impose a severe burden.” Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 208 (1999) (Thomas, J., concurring) (internal quotation marks omitted). The Supreme Court has made it clear that “interactive communication concerning political change,” of the sort Plaintiffs engage in as part of their voter-registration drives, is “core political speech.” Meyer, 486 U.S. at 422 (internal quotation marks omitted). Where a law restricts such core political speech and association, it is subject to “exacting scrutiny.” McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 346 (1995) (quoting Meyer, 486 U.S. at 420). This is true even “where a State’s law does not directly regulate core political speech.” Buckley, 525 U.S. at 207 (Thomas, J., concurring).

The law’s burdens are severe by another measure as well: they significantly impede the speech and association that accompanies Plaintiffs’ voter-registration drives. The amount of speech and association restricted is substantial: two of the Plaintiffs have completely stopped their voter-registration activities in New Mexico altogether, and the others have substantially reduced those activities. (Dickson Aff. ¶ 21; Fraher Aff. ¶¶ 16, 20; Laederich Aff. ¶¶ 21-23; Rodriguez Aff. ¶¶ 27-29.) As Plaintiffs’ expert, Professor Donald Green of Yale University, opined, this reduction in speech and association is the natural result of the challenged law. (Expert Report of Donald P. Green (Potischman Decl. Ex. H) at 3-6.)

As strict scrutiny is applicable to the challenged law, the state must demonstrate that the severe burden imposed by each provision is narrowly tailored to promote a compelling government interest. See id. at 206-07 (Thomas, J., concurring); Burdick v. Takushi, 504 U.S. 428, 434 (1992); McIntyre, 514 U.S. at 346 (1995); see also Campbell v. Buckley, 203 F.3d 738, 745 (10th Cir. 2000) (canvassing Supreme Court cases involving election-related speech). If a less restrictive alternative would serve the government’s purpose, the state “must use that alternative.” United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 813 (2000).⁴

2. The Severe Burdens Imposed by Each Challenged Provision Are Not Narrowly Tailored to Serve Compelling State Interests

The severe burden each challenged provision places on Plaintiffs’ First Amendment rights is widely disproportionate to any benefits potentially reaped by the government. The state may have a legitimate interest in preventing fraud and ensuring that registration certificates are returned to the state in time for the voters to be added to the rolls. But none of the challenged provisions is either narrowly tailored or necessary to promote those interests.

(a) Pre-Registration, Disclosure, and Training Requirements

New Mexico’s pre-registration, disclosure, and training requirements prohibit individuals from engaging in the constitutionally protected activity of voter registration until they appear in-person at the County Clerk’s office, provide substantial personal

⁴ Even if the burdens imposed by the challenged law are found to be less than severe, however, the law still “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” Crawford, 128 S. Ct. at 1616 (quoting Norman, 502 U.S. at 288-89).

information on a notarized pre-registration form, and attend a training session. These requirements severely burden Plaintiffs by (i) imposing significant logistical barriers to speech; (ii) preventing spontaneous speech; and (iii) compelling the disclosure of private information. The challenged law's pre-registration, disclosure, and training requirements are not narrowly tailored to advance any government interest.

In striking down similar laws requiring pre-registration prior to engaging in door-to-door advocacy, the Supreme Court has made clear that prior restraints on speech are highly disfavored because “[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors.” Watchtower Bible & Tract Soc’y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 165-66 (2002); see also Thomas v. Collins, 323 U.S. 516, 539-40 (1945) (“[A] requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.”). Such requirements are burdensome because “the simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely.” NAACP W. Region v. Richmond, 743 F.2d 1346, 1355 (9th Cir. 1984).

First, training and pre-registration take a significant amount of time and training sessions are typically scheduled during limited hours on weekdays. Training at the Bernalillo County Clerk’s Office, for example, takes one hour and is offered only at specific times each week. (Fraher Aff. ¶ 18; Rodriguez Aff. ¶ 30.) Moreover, it is

difficult to travel to the County Clerk's offices, where the training sessions are typically held. (Fraher Aff. ¶ 18; Rodriguez Aff. ¶ 30.) These problems are even more acute for Plaintiffs that might otherwise register voters in rural or even foreign communities, for whom a trip to the appropriate County Clerk's office would take much longer.

(Laederich Aff. ¶ 24.)

Accordingly, the challenged law has been devastating for those Plaintiffs that rely on working volunteers to conduct voter-registration drives because many volunteers who would otherwise register voters cannot take time out of their work (or school) day to attend the training sessions. (Fraher Aff. ¶ 18; Rodriguez Aff. ¶ 30.) For instance, during the 2004 presidential election, Plaintiff SWOP relied on approximately 100 unpaid volunteers to register 5,000 voters in Albuquerque, Santa Fe, and Carlsbad. (Rodriguez Aff. ¶¶ 9, 11.) Without the ability to draw upon as many volunteers, SWOP has decided not to conduct any substantial voter-registration activities in advance of the 2008 presidential election. (*Id.* ¶¶ 26, 28.) The NMPIRG Education Fund has been similarly plagued by an insufficient number of volunteers who are willing and able to get certified to register others to vote. (Fraher Aff. ¶ 20; Tessneer Aff. ¶ 11.) Plaintiffs in New Mexico have suffered a significant reduction in the number of volunteers able to conduct voter registration as a result of the challenged law, and have thus been unable to register as many people to vote. (Fraher Aff. ¶¶ 16, 20; Rodriguez Aff. ¶¶ 27-29.) Indeed, AAPD and FAWCO have entirely ceased registering New Mexico citizens to vote. (Dickson Aff. ¶ 21; Laederich Aff. ¶¶ 21-23.)

Second, the pre-registration and training requirements prevent Plaintiffs from conducting spontaneous voter-registration drives, which traditionally have formed a significant part of Plaintiffs' voter-registration efforts. A person who decides casually that she wants to assist with registration on short notice cannot do so under New Mexico's law because of the registration and training requirements, which require advance planning. (See, e.g., Fraher Aff. ¶¶ 16, 20; Tessneer Aff. ¶ 12, Rodriguez Aff. ¶ 38.) Plaintiffs are therefore precluded from conducting voter-registration drives informally, and those who wish to volunteer spontaneously are simply unable to do so. (Fraher Aff. ¶¶ 16, 20; Tessneer Aff. ¶ 12; Rodriguez Aff. ¶ 38.) "Timing is of the essence in politics." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969) (Harlan, J., concurring); see also Watchtower Bible, 536 U.S. at 167-68. By preventing spontaneous speech, the challenged law prohibits this vital category of core political speech and activity.

Third, the pre-registration requirement on a form that shall be a "public record" discourages some Plaintiffs from conducting voter-registration activities because their members do not wish publicly to disclose their affiliations. Many volunteers for AAPD and the organization's coalition members, for example, do not wish to be publicly identified as disabled or publicly associated with disability-rights organizations. (Dickson Aff. ¶ 25.) A voter with a mental or physical disability, for instance, may fear that public disclosure will expose him or her to stereotyping or employment discrimination on account of that disability. Requiring the public disclosure of such an association discourages individuals from participating in voter-registration drives. The

Supreme Court has recognized the importance of the anonymous support for causes and anonymous group membership, particularly when the group may espouse unpopular beliefs or face stigma. Requiring a person to be publicly identified with a group in an application filed with the government necessarily results in a surrender of anonymity that inhibits speech and association. Watchtower Bible, 536 U.S. at 166-67; see also NAACP v. Alabama ex rel. Patterson, 357 U.S. at 462-63 (compelled disclosure of affiliation with group engaged in advocacy entailed the likelihood of a substantial restraint upon the exercise of the group's members' freedom of association).

These significant burdens cannot be justified as narrowly tailored to serve any compelling government interest. There is no justification for requiring pre-registration in advance of returning voter-registration certificates. For instance, a law requiring registration contemporaneous with the return of forms to the County Clerk's office, rather than before engaging in voter registration, would be significantly less burdensome. See, e.g., Am. Constitutional Law Found., Inc. v. Meyer, 120 F.3d 1092, 1099 (10th Cir. 1997) (upholding requirement that petition circulators submit affidavits when returning petitions), aff'd sub nom. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999). Requiring the form to be sworn in advance of registration efforts and before the County Clerk provides little, if any, additional benefit.

Further, with respect to the de facto training requirement, whatever the merits of training as a general matter, there is no compelling state interest in requiring individuals to be trained in person by an official from the County Clerk's office, and certainly no interest that can overcome the serious burden such a requirement places on Plaintiffs. In

striking down a significantly less burdensome on-line training requirement in Project Vote, 455 F. Supp. 2d at 704-05, the court emphasized that the training mandated by Ohio law was only available online, “necessaril[ly] exclud[ing] participation by those who do not have access to, or the financial wherewithal to have access to, not only the Internet, but the ability to use the Internet.” Id. at 703. The New Mexico requirement being imposed by County Clerks similarly necessarily excludes participation by a much wider range of individuals—those who cannot take the time to go to the County Clerk’s office during a handful of specified business hours. (See Fraher Aff. ¶ 18; Rodriguez Aff. ¶ 30.) Any legitimate state interest in requiring training could surely be served by offering a range of ways for volunteers or workers to be trained, including certifying registration groups to provide training themselves. See, e.g., Colo. Rev. Stat. § 1-2-701. Indeed, the legislature did not even see fit to include any training requirement in the statute itself. It is thus impossible to see how the logistical burdens that this requirement imposes can be justified.

There is similarly no justification for public identification of both the names of individuals registering voters and the organizations on behalf of which they are working. The pre-registration forms could be private, as opposed to public, records. Enabling members of the public to connect the individuals who are registering voters to the organizations on behalf of whom they are working provides no significant additional protection against fraud. It does, however, severely burden speech and association. See Project Vote, 455 F. Supp. 2d at 706-07 (striking down similar disclosure requirement); Watchtower Bible, 536 U.S. at 166-67; NAACP v. Alabama ex rel. Patterson, 357 U.S. at

462. Accordingly, the Supreme Court has struck down provisions requiring the public disclosure of the connection between a paid circulator and the organization for which he or she worked as failing to be narrowly tailored to the goal of preventing voter fraud. See, e.g., Buckley, 525 U.S. at 202-04 (listing paid circulators, as well as their income from such circulation, forces paid circulators to surrender their anonymity and is no more than tenuously related to the interests disclosure serves).

(b) Fifty-Certificate Limit

New Mexico's fifty-certificate limit, and the exception allowing the exercise of standardless discretion by the Secretary of State and County Clerks with regard to whom (if anyone) may obtain more forms at any given time, further constitute a severe burden on Plaintiffs' speech and associational rights that cannot be justified by the State's interests.

First, the fifty-form limit makes high-volume voter-registration drives vastly more difficult. As one federal district court has noted, high-volume voter-registration drives are important ways that third-party voter-registration groups can educate, advocate for their political causes, and enlist new members. See League of Women Voters of Fla., 447 F. Supp. 2d at 1333. The problem is particularly acute for operations in rural areas, where the municipality in which the County Clerk is located may be a substantial distance from certain communities.

The burden that New Mexico's voter-registration law imposes on Plaintiffs is clear: Either they must curtail the size of their voter-registration drives, limiting the extent to which their message is broadcast and the number of individuals with whom they

are able to associate with, or they must pause in their registration efforts each time that a new batch of forms is completed and not resume until they are able to return those forms and obtain new ones.⁵ The latter option has proved so burdensome that Plaintiffs, who rely almost entirely on volunteers to conduct voter-registration activities, have ceased or drastically curtailed their efforts to sponsor voter-registration drives in New Mexico in 2008. (See, e.g., Dickson Aff. ¶¶ 21, 29; Rodriguez Aff. ¶¶ 27, 38-40.) By effectively curtailing the reach of these drives through the fifty-form limit, the challenged law directly infringes on Plaintiffs' ability to (i) communicate their views on particular issues affected by elections (Rodriguez Aff. ¶¶ 15-17); (ii) recruit new members (Fraher Aff. ¶¶ 8, 14; Rodriguez Aff. ¶¶ 18-19; Laederich Aff. ¶ 18); and (iii) empower certain disenfranchised communities and groups to advance shared objectives (Dickson Aff. ¶¶ 6, 8; Laederich Aff. ¶¶ 9-10; Rodriguez Aff. ¶¶ 4, 10).

Second, the provisions of the challenged law permitting the Secretary of State and County Clerks to decide whether to make exceptions to the fifty-form limit provide no guidance as to how this discretion should be exercised. The Supreme Court has repeatedly held unconstitutional statutes implicating First Amendment interests that vest local officials with unfettered discretionary power to permit or curtail speech. See, e.g., City of Chicago v. Morales, 527 U.S. 41, 60-64 (1999); Forsyth County v. Nationalist Movement, 505 U.S. 123, 129-30 (1992); Freedman v. Maryland, 380 U.S. 51, 56-61

⁵ The New Mexico County Clerk's offices are open only during business hours and on weekdays. Accordingly, it is difficult to see how any organization could mount a significant registration effort on a weekend (or on an evening or a holiday) without special dispensation from a County Clerk.

(1965); see also Ass'n of Cmty. Orgs. for Reform Now v. Municipality of Golden, 744 F.2d 739, 746-48 (10th Cir. 1984). Where excessive discretion is entrusted to government officials responsible for regulating speech, there is far too great a risk that even a facially nondiscriminatory law will nonetheless be applied in a content-based fashion. The ambiguity in the statute's explicit grant of authority to the Secretary of State has made it difficult, if not impossible, for Plaintiffs to plan and organize large-scale voter-registration efforts in preparation for the 2008 general election. (See, e.g., Fraher Aff. ¶ 22.)

Moreover, this burdensome limit is not narrowly tailored to any state interest. It is unclear what state interest such an arbitrary limit on form access is meant to serve. Each registration form a group is able to get from the state represents an additional voter whom the group may be able to help register; any decrease in the number of forms available decreases the number of voters registered. The only function of the challenged law's limit on access to state forms is to increase the time, energy, and resources that Plaintiffs must expend if they are to register more than fifty voters at any given time. (See Fraher Aff. ¶ 21; Tessneer Aff. ¶ 14.)

(c) Forty-Eight-Hour Return Requirement

New Mexico's requirement that organizations deliver or mail certificates of registration to the Secretary of State or County Clerk within forty-eight hours of their completion represents a further unjustified burden on Plaintiffs' speech. See NMSA 1978, § 1-4-49(b). Ensuring that certificates are returned within such a short time period significantly increases the cost that Plaintiffs incur per registration. "By making speech

more costly, the State is virtually guaranteeing that there will be less of it.” Citizens for Tax Reform v. Deters, 518 F.3d 375, 388 (6th Cir. 2008) (invalidating state law making it a felony to pay anyone for gathering signatures on election-related petitions). This is particularly true in this case, where each Plaintiff operates with a limited budget, with few staff members and minimal resources. (See Laederich Aff. ¶ 27; Rodriguez Aff. ¶¶ 5, 29, 37; Fraher Aff. ¶¶ 6, 11, 24; Dickson Aff. ¶ 30.) The increased cost of voter registration necessarily decreases the number of voters that can be registered and thereby limits the scope of voter-registration drives.

The quantum of speech is further reduced by the deterrent effect caused by the interaction of the arbitrary deadline and the associated criminal penalties. The deadline leaves no room for error or delay, while the statute imposes significant penalties on anyone who misses it. See NMSA 1978 § 1-4-49(d). The fear that they will not be able to meet the forty-eight-hour deadline has made individuals—particularly those serving on a volunteer basis—significantly less willing to serve as registration agents. (Fraher Aff. ¶¶ 24-25.)

The only court to consider a constitutional challenge to such a deadline struck down a ten-day deadline that was enforced by a \$500 per-form civil fine, imposed on a strict-liability basis. See League of Women Voters of Fla., 447 F. Supp. 2d at 1338. New Mexico’s \$250 per-form civil fine is also imposed without a fault standard and the deadline is significantly shorter. Whether or not any compelling state interest is served by requiring third-party voter-registration groups to return forms on a rolling basis, it is clear that New Mexico’s law goes far beyond what is necessary to achieve that interest.

Moreover, state agencies in New Mexico themselves have ten days to return completed certificates. NMSA 1978, § 1-4-48(d). The government can provide no justification for why Plaintiffs and similarly situated organizations must return completed voter-registration certificates in less time than New Mexico state agencies.

The state may claim that administrative efficiency is promoted if organizations submit registration certificates within forty-eight hours of receipt. Administrative efficiency is not a sufficient justification, however, for burdening First Amendment rights. See, e.g., Tashjian, 479 U.S. at 217-18 (finding administrative burden and increased costs caused by increased number of voters in primary insufficient to justify restriction). Even if administrative efficiency was a sufficient interest to justify burdening Plaintiffs' First Amendment rights, there is no reason why problems relating to delayed submission could not be addressed by a longer, less burdensome, return period.

(d) Civil and Criminal Penalties

The chilling effect of the excessive criminal and civil penalties imposed by the challenged statute has so severely burdened Plaintiffs' constitutional rights that certain Plaintiffs have either shut down or drastically curtailed their voter-registration activity. (See, e.g., Dickson Aff. ¶¶ 21-22; Laederich Aff. ¶¶ 21-22; Rodriguez Aff. ¶¶ 28-29.) That the Plaintiffs themselves have not been prosecuted under the statute is irrelevant because 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, 93 (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).

The statute imposes criminal liability—a petty misdemeanor that carries the possibility of jail time—for intentional violations.⁶ The New Mexico law also imposes stiff civil fines of \$250 per violation up to \$5,000, with no mens rea requirement. The existence of these penalties, particularly the criminal penalties, has drastically decreased the number of volunteers that Plaintiffs have been able to recruit. (See, e.g., Fraher Aff. ¶¶ 25-26; Laederich Aff. ¶ 23; Rodriguez Aff. ¶¶ 28-29.) As the Supreme Court explained in Randall v. Sorrell, 548 U.S. 230, 260 (2006), regulations that “impede a campaign’s ability effectively to use volunteers, thereby making it more difficult for individuals to associate,” are unconstitutional. Moreover, as Plaintiffs have explained, if enforcement of the statute were to become more prevalent, the chilling effect of the penalties would be even more severe. (See Fraher Aff. ¶ 26.)

Strict-liability regulations in particular, which directly deter speech-related activity, have been held to impermissibly chill constitutionally protected rights under the First Amendment. Cf. Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) (“[A] rule that would impose strict liability on a publisher would have an undoubted ‘chilling’ effect

⁶ Although the challenged law imposes criminal liability only for “intentional” violations, it is unclear whether the law provides a safety valve for intentional, though not malevolent, failures to comply with the statute’s rigorous requirements. NMSA 1978, § 1-4-49(d). For instance, it is not clear whether the statute contains an adequate safety valve if volunteers of Plaintiffs’ organizations fail to return completed voter-registration forms within a forty-eight-hour period because they cannot do so—for example, because they fall ill, have car trouble, cannot take off from work, or have to tend to a sick family member.

on speech . . . that does have constitutional value.”). In League of Women Voters of Florida, the district court placed special emphasis on the strict-liability provisions of the challenged law in concluding that the civil fines imposed on voter-registration drives were unconstitutional. 447 F. Supp. 2d at 1338.

At the same time that the challenged law imposes strict civil liability for violations of the statute, the law also allows the Secretary of State to exercise standardless, and potentially discriminatory, discretion regarding the referral of civil enforcement actions. See NMSA 1978, § 1-4-49(e). As discussed above, the Supreme Court has consistently invalidated similar statutes seeking to encroach on constitutionally protected speech by granting standardless and unduly discretionary authority to local functionaries. See, e.g., Shuttlesworth, 394 U.S. at 151; Cox v. Louisiana, 379 U.S. 536, 553-58 (1965).

The penalties in the instant case are unconstitutional not only because they burden protected rights, but also because they are not necessary to the government’s interests in either preventing fraud or holding voter-registration groups accountable for their actions. There is no justifiable reason for the statute to employ strict liability. Penalizing individuals for conduct that is beyond their control—i.e., conduct that is not intentional—makes no sense.

In addition, the potential for imposition of crippling fines for even minor errors that occur without any fault on the part of the organization creates an unnecessarily punitive financial risk for Plaintiffs, who have limited resources. (See, e.g., Dickson Aff. ¶ 30; Laederich Aff. ¶¶ 27; Rodriguez ¶¶ 29, 37.) Consequently, the prospect of

incurring the severe fines the statute imposes has led directly to a reduction of Plaintiffs' speech and associational activity. (See, e.g., Dickson Aff. ¶¶ 21-22; Laederich Aff. ¶¶ 21-22; Rodriguez Aff. ¶¶ 28-29.)

Finally, the criminal and civil penalties are entirely superfluous. Other provisions of the New Mexico code already criminalize fraudulent conduct. See, e.g., NMSA 1978, § 1-20-9 (2008) (criminalizing "falsifying election documents" including registration materials). When a state "already imposes criminal penalties" for violations regarding the voter-registration process, any additional third-party voter-registration statute imposing an additional "civil penalty scheme" is not necessary to advance the government's interest in holding organizations accountable and preventing fraud. League of Women Voters of Fla., 447 F. Supp. 2d at 1338. Even if the election code did not already criminalize such behavior, the state has an obligation to craft more narrowly tailored laws to address state interests without unduly infringing on constitutional rights. Playboy Entm't Group, Inc., 529 U.S. at 812.

3. The Challenged Law Is Unconstitutionally Vague and Overbroad

Not only does the challenged law impose severe burdens on Plaintiffs' First Amendment rights—without being narrowly tailored to any compelling governmental interest—but it is also unconstitutionally vague and overbroad. The Supreme Court has repeatedly made clear that "legislation that imposes criminal penalties in an area permeated by First Amendment interest" is unconstitutionally vague where "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." Hill v. Colorado, 530 U.S. 703, 732 (2000); see also City of

Chicago v. Morales, 527 U.S. at 53; Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (“[W]here a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.” (internal citations and quotation marks omitted) (alterations in original)). Moreover, “a vague statute may be functionally overbroad if it causes affected persons to act as though the statutory language had the broadest possible meaning.” Jordan v. Pugh, 425 F.3d 820, 827 (10th Cir. 2005).

The challenged law applies to “[r]egistration agents who either register or assist persons to register to vote.” NMSA § 1-4-49(a). But the statute and regulations fail to define what it means to “assist persons to register to vote.” The term “assist” could well be read to apply to a teacher who distributes forms to her students, but does not complete them or collect them, or to a student organization that hands out forms on campus, but tells students they should mail them in themselves. Or, it could be read to apply only to those organizations that help voters fill out forms and then collect and return the forms to the state.⁷

It is unclear whether plaintiff FAWCO—whose member organizations often distribute the forms or direct voters to the on-line form without assisting with the physical completion and return of the forms—“assist[s]” those voters in registering to vote. (See

⁷ The voter-registration form issued by the Secretary of State compounds the confusion. It does not use the term “assist” and instead requires only third-party agents who provide assistance with the “completion” of the form to sign. (See Potischman Decl. Ex. D (“The registration agent who assisted you in completing the form must print their name, enter their Registration ID number and sign his or her name in Item 9.” (emphasis added)).)

Laederich Aff. ¶¶ 15-17.) Likewise, it is unclear whether plaintiff AAPD engages in assistance in those circumstances when it simply mails forms to members' homes, speaks with members on the phone to answer questions, or provides general training, but does not collect forms for return. (See Dickson Aff. ¶¶ 14, 19.) The fact that the challenged law may be construed to cover such a wide array of political speech amplifies its constitutional infirmity. See Watchtower Bible, 536 U.S. at 165-66 ("The mere fact that the [law] covers so much speech raises constitutional concerns.").

Plaintiffs FAWCO, AAPD, and others have no way to determine if their conduct obligates them to comply with the statute's many requirements and, consequently, no way to determine if they are subject to the harsh criminal and civil penalties the challenged law imposes. Moreover, the law threatens to sweep too broadly, encompassing protected First Amendment activity, such as the mere distribution of forms and discussion of the importance of registration, that the state could have no possible rationale for regulating. See Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (holding ordinance facially unconstitutional on both overbreadth and vagueness grounds, concluding that it was "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct"); Dombrowski v. Pfister, 380 U.S. 479, 493-94 (1965) (holding Louisiana's Subversive Activities and Communist Control Law unconstitutional on its face because the definition of "subversive person" was "unduly vague, uncertain, and broad").

As in cases where courts have struck down statutes as vague or overbroad, the “chilling effect” of the New Mexico statute on protected First Amendment activity is “both real and substantial.” See Jordan, 425 F. 3d at 828 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975)). Because Plaintiffs cannot ascertain the standard that applies to their protected First Amendment activity, and because of the apparently broad reach of the statute, Plaintiffs have chosen to suspend or curtail activity, like the mere distribution of forms, that not only promotes the national policy expressed in NVRA, see infra section B, but that is squarely protected by the First Amendment. (See Dickson Aff. ¶ 30; Laederich Aff. ¶¶ 21-24.)

B. The Challenged Law Is Preempted by the NVRA

The challenged law plainly runs afoul of the NVRA, 42 U.S.C. § 1973gg et seq., which seeks to promote rather than restrict electoral participation. In enacting the NVRA, Congress made the following specific findings:

- (1) the right of citizens of the United States to vote is a fundamental right;
- (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and
- (3) 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.

Id. § 1973gg(a). Congress further expressly specified the purposes of the NVRA:

- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

- (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
- (3) to protect the integrity of the electoral process; and
- (4) to ensure that accurate and current voter registration rolls are maintained.

Id. § 1973gg(b).

To further these purposes, Congress requires states to provide enhanced opportunities for citizens to register to vote by various means, including via the use of a federally prescribed voter-registration form. See id. §§ 1973gg-2 to -5. Although states may “develop and use” their own voter-registration forms if they comply with several statutory prerequisites, see id. §§ 1973gg-4(a)(2), 1973gg-7(b), states must also make the federally prescribed forms “available for distribution,” id. § 1973gg-4(b), must “accept and use” such forms, id. § 1973gg-4(a), and must ensure that every person who uses such a form is registered to vote if the form is postmarked or physically accepted “not later than the lesser of 30 days, or the period provided by State law, before the date of the election,” id. § 1973gg-6(a)(1).⁸ New Mexico’s voter-registration law would conflict

⁸ A private right of action for declaratory or injunctive relief is created for persons aggrieved by a violation of the NVRA. 42 U.S.C. § 1973gg-9(b). Although an action under the NVRA ordinarily requires advance notice to the state’s chief election official, see id. § 1973gg-9(b)(1), notice is not required here, where Plaintiffs’ notice to Defendant would have been futile and Plaintiffs also bring a claim under 42 U.S.C. § 1983. See Ass’n of Cmty. Orgs. for Reform Now v. Miller, 912 F. Supp. 976, 983 (W.D. Mich. 1995), aff’d 129 F.3d 833 (6th Cir. 1997); Condon v. Reno, 913 F. Supp. 946, 960 (D.S.C. 1995). In any event, voting-rights advocates have squarely provided Defendant with notice of challenged law’s deficiencies under the NVRA. (See March 8, 2006 Letter to the New Mexico Secretary of State (Potischman Decl. Ex. I).)

with the NVRA even if it only applied to registration efforts undertaken using New Mexico's state-prescribed voter-registration form. Remarkably, however—and in a flagrant violation of the NVRA—Defendant has also determined to apply the challenged law to efforts undertaken using the federally prescribed forms.

Congress explicitly noted in the NVRA that states must follow the NVRA “notwithstanding any other Federal or State law.” 42 U.S.C. § 1973gg-2(a). “Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.” English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990) (citation omitted) (recognizing that federal law may preempt state action by way of the Supremacy Clause of Article VI of the United States Constitution, U.S. Const. art VI, cl. 2, via, inter alia, “express” or “conflict” preemption); see also In re Timberon Water Co., 114 N.M. 154, 158 (1992) (preemption is appropriate where “explicitly mandated by Congress, compelled due to an unavoidable conflict between the state law and the federal law, or compelled because the state law is an obstacle to the full accomplishment of congressional objectives.”). Further, where a state law “stands as an obstacle to the accomplishment and execution” of congressional intent, it is preempted. English, 496 U.S. at 79 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

Where, as here, a state law is in conflict with the NVRA, the state law must yield and the NVRA must prevail. See Charles H. Wesley Educ. Found., Inc. v. Cox, 324 F. Supp. 2d 1358, 1366 (N.D. Ga. 2004) (holding that when a state law is “inconsistent with the NVRA, the former must give way to the latter”), aff’d, 408 F.3d 1349 (11th Cir.

2005); see also Wilson v. United States, No. 95 Civ. 20042 (JW), 1996 WL 297051, at *1 (N.D. Cal. May 31, 1996) (ordering that “[a]ll . . . provisions of the California Elections Code that conflict with the NVRA are preempted and shall not be enforced by the State of California”); Commonwealth of Virginia v. United States, No. 95 Civ. 357 (RLW), 1995 WL 928433, at *1 (E.D. Va. Oct. 18, 1995) (similar, as to Virginia).

1. Procedural Roadblocks to Conducting Voter-Registration Drives

The limited distribution and availability of state voter-registration forms in New Mexico plainly runs afoul of both the text and spirit of the NVRA, which provides that voter-registration forms must be made readily available, “with particular emphasis on making them available for organized voter registration programs.” See 42 U.S.C. § 1973gg-4(3)(b); see also Wesley, 408 F.3d at 1353 (noting that NVRA “impliedly encourages” third-party voter-registration drives and stating that the “right to conduct voter registration drives is a legally protected interest”). It is undisputed that New Mexico’s law limits distribution to fifty forms per organization, absent special permission from the state. See 1.10.25.8(c), 1.10.25.10(b) NMAC. In addition, state forms are only distributed to those who have received state-run training. These requirements operate to make forms less available for organized voter-registration programs, in direct contravention of 42 U.S.C. § 1973gg-4(b).⁹

⁹ By limiting distribution of state voter-registration forms, New Mexico’s voter-registration law hampers the ability of voter-registration organizations to conduct organized voter-registration activities. (See Dickson Aff. ¶¶ 21, 28; Rodriguez Aff. ¶¶ 33-35, 37; Fraher Aff. ¶ 21; Tessneer Aff. ¶ 14.) The cap on available forms makes conducting a drive of any meaningful scale impossible, increases the costs of voter registration, and places an undue burden on private entities that wish to organize voter-

Further, the NVRA contemplates that states will add to the voter rolls anyone who registers not later than (a) thirty days before the election, or (b) the applicable state's book-closing date. See 42 U.S.C. § 1973gg-6(a). Under the challenged law, any registration agent who submits a form days, weeks, or even months before New Mexico's book-closing date is nonetheless subject to civil and criminal fines if the agent fails to submit a form within forty-eight hours of completion. By mandating return of forms within forty-eight hours without regard to the book-closing date, the challenged law creates an artificial deadline that—when combined with penalties that have caused many organizations to not register any New Mexico voters—has the effect of decreasing the number of eligible citizens who register to vote. This reflects a fundamental conflict with the NVRA, which expressly states that its primary purpose is to “increase the number of eligible citizens who register to vote.” See id. § 1973gg(b)(1). As such, the NVRA preempts the challenged law. See Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996) (holding that federal law preempts where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of a federal statute).

Moreover, it is difficult to conceive of a more direct conflict between the NVRA and the challenged law than Defendant's decision to mandate training for, and to place all of the other aforementioned burdens on, organizations and individuals who elect to register voters in New Mexico using the federally prescribed voter-registration form. New Mexico simply has no authority to condition access to federal voter-registration

registration drives. (See Dickson Aff. ¶¶ 21, 28; Rodriguez Aff. ¶¶ 27, 35-37; Fraher Aff. ¶ 21; Tessneer Aff. ¶ 14.)

forms to those who submit to training or who pre-register with Defendant; to limit the number of federal forms that registration agents may obtain at any given time; or to legislate that organizations and individuals who submit forms well in advance of the book-closing deadline may nonetheless be criminally prosecuted (or civilly fined) by virtue of having held onto the federal forms for more than forty-eight hours.

2. The Prohibition against Use of Federal Voter-Registration Forms

The record indicates that certain county officials have gone so far as to tell voter-registration groups in New Mexico that they are required to use New Mexico's state voter-registration forms to register voters in New Mexico, and may not use the federal forms to register voters in New Mexico. (See Fraher Aff. ¶ 21; Tessneer ¶ 15; Rodriguez Aff. ¶ 34.) Such practices obviously conflict directly with the NVRA, which requires states to make federal voter-registration forms available and to accept them. See 42 U.S.C. § 1973gg-4.

3. The Direct and Damaging Effect on Voter Participation and Disproportionate Impact on Certain Groups

Finally, the challenged law discourages voter-registration drives and therefore has “a direct and damaging effect on voter participation . . . and disproportionately harm[s] voter participation by various groups.” See 42 U.S.C. § 1973gg(a)(3). The challenged law's requirements reduce voter registration by making it difficult for organizations to secure casual volunteers, reducing the amount of time that registration agents can be in the field registering voters, and discouraging people from volunteering to register voters. (See Fraher Aff. ¶¶ 16, 18, 20; Rodriguez Aff. ¶¶ 24-28, 31; Dickson Aff. ¶¶ 24-26; Laederich Aff. ¶¶ 21-22.) Further, the reduction in voter registration disproportionately

harms voter participation by young, minority, disabled, and low-income citizens of New Mexico, as those are groups of individuals that Plaintiffs would otherwise seek to register to vote. (See Dickson Aff. ¶¶ 20-21; Rodriguez Aff. ¶¶ 4, 26-27.)

C. The Challenged Law Violates the New Mexico State Constitution

The challenged law not only violates the United States Constitution and the NVRA, but it also violates rights guaranteed to Plaintiffs by the New Mexico Constitution. The New Mexico Supreme Court has expressly held that “the states have inherent power . . . to provide more liberty than is mandated by the United States Constitution.” State v. Gomez, 1997-NMSC-6, 122 N.M. 777, 782; see also City of Farmington v. Fawcett, 114 N.M. 537, 544-45 (Ct. App. 1992) (“While it is settled constitutional law that state courts may not restrict the protection afforded by the federal Constitution . . . they may find greater protection under their state constitutions, even when the language is identical.”). When a litigant asserts rights under provisions of both the federal and the New Mexico Constitutions, the New Mexico Supreme Court applies the “interstitial” approach. Id. Under this approach, a state court may diverge from precedent interpreting the federal Constitution for one of the following three reasons: “a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.” Gomez, 1997-NMSC-6, 122 N.M. at 783 (internal citations omitted).

There are important structural differences between the United States Constitution and the New Mexico Constitution that justify interpreting the New Mexico Constitution more broadly than its federal counterpart. Most obviously, Article II, Section 17, the

state provision analogous to the First Amendment in the United States Constitution, affirmatively grants the right to free speech. Compare U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”) with N.M. Const. art. II, § 17 (“Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press.”).¹⁰ New Mexico courts “have interpreted [the] state constitution to provide broader protection than the First Amendment.” State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 759. In analyzing New Mexico’s more speech-protective constitutional provision, the New Mexico Supreme Court noted that “[t]he purpose of free speech and press is to preserve the independence of public discourse so that a democratic will within a culturally heterogeneous state can emerge under conditions of neutrality, and so that individuals can use the medium of public discourse to persuade others to experiment in new forms of community life.” Id. This purpose and the guarantee that people may speak freely on all subjects are directly undermined by the challenged law, a prior restraint that severely limits the amount of Plaintiffs’ speech.

The challenged law also violates the New Mexico Constitution’s explicit electoral protections. Article II, Section 8 of the New Mexico state constitution states that “[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Article VII, Section 1

¹⁰ Courts are free to “assume that the authors of the New Mexico Constitution were aware of the language of the First Amendment to the United States Constitution and consciously chose to adopt a different formula.” City of Farmington, 114 N.M. at 546.

requires that “[t]he legislature . . . enact such laws as will secure the purity of elections.” New Mexico’s voter-registration law violates these provisions and wreaks havoc on “free,” “open,” and “pure” elections by severely burdening Plaintiffs’ political speech and electoral participation.

It is clear that for an election to be “free,” “open,” and “pure” organizations must be free to advocate their positions and participate in the electoral process without undue burden. In one of the few cases interpreting Article II, Section 8, the New Mexico Supreme Court held that “no election can be free and equal . . . if any substantial number of persons entitled to vote are denied the right to do so.” Gunaji v. Macias, 2001-NMSC-28, 130 N.M. 734, 742 (holding that an election in which voters used an incorrect ballot was not “free and open”). As important to a free and open electoral process as the provision of accurate ballots is the ability of voters and organizations to associate and communicate prior to the casting of those ballots. Similarly, an election cannot be pure when citizens are unable to freely associate and advocate. Indeed, an election in which such activities were not guaranteed would scarcely be democratic.

Constitutional provisions in other states requiring the legislature to secure the “purity of elections” mandate “that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.” See, e.g., Socialist Workers Party v. Michigan Sec’y of State, 412 Mich. 571, 596 (1982). Any law that adversely affects the openness and freedom of an election is similarly infirm. Because the

challenged law prohibits activities essential to any free and open election, it must be struck down as violating the New Mexico Constitution.¹¹

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF

As described above, Plaintiffs have suffered, and will continue to suffer, irreparable harm unless the Court grants an injunction. All Plaintiffs have been forced to curtail their voter-registration activity as a result of the challenged law's onerous requirements and some Plaintiffs have ceased such activity completely. This chilling of speech and association "for even minimal periods of time, unquestionably constitute[s] irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976); see also Sumnum v. Pleasant Grove City, 483 F.3d 1044, 1055 (10th Cir. 2007) ("Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction.").

As the 2008 election approaches, Plaintiffs must decide whether and how to conduct voter-registration activities in New Mexico. With every day that passes, Plaintiffs lose opportunities to communicate with and register potential voters. New Mexico's 2008 book-closing date falls in early October. See NMSA 1978, § 1-4-8(1) (2008). Absent a preliminary injunction, Plaintiffs will continue to be deprived of their

¹¹ Even if one way to protect the "purity" of elections is to maintain accurate election rolls, this cannot come at the expense of Plaintiffs' participation in the electoral process. The "purity" of elections is maintained by preserving a political voice for as many individuals and organizations as possible. More importantly, the challenged law is not connected in any meaningful way to preventing fraud; rather, its only effect has been to drastically curtail Plaintiffs' voter-registration efforts and the quantum of core political speech and association they have been able to carry out.

constitutionally protected right to speak and associate freely, and thousands of predominantly low-income, disabled, over-seas, and minority citizens may go uncounted in the upcoming election cycle.

**III. THE THREATENED INJURY TO PLAINTIFFS
OUTWEIGHS ANY HARM TO THE GOVERNMENT**

Defendants cannot claim any harm in being enjoined from enforcing unconstitutional provisions. See ACLU v. Johnson, 194 F.3d at 1163 (holding that “the threatened injury to Plaintiffs’ constitutionally protected speech outweigh[ed] whatever damage the preliminary injunction may cause Defendants’ inability to enforce what appears to be an unconstitutional statute”). In contrast, absent a preliminary injunction, Plaintiffs and potential voters are unable to engage in core political speech and important associational action that lies at the heart of the First Amendment. There can be no doubt that Plaintiffs’ continuing and irreparable constitutional injuries outweigh any speculative and dubious state interest in violating Plaintiffs’ constitutional rights.

IV. THE INJUNCTION IS NOT CONTRARY TO THE PUBLIC INTEREST

Enjoining statutes that “unconstitutionally limit free speech, . . . is an appropriate remedy not adverse to the public interest.” Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1237 (10th Cir. 2005) (quotation marks and citation omitted); see also ACLU v. Johnson, 194 F.3d at 1163 (injunction blocking an unconstitutional New Mexico regulation of the Internet not adverse to the public interest, as it protects the free expression of the millions of users). Absent injunctive relief, the amount of core political speech and association in New Mexico will continue to be artificially depressed. The public will receive less information about current political issues and will have fewer

opportunities to associate with Plaintiffs in a manner that advances their own political concerns and safeguards their participation in the political process. Granting a preliminary injunction will promote and protect important civic activity essential to the public welfare and provide more individuals who wish to engage in core political speech and association the liberty to do so. The public can have no interest in blocking this constitutionally protected activity.

CONCLUSION

For the reasons set forth above, 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 the requirements imposed by New Mexico officials pursuant thereto.

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August 11, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 11th day of August, 2008, I filed electronically through the CM/ECF system the foregoing Application, along with the supporting (i) Memorandum of Points and Authorities and (ii) Declaration of Neal A. Potischman, 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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