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I. INTRODUCTION

The elective franchise is, without a doubt, one of the most fundamental rights guaranteed in our democratic system of government. The efforts of third party voter registration agents such as Plaintiffs are typically motivated by the desire to make a positive impact on our civil and political landscape. Unfortunately, the recent past demonstrates that those beneficent motivations are either too frequently thwarted or sometimes entirely absent. When organizations such as Plaintiffs fail in their goal of increasing voter participation, that failure often has a devastating impact on participatory democracy. It is because of the primacy of the elective franchise – and not in spite of it – that the New Mexico legislature passed Section 1-4-49 in the 2005 session. Contrary to Plaintiffs’ assertions, compliance with the law is not difficult and helps maintain the integrity of our electoral system. Because Section 1-4-49 is constitutional, and because Plaintiffs have otherwise failed to demonstrate that they are entitled to injunctive relief, Defendant Mary Herrera respectfully asks this Court to deny Plaintiffs’ petition for a preliminary injunction.

II. STATEMENT OF FACTS

In response to well-publicized incidents of voter registration fraud, the New Mexico legislature in 2005 passed NMSA 1978, § 1-4-49. The law is intended to curb voter registration fraud through three principal mechanisms. First, it requires that organizations or individuals who intend to assist others in registering to vote must first themselves register as a third party voter registration agent with the New Mexico Secretary of State. In that registration process, the third party agent provides identifying information to the Secretary of State and receives a registration number to be placed on each completed voter registration card submitted by the agent to the proper election official. *See* NMSA 1978, § 1-4-49(A). This requirement is designed to aid the

State in holding accountable third party registration agents who engage in fraudulent conduct by providing a means of tracing a fraudulent registration card to the person or organization that submitted it.

Second, the law requires third party registration agents to either mail or personally deliver to the appropriate election official a completed voter registration form within forty-eight hours of its completion. *See* NMSA 1978, § 1-4-49(B). This requirement helps ensure that the voter registration cards collected by the third party registration agent are, in fact, submitted to the appropriate election official and the voter is actually placed on the voting rolls. This is an essential step in the civic and political empowerment of the very people Plaintiffs ostensibly seek to enfranchise. As discussed in more detail below, on several past occasions New Mexican citizens, believing they have been registered to vote by the actions of a third party voter registration agent, have been turned away at the polls because that agent failed to submit the voter's completed registration form.

Third, the law provides for its enforcement with reasonable fines and criminal penalties. *See* NMSA 1978, § 1-4-49(E). An individual who intentionally violates the provisions of Section 1-4-49 may be fined \$250 for each violation up to a total fine no greater than \$5,000. The violation is also subject to prosecution as a petty misdemeanor, the lowest level of criminal culpability in the New Mexico criminal system. Moreover, if the individual who has intentionally violated Section 1-4-49 is either a director of a third party registration organization or has decision-making authority in the voter registration activities of such an organization, the organization may also be held accountable for the violation. These provisions are intended to ensure that the individuals and organizations responsible for voter registration conduct that

threatens the integrity of our electoral system and ultimately leads to the disenfranchisement of New Mexico citizens are held accountable for their conduct.

A. The Forty-Eight Hour Submission Deadline.

Compliance with the statute has, to date, not proven difficult. Not only have there been no civil or criminal actions instituted under Section 1-4-49 since its passage in 2005, but third party registration agents have continuously operated during the same time period, including many of the Plaintiff organizations. *See* Rodriguez Aff., ¶¶ 25, 26; Fraher Aff., ¶¶ 15(a) and (b). Other third party registration agents have also conducted successful voter registration drives. The Association of Community Organizations for Reform Now, or ACORN, for example, registered its 65,000th voter of the 2008 election cycle on August 12, 2008. *See* Toulouse Aff., ¶ 8.¹

B. The Fifty-Form Limit.

Plaintiffs correctly note that Sections 1.10.25.8(c) and 1.10.25.10(b) of the New Mexico Administrative Code limit to fifty the number of blank voter registration forms an organization or individual may obtain at any one time. Plaintiffs also correctly note that both the Secretary of State and each of the County Clerks have regulatory discretion to provide more than fifty registration forms “for special events or circumstances.” 1.10.25.8(c) and 1.10.25.10(b) NMAC. The reason for the fifty-form limit is principally financial; the State must pay the printing costs for voter registration forms and thus cannot afford to provide them in unlimited number to anyone making such a request. Moreover, election officials must ensure that they keep a supply of registration forms sufficient to meet demand. It is simply unreasonable to expect a County

¹ It is instructive to note that the 65,000 voters registered by ACORN represents a number *thirteen times greater* than the highest aspirational number any of the Plaintiff organizations hope to register in this election cycle. *See* Fraher Aff., ¶ 15(c).

Clerk to give his or her office's entire cache of voter registration forms to any single individual or organization. There will, of course, be instances in which exceeding the fifty-form limit will be prudent and desirable. In recognition of that fact, the County Clerks and the Secretary of State have discretion to exceed that limit when the circumstances justify it.

That discretion has been reasonably exercised. For example, the Bernalillo County Clerk, recognizing the scale of ACORN's effort in the 2008 election cycle, has a standing agreement with ACORN to provide its registration agents with one hundred forms at a time.² See *Toulouse Aff.*, ¶ 7. To date, Defendant is not aware of any County Clerk rejecting a reasonable request to exceed the fifty-form limit. See *Lamb Aff.*, ¶ 10; *Dominguez Aff.*, ¶ 7.

C. The Training Requirement.

Many County Clerks require third party registration agents to attend a short training session before being certified to register others to vote. In Bernalillo County, the Clerk has set aside afternoon hours on Tuesday and Thursday of each week for such training sessions. See *Toulouse Aff.*, ¶ 5. Training is not by any means, however, limited only to those hours. The Bernalillo and Santa Fe County Clerks and the Secretary of State's Office are all available for training sessions after hours (including weekends) and at locations other than the Clerks' offices. See *Lamb Aff.*, ¶ 11; *Toulouse Aff.*, ¶ 5; *Dominguez Aff.*, ¶ 5. Arranging a training session at a mutually agreeable time and place requires no more than a call to the appropriate County Clerk, or even to the Secretary of State. Indeed, one Plaintiff organization has arranged such sessions with the Bernalillo County Clerk in the past. See *Fraher Aff.*, ¶ 19.

The training sessions run from fifteen minutes to an hour, depending on the size of the group being trained and the number of questions posed to the state or county official providing

² It is again worth noting that ACORN, even in the face of this limitation, has so far managed to register 65,000 new voters in New Mexico for this election cycle.

the training. See Lamb Aff., ¶ 11; Toulouse Aff., ¶ 6. Trainees are given informational pamphlets and a list of phone numbers they can call if they have additional questions. See Lamb Aff., ¶ 11. These facts belie Plaintiffs' claims that training sessions are arduous, difficult to schedule, and nearly impossible to attend.

III. ARGUMENT AND AUTHORITIES

Plaintiffs are not entitled to injunctive relief because they cannot meet the elements for such relief:

(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 & Transm. Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986). Plaintiffs fail on each count.

A. Plaintiffs Face No Threat of Irreparable Injury.

Plaintiffs contend that they will suffer irreparable injury absent an injunction from this Court prohibiting the enforcement of Section 1-4-49. Plaintiffs quote from *Elrod v. Burns*, 427 U.S. 347, 373 (1976) for the proposition that the chilling of Plaintiffs' speech by Section 1-4-49 "for even minimal periods of time, unquestionably constitutes irreparable injury." While this may be an accurate statement of First Amendment law, it is inapposite to this case.

In *Elrod*, the petitioners sought to enjoin the newly-elected Democratic sheriff of Cook County, Illinois from firing them based on their political party affiliation. In declaring such a patronage system unconstitutional, the Court noted that threatening one's job on the basis of political belief infringes on that person's freedom to associate with the political party of his or her choosing. See *Elrod*, 427 U.S. at 359 ("The threat of dismissal for failure to provide [support

for a political party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise.”). After reaching this conclusion, the Court briefly discussed the appropriateness of injunctive relief for the petitioners, leading to the language quoted in Plaintiffs’ Application. The facts of this case simply do not map onto *Elrod*.

First, Plaintiffs face no possibility of punishment because of the *content* of their speech. In contrast to the petitioners in *Elrod*, who faced termination because they were Republicans, no person or group can be penalized under Section 1-4-49 because of affiliation with a particular political party. Plaintiffs are free to associate with whomever they choose. Section 1-4-49 simply places reasonable limits on the *manner* in which Plaintiffs may conduct such association. In this regard, Section 1-4-49 is a content-neutral limitation on expressive activity, which is subject to intermediate, not strict, scrutiny. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

Second, Section 1-4-49 does not flatly prohibit Plaintiffs from helping others register to vote. To the extent Plaintiffs have curbed or, in some cases, halted altogether their voter registration efforts, they have done so by choice, not because the challenged law forces them to. Plaintiffs are free to continue voter registration activities so long as they do so competently.

Third, Plaintiffs have no reasonable apprehension of penalty or prosecution under Section 1-4-49. As discussed in greater detail below, compliance with the law is not difficult; in order to avoid penalty Plaintiffs must simply register with the Secretary of State, attend a short training session, and promptly submit completed voter registration cards. If Plaintiffs are capable of meeting these minimal requirements, Section 1-4-49 will have no adverse effect on their rights of speech and association.

Finally, it is worth noting that the law Plaintiffs challenge was enacted and effective in 2005. Plaintiffs have conducted voter registration drives regulated by Section 1-4-49. This casts serious doubt on any claim by Plaintiffs that they face imminent harm of irreparable damage.

B. The Threatened Damage to Plaintiffs Absent an Injunction Does Not Outweigh the Threatened Damage to the State if an Injunction Issues.

Plaintiffs assert that the State of New Mexico has no interest that could be legitimately harmed if the State is enjoined from enforcing an unconstitutional statute. This assertion turns, of course, on a determination that the statute is unconstitutional. As demonstrated below, it is not. The harm to the State of not enforcing Section 1-4-49 is neither minimal nor hypothetical. It is, in fact, because such harm has been done in the past that the legislature passed Section 1-4-49. As set forth more completely in the affidavit of Denise Lamb, there are multiple past instances of conduct by third party voter registration groups that lead directly to the disenfranchisement of New Mexican citizens. *See Lamb Affidavit*, ¶¶ 3-8. The State's interest in protecting the elective franchise is, of course, paramount. *See Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1617 (2008). Weighing this harm against the fact that Plaintiffs are free to engage in the behavior of their choice strongly indicates that injunctive relief would be inappropriate in this case.

C. The Requested Injunction Would Be Adverse to the Public Interest.

The public interest in this case is aligned with the State's interest – ensuring the integrity of the electoral process. Past incidents demonstrate that, absent Section 1-4-49, voter registration fraud and the disenfranchisement of New Mexican citizens are not only possible, but likely. An injunction from this Court prohibiting the enforcement of Section 1-4-49 is thus directly adverse to the public interest.

D. Plaintiffs Are Not Likely to Prevail on the Merits.

Plaintiffs contend that Section 1-4-49 violates both the United States and New Mexico Constitutions and is preempted by the National Voter Registration Act, 42 U.S.C. § 1973gg, *et seq.* These contentions fail. As a result, Plaintiffs are not likely to prevail on the merits of their claims and are not entitled to injunctive relief from this Court.

1. Section 1-4-49 does not violate the United States Constitution.

Contrary to Plaintiffs' assertions, Section 1-4-49 does not constitute a severe restriction on Plaintiffs' core expressive conduct. First, the law is subject to intermediate scrutiny, not the strict scrutiny urged by Plaintiffs. Second, Section 1-4-49 is narrowly tailored to serve a fundamental and compelling state interest, namely maintaining the integrity of the electoral system. Third, Section 1-4-49 is neither vague nor overbroad. Its terms are easily discernible and reach only that conduct properly subject to restriction.

a. The Court should apply either intermediate scrutiny or the *Anderson* balancing test in its analysis.

Plaintiffs erroneously contend that Section 1-4-49 is subject to strict scrutiny. Plaintiffs cite five cases in support of their strict scrutiny argument. The two United States Supreme Court cases Plaintiffs cite, *Meyer v. Grant*, 486 U.S. 414 (1988) and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), are inapplicable. In *Meyer*, the challenged law made it a felony to pay individuals to circulate petitions regarding proposed constitutional amendments. The Court applied strict scrutiny to that law because it restricted political expression in two ways:

First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

Meyer, 486 U.S. at 422-3 (footnote omitted).

In contrast, Section 1-4-49 does not limit the number of voices with which Plaintiffs may speak. It is true that a person cannot act as a third party registrar until he or she has completed training. But, as discussed below, the training requirement is hardly burdensome on Plaintiffs' speech. Moreover, as Plaintiffs themselves admit, Plaintiffs can engage in the political speech they seek to protect whether they are registering voters or not – nothing prohibits them from engaging others in “conversations concerning the issues of the day, political change, and the reasons why it is important to vote.” Memorandum of Points and Authorities in Support of Plaintiffs' Application for a Preliminary Injunction (“Plaintiffs' Memorandum”), pg. 14. *See also* Fraher Aff., ¶ 20.

Section 1-4-49 also has no effect analogous to the Colorado law's effect on the effort to collect petition signatures. Collecting those signatures was an important mechanism of making the matter “a focus of statewide attention,” a partisan effort to change a law. *See Meyer*, 426 U.S. at 423. Voter registration, however, is non-partisan; surely Plaintiffs would not refuse to register a potential voter because he or she intended to register with a political party to which Plaintiffs were philosophically opposed.

Village of Schaumburg dealt with an ordinance that prohibited door-to-door financial solicitations by any group that could not demonstrate that 75% of its income was donated to a charitable cause. The Court struck the ordinance down as overbroad, but did not employ a strict scrutiny test in doing so. Instead, the Court held that “[t]he Village may serve its legitimate interests, but it must do so by narrowly drawn

regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.” *Village of Schaumburg*, 444 U.S. at 637.³

Finally, only two federal courts have examined third party voter registration statutes. Plaintiffs cite to both of these cases in support of their argument that this Court should apply strict scrutiny to Section 1-4-49, but neither of those courts did so. In *League of Women Voters v. Cobb*, the court rejected both the strict scrutiny test urged by the plaintiffs and the rational basis test urged by the defendant:

According to Plaintiffs, because the Third-Party Voter Registration Law burdens their core political speech, the Court must subject the Law to strict scrutiny. Contrariwise, Defendants argue that the *Anderson* test is only utilized in ballot access cases, and that the Court should instead apply a rational basis test. Having carefully considered both parties’ arguments, the Court finds that the Law is most appropriately viewed as an election regulation, and thus will apply the *Anderson* test.

447 F. Supp. 2d 1314, 1332 n. 21 (S.D. Fla. 2006) (citations omitted).

In *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 701-02 (N.D. Ohio 2006), the court expressly rejected the strict scrutiny approach in favor of intermediate scrutiny:

Based on its limited review, the Court is inclined to believe that the appropriate level of scrutiny to be applied at this juncture of the proceedings is intermediate scrutiny. The Court reaches this conclusion because it finds that, while the interests impacted by the regulations are critical First Amendment rights, the burden imposed upon them by the regulations – though substantial (and, as will be discussed below, unnecessary) – are not likely to be characterized as “severe.” Thus, the question is whether the burdens imposed by the challenged regulations are justified in light of the articulated interests – specifically, do the regulations address a legitimate and important state interest, and do the

³ Indeed, as one commentator has observed, “It is by now well understood that burdens on the right to vote and the affiliated right to associate for political change need not trigger strict scrutiny. Rather, constitutional challenges to electoral mechanics are resolved using a nominal balancing test, under which the level of scrutiny purportedly varies with the “character and magnitude” of the associated burden.” Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 394 (2007).

regulations serve that interest in a way that is no greater than necessary in light of the importance of the interest.

As this review of the cited authority shows, strict scrutiny is improper in this case. Plaintiffs apparently concedes that this Court must perform an *Anderson* balancing test, but seem to argue that the *Anderson* test is itself performed through the lens of strict scrutiny. There is no authority for this novel proposition. Defendant urges this Court to apply either the intermediate scrutiny test adopted by the *Blackwell* court or the *Anderson* balancing test employed by the court in *League of Women Voters*. Ultimately, either analysis requires an examination of the severity of the burden the challenged law places on speech weighed against the interest asserted by the State in support of the law. The more severe the restriction, the more compelling the State interest must be.

In *Anderson v. Celebrezze*, the Supreme Court set forth the following standard for evaluating constitutional challenges to state election laws:

Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first 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 those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. 780, 789 (1983) (citation omitted). While there appears to be some confusion among federal courts in choosing and applying the standard for analyzing state election laws, there is nonetheless widespread acknowledgment that the *Anderson* test is most

appropriate. See *Crawford*, 128 S. Ct. at 1616; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (noting that “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”).

There seems to be little difference between the intermediate scrutiny test and the *Anderson* balancing test. Regardless of which test the Court applies, Section 1-4-49 is constitutional. First, it does not impose as severe a restriction on Plaintiffs’ speech rights as Plaintiffs contend. Second, the law serves New Mexico’s legitimate interest in a manner no more burdensome than necessary in light of the magnitude of that interest.

b. Section 1-4-49 is not a severe restriction on Plaintiffs’ First Amendment rights.

Plaintiffs argue that “‘interactive communication concerning political change,’ of the sort Plaintiffs engage in as part of their voter drives, is ‘core political speech.’” Plaintiffs’ Memorandum, pg. 17. As Plaintiffs acknowledge, however, they are able to engage in the “interactive communication concerning political change” separate and apart from helping a person register to vote. The act of aiding in a future voter’s registration is not itself political speech; the speech surrounding that act is often political, and Section 1-4-49 has no effect whatsoever on that speech. Even if Plaintiffs entirely cease their voter registration activity, they are still free to engage citizens in whatever political discussion they please.

Additionally, the decision to cease or reduce voter registration activities is an affirmative, volitional act. It is not compelled by the existence of Section 1-4-49. Indeed, as the affidavits

attached to Plaintiffs' Memorandum make clear, Plaintiffs have undertaken voter registration drives since the passage of Section 1-4-49 in 2005.⁴ None of them have been prosecuted or subject to any penalty under the law. This fact is important for two crucial reasons. First, it demonstrates that Plaintiffs can, in spite of Section 1-4-49, continue to actually register voters, conduct they now claim is "severely restricted." Second, it demonstrates that Plaintiffs' fear of prosecution or penalty under Section 1-4-49 is not entirely reasonable.

This second point is important in light of Plaintiffs' professed intentions to either halt or greatly reduce their voter registration activity. It is not enough, from a constitutional standpoint, for Plaintiffs to simply make that claim, or even to actually alter their behavior. The law does not give Plaintiffs so much control over the outcome of a constitutional analysis. Rather, Plaintiffs must demonstrate that it is reasonable, in light of the challenged law, to so alter their behavior. They are unable to do so in this case.

i. The pre-registration, disclosure, and training requirements of Section 1-4-49 are not unduly burdensome on Plaintiffs' First Amendment rights.

Plaintiffs first attack the law's pre-registration, disclosure, and training requirements, making three arguments: (1) training and pre-registration impose logistical barriers to speech; (2) the requirements prevent spontaneous speech; and (3) the requirements compel the disclosure of private information. None of these arguments is sufficient to show a "severe burden" on Plaintiffs' speech interests.

Plaintiffs contend that training and pre-registration take "significant amounts of time" and that training sessions "are typically scheduled during limited hours on weekdays."

⁴ Plaintiffs are not, of course, the only organizations attempting to register people to vote in New Mexico. As noted above, ACORN has managed to register 65,000 new voters in the still-ongoing 2008 election cycle alone, hardly evidence that Section 1-4-49 "severely restricts" third party voter registration activity.

Plaintiffs' Memorandum, pg. 19. Plaintiffs assert that they are burdened by the fact that training sessions are infrequent and conducted at inconvenient locations. These assertions do not bear scrutiny. Both the Secretary of State and the County Clerks in New Mexico are willing to make extensive accommodations for third party voter registration groups, and, in fact, have made such accommodations.⁵ Officials from the Bernalillo County Clerk's office have already conducted two training sessions on the campus of the University of New Mexico *this year*. See Fraher Aff., ¶ 19. Those sessions were obviously not conducted in the Clerk's office and were not held during the specified afternoon hours of which Plaintiffs complain.

These on-campus training sessions are not extraordinary. Election officials are willing to work with any group that requests a training session to schedule the session for a mutually agreeable time and place. See Lamb Aff., ¶ 11; Toulouse Aff., ¶ 5. Moreover, the training sessions are not the arduous, intimidating ordeals Plaintiffs describe. The sessions take anywhere from fifteen minutes to an hour, and provide the trainees with informational pamphlets as well as contact information for the appropriate election official should the trainees have any further questions. See Lamb Aff., ¶ 11; Toulouse Aff., ¶ 5.

Plaintiffs next argue that the pre-registration and training requirements prevent Plaintiffs "from conducting spontaneous voter-registration drives," thus infringing on "this vital category of core political speech and activity." Plaintiffs' Memorandum, pg. 21. This argument fails for three reasons.

⁵ For purposes of this lawsuit, only the Secretary of State and the Santa Fe and Bernalillo County Clerks are relevant, as only the Federation of Women's Clubs Overseas, Inc., and the Southwest Organizing Project claim to register voters outside of Santa Fe or Bernalillo County. In any event, the Secretary of State's office is both willing and able to conduct remote training sessions for people living outside of New Mexico's population center. See Dominguez Aff., ¶ 5.

First, as noted above, Section 1-4-49 does not prohibit or infringe upon Plaintiffs' ability to engage in the political speech that surrounds their voter registration efforts; that speech does not *depend* on, but merely coincides with, voter registration efforts. Assisting an individual in completing a voter registration form is not itself an expressive act protected by the First Amendment.

Second, while it may be true that Plaintiffs have used "spontaneous voter-registration drives" in the past, it does not necessarily follow that they are *entitled* to do so such that any burden on spontaneous registration drives is a violation of Plaintiffs' First Amendment rights. Plaintiffs are certainly entitled to spontaneously engage whomever they choose in speech of a political nature. Section 1-4-49 has no detrimental impact whatsoever on their ability to do so. Moreover, it is not Section 1-4-49 that prevents spontaneous registration drives, it is the manner in which Plaintiffs choose to conduct their business. If Plaintiffs will simply ensure that a sufficient number of their members have registered with the Secretary of State and attended one of the short training sessions offered by any number of New Mexico election officials, they will be prepared to register voters at any time they wish. But Plaintiffs' lack of adequate preparation is hardly an infringement on their rights of free speech and association.

Third, a state may constitutionally regulate the time, place, and manner of an organizations' speech, even if such regulation makes spontaneous speech difficult or impossible. For example, the federal courts have routinely upheld laws that require groups to obtain permits or licenses before gathering, marching, or protesting in public. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (upholding a New Hampshire law criminalizing parades or marches conducted without a permit); *Poulos v. New Hampshire*, 345 U.S. 395, 408 (1953) (upholding the same law against a challenge by a group holding a religious meeting in a public park);

Stonewall Union v. City of Columbus, 931 F.2d 1130, 1137 (6th Cir. 1991) (upholding an ordinance requiring groups to pay a fee and obtain a permit before conducting a parade). Thus, even if Section 1-4-49 somehow prevented Plaintiffs from spontaneously engaging in political speech, which it does not, the regulation would be constitutionally permissible.

Plaintiffs next contend that because Section 1-4-49 discourages participation in Plaintiffs' voter registration efforts because it requires third party voter registration agents to identify, in a public document, their membership in the Plaintiff organization. More specifically, Plaintiff AAPD asserts that many of its volunteers do not wish to be publicly tied to the organization. The identification of a group's members is principally important only as it identifies those members of the organization who are either officers or have decision-making authority with regard to the group's voter registration activities. *See* NMSA 1978, § 1-4-49(d). To the extent the officers of AAPD are publicly known to hold their respective positions within the organization, Section 1-4-49 places no additional burden on them.

ii. The fifty form limit does not significantly inhibit Plaintiffs' voter registration efforts.

Plaintiffs contend that the fifty form limit in sections 1.10.25.8(C) and 1.10.25.10(B) of the New Mexico Administrative Code, along with the grant of "standardless discretion by the Secretary of State and County Clerks . . . constitute a severe burden on Plaintiffs' speech and associational rights." Plaintiffs' Memorandum, pg. 24. The fifty form limit, however, presents no difficulty to Plaintiffs or to any other similar organization.

Plaintiffs first argue that the existence of the limitation makes large scale voter registration drives impractical, and forces Plaintiffs to either limit their drives (and thus their speech) or take time from a successful drive to obtain additional forms. This argument fails for three reasons. First, the fifty form limit is far from absolute. Special dispensation is made for

groups who need additional forms, and no reasonable request for additional forms has been refused by any election official. *See* Lamb Aff., ¶ 10; Toulouse Aff., ¶ 7; Dominguez Aff., ¶ 7. Second, Plaintiffs are free to use the federal voter registration form made available online pursuant to the National Voter Registration Act, so long as each form submitted to the State includes the third party registration agent's identification number. Plaintiffs are obviously not limited by the State of New Mexico in the number of federal voter registration forms they download from the Internet. Third, Plaintiffs' concerns regarding large scale voter registration drives are little more than a red herring. None of the Plaintiffs have *ever* registered more than 1,000 voters in any given election cycle, and the largest aspirational number of voter registrations identified by any Plaintiff for the 2008 election cycle is 5,000. *See* Fraher Aff., ¶ 15(c); Rodriguez Aff., ¶ 9.⁶ Since both registered individuals *and* organizations can obtain registration forms from the Secretary of State, *see* 1.10.25.8(C) NMAC, even if the fifty form limit were strictly applied to Plaintiffs, it is unlikely that it would significantly interfere with their stated voter registration goals for this election cycle.

Plaintiffs next argue that 1.10.25.8(C) and 1.10.25.10(B) NMAC are unconstitutional because they give discretion to the Secretary of State and the County Clerks, respectively, to deviate from the fifty form limit, but "provide no guidance as to how this discretion should be exercised." Plaintiffs' Memorandum, pg. 25. Plaintiffs then cite several Supreme Court opinions for the proposition that statutes "implicating First Amendment interests that vest local

⁶ There is also some question as to whether the burden imposed by the fifty form limit is greater than any burden Plaintiffs have faced in the past. Plaintiff Southwest Organizing Project, for example had difficulty obtaining forms in 2004, the year *before* Section 1-4-49 was passed. *See* Rodriguez Aff., ¶ 33. Indeed, to the extent those difficulties stemmed from "inconsistent and unclear rules with respect to obtaining forms," *id.*, the challenged regulations, by providing consistency and clarity, should *lessen* this burden.

officials with unfettered discretionary power to permit or curtail speech” are unconstitutional. *Id.* This line of case law is inapposite in this case.

First, Plaintiffs stretch the application of the challenged provisions in claiming that they vest the Secretary of State and the County Clerks with “unfettered discretionary power to permit or curtail speech.” Unlike the ordinances and laws challenged in the cases cited by Plaintiffs, Sections 1.10.25.8(C) and 1.10.25.10(B) do not directly permit or curtail speech. *Compare, e.g., City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (striking down an anti-loitering ordinance in part because it gave excessive discretion to police in determining what activities constituted loitering). And, even assuming that the provision of blank voter registration cards is a speech act, the discretion granted by the provisions Plaintiffs challenge cannot be used to *curtail* speech, because that discretion can only be exercised to *increase* the number of forms available.

Moreover, the challenged provisions do not provide “unfettered” discretion, but instead give some guidance to the Secretary of State and the County Clerks in its application; additional forms may be provided “for special events or circumstances.” *See* 1.10.25.8(C) and 1.10.25.10(B) NMAC. A large scale voter registration drive by a reputable organization such as any of the Plaintiffs likely constitutes either a special event or a special circumstance under these regulations. Should Plaintiffs request additional forms, they are likely to receive them.

iii. The forty-eight hour deadline does not unduly burden Plaintiffs’ speech.

Plaintiffs allege that requiring them to submit voter registration forms within forty eight hours of completion “significantly increases the cost that Plaintiffs incur per registration.” Plaintiffs’ Memorandum, pg. 26. It is unclear, however, exactly how that cost increase occurs. In any event, such costs are minimal, and take the form of either personally visiting an election official’s office or using the United States mails.

Plaintiffs point to the *League of Women Voters* case in Florida as an example of a federal court striking down a deadline on the submission by third party voter registration agents of completed voter registration forms. There are, however, two significant differences between the law at issue in *League of Women Voters* and the law before this Court.

First, Florida already had a law providing for fines and criminal penalties for those who, among other things, “obstruct or delay the delivery of a voter registration form or election ballot.” See Fla. Stat. Ann. § 104.0615(4). There is no corresponding statute in New Mexico. The existence of this statute was significant to the *League of Women Voters* court:

Next, Defendants have not addressed why the Third-Party Voter Registration Law’s civil penalties scheme is necessary given that Florida law already imposes criminal penalties on those who “knowingly destroy, mutilate, or deface a voter registration form or an election ballot or obstruct or delay the delivery of a voter registration form or election ballot.” The criminal law allows for both jail and monetary fines, and addresses Defendant’s core concerns of holding organizations accountable and preventing fraud.

League of Women Voters, 447 F. Supp. 2d at 1338 (citation omitted). Indeed, the State of Florida did not make an attempt to justify the penalties, arguing instead that there was significant discretion in applying the fines and an opportunity to contest the application of any fine. *Id.* Also, significantly, the *League of Women Voters* court did not discuss whether a ten-day deadline was burdensome; the court focused instead on the severity of the fines imposed. *Id.* at 1338-39. Consequently, *League of Women Voters* does not stand for the proposition that a forty-eight hour deadline is unconstitutional.

The severity of the fines at issue is, of course, the second important distinction between *League of Women Voters* and the case at bar. The Florida law set out three categories of fines: (1) a fine of \$250 for each application turned in to an election official beyond the ten-day deadline; (2) a fine of \$500 for each application turned in to an election official after the date on

which a voter must submit an application to be eligible to vote in the next upcoming election; and (3) a fine of \$5,000 for each application collected by a third party registration agent but never submitted to the appropriate election official. *See Fla. Stat. Ann. § 97.0575(3)(a)-(c)*. Moreover, the Florida law did not provide for any cap on the specified fines.

New Mexico's penalties are substantially less severe. A violation of Section 1-4-49 is punishable by a "civil penalty of two hundred fifty dollars (\$250) for each violation, not to exceed five thousand dollars (\$5,000)." NMSA 1978, § 1-4-49(D). Plaintiffs' contend that these fines are oppressive, but Plaintiffs are hardly faced with the "threat of crippling fines" that confronted the Florida organizations. *League of Women Voters*, 447 F. Supp. 2d at 1339.

It is illuminating to see Plaintiffs' candid explanation of why a forty-eight hour deadline is difficult for them to meet – because they want to take the time to enter the names and addresses of the voters they register in their databases for future political and civic undertakings. *See Fraher Aff.*, ¶ 23 ("Before returning voter registration forms, Students for NMPIRG members must count them, review them, *enter the information into our database*, and return them. *Complying with the 48-hour deadline gives us less time to review forms.*") (emphasis added). While it is understandable that an organization such as NMPIRG would want to build its database in such a manner, it is not constitutionally entitled to do so. *See Zemel v. Rusk*, 381 U.S. 1, 17, (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.") To the extent compliance with the forty-eight hour requirement is difficult for Plaintiffs because of internal policies such as this, that difficulty is of no constitutional importance.

Finally, Plaintiffs complain that the forty-eight hour deadline, combined with the penalties provided in Section 1-4-49, make it difficult to recruit volunteers because prospective

volunteers are afraid that they may, through their own negligence, accidentally misplace completed voter registration forms. *See Fraher Aff.*, ¶ 25; *Tessneer Aff.*, ¶ 18. This argument is also of no constitutional significance. The same fear would grip the same volunteers if the Section 1-4-49 required that forms be submitted by book closing rather than within forty-eight hours of their completion. A third party registration agent who had misplaced or forgotten about completed voter registration forms would still face potential penalty. This highlights the reason for the forty-eight hour deadline – if the forms are not returned, the affected voters are wholly disenfranchised. The fear that they will not be able to competently register voters is not a sufficient basis on which to sustain Plaintiffs’ challenge to Section 1-4-49.

iv. The civil and criminal penalties for violations of Section 1-4-49 are appropriate.

As noted above, the penalties assessed for violations of Section 1-4-49 are minimal. No individual fine may exceed \$250, and no individual or organization can be fined more than \$5,000 in the aggregate. Additionally, the only criminal penalty available is prosecution for a petty misdemeanor, the lowest level of criminal culpability. Plaintiffs contend that the penalties under Section 1-4-49 are particularly susceptible because they are strict liability penalties. It is not, however, at all clear that this is the case.

Section 1-4-49(D) provides, in part, that “[a] person who intentionally violates the provisions of this section is guilty of a petty misdemeanor” The use of the word “intentionally” in this statute suggests that an individual or organization may only be criminally prosecuted for taking action intended to violate the statute. *See, e.g., People v. Whitney*, 228 Mich. App. 230, 253, 578 N.W.2d 329 (Mich. App. 1998) (holding that a statute providing for a fine of up to \$1,000 for a public official who “intentionally violates” the Michigan Open Meetings Act required three elements: “(1) the defendant is a member of a public body, (2) the

defendant actually violated the OMA in some fashion, and (3) the defendant intended to violate the OMA.”).

The civil penalties described in Section 1-4-49(E) apply to non-intentional conduct. This fact alone, however, is insufficient to render those penalties unconstitutional. They are still subject to the *Anderson* balancing test, and application of that test weighs in favor of the State. Plaintiffs’ principal concern appears to be that their members will be subject to civil penalty for inadvertently failing to submit completed registration forms to the appropriate election official within forty-eight hours of the forms’ completion. Given the ultimate consequence of failing to submit completed forms, *i.e.*, the disenfranchisement of potential voters, such liability is not only sensible and fair, but necessary. *See Barreto Report*, pp. 5-6.

It is important to note that the Southern District of Florida, examining Florida’s third party voter registration law in the wake of *League of Women Voters*, rejected an application for a preliminary injunction against Florida’s amended law. One of the bases on which the plaintiffs’ challenge rested was the strict liability imposed on violators of the law, excepting only situations in which the failure to submit a completed voter registration form results from force majeure or impossibility of performance. The court rejected this argument and refused to declare the amended Florida law unconstitutional. *See League of Women Voters v. Browning*, No. 08-21243-CIV-ALTONAGA (S.D. Fla., Aug. 6, 2008).

Plaintiffs next argue that the challenged law “allows the Secretary of State to exercise standardless, and potentially discriminatory, discretion regarding the referral of civil enforcement actions.” Plaintiffs’ Memorandum, pg. 30. This is a misreading of the pertinent provision. The law states that “[i]f the secretary of state reasonably believes that a person committed a violation of the provisions of this section, the secretary of state *shall* refer the matter to the attorney

general or a district attorney for enforcement.” NMSA 1978, § 1-4-49(E). Thus, the Secretary of State has no discretion in making a referral for enforcement; the phrase “reasonably believes” is a limitation on the cases that may be referred, not a grant of discretion to refer whomever the Secretary of State chooses. To the extent there is any discretion involved in the enforcement of Section 1-4-49, it is prosecutorial discretion, which is, beyond peradventure, legitimate. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

Finally, Plaintiffs erroneously contend that New Mexico law already punishes the conduct at issue in Section 1-4-49. Citing to NMSA 1978, § 1-20-9, Plaintiffs call the penalties in Section 1-4-49 “entirely superfluous.” Plaintiffs’ Memorandum, pg. 31. Section 1-4-49 reaches very different conduct than Section 1-20-9, which deals only with the falsification of election documents. Section 1-20-9 would not, for example, apply to a third party voter registration agent who failed to submit a completed voter registration form. Section 1-4-49 clearly would, and is thus not redundant of other law.⁷

Ultimately, the available facts simply do not support Plaintiffs’ assertions regarding the severity of the burden Section 1-4-49 places on their voter registration activity. ACORN, as one example, continues to register large numbers of voters. The New Mexico chapter of the League of Conservation Voters, formerly headed by current Bernalillo County Clerk Maggie Toulouse Oliver, also felt no burdensome impact from the requirements of Section 1-4-49, registering as

⁷ Interestingly, Plaintiffs make no argument that Section 1-20-9 would be unconstitutional as applied to them. This is either an admission that Section 1-4-49 is not rendered superfluous by Section 1-20-9 or an admission that the penalties in Section 1-4-49 are constitutional.

many voters after the passage of the law as before it. *See Toulouse Aff.*, ¶ 3. The empirical evidence thus strongly suggests that Plaintiffs' claims regarding the burdensome effect of Section 1-4-49 on their protected speech interests is overstated.

c. Section 1-4-49 serves New Mexico's compelling state interest in the integrity of its electoral process in a manner no more burdensome than necessary.

The state interest animating the passage of Section 1-4-49 is both obvious and weighty – the protection of our electoral system. In *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), the Supreme Court considered an Indiana law that required voters to produce valid photo ID at the polls before being allowed to vote. The Court upheld the law, and identified powerful state interests supporting it that were “unquestionably relevant to the State’s interest in protecting the integrity and reliability of the electoral process.” *Id.* at 1617. The Court acknowledged the “legitimacy [and] importance of the State’s interest in counting only the votes of eligible voters,” *Id.* at 1619, and also the interest in protecting public confidence in the electoral system. Regarding the latter, the Court noted that “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Id.* at 1620.

These interests, along with the interest of ensuring that New Mexico voters are not disenfranchised, justify Section 1-4-49. There is no real dispute that these interests are overpowering. Nonetheless, and perhaps because of the strength of these interest, Plaintiffs attempt in various portions of their Memorandum to characterize New Mexico’s interest much more narrowly.

First, Plaintiffs argue that “there is no justification for requiring pre-registration in advance of returning voter-registration certificates.” Plaintiffs’ Memorandum, pg. 22. Plaintiffs

suggest that a law “requiring registration contemporaneous with the return of the forms . . . would be significantly less burdensome.” *Id.* There is, however, no explanation of why contemporaneous registration would, in fact, be less burdensome. In either case, the third party agent must complete the same form and provide it to the same election official. Moreover, there is a justification for requiring pre-registration, namely that the State keeps a finite supply of voter registration forms and simply cannot afford to provide them to organizations or individuals who are unlikely to use them for their intended purpose. Pre-registration provides some assurance that the third party registration agent will actually use the forms to register additional voters.

Next, Plaintiffs contend that there is no justification for the training performed by the County Clerks and the Secretary of State. The justification for such training is, however, self-evident. The training provides third party registration agents with important information about the voter registration process. It helps ensure that those agents competently perform the task they have set out for themselves. *See Dominguez Aff.*, ¶ 6; *Toulouse Aff.*, ¶ 6. This, in turn, ensures that the putative voters signed up by the third party agent are actually registered to vote and thereby allowed to participate in the election process.

Third, Plaintiffs note that state agencies are given ten days, not forty-eight hours, in which to transmit a completed voter registration form to the appropriate election official, *see* NMSA 1978, § 1-4-48(D), and argue that the State “can provide no justification” for the differential treatment. That justification, however, is clear. State agencies that routinely receive completed voter registration forms have been, in essence, thoroughly vetted as voter registration agents. Many organizations that seek to assist in voter registration have not and, indeed, many have proven incompetent in completing the task. *See Lamb Aff.*, ¶¶ 3-8. The state agencies operating under Section 1-4-48 are not similarly situated to organizations such as Plaintiffs.

Finally, Plaintiffs contend that the fines applicable under Section 1-4-49 are not necessary to serve a state interest. Plaintiffs' Memorandum, pg. 30. First, this argument assumes the application of a strict scrutiny standard, which is inappropriate in this case. The question is instead whether the State's interest in levying the fines outweighs whatever burden the fine may represent to a violator's free speech rights. The burden, as discussed above, is minimal; the State's interest is not.

Section 1-4-49 was not passed in reaction to hypothetical or imaginary harms to our electoral system. A few examples serve to illustrate the point:

- In 1999, members of the Libertarian Party fraudulently registered eight hundred already-registered voters as Libertarians. *See* Lamb Aff., ¶¶ 4, 5.
- After the 2000 general election, members of the Democratic Party in New Mexico discovered approximately two hundred completed voter registration forms that members of the party had gathered but never submitted to the appropriate election official.⁸ *See* Lamb Aff., ¶ 6.
- In the 2004 election, the failure of a third party registration organization to submit completed voter registration forms resulted in sixty or seventy young voters being turned away at the polls. *See* Lamb Aff., ¶ 7.
- Also in 2004, ACORN allegedly registered a fourteen-year old boy to vote in Bernalillo County. *See* Lamb Aff., ¶ 8.

As *Crawford* indicates, the prevention of voter fraud is a paramount state interest. So, too, is guarding against the disenfranchisement of a state's citizens. If third party registration agents engage in voter registration fraud, they have harmed the electoral system. If third party voter registration agents fail to submit completed voter registration forms, they will ultimately decrease voter participation because the voter who was unexpectedly turned away at the polls is

⁸ Section 1-4-49 includes political parties as third party registration agents. *See* NMSA 1978, § 1-4-49(A). Political parties must therefore comply with the same requirements as other groups, a significant difference between New Mexico's law and the one struck down in *League of Women Voters*. *See League of Women Voters*, 447 F. Supp. 2d at 1335.

unlikely to return. *See* Barreto Report, pp. 4, 5. Moreover, the voters most likely to be affected by such conduct are precisely the kind of voters Plaintiffs profess to empower: young voters, the elderly, and minorities. *Id.* at 5. Ultimately, New Mexico's interests in passing Section 1-4-49 are both to protect the electoral system from fraud and to guarantee participation in our democratic system.

Section 1-4-49 is properly constructed to meet these interests and is thus constitutional under *Anderson*. The first step is considering the "character and magnitude of the asserted injury" to Plaintiffs' First Amendment rights. *Anderson*, 460 U.S. at 789. This is *not* a consideration of the character and magnitude of the right itself. There is no doubt that the speech surrounding Plaintiffs' voter registration efforts is significant and worthy of constitutional protection. This Court must instead focus on the injury alleged by Plaintiffs.

That injury is insignificant. First, Section 1-4-49 has no impact whatsoever on Plaintiffs' ability to discuss political and civic issues with whomever they choose. Second, compliance with Section 1-4-49 requires minimal effort on Plaintiffs' part; indeed, it only requires Plaintiffs to competently perform the task they have set out to accomplish. To avoid penalty under Section 1-4-49, Plaintiffs must: (1) fill out a short registration form and submit it to the Secretary of State;⁹ (2) ensure that their third party voter registration agent number appears on every completed voter registration form they submit to either the Secretary of State or a County Clerk; and (3) place in the mail or personally deliver, within forty-eight hours, each completed registration certificate. As fully discussed above, none of these requirements place a substantial burden on Plaintiffs' voter registration efforts. The success of similar organizations, in this and in previous election cycles, very strongly suggests that Plaintiffs' claims are overstated.

⁹ A copy of the registration form is attached as Exhibit E to Plaintiffs' Memorandum. It consists of a single page including a declaration that the agent will abide by New Mexico election law.

The second step in the *Anderson* analysis is the identification and evaluation of “the precise interests put forward by the State” to justify the challenged law. *Anderson*, 460 U.S. at 789. Those interests are maintaining the integrity of the electoral system and protecting the election franchise of New Mexico citizens, interests of paramount importance. As previously demonstrated, the potential harm to those interests addressed by Section 1-4-49 is not hypothetical.

The final step in the *Anderson* analysis is weighing the “legitimacy and strength” of the State’s interests in light of “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789. The legitimacy and strength of New Mexico’s interests implicated by Section 1-4-49 are unquestionable. And, as the past conduct of third party voter registration organizations has shown, the protection of those interests absolutely demands the regulation of third party voter registration activity. Consequently, application of the *Anderson* test to Section 1-4-49 and to Title 1, Chapter 10, Part 25 of the New Mexico Administrative Code compels the conclusion that the challenged laws are constitutional.

d. Section 1-4-49 is neither vague nor overbroad.

Plaintiffs’ first argument regarding the alleged vagueness of Section 1-4-49 is that it does not sufficiently define the term “assist” in subsection A. Plaintiffs therefore posit that the law could apply to “a teacher who distributes forms to her students[] but does not complete them or collect them.” Plaintiffs’ Memorandum, pg. 32. “Assist,” as that term is used in Section 1-4-49(A) clearly encompasses more than simply providing a registration form to a potential voter. It must be something more than a but-for cause of a voter’s registration. Indeed, the evidence Plaintiffs’ identify as “compound[ing] the confusion,” Plaintiffs’ Memorandum, pg. 32 n. 7, does quite the opposite. As Plaintiffs’ note, the voter registration form provided by the Secretary of

State indicates that registration agents who assist in the completion of the form must include their registration number on the form. This clearly contemplates more than merely providing the form to the potential voter.

Plaintiffs claim that they “have no way to determine if their conduct obligates them to comply with the statute’s many requirements.” Plaintiffs’ Memorandum, pg. 33. Accepting this claim requires the suspension of credulity. If Plaintiffs provide substantive assistance to a voter in completing a voter registration form, they have assisted that voter for purposes of Section 1-4-49(A). More importantly, if a third party voter registration agent takes physical custody of a completed registration form, whether that agent assisted in its completion or not, the agent is now responsible for ensuring that the form is timely submitted to the appropriate election official. This is, of course, the entire point of voter registration drives; such drives result in increased voter registration because the organization conducting the drive has reduced the transaction costs of registration for the individual voters.

Ultimately, an organization can hand out as many blank voter registration forms as it pleases. But once an organization has affirmatively taken it upon itself to facilitate the registration process, it must do so competently and in a way that ensures the actual registration of the voter. These requirements are plainly evident from the face of Section 1-4-49, and Plaintiffs’ contention that the law is unconstitutionally vague fails.

2. Section 1-4-49 does not violate the New Mexico Constitution.

Plaintiffs claim that, because “New Mexico courts ‘have interpreted [the] state constitution to provide broader protection than the First Amendment,’” Plaintiffs’ Memorandum, pg. 41 (quoting *State v. Rendleman*, 2003-NMCA-150, ¶ 57, 134 N.M. 744), Section 1-4-49 violates Article II, § 17 of the New Mexico Constitution. Plaintiffs do not, however, provide any

analysis in support of this claim. It is, of course, insufficient to simply note that the New Mexico Constitution is more protective of speech than its federal counterpart; Plaintiffs' must still explain *why* the challenged law runs afoul of Article II, § 17. They fail to do so.

Plaintiffs also, somewhat quixotically, contend that Section 1-4-49 violates Article II, § 8 and Article VII, § 1 of the New Mexico Constitution because it “wreaks havoc on ‘free,’ ‘open,’ and ‘pure’ elections by severely burdening Plaintiffs’ political speech and electoral participation.” Plaintiffs’ Memorandum, pg. 42. This claim, of course, begs the ultimate question of whether Plaintiffs’ conduct, and the conduct of similar organizations, contributes to free, open, and pure elections. Plaintiffs argue that such elections demand that organizations “be free to advocate their positions and participate in the electoral process without undue burden.” *Id.* But Plaintiffs *are* free to do so; they are entirely free to advocate their positions as vociferously as they like. They are also free to participate in the electoral process by assisting others in the voter registration process. They must simply ensure that in doing so they do not ultimately disenfranchise any of the voters they intend to help.

Plaintiffs provide no analysis in support of their claim that Section 1-4-49 violates the New Mexico Constitution. For the same reasons that the law complies with the mandates of the United States Constitution, it also complies with the mandates of our state constitution. Plaintiffs’ claim fails.

3. The National Voter Registration Act does not preempt Section 1-4-49.

Finally, Plaintiffs argue that Section 1-4-49 conflicts with the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*, and thus falls under the doctrine of federal preemption. First, Plaintiffs contend that any attempt to apply Section 1-4-49 to federally proscribed voter registration forms is “a flagrant violation of the NVRA.” Plaintiffs’ Memorandum, pg. 36.

Plaintiffs do not, however, explain why. Section 1-4-49 certainly does not prohibit or even limit the use of the federal form to which Plaintiffs refer. It simply regulates the *conduct* of a third party registration agent using such a form. Section 1-4-49 thus neither prevents New Mexico from making the federal form “available for distribution,” as required by U.S.C. § 1973gg-4(b), nor prevents New Mexico from “accept[ing] and us[ing]” such forms as required by U.S.C. § 1973gg-4(a).

Plaintiffs also claim that Section 1-4-49 runs afoul of the purposes of the NVRA. Plaintiffs appear to have lost sight, however, of the class of persons for whose benefit the NVRA was enacted. That class is, of course, the voting age public. The law is *not* concerned with third party voter registration agents. Plaintiffs assume that the interests of such agents are perfectly aligned with the interests of potential voters. Unfortunately, this is not always the case, and even when it is, it is only to the extent of the competence of the third party registration agent. There is no doubt that third party agent conduct resulting in the disenfranchisement of voters is not the conduct Congress intended with the passage of the NVRA.

Plaintiffs next argue that the challenged laws violate the NVRA because they make it more difficult for Plaintiffs to conduct voter registration drives. Specifically, Plaintiffs target the training requirement and the fifty form limit as the offending provisions. As noted above, if Plaintiffs need more than fifty forms at a time, they can easily obtain them. They are also free to use the federal registration form so long as the individual submitting the form includes his or her registration number on that form. And the training of which Plaintiffs complain is easy to

arrange and complete. Those requirements therefore do not burden Plaintiffs' voter registration activities such that Section 1-4-49 conflicts with the NVRA.¹⁰

Plaintiffs also contend that Section 1-4-49 violates the NVRA because "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." Plaintiffs' Memorandum, pg. 38. Section 1-4-49 allegedly conflicts with these provisions of the NVRA because Section 1-4-49 mandates "return of forms within forty-eight hours without regard to the book-closing date." *Id.* This conflict is entirely illusory. The NVRA is only concerned with ensuring that a state will allow a citizen to register to vote so long as the registration arrives before book closing. Under Section 1-4-49, a citizen registered to vote by a third party voter registration agent will be added to the rolls if his or her form is received before book closing regardless of whether the third party agent submitted it within forty-eight hours of its completion. Here again, both Section 1-4-49 and the NVRA are concerned with the rights of voters, and there is no conflict.

Plaintiffs also assert that "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 the 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." Plaintiffs' Memorandum, pg. 38. It is, of course, very easy to conceive of a more direct conflict, namely a state law that prohibited the use of federal voter registration forms. Section 1-4-49 has no such effect. Plaintiffs are free to use the federal form. Moreover, the NVRA, as principles of

¹⁰ Moreover, because the challenged laws are intended to ensure participation in the electoral process by guarding against voter disenfranchisement, their purpose is entirely aligned with the NVRA.

federalism demand it must, allows states to regulate their own elections. There is nothing sacrosanct about the federal voter registration form, and the NVRA certainly does not prohibit a state from regulating the behavior of third party voter registration efforts. If a third party voter registration agent disenfranchises voters, the agent should be accountable whether it used the New Mexico or federal form to do so.

Finally, Plaintiffs claim that Section 1-4-49 precludes the use of the federal form and that, by discouraging voter registration drives, the law has “a direct and damaging effect on voter participation . . . and disproportionately harm[s] voter participation by various groups.” Plaintiffs’ Memorandum, pg. 39 (quoting U.S.C. § 1973gg(a)(3)). These claims fail. As to the first, to the extent Plaintiffs have been told they cannot use a federal voter registration form, they have been misinformed. To comply with Section 1-4-49, they only need include their registration number on each form they submit.

Regarding the alleged impact on voter participation, Plaintiffs here point to their reliance on casual volunteers. This argument is addressed above, and fails here for those same reasons. Plaintiffs’ claim that Section 1-4-49 disproportionately affects “young, minority, disabled, and low-income citizens of New Mexico” is without merit. While it may be true that these are the groups that Plaintiffs target in their voter registration efforts, there is no evidence suggesting that *every* such effort carried out by organizations not a party to this lawsuit is targeted at the same groups. Thus, to the extent Section 1-4-49 burdens voter registration efforts, it does so without regard to the class of voters targeted by the third party registration agent. Moreover, Section 1-4-49 actually *protects* this class of potential voters by ensuring that they are not disenfranchised due to the negligent or willful conduct of a third party registration agent. Such

disenfranchisement is devastating to participatory democracy, particularly among the groups identified by Plaintiffs. *See* Barreto Report, pp. 4-6.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court: (1) deny Plaintiffs' application for a preliminary injunction; (2) order all parties to pay their own costs; and (3) provide Defendant any additional relief to which she may be entitled.

DATED: August 15, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing motion on Plaintiffs' counsel of record via electronic filing with the CM/ECF filing system on August 15, 2008.

/s/ Scott Fuqua
Scott Fuqua