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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 positively 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. This Court has already held that Plaintiffs were not entitled to injunctive relief on the basis that Section 1-4-49 is constitutional under the balancing test established by the Supreme Court. Defendant accordingly seeks dismissal of Plaintiffs’ Amended Complaint pursuant to Rule 12(b)(6) on the same basis.

II. STATEMENT OF FACTS

In 2005, the New Mexico legislature in 2005 passed NMSA 1978, § 1-4-49. The law is designed to address 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 ensures 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.

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. An intentional 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 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.

In addition to the language of Section 1-4-49, the Secretary of State has enacted administrative rules that regulate the conduct of third party voter registration agents. At issue in this lawsuit are Sections 1.10.25.8(c) and 1.10.25.10(b) of the New Mexico Administrative

Code, which limit to fifty the number of blank voter registration forms an organization or individual may obtain at any one time. 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. But, in recognition of the fact that circumstances may exist justifying the disbursement of more than fifty forms at a time, the County Clerks and the Secretary of State have discretion to exceed that limit.

Plaintiffs also attack the *de facto* training requirements imposed by various County Clerks on third party registration agents. Such training is not required by either Section 1-4-49 or the rules promulgated thereunder by the Secretary of State. Contrary to Plaintiffs’ assertions, such training does not substantially burden their First or Fourteenth Amendment rights.

III. ARGUMENT AND AUTHORITIES

This Court should dismiss Plaintiffs’ Amended Complaint in its entirety. Section 1-4-49 is a reasonably restricted means of accomplishing an important state interest, namely safeguarding the integrity of the elective franchise. Under the Supreme Court’s balancing test, the challenged laws are constitutional and Plaintiffs have thus failed to state a cause of action upon which relief can be granted.

A. The Constitutionality Of Section 1-4-49 Is Properly Determined Through The *Anderson* Balancing Test.

In denying Plaintiffs’ preliminary injunction application, this Court rejected Plaintiffs’ contention that the challenged laws are subject to strict scrutiny and instead applied the balancing

test established by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). This Court is not the only tribunal to do so. In *League of Women Voters v. Cobb*, 447 F. Supp. 1314, 1332 (S.D. Fla. 2006) the court, in examining a Florida law regulating third party voter registration agents, rejected the plaintiff's contention that the statute was subject to strict scrutiny. Instead, the court applied the *Anderson* test. *Id.* at 1332 n. 21. Similarly, in *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 701-02 (N.D. Ohio 2006), the court expressly rejected the strict scrutiny approach urged by the plaintiff.¹

In *Anderson*, 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*

¹ 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).

Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 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.”).

Section 1-4-49 meets the *Anderson* standard and is thus 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 Does Not Severely Restrict Plaintiffs’ First Amendment Rights.

Plaintiffs’ first cause of action alleges that Section 1-4-49 violates their First and Fourteenth Amendment rights by imposing severe burdens on their rights by directly limiting the expressive conduct that is assisting a citizen in the voter registration process (Amended Complaint, ¶¶ 101, 102), by limiting core political speech that is “inextricably intertwined” with voter registration activities (Amended Complaint, ¶ 104), and by burdening Plaintiffs’ ability to associate with potential voters and individuals who may later decide to serve as a volunteer in one of the Plaintiffs’ organizations (Amended Complaint, ¶¶ 109-113). Plaintiffs also contend that the challenged law is vague and overbroad. *Id.*, ¶¶ 122, 123. These claims fail.

1. The act of assisting in the voter registration process is not expressive conduct protected by the First Amendment.

As an initial matter, the act of assisting a person in the voter registration process is not in and of itself a speech act. It is, instead, purely ministerial conduct. Plaintiffs contend that by assisting in the voter registration process, they “are sending a message about the ability of people

and organizations to initiate collective action.” Amended Complaint, ¶ 101. Plaintiffs place far too much significance on the voter registration process as a communicative act. First, Plaintiffs fail to identify to whom this message is allegedly communicated. Second, Plaintiffs true speech acts – discussing the pressing issues of the day and communicating “their belief in democracy and in the political empowerment of underrepresented communities” (Amended Complaint, ¶ 102) – are incidental to the process of voter registration. Contrary to Plaintiffs’ assertions, the act of assisting a voter in filling out a voter registration card communicates nothing more than the willingness to do so. Even if voter registration is itself protected First Amendment conduct, as described more particularly below, Section 1-4-49 does not unduly burden that conduct.

2. Section 1-4-49 does not burden either Plaintiffs’ protected speech incidental to the process of voter registration or Plaintiffs’ expressive association.

Plaintiffs contend that by virtue of their voter registration activities, they engage in political speech with potential voters. Amended Complaint, ¶¶ 104-107. Section 1-4-49 has no affect whatsoever on that speech. Plaintiffs are free to engage whomever they choose in such conversations separate and apart from helping a person register to vote. Even if Plaintiffs were to entirely cease their voter registration activity, they would still be free to engage citizens in whatever political discussion they please. 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.

Importantly, 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). To the extent Section 1-4-49 has any impact on the political speech incident to the act of assisting in voter registration, the challenged law is a content-neutral time, place, and manner restriction. It is, therefore, constitutionally permissible.

Plaintiffs’ also contend that Section 1-4-49 limits their ability to recruit additional volunteers. Amended Complaint, ¶ 106. This contention fails for the same reason that Plaintiffs’ larger First Amendment claim fails – Section 1-4-49 does not prohibit any member of any organization, including Plaintiffs, from engaging whatever citizens they choose in speech related to their organization, even in the context of a voter registration drive. Plaintiffs fundamentally misconstrue the reach of Section 1-4-49. If Plaintiffs, through their volunteers, want to hand out blank voter registration forms to potential voters, and in the process of doing so attempt to recruit those potential voters, they may do so without restriction. Section 1-4-49 only applies to their conduct once they have affirmatively taken control of a completed voter registration form. It does not in any way burden their ability to recruit potential volunteers.²

Plaintiffs also 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. Amended Complaint, ¶ 113.

² Plaintiffs also complain that the forty-eight hour deadline for returning completed voter registration forms burdens their associative rights because it gives them less time to “collect and enter voter contact information” in their own databases. Amended Complaint, ¶ 111. Plaintiffs are not constitutionally entitled to such data mining. *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.”)

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 any Plaintiff organization are publicly known to hold their respective positions within the organization, Section 1-4-49 places no additional burden on them.

3. The forty-eight hour deadline does not unduly burden Plaintiffs' speech.

Plaintiffs contend that there is no legitimate interest supporting New Mexico's forty-eight hour deadline. Amended Complaint, ¶ 118. This contention is addressed more fully below. Before considering the state interest at issue, it is first necessary to determine if the requirement burdens Plaintiffs' speech in any significant manner. Because it does not, any interest is sufficient to justify the challenged law.

In the *League of Women Voters* case in Florida, the court struck down a ten-day 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 that case 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.

Plaintiffs also contend that "organizations are bound by the forty-eight-hour rule even if they provide advice about the form . . . but do not physically collect any of the completed forms." Amended Complaint, ¶ 118. This contention misreads Section 1-4-49. The provision

is, and as a practical matter only can be, concerned with the conduct of a third party voter registration agent after that person has taken physical custody of a completed voter registration form. Any other reading of the statute is nonsensical. If an agent has not taken a completed form, he or she cannot return it to the appropriate election official by *any* deadline.

Ultimately, Plaintiffs' claim that the forty-eight hour deadline impermissibly burdens their protected speech fails. Even without considering the significant state interest supporting the requirement (which is discussed below), the fact that the challenged requirement has no significant impact on Plaintiffs' speech is sufficient justification for dismissal of those claims premised on this claim.

4. The fifty form limit does not significantly burden Plaintiffs' protected speech.

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 discretion to the Secretary of State and County Clerks burdens their First Amendment rights. The fifty form limit, however, presents no difficulty to Plaintiffs or to any other similar organization.

First, the fifty form limit is far from absolute. There is no dispute that special dispensation is made for groups who need additional forms. 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.

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 to deviate from the

fifty form limit, but provide no guidance as to how this discretion should be exercised. This argument fails.

First, Plaintiffs the challenged provisions do not vest the Secretary of State and the County Clerks with any power to permit or prevent speech. Sections 1.10.25.8(C) and 1.10.25.10(B) do not directly do so, 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 would likely constitute either a special event or a special circumstance under these regulations.

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.

Section 1-4-49 was passed to prevent voter fraud, a paramount state interest identified in *Crawford*. Of equal importance 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 because the voter who was unexpectedly turned away at the polls is unlikely to return. 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. 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 of the *Anderson* analysis 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.

This Court has already determined that the alleged injury is insignificant, and there is no reason to revisit that determination. 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; (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. None of these requirements place a substantial burden on Plaintiffs' voter registration efforts or, accordingly, their protected speech interests.³

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.

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. 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 contend that Section 1-4-49 is overbroad “because it chills substantially more speech than is necessary to promote any legitimate state interests.” Amended Complaint, ¶ 122.

Plaintiffs focus on the individual registration requirements, disclosure of affiliation, and training

³ Plaintiffs contend that there is no legitimate interest justifying pre-registration requirements for individual voter registration agents. *See* Amended Complaint, ¶ 122. This Court has already identified that interest as a “safeguard against fraud and the appearance of fraud” in the voter registration process. *American Ass’n of People With Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1237 (D.N.M. 2008) (“AAPD”). The Court has also recognized the interest in being able to trace fraudulent registration conduct to the person responsible. *Id.* Such tracing is impossible without pre-registration.

requirements and on the forty-eight hour deadline for returning completed forms. The Court has already rejected this argument:

With respect to overbreadth: the law has a wide legitimate sweep, because it reaches conduct properly subject to restriction. Significantly, the law is silent on speech content, and leaves associational conduct and other First Amendment conduct largely untouched. In sum, Section 1-4-49's terms are discernible and reach only that conduct properly subject to restriction.

AAPD, 580 F. Supp. 2d at 1241. Plaintiffs' overbreadth challenge fails.

In a separate Count II, Plaintiffs contend that Section 1-4-49 is void for vagueness. Amended Complaint, ¶¶ 125-129. Plaintiffs' argument centers on the fact that the law does not define the word "assist," and posit several hypothetical instances in which it is allegedly unclear whether or not the law applies. "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 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.

Accepting Plaintiffs' claim requires the suspension of credulity, and this Court has already rejected this argument. *See AAPD*, 580 F. Supp. 2d at 1241 ("Neither of the terms in question ["assist" and intentionally"] have been interpreted with respect to Section 1-4-49. Even so, both have plain import and are frequently used in legislation. The Plaintiffs' ability to hypothesize about possible ambiguities does not avoid that fact."). 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 then 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.

E. The National Voter Registration Act Does Not Preempt Section 1-4-49.

In their third count, Plaintiffs allege 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 supremacy. This count fails. First, the fifty-form limitation does not prohibit or even limit the use of the federal voter registration form that States must accept under the NVRA. 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 contend that the forty-eight hour deadline conflicts with the NVRA. This argument fails. 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.

Section 1-4-49 also does not run afoul of the more general purposes of the NVRA. The NVRA was enacted for the benefit of the voting age public. The law is *not* principally 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 to promote through the passage of the NVRA. There is no legal merit to the contention that the NVRA precludes the application of Section 1-4-49, and the Court should accordingly dismiss Count III of the Amended Complaint.

F. Section 1-4-49 Does Not Violate The New Mexico Constitution.

In Counts IV and V, Plaintiffs allege violations of Article II, Section 8 and Article II, Section 17 of the New Mexico Constitution. These claims fail.

1. Section 1-4-49 does not interfere with free and open elections.

Plaintiffs have confused a potential restriction on political speech, and the First Amendment law concerning such restrictions, with the guarantee of free and open elections under Article II, Section 8 of the New Mexico Constitution. Plaintiffs contend that the challenged law “limits Plaintiffs’ ability to participate in free and open elections” by curtailing their expressive conduct. Amended Complaint, ¶ 150. Plaintiffs also hint that Section 1-4-49 violates Article II, Section 8 by denying a “substantial number of persons entitled to vote . . . the right to do so.” *Id.* (quoting *Gunaji v. Macias*, 130 N.M. 734, 742 (2001)).

Plaintiffs’ right to participate in free and open elections does not extend to their attempts to register voters. Initially, Article II, Section 8 is principally concerned with the right to vote in state elections. *See State ex rel. Walker v. Bridges*, 27 N.M. 169, 174, 199 P. 370, 375 (1921) (“It remains true, nevertheless, that the supreme right guaranteed by the Constitution of the state

is the right of a citizen to vote at public elections.”); *see also* *Gunaji*, 130 N.M. at 742. Moreover, Plaintiffs’ suggestion that Section 1-4-49 will somehow operate to deny citizens the right to vote is unfounded. Indeed, Section 1-4-49 is the law in New Mexico because unregulated third party voter registration efforts can result in disenfranchisement. The restrictions on third party voter registration conduct are entirely reasonable, and operating within those restrictions will have no negative effect on voter behavior in New Mexico.

Plaintiffs’ argument that Section 1-4-49 violates Article II, Section 8 by limiting their ability to participate in free and open elections begs the ultimate question of whether Plaintiffs’ conduct, and the conduct of similar organizations, contributes to free, open, and pure elections. Plaintiffs argue that Section 1-4-49 curtails their ability to “associate with those whose participation in the political process they wish to encourage.” Amended Complaint, ¶ 150. This assertion is simply false. Plaintiffs are free to associate with whomever they choose; they need not be actively assisting potential voters with the voter registration process in order to engage in the precise expressive conduct they describe in the Amended Complaint. Most importantly, Plaintiffs 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.

2. Section 1-4-49 does not violate Article II, Section 17 of the New Mexico Constitution.

While it may be true that New Mexico courts “have interpreted [the] state constitution to provide broader protection than the First Amendment,” *State v. Rendleman*, 2003-NMCA-150, ¶ 57, 134 N.M. 744, Plaintiffs have not stated a separate cause of action under Article II, Section 17. It is insufficient to simply restate the allegations in Count I and hope that the challenged law might be invalid under the New Mexico Constitution even if it survives First Amendment

scrutiny. Plaintiffs fail to explain *why* the challenged law runs afoul of Article II, Section 17. The reasons supporting the constitutionality of Section 1-4-49 under the federal constitution apply with equal force here, and Plaintiffs' claim should be dismissed.

G. The Challenged Laws Do Not Violate Principles Of Non-Delegation.

Plaintiffs contend in Count VI of the Amended Complaint that the training requirements enforced by New Mexico's County Clerks constitute unlawful delegation of the Secretary of State's authority to develop standards for elections. Amended Complaint, ¶ 159. Plaintiffs cite to *Cobb v. New Mexico Canvassing Bd.*, 2006-NMSC-034, ¶ 44, 140 N.M. 77 (2006) in support of that proposition. *Cobb*, however, provides no such support.

In *Cobb*, the Court examined whether the State Canvassing Board could establish a policy regarding the cost to be charged to a candidate who requests a recount in an election. After briefly describing the statutory duties incumbent upon the Canvassing Board, the Court held that the Board "is not legislatively directed to develop standards for elections." *Id.* *Cobb* did not discuss at all the Secretary of State's delegation authority.

In any event, the informal training requirement of which Plaintiffs complain is not a standard for an election. Nor is it election policy. It may be election *related* policy, but Plaintiffs fail to set out in any detail how far the Secretary of State's delegation authority extends. Plaintiffs have instead simply asserted that allowing the County Clerks to require training in advance of conducting voter registration activities exceeds that authority. In *Cobb*, the New Mexico Supreme Court held that the Canvassing Board lacked authority to establish a policy regarding how much of the cost of a recount could be charged to the candidate requesting it. The Court did not hold that the Secretary of State could not delegate authority to the County Clerks in election related matters.

Curiously, Plaintiffs also do not identify the provision of the New Mexico Constitution that the Secretary of State's delegation allegedly violates. While there is a clear prohibition on excessive delegation of legislative authority to an executive department, there appears to be no similar prohibition on the delegation of authority from one executive agent to another. In any event, the delegation at issue here is hardly excessive. The County Clerks, by law, are agents of the Secretary of State in the registration of third party voter registration agents. *See* § 1.10.25.10 NMAC. The County Clerks answer in such matters (and all election-related matters) directly to the Secretary of State, who is the chief election officer of New Mexico. *See* NMSA 1978, § 1-2-1(A) (designating the Secretary of State as "the chief election officer of the state.").

Because Plaintiffs have failed to state with any specificity either the New Mexico constitutional provision allegedly at issue or the manner in which the Secretary of State has supposedly violated that unidentified provision, and because the alleged delegation here is not constitutionally problematic, Count VI fails as a matter of law. The Court should accordingly dismiss it.

H. Section 1-4-49 Does Not Violate Plaintiffs' Due Process Rights.

Plaintiffs' final claim is that allowing the County Clerks to require training in advance of registration as a third party voter registration agent violates Plaintiffs' procedural due process rights because those Clerks may "exercise unconstrained discretion in exempting organizations from the strictures of the challenged law." Amended Complaint, ¶ 166. This claim also fails.

As an initial matter, Plaintiffs do not describe the process that they believe they are due. Nor do they describe the manner in which their rights have allegedly been violated as a result of the discretion exercised by the County Clerks. Assuming the facts pled in the Amended Complaint to be true, Plaintiffs have simply failed to adequately describe the manner in which their rights have been violated. This failure alone is a sufficient basis to dismiss Count VII.

Moreover, Plaintiffs do not allege that some third party voter registration agents are required to undergo training and others are not. Plaintiffs thus do not allege any discriminatory application of the discretion County Clerks allegedly exercise in requiring such training. Therefore, by suggesting that the County Clerks may exercise unrestrained discretion in allowing some organizations to avoid the “strictures of the challenged law,” Plaintiffs can only be referring to the fifty-form limit, as no other provision of the law admits of such discretion.

This Court has already upheld the grant of discretion to County Clerks regarding the fifty-form limit, noting that

the challenged provisions do not provide unfettered discretion, but instead give some guidance to the Secretary of State and the County Clerk in its application. Additional forms may be provided “for special events or circumstances.” §§ 1-1-.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 the Plaintiffs request additional forms, they are likely to receive them.

AAPD, 580 F. Supp. 2d at 1235. Without a clearer exposition of Plaintiffs’ due process claim, it is difficult to know exactly how they believe their rights have been violated, but this Court has already examined the discretion given to the County Clerks by the Secretary of State under the challenged laws and found it to be legitimate.

By failing to identify the manner in which their rights have allegedly been violated, Plaintiffs have failed to state a claim in Count VII. Additionally, because the discretion granted to both the Secretary of State and the County Clerks by the challenged provisions is neither unreasonable nor excessive, Plaintiffs’ claim is legally infirm. This Court should therefore dismiss Count VII of the Amended Complaint.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court: (1) dismiss Plaintiffs' Amended Complaint in its entirety; (2) order all parties to pay their own costs; and (3) provide Defendant any additional relief to which she may be entitled.

DATED: August 21, 2009

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 21, 2009.

/s/ Scott Fuqua
Scott Fuqua