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Declarations

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Cole Decl. II Declaration of Leighanne Cole, Field Director, New Mexico Public Interest Research Group (“NMPIRG”) Education Fund, Inc. and exhibit (attached to Declaration of Charles E. Borden as Ex. 7)

Dickson Decl. Declaration of James Dickson, Vice President for Organizing and Civic Engagement, American Association of People with Disabilities (“AAPD”) (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs’ Motion for Summary Judgment as Exhibit 1 (Dkt. # 121-1))

Fraher Decl. Declaration of Katryn Fraher, Member and Coordinator, NMPIRG (filed on 07/02/10 and attached to Declaration of Charles E. Borden as Exhibit 3 (Dkt. # 121-4))

Laederich Decl. Declaration of Lucy Laederich, U.S. Liaison for Federation of American Women’s Overseas, Inc. (“FAWCO”) (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs’ Motion for Summary Judgment as Exhibit 2 (Dkt. # 121-2))

Rodriguez Decl. Declaration of Robby Rodriguez, Executive Director, SouthWest Organizing Project (“SWOP”) (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs’ Motion for Summary Judgment as Exhibit 6 (Dkt. # 121-7))

Tessneer Decl. Declaration of Jamison Tessneer, former Campus Organizer, NMPIRG (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs’ Motion for Summary Judgment as Exhibit 4 (Dkt. # 121-5))

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Fulgenzi Dep. Excerpts from the deposition of Kelli Fulgenzi, Bureau of Elections Administrator, State of New Mexico (filed on 07/02/10 and attached to Declaration of

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Herrera Dep. I Excerpts from the deposition of Mary Herrera, Secretary of State, State of New Mexico (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs' Motion for Summary Judgment as Exhibit 7 (Dkt. # 121-14))

Herrera Dep. II Excerpts from the deposition of Mary Herrera, Secretary of State, State of New Mexico (attached to Declaration of Charles E. Borden as Exhibit 1)

Jimenez Dep. I Excerpts from the deposition of Mario Jimenez, Chief Deputy County Clerk for Dona Ana County (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs' Motion for Summary Judgment as Exhibit 15 (Dkt. # 121-22))

Jimenez Dep. II Excerpts from the deposition of Mario Jimenez, Chief Deputy County Clerk for Dona Ana County (attached to Declaration of Charles E. Borden as Exhibit 2)

Lamb Dep. I Excerpts from the deposition of Denise Lamb, Chief Deputy Clerk for Santa Fe County (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs' Motion for Summary Judgment as Exhibit 8 (Dkt. # 121-15))

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Oliver Dep. I Excerpts from the deposition of Mary Toulouse-Oliver, Bernalillo County Clerk filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs' Motion for Summary Judgment as Exhibit 11 (Dkt. # 121-18))

Oliver Dep. II Excerpts from the deposition of Mary Toulouse-Oliver, Bernalillo County Clerk (attached to Declaration of Charles E. Borden as Exhibit 8)

Rodela Dep. I Excerpts from the deposition of Maria Elena Rodela, Bureau of Elections Chief for Rio Arriba County (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs' Motion for Summary Judgment as Exhibit 14 (Dkt. # 121-21))

Rodela Dep. II Excerpts from the deposition of Maria Elena Rodela, Bureau of Elections Chief for Rio Arriba County (attached to Declaration of Charles E. Borden as Exhibit 6)

Shaw Dep. Excerpts from the deposition of Jess Douglas Shaw, Chief Deputy Clerk for Chaves County (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs' Motion for Summary Judgment as Exhibit 9 (Dkt. # 121-16))

Trujillo Dep. I Excerpts from the deposition of Don Francisco Trujillo, Deputy Secretary of State, State of New Mexico (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs' Motion for Summary Judgment as Exhibit 12 (Dkt. # 121-19))

Trujillo Dep. II Excerpts from the deposition of Don Francisco Trujillo, Deputy Secretary of State, State of New Mexico (attached to Declaration of Charles E. Borden as Exhibit 3)

Vidasol Dep. Excerpts from the deposition of Manuel Vidasol, Administrator for the New Mexico Secretary of State's Office (filed on 07/02/10 and attached to Declaration of Charles E. Borden in Support of Plaintiffs' Motion for Summary Judgment as Exhibit 13 (Dkt. # 121-20))

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Barreto Rept. Expert Report of Matthew A. Barreto (filed on 08/15/08 and attached to Declaration of Scott Fuqua in Opposition to Plaintiffs' August 2008 Application for a Preliminary Injunction (Dkt. # 23-1))

Def.'s Mot. to Dismiss Defendant's Motion to Dismiss (Dkt. # 78) (filed 08/21/09)

Pls.' Mot. for Recons. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Reconsideration of the Court's February 5, 2010 Order Granting in Part Defendant's Motion to Dismiss (Dkt. # 96) (filed 03/05/10)

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Def.'s Resp. Response to Plaintiffs' Motion for Summary Judgment (Dkt. # 123) (filed 07/16/10)

PLAINTIFFS' COUNTER STATEMENT OF FACTS

Plaintiffs object to the Secretary's Statement of Undisputed Facts (Def.'s Mot. 2-5) for its failure to comply with Local Rule 56.1(b). It fails to set forth "all of the material facts as to which movant contends no genuine issue exists." D.N.M.L.R.-Civ. 56.1(b). The facts it does set forth are not submitted in a numbered fashion, *id.*, and are commingled with argument. Furthermore, the Statement of Undisputed Facts fails to "refer with particularity to those portions of the record upon which" the Secretary relies, failing to cite to *any* evidence in support of the vast majority of its alleged facts. *Id.* The Secretary's failure to cite evidence at this stage completely contravenes the purpose of summary judgment, and this Court would be within its discretion to strike Defendant's motion.

The Secretary's failure to comply with Local Rule 56.1 has forced Plaintiffs to deduce what the alleged "undisputed facts" relied upon by the Secretary are. And it presents the Court with an incomprehensible record, which is what Local Rule 56.1 aims to prevent. The Secretary's failure to submit a statement of facts that complies with Local Rule 56.1 should cause this Court to deem Plaintiffs' facts admitted. *Coleman v. Blue Cross Blue Shield of Kan., Inc.*, 287 Fed. Appx. 631, 635 (10th Cir. 2008) (it is not the Court's responsibility "to conduct a fishing expedition" of any record evidence in order to support the assertions made in a party's motion). Thus, for clarity, the Court can refer to Plaintiffs' statement of facts, submitted with their motion for summary judgment, which Defendant has not disputed, save for two minor issues. (Def.'s Resp. 1-2.).

Notwithstanding Defendant's failure to comply with the local rules, Plaintiffs have endeavored to discern the facts set forth in Defendant's memorandum and respond to each

below.¹ Because the Secretary's failure to identify facts as provided by Local Rule 56.1 leaves uncertain what facts she is actually asserting, Plaintiffs reserve the right to supplement their responses if the Secretary claims that Plaintiffs have failed to respond to an asserted fact.

1. "The New Mexico legislature passed Section 1-4-49 in recognition of the potential harm that unrestrained third party registration agent activity might visit on New Mexico's electoral franchise." (Def.'s Mot. 1.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond. Furthermore, the Secretary contradicted this statement by testifying that N.M. Stat. 1978, § 1-4-49, along the administrative regulations implementing this law, 1.10.25.7-10 N.M. Admin. Code (collectively, "the challenged law" or "the law"), was passed in part as a political compromise with proponents of a requirement that all voters display a photo ID to deal with "alleged voter registration fraud." (Herrera Dep. II 131:5-132:13.) This statement is *disputed* to the extent the Secretary implies that third party registration agent activity has "harm[ed]" New Mexico's electoral franchise. In fact, the *undisputed* facts show the *opposite* is true: the record does not contain a single proven instance of disenfranchisement or fraud resulting from the actions of third-party voter registration organizations. (*See* Pls.' SOF ¶ 14; Def.'s Resp.1 (conceding these facts).) Indeed, the Secretary has conceded that Plaintiffs, which are volunteer-driven nonpartisan organizations, are "reputable." (Def.'s Mot. to Dismiss 11.)

2. "In 2005, the New Mexico legislature passed NMSA 1978, § 1-4-49." (Def.'s Mot. 2.)

RESPONSE: *Undisputed.*

¹ Although Plaintiffs are not required to do so, their effort to respond includes responding to facts supported by record cites contained in the argument section of Defendant's brief.

3. “The law addresses voter registration fraud through three principal mechanisms.” (Def.’s Mot. 2.)

RESPONSE: This is statement not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond. Additionally, to the extent the statement suggests that the law was passed to “address[]” actual voter registration fraud, the *undisputed* facts show that the law did not address voter registration fraud. (See Herrera Dep. II 133:13-23; see also Pls.’ SOF ¶¶ 12-13 (noting Defendant’s inability to identify evidence of any instance of proven voter registration fraud in New Mexico prior to or after the enactment of Section 1-4-49); Def.’s Resp.1 (not disputing this fact).) The Secretary’s contention that the law addresses “voter registration fraud” finds no support in the undisputed facts, particularly given that New Mexico already has in place systems that are designed to prevent (and that have prevented) voter registration fraud, including laws criminalizing voter fraud. (See Pls.’ SOF ¶ 11 (listing various New Mexico laws addressing voter fraud).) In addition, a statewide online database allows County Clerks to determine what other county a registrant was previously registered in (if any), and to compare the registrant’s Social Security number, address, name, and date of birth against database entries. (See *id.*).

4. “First, it requires organizations or individuals who intend to assist others in registering to vote to first themselves register as a third party voter registration agent with the New Mexico Secretary of State.” (Def.’s Mot. 2.)

RESPONSE: *Undisputed.*

5. “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).” (Def.’s Mot. 2.)

RESPONSE: *Undisputed.*

6. “This requirement aids 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.” (Def.’s Mot. 2.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond.

7. “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).” (Def.’s Mot. 2.)

RESPONSE: *Disputed* that the law permits third party registration agents to mail completed voter registration forms within forty-eight hours of completion. Indeed, the law is unclear on this point, and suggests that the forms have to be received by the election official within forty-eight hours of completion. *See* N.M. Stat. 1978, § 1-4-49(B). In fact, this is a disputed statement of law. (Pls.’ Mot. to Recons. 9-10.) The ambiguity inherent in this requirement is evident from Defendant’s own Statement of Undisputed Facts. (*Compare* Statement 7 *with* Statement 34 *infra*.)

8. “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.” (Def.’s Mot. 2.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond. Additionally, to the extent that the Secretary suggests the forty-eight hour requirement “ensures” that voter registration cards are properly submitted and that the voter is actually placed on the voting rolls, she in fact concedes that the *opposite* is true. (*See* Pls.’ SOF ¶ 19 (describing the lack of a process in place to monitor compliance with the forty-eight hour requirement); Def.’s Resp.1-2 (conceding this fact).)

Indeed, the forty-eight hour requirement makes it more difficult to ensure that voter

registration cards are properly submitted and that voters are actually put on voting roles. Prospective voters often fill out their voter registration forms incorrectly, (*see, e.g.*, Jimenez Dep. II 59:25-60:9.), which necessitates careful quality review by the third party registration agents who receive them — a process which is difficult to complete within the forty-eight hour window. (*See* Fraher Decl. ¶ 25; Rodriguez Decl. ¶¶ 25; 41-42.) Thus, the challenged law also undermines the State’s interests in accurate and timely submission of voter registration forms. (*See* Pls.’ SOF ¶¶ 33, 35.) And Plaintiffs’ efforts to convey a message of voter empowerment and participation are wasted if the voters they seek to register are turned away at the polls for technical errors in their registration forms. *Id.*

The forty-eight hour deadline is needless given the goal of “ensur[ing] that people . . . are registered in time for the election.” (Green Rept. 7.) And as the Secretary has conceded, as long as a registration form is submitted prior to New Mexico’s existing registration deadline, the registrant may vote. (Pls.’ SOF ¶ 17.)

9. “Third, the law provides for its enforcement with reasonable fines and criminal penalties. *See* NMSA 1978, § 1-4-49(E).” (Def.’s Mot. 2.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond. Although it is *undisputed* that the law imposes fines and penalties for violations, it is *disputed* that fines and penalties under the law are “reasonable,” a statement that is unsupported by any citation to evidence in the record. In fact, the *undisputed* facts show the *opposite* is true. (*See* Pls.’ SOF ¶¶ 23, 37-40 (explaining the deterrent effect of the civil and criminal penalties available under the challenged law); Def.’s Resp. 1-2 (not disputing these facts).) The unreasonableness of the penalties is shown by the fact prospective third party registration agent volunteers have been and continue to be deterred from conducting

voter registration activities because of these penalties. (Dickson Decl. ¶¶ 26-29; Rodriguez Decl. ¶¶ 34-35; Fraher Decl. ¶¶ 21, 28 (describing interaction with frightened volunteer); Tessneer Decl. ¶¶ 22-23; *compare* Cole Decl. ¶ 14 with Cole Decl. II ¶ 6; Ex. 1 AAPD 0000177-179 (demonstrating that NMPIRG was able to assist dramatically fewer voters to register in 2008 when compared with 2004)). Further disputed in light of the fact that many of Plaintiffs' volunteers are of modest means (*see, e.g.*, Rodriguez Decl. ¶ 5), and a single fine of \$250, to say nothing a fine of several thousand dollars, dramatically deters them from volunteering. (Fraher Decl. ¶ 19(f); Tessneer Decl. ¶ 22; Rodriguez Decl. ¶ 35.) SWOP, for example, abandoned its plans to conduct a large scale voter registration drive in 2006 after it learned about the penalties imposed by the law. (Rodriguez Decl. ¶¶ 28, 34, 42.) Faced with a more relaxed deadline and less severe penalties, Plaintiffs would likely be able to resume or increase their voter registration activities. (*See, e.g., id.* ¶ 44; Tessneer Decl. ¶ 23; Dickson Decl. ¶ 38.)

10. "An individual who 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." (Def.'s Mot. 2.)

RESPONSE: *Disputed* to the extent Defendant's statement implies that Section 1-4-49 imposes a cap of \$5,000 on the *total* amount of fines that a person or organization may incur for violations of the challenged law. In fact, Section 1-4-49 imposes no limit on the number of civil actions that a state may file against a person or organization under the challenged law, *id.*, thus exposing volunteers and organizations to potentially unlimited liability.

11. "An intentional violation is also subject to prosecution for a petty misdemeanor." (Def.'s Mot. 2.).

RESPONSE: *Undisputed*.

12. "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.” (Def.’s Mot. 2.)

RESPONSE: *Undisputed* that Defendant summarizes the text of the challenged law.

13. “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.” (Def.’s Mot. 2-3.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond.

14. “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.” (Def.’s Mot. 3.)

RESPONSE: *Undisputed.*

15. “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.” (Def.’s Mot. 3.)

RESPONSE: *Undisputed*, although other provisions of the challenged law are also subject to the pending suit.

16. “Both the Secretary of State and each of the County Clerks have 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.” (Def.’s Mot. 3.)

RESPONSE: *Undisputed* that Defendant quotes the text of the New Mexico Administrative Code which provides Defendant and the County Clerks complete discretion to decide to provide more than fifty forms to a voter registration agent in “special” circumstances, or to deny such requests.

17. “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. (*See* Trujillo Dep., p. 63, l. 16-21.)” (Def.’s Mot. 3.)

RESPONSE: *Undisputed* that Defendant contends the reason for the fifty-form limit is principally financial.

18. “Moreover, election officials must ensure that they keep a supply of registration forms sufficient to meet demand, and providing an unlimited number of blank registration forms to any third party agent who requested them would quickly deplete that supply.” (Def.’s Mot. 3.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond.

19. “Nonetheless, 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.” (Def.’s Mot. 3.)

RESPONSE: *Undisputed* that Defendant summarizes the challenged law’s provision that the County Clerks and the Secretary of State have the power, in their sole discretion, to exceed the fifty-form limit – or to decline to do so – when they so choose. *Disputed* to the extent Defendant suggests that this discretion provides meaningful relief to voter registration organizations.

20. “Plaintiffs also attack the *de facto* training requirements imposed by various County Clerks on third party registration agents.” (Def.’s Mot. 3.)

RESPONSE: *Undisputed.*

21. “Such training, although not expressly required by either Section 1-4-49 or the rules promulgated thereunder by the Secretary of State, imposes a minimal burden on Plaintiffs.” (Def.’s Mot. 3.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond. In fact, the *undisputed* facts show the *opposite* is true: the burdens imposed on Plaintiffs are significant. (*See* Pls.’ SOF ¶¶ 24-27 (detailing Plaintiffs’

burdens); Def.'s Opp'n 1-2 (conceding these facts).) In addition to the undisputed facts set forth in Plaintiffs' Statement of Facts, Plaintiffs are also burdened in that the prospect of registering as a third party registration agent and attending a training is particularly daunting to many disabled people who fear that disclosing their affiliation with a disability rights organization, like AAPD, will result in discrimination. (*See Dickson Decl.* ¶ 32.)

22. "Training sessions are typically very brief, lasting anywhere from 15 minutes to two-and-a-half hours. (*See Trujillo Dep.*, p. 72, line 15 – p. 73, line 3; *Dominguez Dep.*, p. 108, line 22 – p. 109, line 19 and p. 110, line 25 – p. 111, line 4)." (Def.'s Mot. 3-4.)

RESPONSE: *Disputed* to the extent Defendant characterizes training sessions that can last up to two-and-a-half hour as "very brief." Further disputed because training sessions can last as long as three hours. (*Trujillo Dep. II 72:15 - 73:3.*)

23. "According to Plaintiff New Mexico Public Interest Research Group ("NMPIRG"), the typical training is thirty minutes. (*See Ex. 7, pp. 216-218.*)" (Def.'s Mot. 4.)

RESPONSE: *Disputed* to the extent that Defendant's statement suggests that NMPIRG's statement describes anything other than NMPIRG's experience in 2006 in Albuquerque. (*See Fuqua Decl. Ex. 7.*)

24. "The length of a training session depends largely on the number of people who participate and the number of questions asked by the people receiving the training. (*See Trujillo Dep.*, p. 72, lines 17-24.)" (Def.'s Mot. 4.)

RESPONSE: *Undisputed* that the number of participants and questions asked affects the length of the training sessions. However, the length of trainings is also dependant upon the individual providing the training (*see Dominguez Dep. II 109:25-110:1-9*), as well as the entity providing the training. (*Lamb Dep. I 48:24; Oliver Dep. I 104:20-25*).

25. "The training is designed to minimize the disenfranchisement that may result when a third party agent is not sufficiently informed about the use of New Mexico's voter registration

form.” (Def.’s Mot. 4.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond.

26. “The training also alerts third party agents about the penalties for violations of the law. (See Toulouse Dep., p. 143, line 21 – p. 145, line 3.)” (Def.’s Mot. 4.)

RESPONSE: *Disputed.* Penalties are not mentioned in some trainings. (Lamb Dep. II 57-58.) Even when they are, the penalties may be inaccurately described. For instance, during training sessions SWOP members have been erroneously told, among other things, that if the individual voter registration numbers did not match up with the specific serial numbers on the forms that they were given, “really bad things would happen” in the form of penalties. (Rodriguez Decl. ¶ 35.)

In addition, according to Deputy Secretary of State Don Francisco Trujillo II, agents are informed at trainings provided by the Secretary of State’s Office that “it’s a fourth degree felony if [the provisions of the challenged law] are not complied with,” (Trujillo Dep. II 74:11-18), which is erroneous. See N.M. Stat. Ann. 1978, § 1-4-49(D), (E).

27. “Effort is also made by the State to accommodate individuals and groups who need training, including offering training sessions after hours and on weekends. (See Trujillo Dep., p. 16, line 18 – p. 17, line 25; Toulouse Dep., p. 103, line 4 – p. 104, line 19.)” (Def.’s Mot. 4.)

RESPONSE: *Disputed.* In fact, the *undisputed* facts show the *opposite* is true. See Pls.’ SOF ¶ 24 (describing difficulties NMPIRG members encounter in attempting to receive third party registration training); Def.’s Opp’n 1-2 (accepting these facts as true). Further disputed to the extent Defendant implies that the County Clerks and/or Secretary of State’s Office frequently “accommodate” individuals and groups by offering sessions after hours and on

weekends. The Deputy Secretary of State testified that in 2008 “small groups of people, sometimes two or three, sometimes ten, fifteen, wanted to be trained, and the Santa Fe County Clerk's Office was *not* accommodating them.” (Trujillo Dep. II 18:24-19:4 (emphasis added).) Despite receiving a number of requests, the Santa Fe County Clerk’s Office refused to provide training to groups. (*Id.*).

28. “Plaintiff NMPIRG acknowledges this fact. (*See* Ex. 7, pp. 216-218.)” (Def.’s Mot. 4.)

RESPONSE: *Disputed* to the extent that Defendant’s statement suggests that NMPIRG’s statement describes anything other than NMPIRG’s experience in 2006 in Albuquerque. (*See* Fuqua Decl. Ex. 7).

29. “To date, no request for training accommodations has been refused. (*See* Trujillo Dep., p. 77, lines 12-22; Toulouse Dep., p. 158, lines 8-16.)” (Def.’s Mot. 4.)

RESPONSE: *Disputed*. Requests for training accommodations have been refused. (*See supra* Response to Fact 27). Moreover, even when such accommodations are granted, the County Clerks do not always follow through and actually provide the accommodations. (Fraher Decl. ¶ 19(b).) (after agreeing to hold on-campus training sessions in 2006 and 2008, the Clerk’s office required a minimum number of persons to attend and the on-campus trainings were repeatedly canceled by the County Clerk’s Office at the last minute); *see also* Pls.’ SOF ¶ 24 (noting NMPIRG issues with cancelled training); Def.’s Resp. at 1-2 (not disputing this fact).

30. “The Secretary (and other election officials) is willing to conduct training remotely, via telephone or the internet. (*See* Herrera Dep., p. 82, lines 1-14; Toulouse Dep., p. 158, line 17 – p. 159, line 3.)” (Def.’s Mot. 4.)

RESPONSE: *Disputed* that the Secretary’s “willing[ness]” to provide remote trainings is a material fact. Further disputed to the extent that this statement is intended to suggest that

such trainings are provided remotely. The Secretary admits that third party voter registration agent training has *never* been provided remotely via telephone or the internet, the regulations do not provide for remote training, and the unwritten training requirement requires in-person trainings. (Herrera Dep. II 81:15-16, 69:10-24, 82:7-10.)

Further disputed to the extent the statement suggests this “willingness” is universal. The Secretary’s own deputy testified that the third party voter registration agent training would not be provided over the phone or on the internet. (Trujillo Dep. II 76:8-20.)

31. “The State of New Mexico requires third party voter registration agents to register with the Secretary of State before engaging in registration activity;” (Def.’s Mot. 4.)

RESPONSE: *Undisputed.*

32. “Third party registration agents must also complete a training program that can last anywhere from 15 minutes to two-and-a-half hours, depending on the size of the training class and the number of questions asked by the trainees, before engaging in registration activity;” (Def.’s Mot. 4-5.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond. *See also supra* Response to Fact # 22, (disputing statements).

33. “An agent may only take fifty blank New Mexico voter registration forms at a time;” (Def.’s Mot. 5.)

RESPONSE: This statement is not a fact, but an unsupported assertion to which Plaintiffs have no duty to respond. Additionally, Defendant’s assertion that agents may “take fifty blank New Mexico voter registration forms at a time” contradicts testimony by the former Deputy County Clerk and current Bureau of Elections Chief for Rio Arriba County who testified that the Rio Arriba County Clerk’s Office provides agents with only ten to fifteen forms upon registration. (Rodela Dep. I 31:10-13.)

34. “Third party agents must return all completed voter registration forms to the appropriate election official within 48-hours of the voter’s completion of the form;” (Def.’s Mot. 5.)

RESPONSE: *Disputed* to the extent Defendant implies that the requirements of the forty-eight hour deadline are clear. Indeed, the ambiguity inherent in this requirement is evident from Defendant’s own Statement of Undisputed Facts. (*Compare* Statement 7 *supra* (stating that mailing the forms within forty-eight hours satisfies the challenged law) *with* Statement 34 (providing the forms must be returned to an election law official within forty-eight hours); *see also supra* Response to Statement 7 (“Resp. to Stmt.”)). State officials disagree about (i) whether the forty-eight hour deadline begins to toll when the registration agent receives the forms from the county clerk or when the registrant completes the form (*compare* Jimenez Dep. I 145:20-21 and Vildasol Dep. 94:3-10 *with* Rodela Dep. I 65:9-14); (ii) whether, and when, forms may be mailed (*compare* Herrera Dep. I 86:14-87:1; Jimenez Dep. I 140:7-19 *with* Shaw Dep. 203:2-204:5, Lamb Dep. I 75:17-21, Dominguez Dep. I 115:18-22, SOS 23, and Rodela Dep. I 55:5-56:20); and (iii) whether the forty-eight hour requirement continues to apply when the potential voter retains the form (*compare* Herrera Dep. I 90:2-7 and Oliver Dep. I 192:18-23 *with* Vildasol Dep. 104:7-14 and Jimenez Dep. I 172:4-11). Understandably, Plaintiffs’ have determined that they must hand-deliver the forms to comply fully with the law. (Dickson Decl. ¶ 26; Laederich Decl. ¶ 22; Fraher Decl. ¶ 27; 216-218, Cole Decl. I Tab (5).)

35. “Failure to comply with the 48-hour requirement may subject an agent to civil penalties; a willful violation could result in criminal penalties.” (Def.’s Mot. 5.)

RESPONSE: *Disputed* that a “willful” violation of the forty-eight hour requirement could result in criminal penalties. Instead, the text of Section 1-4-49 states that criminal penalties may be imposed for “intentional” violations of the law’s provisions. The meaning of

“intentional” is not defined in the text of Section 1-4-49 or its implementing regulations. Further disputed that failure to comply with the forty-eight-hour requirement “may” subject an agent to civil penalties. Indeed, the civil penalties are governed by a strict liability, not negligence, standard. *See* N.M. Stat. Ann. 1978, § 1-4-49(E). In fact, one of Defendant’s agents testified that turning in forms after forty-eight hours violates the law, even if the third party voter registration agent was in the hospital, and even if the forms are turned in before voter registration closes. (*See, e.g.*, Jimenez Dep. I 148:3-11; *see also* Rodela Dep. II 91:3-9.)

36. “Sections 1.10.25.8(C) and 1.10.25.10(B) of the New Mexico Administrative Code expressly permit the Secretary of State and the County Clerks to provide additional forms ‘for special events or circumstances.’” (Def.’s Mot. 7.)

RESPONSE: *Undisputed* that Defendant quotes a section of the New Mexico Administrative Code.

37. “County Clerks may even have a standing arrangement with an organization to provide more than fifty forms at a time to the organization and its members. (*See* Herrera Dep., p. 100, line 24 – p. 101, line 5; Toulouse Dep., p. 203, lines 4-14.)” (Def.’s Mot. 7.)

RESPONSE: *Undisputed* that Defendant summarizes testimony by Secretary Herrera and Maggie Toulouse Oliver with respect to the theoretical possibility of an organization entering into a standing arrangement with a county clerk’s office to provide more than fifty forms at a time to the organization and its members. However, even when an exception to the fifty-form limit has been granted, some county clerks have applied it to people, not organizations. For instance, certain individual members of NMPIRG were personally granted dispensations for more than fifty forms, but were not permitted to pick up extra forms on behalf of anyone else, including any other NMPIRG member. (Tessneer Decl. ¶ 15; Fraher Decl. ¶ 24.)

38. “In fact, Maggie Toulouse Oliver, the Bernalillo County Clerk, testified that no such

request made of her office had ever been denied. (*See* Toulouse Dep. p. 206, lines 5-8.)” (Def.’s Mot. 7-8.)

RESPONSE: *Undisputed* to the extent that Defendant summarizes Maggie Toulouse Oliver’s testimony as it pertains to past practice in Bernalillo County.

39. “Indeed, NMPIRG was able to run a successful voter registration drive in 2006 in spite the fifty form limit. (*See* [Fuqua Decl.] Ex. 7, pg. 426.)” (Def.’s Mot. 8.)

RESPONSE: *Disputed*. Defendant mischaracterizes the cited evidence. In fact, the *undisputed* facts show the *opposite* is true. (*See* Pls.’ SOF ¶ 28 (describing the ways in which the fifty-form limit has hampered NMPIRG’s voter registration activities in New Mexico); Def.’s Resp. 1-2 (not disputing this fact). The fifty-form limit reduces the feasible size of Plaintiffs’ voter registration drives, as it forces Plaintiffs into stop-and-go registration, which reduces the number of voter Plaintiffs can reach. (Fraher Decl. ¶¶ 23-24; Tessneer Decl. ¶¶ 17-18; Rodriguez ¶ 39.) Plaintiffs’ voter registration efforts are further interrupted by the requirement from certain County Clerks that an agent may only take out fifty additional forms only once their previous batch of forms is *received* by the clerk’s office. (*See* Pls.’ SOF ¶ 9(c); Fraher Decl. ¶ 25.) Numerous trips to the County Clerk’s Office, sometimes as many as one to two each day, prevent volunteers from registering prospective voters and, thus, harmed their expressive and associational activities. (Tessneer Decl. ¶ 17.) Organizations contemplating large-scale voter registration drives would need extra volunteers who could shuttle themselves between voter registration areas, quality control locations, and their nearest County Clerk’s Office without ceasing. (Rodriguez Decl. ¶ 39; Fraher Decl. ¶ 23.) In part because of this logistical hurdle, SWOP concluded that a large-scale voter registration drive would be impossible under the challenged law and since then it has not conducted any large-scale voter

registration activities. (Rodriguez Decl. ¶ 39.) Indeed, the scale of Plaintiffs’ voter registration efforts often hinges on the hope that a particular County Clerk employee will become “invested in the success of the organization” and “[c]ome to regard” its activities as sufficiently “important and unique” to grant dispensation from more forms — and that the County Clerk will not change its mind later and eliminate the dispensation. (*See, e.g.*, Fraher Decl. ¶ 24.)

40. “In the historical 2008 election season, the highest aspirational total that any of the Plaintiffs identified for voter registration efforts was NMPIRG with 5,000. (*See* Fraher Aff., ¶ 15(c).)” (Def.’s Mot. 8.)

RESPONSE: *Undisputed.* These goals were influenced, at least in part, by the challenged law. (*See* Pls.’ SOF ¶¶ 24-27 (explaining why Plaintiffs either significantly scaled back or completely ceased voter registration activities in New Mexico after the passage of the challenged law); Def.’s Resp. 1-2 (not disputing these facts).) In fact, NMPIRG’s aspirational goal of registering 5,000 voters in New Mexico for the 2008 election is, instead, indicative of the fact that NMPIRG was compelled to scale back its expectations after the challenged law took effect. In fact, NMPIRG reduced their aspirational goal in 2006 following the passage of Section 1-4-49 and despite its rather modest aspirational goal of registering 5,000 voters, NMPIRG was only able to successfully register 309 voters in 2008. (Pls.’ Resp. to Interrogatories, No.1).

41. “Plaintiff Federation of Women’s Clubs Overseas (“FAWCO”) registered a grand total of *one* New Mexico voter in 2004 – a Presidential election year and one year before the passage of Section 1-4-49.” (*See* Ex. 7, pg. 30.) (Def.’s Mot. 8.)

RESPONSE: *Disputed* that this is a material fact. Furthermore, the statement is not supported by the evidence. Although FAWCO records reflect that only one New Mexico voter was registered by the group in 2004, others may have been registered and not recorded. (*See* Tessneer Decl. ¶ 21.)

42. “In addition, third party voter registration agents may use the federal voter registration form with impunity. The form is freely available on the internet, and New Mexico’s election officials, as they must, accept the form. The State does not treat the federal voter registration form any differently than the New Mexico form, and election officials do not discourage the use of the federal form. (See Trujillo Dep., p. 101, lines 13-20; Herrera Dep., p. 125, line 22 – p. 127, line 13; Dominguez Dep., p. 137, line 23 – p. 138, line 6; Toulouse Dep., p. 65, lines 3-21 and p. 69, lines 22-25.)” (Def.’s Mot. 8-9.)

RESPONSE: *Disputed.* Ms. Fraher and Mr. Rodriguez were told on separate occasions that they could not use the federal voter registration form by members of the Bernalillo County Clerk’s staff. (Fraher Decl. ¶ 22; Rodriguez Decl. ¶ 38.) Furthermore, Mario Jimenez, Chief Deputy Clerk for Doña Ana County, testified that he “recommend[s]” that voters and TPVRAs use the state form, as opposed to the federal form, (Jimenez Dep. II 48:14-17.), and that he instructs his staff to do the same. (Jimenez Dep. II 52:2-18.) The Bernalillo County Clerk’s Office has similarly discouraged use of the federal form. (Oliver Dep. II 65:3-66:23.)

43. “Indeed, NMPIRG seems to believe that hand delivery of completed forms poses no special problem. (See Ex. 7, pp. 216, 217. . .)”(Def.’s Mot. 10.)

RESPONSE: *Disputed.* In fact, the *undisputed* facts show the *opposite* is true. (See Pls.’ SOF ¶ 33 (detailing the detrimental impact to NMPIRG’s voter registration efforts caused by hand delivery of completed forms); Def.’s Resp. 1-2 (not disputing this fact).)

44. Indeed, traditionally disenfranchised voters who have a negative experience with the process - particularly one in which they believe they have been registered when, in fact, they have not - tend to opt out of the system and never return. (See Barreto Report, pp. 5-6.)

RESPONSE: *Undisputed.* Inasmuch as Defendant contends this fact shows a need for the for the challenged law, however, there is no evidence in the Barreto Report that voters are turned away at the polls due to the failure of third-party voter registration organizations to deliver voter registration forms, and Defendant has conceded that there is no such evidence in the

record. (Pls.' SOF ¶ 17).

INTRODUCTION

The First Amendment shields freedoms that “are delicate and vulnerable, as well as supremely precious in our society.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). Accordingly, any burden upon those freedoms “must,” at a minimum, “be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008) (plurality opinion) (quotation omitted). Plaintiffs’ voter registration activities express Plaintiffs’ commitment to empowering all citizens, including minorities, the poor, citizens living abroad, young people, and the disabled, to find their voices in the political process. The State of New Mexico cannot halt or hinder Plaintiffs’ constitutionally protected activities based upon the mere conjecture that there is a need to do so.

Yet New Mexico has done just that. The Secretary concedes that the First Amendment protects Plaintiffs’ voter registration activities. She also concedes that the challenged law, which purportedly addresses problems with third-party voter registration fraud and disenfranchisement, burdens those First Amendment rights. Finally, she concedes that Plaintiffs are correct that there is no evidence of proven third-party voter registration fraud in New Mexico, nor any evidence that third party organizations systematically have disenfranchised prospective voters. Given the Secretary’s concessions, the only question in this case is whether the Secretary can meet her burden to show a “sufficiently weighty” State interest by – as she attempts to do here – merely asserting that the challenged law serves interests that are “obvious and weighty.” (Def.’s Mot. 14.)

As this Court held in denying the Secretary's motion to dismiss, if the State could defeat a First Amendment claim merely by asserting its interests are "important," then the First Amendment would be a brittle shield indeed. *See Am. Ass'n of People with Disabilities v. Herrera* ("AAPD"), 690 F. Supp. 2d 1183, 1218-19 (D.N.M. 2010). In moving for summary judgment the Secretary repeats *verbatim* the arguments regarding State interest that she offered in her motion to dismiss (*Compare* Def.'s Mot. 14-15 *with* Def.'s Mot. Dismiss 11-12) — without *any* effort to support those arguments with citations to actual evidence. Thus, the Secretary has done nothing more than repeat the same bald assertions this Court held were insufficient to defeat Plaintiffs' claims at the pleading stage. They are *patently* insufficient here, where the Secretary is obligated to point the court to evidence entitling her to judgment.

Although the Secretary insists otherwise, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), does not permit a State to burden First Amendment freedoms based upon conjectural interests. The Secretary certainly *asserts* that the challenged law is designed to accomplish weighty state interests, but she has offered *no evidence* that there is any fraud to combat or disenfranchisement to prevent — nor that the far less restrictive laws already on the books do not already accomplish New Mexico's purported goals. In short, the Secretary has established no legitimate and sufficient State interest in the challenged law.

The Secretary also claims that the burdens that Plaintiffs have shown are minimal. But these burdens are not made light by the Secretary's unsupported say-so. As an initial matter, the Secretary simply misstates the law when she claims, repeatedly, that even though the burdens imposed by the law are wholly unnecessary to accomplish the State's asserted interests, they are nevertheless constitutional because the Secretary claims those asserted interests are important.

Moreover, the evidence presented by Plaintiffs, which the Secretary concedes to be accurate, shows that the burdens imposed by the challenged law are severe, that they have forced Plaintiffs to cease or severely to curtail their protected voter-registration activities, and that they are *wholly unnecessary* to fulfill the interests that State asserts animate the challenged law.

Accordingly, Defendant has completely failed to meet her burden to establish her entitlement for judgment as a matter of law, and her motion should be denied.

STANDARD OF REVIEW

Summary judgment is proper if the moving party demonstrates that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The “party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). If the non-moving party bears the burden of persuasion on an issue at trial, the moving party satisfies its initial burden by showing that the record lacks substantial evidence to support a necessary element of the non-movant’s claim. *Id.* at 324-26. Where the *moving* party bears the ultimate persuasion, however it “must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it.” 11 JAMES WM. MOORE, ET. AL., MOORE’S FEDERAL PRACTICE § 56.13 (3d ed 2010) (citing *United Mo. Bank, N.A. v. Gagel*, 815 F. Supp. 387, 391 (D. Kan. 1993)).

Where the law requires the government to make a showing of state interest in a challenged law, as it does here, the government bears the burden to provide specific evidence of a sufficient state interest. *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 156 F.3d 1068, 1073 (10th Cir. 1998). Thus because the Secretary bears the burden of proof on the issue, she must show that that specific evidence satisfies her burden “beyond a reasonable doubt.” *Hatfield v. Burlington N.R. Co.*, 747 F. Supp. 634, 636 (D. Kan. 1990) (citing *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985)).

The Secretary has conceded that the challenged law burdens Plaintiffs’ First Amendment rights. (*See infra* note 3.) Under the balancing test set out in *Anderson*, she therefore bears the burden to show (1) that the challenged law serves a legitimate and sufficient state interests, and (2) that the law does not burden Plaintiffs’ protected activities unnecessarily. *Anderson*, 460 U.S. at 789. If the Secretary’s motion for summary judgment is to prevail, that evidence must leave no reasonable doubt that the Secretary has met her obligation to show that the burdens imposed by the law are justified by the state interests that the law advances.

ARGUMENT

I. PLAINTIFFS’ PROTECTED ACTIVITIES ARE INTERTWINED WITH PLAINTIFFS’ VOTER REGISTRATION ACTIVITIES.

Plaintiffs allege that their voter registration drives help them encourage civic participation by expressing Plaintiffs’ commitment to fostering democracy, by making their message that voting matters persuasive and helping them to engage their fellow citizens on pressing issues of the day, and by giving Plaintiffs an effective platform for associating with prospective voters and their own members. The Court held that these allegations meet Plaintiffs’ burden to plead that the First Amendment protects their voter registration activities. *See AAPD*,

690 F. Supp. 2d at 1215-19. Now, Plaintiffs offer undisputed evidence to substantiate those allegations, as set out in their motion for summary judgment. (Pls.' Mem. 18-20.) Indeed, the Secretary concedes that "[t]here is no doubt that the speech surrounding Plaintiffs' voter registration efforts is significant and worthy of constitutional protection." (Def.'s Mot. 15.)

Nevertheless, the Secretary suggests that the State can burden Plaintiffs' voter registration activities without affecting Plaintiffs' speech and associational rights. As the Secretary would have it, even though the challenged law burdens Plaintiffs' ability to register voters, it does not burden Plaintiffs' core political speech and association because "Plaintiffs are free to engage whomever they chose [*sic*] in whatever conversations they deem appropriate." (Def.'s Mem. 9; *see also id.* at 12-13.) This Court flatly rejected that argument when the Secretary made it in support of her motion to dismiss, explaining that "[t]he incidental speech in which the Plaintiffs engage while registering voters is no less protected because it is possible to engage in such conversations separate and apart from helping a person register to vote." *AAPD*, 690 F. Supp. 2d at 1217. Indeed, Plaintiffs cannot effectively persuade their fellow citizens to register to vote if they cannot help them to do so, and the First Amendment protects Plaintiffs' right to "select what they believe to be the most effective means" for engaging others in political conversations. *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *accord AAPD*, 690 F. Supp. 2d at 1217 (quoting *Meyer*). Similarly, Plaintiffs' "freedom of association not only encompasses the right to associate with others, but also the right to choose how one associates with others." *AAPD*, 690 F. Supp. 2d at 1218. Plaintiffs have shown that their voter registration activities are the most effective platform for them to interact with prospective voters, members, and volunteers, and that their message of empowerment is intertwined with their ability to associate

with their fellow citizens. (Pls.’ Mem. 19-20.) By preventing or severely curtailing Plaintiffs’ voter registration activities — which are protected expressive conduct — the State necessarily burdens the core political speech and political association that depend upon those activities. As this Court has held, the First Amendment prevents the Secretary from limiting Plaintiffs’ “liberty of expression” on the theory that “it may be exercised in some other place” or manner. *AAPD*, 690 F. Supp. 2d at 1217 (internal quotation marks omitted). This Court therefore should hold that the undisputed evidence establishes that Plaintiffs’ voter registration activities are protected expressive conduct, intertwined speech-and-conduct, and expressive association.

II. THE SECRETARY HAS NOT AND CANNOT MEET HER BURDEN TO SHOW THE STATE HAS A LEGITIMATE AND SUFFICIENT INTEREST IN THE CHALLENGED LAW.

The Secretary concedes not only that Plaintiffs’ voter registration activities are protected by the First Amendment, but also that they are burdened by the challenged law. (*See infra* note 3.) Thus, this dispute now turns upon whether the Secretary has met her burden under *Anderson* to substantiate New Mexico’s asserted interests in the law. Given the Secretary’s concessions, *Anderson* obliges the Secretary *at a minimum* to provide evidence, not “only assert,” that there is a need for the challenged law. *AAPD*, 690 F. Supp. 2d at 1220. That is because “[h]owever slight” a burden upon First Amendment rights “may appear,” it “must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.” *Crawford*, 553 U.S. at 191 (quotation marks omitted).

The Secretary has not met that burden, and cannot do so. The challenged law is an unnecessary response to a conjectural problem, and therefore cannot be “sufficiently weighty” to justify any burden upon First Amendment rights. Accordingly, because the challenged law

burdens Plaintiffs' First Amendment rights, it is unconstitutional regardless of the magnitude of the burden it imposes.²

A. The Secretary bears the burden under *Anderson* to show that the State has a legitimate and sufficient interest in the challenged law.

Having conceded that the challenged law burdens Plaintiffs' First Amendment rights,³ the Secretary must do more than merely *assert* those burdens are minimal or that the State's "interests in regulating third-party voter registration are important." *AAPD*, 690 F. Supp. 2d at 1220. The Secretary disagrees, essentially suggesting that she need only *allege* that "obvious and weighty" interests "animat[e]" the challenged law (Def.'s Mem. 14), and that she need not demonstrate that the asserted State interest advanced by the challenged law makes it necessary to impose the burdens at all (Def.'s Resp. 3). But the Secretary has misinterpreted both the *Anderson* framework as well as the nature of her burden to substantiate the asserted State interest in the challenged law.

Crawford is quite clear that the *Anderson* balancing test requires a State to justify even minimal burdens upon First Amendment rights. 553 U.S. at 191. Thus, if a challenged law burdens First Amendment rights to any degree, the State must provide a legitimate and "sufficiently weighty" justification in light of "the extent to which" the State's asserted interest

² Moreover, as Plaintiffs explain *infra* Part III, the challenged law severely burdens Plaintiffs' First Amendment rights. Accordingly, the Secretary must show the challenged law is narrowly tailored to advance a compelling state interest. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."). Because, however, the Secretary has not and cannot make even the minimum showing required under *Anderson*, this Court need not reach the parties' dispute regarding the magnitude of Plaintiffs' burden.

³ The Secretary concedes that the challenged law burdens Plaintiffs' First Amendment rights. (*See, e.g.*, Def.'s Mot. 1, 6, 14-16.) Indeed, the Secretary admits Plaintiffs' factual statements regarding the burdens the challenged law imposes upon their protected voter registration activities. (Def.'s Resp. 1-2.)

“make[s] the burden *necessary*.” *Timmons*, 520 U.S. at 358-59 (emphasis added). In other words, under *Anderson* balancing the factors relevant to the state-interest side of the scale are (1) the magnitude of the State’s asserted interest and (2) the extent to which the State’s interest makes the *specific* burdens of the challenged law necessary. It follows that a law that is not supported by a state interest of *any* magnitude and, in any event, is unnecessary in light of the purported interest, is due no weight in the balancing test. Accordingly, if such a law imposes any burden — regardless of that burden’s magnitude — it is unconstitutional under *Anderson*.⁴ See *Crawford*, 553 U.S. at 191. The Secretary erroneously argues Plaintiffs have conflated *Anderson* balancing with strict scrutiny. (Def.’s Resp. 3.) Plaintiffs make no such argument.⁵ *Anderson* rather, provides that *both* the magnitude of the State’s asserted interest *and* the extent to which the burdens created by the challenged law are necessary to advance that interest are relevant factors. Plaintiffs’ point is that (1) the State’s interests are nonexistent and, in any event, (2) the State’s purported interests do not make the specific burdens imposed by the challenged law necessary at all.

The Secretary also suggests that *Anderson* requires nothing more than that she *allege* that the challenged law addresses interests that are “obvious and weighty.” (Def.’s Mot. 14.) An allegation without evidence is conjecture, however, and under *Anderson*, the Secretary must provide evidence that (1) the challenged law addresses problems that are “real, not merely conjectural,” *AAPD*, 690 F. Supp. 2d at 1220, and (2) the challenged law directly advances that

⁴ Indeed, even a law supported by some legitimate state interest is unconstitutional if it imposes significant burdens that are wholly unnecessary to serve that interest. (*See infra* Section III.)

⁵ This Court has held *Anderson* balancing applies to Plaintiffs’ First Amendment claims. Plaintiffs prevail under that framework. Because, however, the challenged law burdens fundamental rights, Plaintiffs believe strict scrutiny applies and reserve the right to renew that argument in the future.

asserted State interest. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); (Pls.’ Mem. 22) (citing cases). The Secretary cannot meet this burden by reciting “highly significant values” in the “abstract.” *Cal. Democratic Party*, 530 U.S. at 584. Indeed, when attempting to justify an election law, the government will almost always be able to recite goals that appear significant in the abstract. As this Court explained, if mere “allegations were sufficient to justify burdens on First-Amendment rights, the protection against restrictions on First-Amendment rights would be weakened.” *AAPD*, 690 F. Supp. 2d at 1220.

The Secretary ignores this Court’s prior holding and repeats *verbatim* her assertions, offered in support of her unsuccessful motion to dismiss, that the State has interests in preventing voter registration fraud and protecting the franchise that are “obvious and weighty.” (*Compare* Def.’s Mot. 14-15 *with* Def.’s Mot. to Dismiss 11-12.) But these unadorned allegations were insufficient at the pleading stage, and the Secretary has offered no evidence to support them now at summary judgment — where she must come forward with undisputed evidence that entitles her to judgment. Indeed, the Secretary has admitted all of Plaintiffs’ factual statements regarding the complete absence of any evidence supporting her claims that voter registration fraud or disenfranchisement are problems. (Def.’s Resp. 1-2.) And just as the Secretary’s mere recitation of the words “fraud” and “franchise” was insufficient at the pleading stage to obtain dismissal of Plaintiffs’ claims, it is insufficient now to establish Defendant’s right to judgment as a matter of law.

Although the Secretary implies that *Crawford* established the magnitude of the State’s asserted interest as a matter of law (Def.’s Mot. 14-15), *Crawford* stands for no such rule. If it did, there would be no reason to insist that the Secretary come forward with more than mere

“allegations” that the challenged law serves “important” interests. *AAPD*, 690 F. Supp. 2d at 1220. To the contrary, *Crawford* undermines the Secretary’s position. *Crawford* specifically rested its holding on *evidence*, 553 U.S. at 190-97,⁶ making clear that even on a *facial* challenge, the State must make an affirmative showing of state interest whenever the evidence establishes the challenged law imposes a burden upon First Amendment rights. *Id.* at 191. By contrast, the Secretary has offered no evidence that (1) prior to the challenged law’s enactment, there was a problem with fraud or proper and timely registration of voters or (2) the requirements of the challenged law are at all necessary to advance the State’s asserted interests in preventing fraud and protecting the franchise. (*See* Pls.’ Mem. 22-32.) Therefore, the Secretary could not prevail even under the standard for *facial* challenges set in *Crawford*.

A fortiori, the Secretary cannot defeat Plaintiffs’ *as-applied* challenge here. As *Crawford* made clear, the State’s burden under *Anderson* balancing is greater on an as-applied challenge. *See Crawford*, 553 U.S. at 200-02. Because a “facial challenge must fail where the statute has a plainly legitimate sweep,” a plaintiff bringing a facial challenge under *Anderson* bears a “heavy burden of persuasion” to show the state cannot justify the burdens imposed upon most, if not all, of those affected by the challenged law. *Id.* (internal quotation marks omitted). By contrast, here the Secretary must show a sufficiently weighty state interest in burdening *Plaintiffs*, which

⁶ In *Crawford* the State alleged that its law addressed voter-impersonation fraud and supported that allegation with, *inter alia*, (1) evidence that the U.S. Department of Justice had both investigated and charged multiple counts of voter fraud nationwide, (2) a report by former President Carter and others concluding that impersonation fraud occurs, (3) evidence of impersonation fraud from Indiana, California, Washington, Maryland, Wisconsin, Georgia, Illinois, Pennsylvania, Missouri, City of Miami, and the City of St. Louis, and, finally, (4) evidence that problems in Indiana’s preexisting regime justified the challenged law. Brief of State Respondents, 2007 WL 4232930, at *2, 3, 4, 5-7, 49-53 (Dec. 3, 2007), *Crawford*, 553 U.S. 181 (Nos. 07-21, 07-25); *Crawford*, 553 U.S. at 190-97 & n.12 (citing record evidence).

the Secretary concedes are “reputable organization[s].” (Def.’s Mot. to Dismiss 11.)

B. The Secretary has not met, and cannot meet, her burden to show that the State has a legitimate and sufficient interest in the challenged law.

The Secretary asserts that the challenged law deters and punishes voter fraud and protects the franchise by ensuring that voters can vote in elections for which they have tried to register. (Def.’s Mot. 14-15.) But she does not cite a single instance of actual voter registration fraud or disenfranchisement in New Mexico or anywhere else prior to the enactment of the challenged law (Resp. Stmt No. 3), and has thus failed entirely to establish that the “recited harms are real, not merely conjectural.” *AAPD*, 690 F. Supp. 2d at 1220. Indeed, as Plaintiffs have demonstrated, (Pls.’ Mot. 23-32), the record does not contain a single proven instance of fraud or disenfranchisement resulting from the actions of third-party voter registration organizations. (Resp. Stmt. No. 1). This is fatal to the Secretary’s motion, as she must show that the challenged law is a *necessary* addition to the preexisting election law regime that criminalized voter registration fraud. *See Anderson*, 460 U.S. at 789; *Buckley v. Am. Constitutional Law Found.* (“*ACLF*”), 525 U.S. 186, 192, 204 (1999). But on its face the State’s preexisting regime both deterred fraud with the threat of criminal penalties and detected problems through the use of statewide tracking databases. (*See* Pls.’ Mem. 23-24; Resp. Stmt. No. 3.) Because there is no indication that the preexisting regime was ineffective, the Secretary must produce evidence that the regime had proven inadequate. *See ACLF*, 525 U.S. at 192 (noting that the necessity of a restriction “is informed by other means [the state] employs to accomplish its regulatory purposes”); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000) (noting that the evidence required to prove a state’s need for a restriction will vary “with the novelty and plausibility of the justification raised”). The record, however, contains no such evidence. Indeed, the Secretary

admits she is aware of no instance of proven voter registration fraud either prior to or since the enactment of the challenged law. (Def.'s Resp. 1-2; Pls.' SOF ¶¶ 12-13; Resp. Stmt. No. 3.) In sum, the Secretary has not, and cannot, show that the challenged law is necessary to advance a legitimate and sufficient State interest in combating fraud.

The Secretary's second asserted interest, preventing disenfranchisement, suffers from the same lack of evidence. In order to substantiate this interest, the Secretary needed to point to evidence showing that voter registration organizations systematically fail to turn in accurate forms in a timely fashion. The Secretary offers *ad hominem* attacks against Plaintiffs' voter registration activities, suggesting that third party voter registration agents may "through their own negligence . . . destroy the trust" of their fellow citizens (Def.'s Mem. 12), but she does not cite evidence of a single instance in which a third party voter registration organization disenfranchised a prospective voter by failing to turn in the voter's registration form. (Resp. Stmt. No. 3.) This is unsurprising, because, as she admits, she has no "evidence that third-party voter registration organizations has systematically disenfranchised voters by failing to turn in registration forms" (Pls.' SOF ¶ 14; Resp. Stmt. No. 1); indeed, the record does not contain a single proven instance of such disenfranchisement. (Resp. Stmt. No. 1).⁷ To the contrary, the

⁷ To justify the challenged law as necessary to advance the State's interests in preventing fraud and protecting the franchise the Secretary offers, at bottom, only two citations to evidence. Both citations are made to the report of Matt A. Barreto for the propositions that (1) voters from traditionally disenfranchised groups who are turned away at the polls "tend to opt out of the system" and (2) the voters "most likely to be affected" by voter registration fraud are "young voters, the elderly, and minorities." (Def.'s Mot. 12 (citing Ex. 5, at 5-6), 15 (citing Ex. 5, at 4).) The report in no way supports the State's asserted interest in the challenged law. The report does note that traditionally disenfranchised people who are turned away at the polls are discouraged from voting, but it states that voters were rejected because of problems with "voting machines," "receipt of improper instructions," "the lack of a voter bill of rights at the polling location," "the reluctance to provide provisional ballots," and being "turned away without proper ID" — nowhere does the report contain evidence that the problem is caused by voter registration

undisputed evidence shows the challenged law actually undermines the State's interests in accurate and timely submission of voter registration forms. (Resp. Stmt. No. 8.)

In addition, as set forth more fully below, (*see infra* Section III.A), because this is an as-applied challenge, the Secretary needs to provide evidence that justifies the onerous burdens of the law *upon Plaintiffs*. The Secretary has conceded that Plaintiffs, which are volunteer-driven, nonpartisan organizations, are "reputable." (Def.'s Mot. to Dismiss 11; *see also* Resp. Stmt. No. 1.) And she has offered no evidence that Plaintiffs present the problems the challenged law purportedly addresses. Instead, she offers merely vague allegations that voter registration organizations may act fraudulently or negligently. (Def.'s Mot. 12, 15.) But the Secretary cannot lump all voter registration organizations together and presume, without any evidence, that Plaintiffs present a problem that justifies imposing the challenged law upon them. *See, e.g., Village of Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 637 (1980) (holding that government may not "lump" reputable charitable organizations with entities that use charitable solicitations as a cloak for profitmaking); (Pls.' Mot. 26-27, 30).

The Secretary has *asserted* that the challenged law serves state interests, but she has offered no evidence to show that the law is necessary to advance those state interests at all — nor could she. Given that the Secretary has conceded the challenged law burdens plaintiffs, not only must her motion for summary judgment be denied, the challenged law must be struck down.

organizations that fail to turn in forms. (Def.'s Mot., Ex. 5 at 5-6.) And the report does not address voter registration fraud at all. (*Id.* at 4.) (*See generally* Resp. Stmt. No. 44.)

III. THE SECRETARY CANNOT SHOW THAT THE BURDENS IMPOSED BY THE CHALLENGED LAW ON PLAINTIFFS ARE AT ALL NECESSARY TO FULFILL A LEGITIMATE STATE INTEREST

Having identified and evaluated “the precise interests put forward by the State as justifications for the burden imposed by its rule,” *Anderson* instructs the Court to consider the “character and magnitude” of the injury to their rights that Plaintiffs allege, and the “extent to which” the State’s asserted interests “make it necessary to burden the plaintiff’s rights.” 460 U.S. at 789. The Secretary contends that the challenged law survives this portion of the *Anderson* test, but as explained below, her arguments are based on a misunderstanding of several controlling legal principles. When the law is properly applied to the record in this case, it is evident that the burdens imposed by the challenged law are severe, that they are wholly unnecessary to accomplish the interest asserted by the State, and that the challenged law should be struck down.

A. The Secretary’s arguments regarding *Anderson*’s “burden” analysis are based on a misunderstanding of several legal principles.

The Secretary concedes that the challenged law imposes the burdens that Plaintiffs have shown in their motion for summary judgment. (Def.’s Resp. 1-2). She also concedes that the State could achieve the interest she claims the challenged law advances with less burdensome restrictions — meaning that the interest does not “make it necessary to burden” Plaintiffs’ rights. *Anderson*, 460 U.S. at 789; (Def. Resp. 9); (*see infra* Section III.B.) Having made these concessions, the Secretary argues that the law nonetheless survives *Anderson*’s balancing test. She is wrong, however, for three reasons.

First, while the Secretary concedes that the State could achieve its asserted interests through much less burdensome restrictions, she argues that the challenged law can impose

wholly unnecessary burdens “in light of the magnitude” of the State’s interests in the challenged law. (Def.’s Mot. 6.) Put differently, the Secretary argues that when an asserted state interest is sufficiently weighty, this Court should essentially ignore the unnecessary-burden portion *Anderson*’s balancing test. *Anderson*, however, provides no support for this argument. *Nowhere* does *Anderson* create a “weighty-interest” exception to its balancing test. Rather it provides that “the Court must not only determine the legitimacy and strength of [the State’s] interests; *it must also consider* the extent to which those interests make it necessary to burden the plaintiff’s rights.” 460 U.S. at 789 (emphasis added). Whatever the government’s interest, the *Anderson* balancing test tilts towards unconstitutionality when a law asserted to accomplish that interest imposes heavy burdens that are utterly unnecessary.

Not only is the Secretary’s argument divorced from the actual *Anderson* test, it presupposes here that the Secretary has satisfied her burden to *show* that the State’s asserted interests are important in the first place. As Plaintiffs have demonstrated, however, the Secretary has relied on assertions, not evidence, to prove up the importance of the State’s interest in the challenge law. (*See supra* Section II.B.) *Anderson* requires more than that. The basis for Defendant’s claim that the Court can ignore burdens wholly unnecessary imposed by the challenged law therefore does not exist.

Second, the Secretary attempts to define the character and magnitude of the burdens that the challenged law imposes on Plaintiffs by arguing that a reasonable person (of her own creation) would not be burdened by the law. (Def.’s Mem. 7-14.) Plaintiffs have challenged the law as it applies to *them*, however. As-applied challenges consider the law’s *actual* application to *the plaintiffs*, and the *actual* burdens suffered by *the plaintiffs* — not the entire “sweep” of

the law that is considered in facial challenges. *Crawford*, 553 U.S. at 202. Thus while a court analyzing a facial challenge might consider, for example, “only the statute’s broad application to all Indiana voters,” *id.* at 202-03, as-applied challenges are “limited to the plaintiffs’ particular case.” *Doe v. Reed*, No. 09-559, 2010 U.S. LEXIS 5256, at *14 (S. Ct. June 24, 2010). The Court in *Schaumburg* thus forbade the Village of Schaumburg to “lump” the plaintiffs, legitimate charitable organizations, “with those that in fact are using the charitable label as a cloak for profitmaking” when considering plaintiffs’ as-applied challenge. 444 U.S. at 637.⁸ Likewise in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court looked to the burdens suffered by the *plaintiffs* when it considered an as-applied challenge to a law requiring petition signature collectors both to be registered voters themselves and to wear identifying badges. The Court’s analysis looked directly to the plaintiffs’ witness testimony about precisely how the law affected their efforts, going so far as to note that one signature-gatherer had suffered harassment because his badge identified him as affiliated with an organization seeking to legalize hemp. *Id.* at 198-99. And in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), several political parties, including two minor parties, claimed that a state ballot regulation burdened their ability to select nominees internally. In analyzing the law, the Court emphasized that it was the “minor parties, such as the Libertarian Party and the Peace and Freedom Party” that were particularly burdened by the law. *Id.* at 578. It overturned the law

⁸ The Secretary suggests *Schaumburg* considered the particular characteristics of the plaintiffs only because the Court applied strict scrutiny in that case, but one will search the opinion in vain for support for that reading. Instead, the question in *Schaumburg* was whether the regulation was invalid as applied to Plaintiffs, which necessarily required examination of Plaintiffs’ characteristics. *See, e.g., Schaumburg*, 444 U.S. at 639 (Rehnquist, J., dissenting) (“The Court holds that Art. III of the Schaumburg Village Code is unconstitutional as applied to prohibit respondent Citizens for a Better Environment (CBE) from soliciting contributions door to door.”).

on that basis, concluding that “[t]he burden [the challenged law] places on *petitioners*’ rights of political association is both severe and unnecessary.” *Id.* at 586 (emphasis added).

The Secretary’s argument that a “reasonable” person could comply with the law simply takes no account of what Plaintiffs are: *e.g.*, volunteer-driven organizations that have limited means but that are nonetheless undisputedly reputable. While the Secretary can speculate that *some* hypothetical person or organization would not find the laws very burdensome, and thus might seek to argue that the challenged law has some “legitimate sweep,” *Crawford*, 553 U.S. at 202, the Supreme Court teaches that when considering Plaintiffs’ *as-applied* challenge, this Court is to consider the burdens that the law actually imposes on Plaintiffs before it.

Third, the Secretary analyzes each of the challenged law’s restrictions in isolation (Def.’s Mem. 7-14), suggesting that when analyzing the burdens imposed by the challenged law this Court should consider each restriction in isolation. As this Court held, however, the Court must consider the burdens that the law’s restrictions impose cumulatively, not that each imposes in isolation. *AAPD*, 690 F. Supp. 2d at 1219-20. And indeed, the challenged law sets down a gauntlet through which Plaintiffs must pass in order to register voters. As set out below, Plaintiffs’ potential voter registration volunteers must first register with the Secretary of State or one of her agents, disclosing personal information about their status and affiliations in the process. The volunteers next must attend a training session in person, at training sessions that are frequently held at inconvenient times and locations, that may be cancelled without notice, and that can drag on for hours. Those voter registration agents who are willing to go through these inconveniences are then given only fifty forms each, forcing them to stop registering voters once they use up their allotted forms. And the law requires each volunteer to return the forms

within forty-eight hours; a handful of forms turned in just moments late, despite the volunteers' and organizations' best efforts, exposes each volunteer, many of whom are of modest means, to thousands of dollars in fines on a strict liability basis. These penalties are especially severe because the interpretation of the term "assist," and what must be done to satisfy the deadline, changes from official to official such that no voter registration organization can reasonably know which acts will comply with the law and which could lead to potentially ruinous liability.

Plaintiffs thus struggle with fewer volunteers willing to register as agents, fewer volunteers able to attend in-person training, and a stop-and-go voter registration effort that forces volunteers to cease registering voters while they travel back to the clerk's office to get more forms. And Plaintiffs must decide whether to expose their volunteers to thousands of dollars of fines under a strict liability regime (along with potential criminal penalties) if forms are not turned in within an extremely tight deadline. The combined weight of these burdens has led to an inevitable result: Plaintiffs have either stopped or dramatically curtailed their registration of New Mexico voters.

B. The challenged law imposes severe burdens on Plaintiffs' protected activities that are wholly unnecessary to advance the State's asserted interests.

As set forth below, Plaintiffs have offered evidence that the challenged law's restrictions, both cumulatively and individually, impose severe burdens on Plaintiffs' protected activities that are wholly unnecessary to accomplish the State's asserted interests for the law's enactment.

1. *The penalties for violating the forty-eight hour deadline impose severe burdens on Plaintiffs, yet the deadline and the penalties are utterly unnecessary to advance a legitimate State interest.*

The Secretary, citing to no facts in support, makes the circular argument that the forty-eight hour requirement does not impose a significant burden because it is "a simple matter" to

return voter registration forms within forty-eight hours. (Def.'s Mem. 10.) On the strength of this say-so, the Secretary deduces that the challenges posed by the deadline *must* be due to Plaintiffs' negligence or incompetence — and therefore, that the burdens imposed by the law are light. (*Id.* 12-13.) The *evidence*, however, establishes that it is extremely difficult for Plaintiffs to meet this deadline, especially during large voter-registration drives. The evidence also establishes that *any* failure to meet the deadline exposes volunteers, and potentially Plaintiffs, to severe penalties. This creates a severe impediment to Plaintiffs' ability to register voters.

The forty-eight hour deadline is particularly hard for Plaintiffs to meet because the forms they receive from voters are often filled out incorrectly. (Resp. Stmt. 8.) Indeed, as one County Clerk testified regarding errors found on voter registration forms,

Our most common issue would be lack of a physical address, no signature, and the series of boxes at the bottom of our state form that are not answered. Will you be 18 years of age on or before election day, and are you a citizen. Those are the most common problems we have.

(Jimenez Dep. II 59:25-60:9; Resp. Stmt. 8.) As Plaintiffs explained in their motion for summary judgment, their efforts to convey a message of voter empowerment and participation are wasted if the voters they seek to register are turned away at the polls for technical errors in their registration forms. (*Id.*) Plaintiffs also conduct the reviews to protect their volunteers, by ensuring that each of the assigned forms is turned in on time. (*Id.*) Experienced voter registration drive organizers explain that the review process actually takes time: the volunteer registers voters in the field, then brings the forms back a location for quality review; volunteers must then collect the forms, examine each one to determine that it has been filled out properly (sometimes calling the voter and correcting forms that have errors), and then order them

sequentially for return to the clerk's office. (*Id.*) This process is extremely difficult to complete within forty-eight hours, and even without a quality review process, the forty-eight hour requirement creates a deadline so tight that any unforeseen incident, like a sick volunteer or heavy traffic, could expose volunteers to penalties for violating the law. (*Id.*)

The difficulties of returning voter registration forms within forty-eight hours are compounded by the law's uncertain enforcement. County Clerks have provided divergent interpretations of when the forty-eight hour deadline begins to toll and whether (and when) forms may be mailed, as opposed to hand-delivered. (*See* Resp. Stmt. Nos. 7, 34.) What is more, County Clerks require that an agent may only take out fifty additional forms only once their previous batch of forms is *received* by the clerk's office. (Resp. Stmt. No. 39.) Understandably, Plaintiffs have determined that they must hand-deliver the forms to ensure that they comply fully with the law. (Resp. Stmt. No. 34.)

While the guidance for complying with the forty-eight hour requirement is unintelligible, the challenged law unquestionably exposes volunteers to severe fines for *any* violation. The Secretary suggests that the law applies only to negligent acts (*see* Def. Mot. 12), but the challenged law contradicts her. The law is a strict liability regime, *see* N.M. Stat. 1978 § 1-4-49(e), and the volunteer who makes every reasonable effort to get the forms in on time is exposed to penalties if they are but a moment late.⁹ The law's criminal penalties, meanwhile, attach to *any* deliberate choice to turn forms in after the deadline — presumably one innocuous

⁹ Indeed, one of the Secretary's agents testified that turning in forms after forty-eight hours violates the law, even if the third party voter registration agent was in the hospital, and even if the forms are turned in before the voter registration deadline. (Resp. Stmt. 35.)

as a volunteer who, juggling the tight return deadline with parenting responsibilities, elects to take her child to the hospital rather than get the forms in on time.

Contrary to the Secretary's claim, the law's fines would be crippling for Plaintiffs' members and volunteers. Many of Plaintiffs' volunteers are of modest means, (*see, e.g.*, Resp. Stmt. No. 9), and a single fine of \$250, to say nothing a fine of several thousand dollars, dramatically deters them from volunteering.¹⁰ (*Id.*) And a volunteer would be subject to a \$5,000 fine for turning in a batch of twenty forms just a few moments late. *See* N.M. Stat. Ann. § 1-4-49(e). What is more, the law's "cap" is illusory: while penalties are limited to \$5,000 "per civil action," the law does not limit the number of civil actions that may be brought. N.M. Stat. Ann. 1978 § 1-4-49(e). (Resp. Stmt. No. 10.) Indeed, New Mexico's severe and easily triggered penalties are an outlier among states (Pl.'s Mem. 31-32), which underscores the lack of justification for the challenged law. The Secretary plays down the harshness of these penalties by arguing that she has not yet chosen to prosecute violations, (Def.'s Mot. 11-12), but as Chief Justice Roberts recently wrote in rejecting a similar not-to-worry argument, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (Roberts, C.J.).

¹⁰ As Plaintiffs have noted, the court in *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314, 1322 (S.D. Fla. 2006), struck down a law imposing a \$250 fine for turning in forms after *ten days*, not forty-eight hours. The Secretary's tries to distinguish *Cobb* by arguing that the Florida law contained other penalties, (Def.'s Mot. 11), but the law's \$250 penalty operated on its own, and nowhere does *Cobb* suggest that that penalty was struck down because other penalties also existed.

Indeed, the record demonstrates that along with the challenged law's other restrictions, the threat of crippling penalties for violating such tight deadlines caused Plaintiffs to cease or curtail their protected conduct. NMPIRG lost significant numbers of volunteers, who were deterred by the law's easily-triggered penalties, (Resp. Stmt. No. 9), and in 2008, the first presidential election year after the challenged law was enacted, NMPIRG helped only *one percent* of the number of New Mexico voters register that it helped in 2004, before the law's enactment. (*Id.*) Similarly, SWOP abandoned its plans to conduct a large scale voter registration drive in 2006 after it learned about the penalties imposed by the law. (*Id.*) The evidence offered by Plaintiffs demonstrates that these were not choices made on a whim. Rather the challenged law, with its severe burdens, forced Plaintiffs to reduce and curtail their protected activities. Faced with a more relaxed deadline and less severe penalties, Plaintiffs would be able to resume and increase their voter registration activities. (*Id.*)

Anderson asks the Secretary to show that the requirement that forms be turned in within forty-eight hours does not impose a greater burden than necessary to achieve a legitimate state interest. Put differently, *Anderson* obliges the Secretary to show what interest makes imposing the burden *necessary*. But the Secretary makes it plain that she will not even attempt to offer any such evidence. The only evidence submitted on this point is that the imposed deadline is needless given the goal of "ensur[ing] that people . . . are registered in time for the election." (Resp. Stmt. No. 8) And as the Secretary admits, as long as a registration form is submitted prior to New Mexico's existing registration deadline, the registrant may vote. (*Id.*) Not only is the forty-eight hour requirement completely unnecessary to ensure forms are turned in by the registration deadline; by hampering Plaintiffs' quality control efforts, it actually undermines the

State's asserted interest in avoiding disenfranchisement by increasing the number of forms turned in with errors. (*Id.*)¹¹ The forty-eight hour deadline therefore cannot survive *Anderson*.

2. *The fifty-form limit places burdens on Plaintiffs that the Secretary concedes are not necessary.*

In moving for Summary Judgment, the Secretary argues that Plaintiffs' protected activities are not burdened by the fifty-form limit because (1) no Plaintiff has conducted a voter registration drive on a scale that the fifty-form limit would impede (Def.'s Mot. 8); (2) the government routinely grants exceptions to the fifty-form limit (*id.*); and (3) Plaintiffs are free to use the federal voter registration form. (*Id.* 8-9). The record, however, demonstrates that each of these arguments is incorrect.

The Secretary's unsupported suggestion that Plaintiffs' registration drives are not large enough to be hampered by the fifty-form limit ignores that Plaintiffs' reduced aspirations for voter registration *followed* the passage of Section 1-4-49. (Resp. Stmt. Nos. 39, 40.) While NMPIRG set a goal of 5,000 voters in 2008, for example, it registered nearly 30,000 voters in 2004, before the law was passed. (Resp. Stmt. No. 40.) The fifty-form limit plays a role in reducing the feasible size of those drives, as it forces Plaintiffs into stop-and-go registration, which reduces the number of voters Plaintiffs can reach. (Resp. Stmt. No. 39.) And though the Secretary claims that forms can be returned through the mail, County Clerk's offices will not permit volunteers to receive fifty additional forms until the clerk has *received* the previous fifty forms, (*Id.*), making use of the mail unfeasible. Because of the fifty-form requirement,

¹¹ Although the Secretary disputes this in passing in her opposition to Plaintiffs' motion for summary judgment (Def.'s Resp. 7), she agrees with Plaintiffs' evidence showing that the forty-eight hour requirement impedes quality control and thus accurate completion of forms (*Id.* 1-2; Resp. Stmt. No. 8).

volunteers have to shuttle back and forth between the County Clerk's office, sometimes twice each day, forcing them to spend hours in transit that they would otherwise spend registering voters and engaging them in related discussion. (*Id.*) Organizations contemplating large-scale voter registration drives would need extra volunteers who could shuttle themselves between voter registration areas, quality control locations, and their nearest County Clerk's Office without ceasing. (*Id.*) In part because of this logistical hurdle, SWOP concluded that a large-scale voter registration drive would be impossible under the challenged law and since then it has not conducted any large-scale voter registration activities. (*Id.*)

The Secretary next argues, citing NMPIRG's experience as proof, that the law imposes no burden because County Clerks have discretion to distribute more than fifty forms at a time. (Def.'s Mot. 7-8.) But NMPIRG was only allowed extra forms after a particular staff member in the County Clerk's office "came to regard" NMPIRG's efforts as "important and unique." (Resp. Stmt. No. 39.) Plans for a large-scale voter-registration drive cannot hinge on the hope that a County Clerk will become "invested in the success of the organization" (*Id.*; Fuqua Decl. Ex 7 at 426) and "c[o]me to regard" its activities as sufficiently "important and unique" to grant a dispensation for more forms — and that the County Clerk will not change its mind and eliminate the dispensation. (Resp. Stmt. No. 39.) Such uncertainty drove SWOP's decision to forego *all* affirmative voter registration efforts, and it hampers NMPIRG's ongoing registration activities. (*Id.*)

The Secretary finally asserts that the fifty-form limit imposes no burden because in any event, Plaintiffs may use the federal forms "with impunity." (Def. Mot. 8.) But the County Clerks have repeatedly told Plaintiffs that they disfavor the federal form and that Plaintiffs

should use only the State form (Resp. Stmt. No. 42.) Plaintiffs are not free to use the federal form without risking that the form will be rejected.

The Secretary justifies the fifty-form limit as a cost control measure designed to ensure officials can meet demand for forms. (Def.'s Mot. 3.) As Plaintiffs have explained, however, the cost of administering elections is, as a matter of law, not sufficiently weighty to justify the Secretary's selection of the fifty-form limit. (Pls.' Mem. 33-34.) (citing cases) And in any event, under *Anderson*, the Secretary must provide some reason *why* such expensive forms are necessary to advance a legitimate and sufficient state interest. The Secretary does not offer any explanation why such expensive forms are necessary. To the contrary, she concedes that the State does not need such an expensive form and will create a less expensive one — someday. (Def.'s Resp.9.) Given that the State has *no* interest in its expensive forms and thus the fifty-form requirement, the burdens that the law imposes cannot survive the *Anderson* balancing test.

3. *The Secretary concedes that the State has no interest in requiring that training be conducted in person, and that such a requirement burdens Plaintiffs unnecessarily.*

The requirement that volunteers attend voter registration training in person imposes significant burdens on Plaintiffs, as the Secretary concedes. (Resp. Stmt. No. 30.) What is more, the Secretary concedes that she has *no interest* in an in-person training requirement. She states that she has “no objection” to remote training, (Def.'s Mot. 14 n.4), that she is “willing to make” the training “available via telephone or the internet,” (*id.* 14), and that, “[a]ccordingly, no third party voter registration agent is required to meet an excessively burdensome training

requirement.” (*Id.* (emphasis added)).¹² The Secretary concedes that she has not made such remote training available, but promises it is coming soon. (*Id.* 14 n.4.)¹³

4. *The registration requirement unnecessarily burdens Plaintiffs’ associational rights.*

The registration requirement compels potential voter registration agents to disclose personal information, including their affiliation with a specific organization. Such disclosures place a burden on volunteers as a matter of law, *see NAACP v. Alabama*, 357 U.S. 449, 462 (1958), *rev’d on other grounds*, 360 U.S. 856 (1959) (compelling persons to disclose their organizational affiliations impacts the associational rights of both volunteers and organizations), and as a matter of fact in this case. (*See* Dickson Decl. ¶ 32 (explaining that many disabled people do fear that disclosing their affiliation with a disability rights organization, like AAPD, will result in discrimination) (Resp. Stmt. No. 21).)

The Secretary justifies the registration requirement as necessary to detect voter registration fraud (Resp. Stmt. No. 1), but there is no evidence that fraud was a problem prior to the law’s enactment, or moreover, that the State lacked adequate means to detect fraud (*Id.*). Even if there were such evidence, the Secretary would still be unable to substantiate the State’s interest in registration. The Secretary argues that persons “may use the federal voter registration

¹² On this ground alone, FAWCO is entitled to summary judgment. (*See* Def.’s Mot. 14 n.4 (conceding that FAWCO cannot reasonably comply with the in-person training requirement and stating that the Secretary has “no objection” to remote training)).

¹³ This assurance does not render Plaintiffs’ First Amendment challenge moot, because the in-person training requirement is still in effect and the Secretary’s litigation position does not remove the possibility that she will continue to apply the in-person training requirement. *See Building & Constr. Dep’t v. Rockwell Int’l. Corp.*, 7 F.3d 1487, 1491 (10th Cir. 1993) (case not constitutionally moot until State has enacted regulatory change that “completely and irrevocably eradicates the effects of the alleged violation”); *id.* at 1492 (case not prudentially moot when “there exists some cognizable danger of recurrent violation”).

form with impunity.” (Def.’s Mot. 8.) If that is so, unscrupulous persons bent on fraudulent activity can avoid the State’s regime. Thus, per the Secretary’s reasoning, the preregistration and disclosure regime does not directly advance the State’s asserted interest, but rather merely burdens concededly “reputable” organizations like Plaintiffs (*see* Def.’s Mot. to Dismiss 11).

CONCLUSION

Plaintiffs have offered evidence showing, and the Secretary has conceded, that Plaintiffs’ voter registration activities are constitutionally protected, that the challenged law burdens those activities, and that far less restrictive regulations could achieve the State’s asserted interest in the challenged law just as effectively. The Secretary nonetheless contends that she is entitled to summary judgment under *Anderson* because the State’s asserted interest is important. This argument simply ignores the evidence now on the table at summary judgment.

Setting to one side the weight the Secretary would assign to each of the factors in *Anderson*’s balancing test, this Court instructed that the Secretary could not satisfy her burden under *Anderson* merely by asserting that the challenged law serves important interests; rather, the Secretary’s obligation was to come forward with evidence that would allow a reasonable fact-finder to conclude that the State’s interest in the challenged law is indeed important. Yet now at summary judgment, the Secretary has failed to come forward with *any* evidence that the challenged law addressed actual problems, or that laws already on the books did not address any purported problems just as effectively. In light of the unnecessary burdens imposed by the challenged law, and the Secretary’s complete failure to show with evidence that any of those burdens serves a legitimate state interest, the Court should deny the Secretary’s motion for summary judgment.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that on July 23, 2010, I filed the foregoing electronically through the CM/ECF system, which caused parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

s/ Edward Ricco

By _____
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