

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

_____	x	
)	
AMERICAN ASSOCIATION OF PEOPLE)	
WITH DISABILITIES, FEDERATION OF)	
WOMEN’S CLUBS OVERSEAS, INC., NEW)	
MEXICO PUBLIC INTEREST RESEARCH)	
GROUP EDUCATION FUND, and)	
SOUTHWEST ORGANIZING PROJECT,)	
)	
Plaintiffs,)	
)	No. 1:08-cv-702 JOB/WDS
)	
)	
v.)	
)	
MARY HERRERA, in her capacity as)	
Secretary of State,)	
)	
Defendant)	
)	
)	
_____	x	

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Office of the New Mexico Attorney General
Scott Fuqua
Assistant Attorney General
408 Galisteo Street
Santa Fe, NM 87501

*Attorney for Defendant
Mary Herrera*

DATED: July 2, 2010

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

II. STATEMENT OF UNDISPUTED FACTS 2

III. ARGUMENT AND AUTHORITIES..... 5

A. The Court Should Apply The Anderson Balancing Test To Plaintiffs’ Free Speech Claims. 5

B. Section 1-4-49 Does Not Severely Restrict Plaintiffs’ First Amendment Rights... 6

1. The fifty form limit does not excessively burden Plaintiffs free speech rights. 7

a. The fifty form limit does not infringe on Plaintiffs’ expressive conduct..... 7

b. The fifty form limit does not infringe on Plaintiffs’ protected speech incidental to the process of voter registration. 9

c. The fifty form limit does not infringe on Plaintiffs’ protected associational rights..... 9

2. The 48-hour requirement and attendant penalties for its violation do not excessively burden Plaintiffs’ protected speech rights. 10

a. The 48-hour requirement does not infringe on Plaintiffs’ expressive conduct. 10

b. The 48-hour requirement does not infringe on Plaintiffs’ protected speech incidental to the process of voter registration. 12

c. The 48-hour requirement does not infringe on Plaintiffs’ protected association rights..... 13

3. The training requirement does not excessively burden Plaintiffs’ protected speech rights..... 13

C. Section 1-4-49 Serves New Mexico’s Compelling State Interest In The Integrity Of Its Electoral Process In A Manner No More Burdensome Than Necessary.... 14

D. Section 1-4-49 Does Not Violate Article II, Section 17 Of The New Mexico Constitution..... 16

IV. CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

<i>American Ass’n of People With Disabilities v. Herrera</i> , 580 F. Supp. 2d 1195, 1237 (D.N.M. 2008)	16
<i>Anderson v. Celebrezze</i> , 460 U.S. 780, 789 (1983)	5, 6, 15, 16
<i>Crawford v. Marion County Election Board</i> , 128 S. Ct. 1610 (2008).....	14, 15
<i>State v. Rendleman</i> , 2003-NMCA-150, 134 N.M. 774 (Ct. App. 2003)	17
<i>Zemel v. Rusk</i> , 381 U.S. 1 (1965)	13

Statutes

Fla. Stat. Ann. § 97.0575	11
NMSA 1978, § 1-4-49	passim

Rules

1.10.25.10 NMAC.....	3
1.10.25.8 NMAC.....	3

I. INTRODUCTION

The Court, in its February 5, 2010 Memorandum Opinion and Order, dismissed Counts II, III, IV, VI, and VII of Plaintiffs' Amended Complaint. The only remaining issues are whether New Mexico's third party voter registration law, NMSA 1978, § 1-4-49, violates Plaintiffs' free speech rights under either the First Amendment to the United States Constitution (Count I) or Article II, Section 17 of the New Mexico Constitution (Count V).¹ The undisputed facts in this case indicate that they do not.

The law is a reasonable exercise of the State's power to regulate elections and election-related matters. Any burden it places on Plaintiffs' free speech rights is outweighed by the State's interest in maintaining the integrity of its electoral process. While nobody questions the beneficial impact third party voter registration agents may have on the democratic process, there is also no question that third party agents who are either unscrupulous or incompetent can cause significant damage to that process.

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. The law is designed to address voter registration fraud through narrowly-tailored means (even though the law is not subject to strict scrutiny) that are minimally burdensome on Plaintiffs free speech rights. There is no material issue of fact for the Court to decide, and summary judgment is therefore appropriate.

¹ The Court is currently considering Plaintiffs' Motion to Reconsider that portion of the February 5, 2010 Memorandum Opinion and Order dismissing Count II of the Amended Complaint, which alleges that the law is unconstitutionally vague. The Secretary reserves her right to file a summary judgment motion on Count II should the Court reinstate it.

II. STATEMENT OF UNDISPUTED FACTS

In 2005, the New Mexico legislature passed NMSA 1978, § 1-4-49. The law addresses voter registration fraud through three principal mechanisms. 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. In that registration process, the third party agent provides identifying information to the Secretary of State and receives a registration number to be placed on each completed voter registration card submitted by the agent to the proper election official. *See* NMSA 1978, § 1-4-49(A). This requirement 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.

Second, the law requires third party registration agents to either mail or personally deliver to the appropriate election official a completed voter registration form within forty-eight hours of its completion. *See* NMSA 1978, § 1-4-49(B). This requirement ensures that the voter registration cards collected by the third party registration agent are, in fact, submitted to the appropriate election official and the voter is actually placed on the voting rolls.

Third, the law provides for its enforcement with reasonable fines and criminal penalties. *See* NMSA 1978, § 1-4-49(E). 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. An intentional violation is also subject to prosecution for a petty misdemeanor. Moreover, if the individual who has intentionally violated Section 1-4-49 is either a director of a third party registration organization or has decision-making authority in the voter registration activities of such an organization, the organization may also be held accountable for the violation. These provisions

ensure that the individuals and organizations responsible for voter registration conduct that threatens the integrity of our electoral system and ultimately leads to the disenfranchisement of New Mexico citizens are held accountable for their conduct.

In addition to the language of Section 1-4-49, the Secretary of State has enacted administrative rules that regulate the conduct of third party voter registration agents. At issue in this lawsuit are Sections 1.10.25.8(c) and 1.10.25.10(b) of the New Mexico Administrative Code, which limit to fifty the number of blank voter registration forms an organization or individual may obtain at any one time. Both the Secretary of State and each of the County Clerks have discretion to provide more than fifty registration forms “for special events or circumstances.” 1.10.25.8(c) and 1.10.25.10(b) NMAC. The reason for the fifty-form limit is principally financial; the State must pay the printing costs for voter registration forms and thus cannot afford to provide them in unlimited number to anyone making such a request. (*See* Trujillo Dep., p. 63, l. 16-21.) 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. 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.

Plaintiffs also attack the *de facto* training requirements imposed by various County Clerks on third party registration agents. 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. 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) According to Plaintiff New Mexico Public Interest Research Group (“NMPIRG”), the typical training is thirty minutes. (*See* Ex. 7, pp. 216-218.)² 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.) 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. 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.)

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.) Plaintiff NMPIRG acknowledges this fact. (*See* Ex. 7, pp. 216-218.) 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.) 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.)

Ultimately, the undisputed facts are:

- The State of New Mexico requires third party voter registration agents to register with the Secretary of State before engaging in registration activity;
- 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

² The page numbers given for Exhibit 7, a collection of the documents produced by Plaintiffs, correspond to the bates numbers on each page.

training class and the number of questions asked by the trainees, before engaging in registration activity;

- An agent may only take fifty blank New Mexico voter registration forms at a time;
- 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; and
- Failure to comply with the 48-hour requirement may subject an agent to civil penalties; a willful violation could result in criminal penalties.

The Court must therefore determine whether these facts constitute an unconstitutional burden on Plaintiffs' free speech rights.

III. ARGUMENT AND AUTHORITIES

The Secretary of State is entitled to summary judgment on Counts I and V of Plaintiffs' Amended Complaint. Section 1-4-49 is a reasonably restricted means of accomplishing an important state interest, namely safeguarding the integrity of the elective franchise. Under the Supreme Court's balancing test, the challenged laws are constitutional and Plaintiffs have thus failed to state a cause of action upon which relief can be granted.

A. The Court Should Apply The *Anderson* Balancing Test To Plaintiffs' Free Speech Claims.

At this point in this litigation, there is no dispute that the Court should examine the constitutionality of Section 1-4-49 through the balancing test established by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Court has twice applied this standard in this case, once in denying Plaintiffs' Motion for Preliminary Injunction and again in partially

granting the Secretary's Motion to Dismiss. The parties have now briefed this issue twice, and the Secretary will not waste the Court's time with another review of the law on the topic.

Anderson requires a Court to resolve challenges to a State's election laws through application of a balancing test:

Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. 780, 789 (1983) (citation omitted).

Section 1-4-49 meets the *Anderson* standard and is thus constitutional. First, it does not impose as severe a restriction on Plaintiffs' speech rights as Plaintiffs contend. Second, the law serves New Mexico's legitimate interest in a manner no more burdensome than necessary in light of the magnitude of that interest.

B. Section 1-4-49 Does Not Severely Restrict Plaintiffs' First Amendment Rights.

Count I in the Amended Complaint alleges that Section 1-4-49 violates Plaintiffs' First and Fourteenth Amendment rights through the imposition of severe burdens on their rights by: (1) directly limiting the expressive conduct that is assisting a citizen in the voter registration process (Amended Complaint, ¶¶ 101, 102); (2) limiting core political speech that is "inextricably intertwined" with voter registration activities (Amended Complaint, ¶ 104); and (3) burdening Plaintiffs' ability to associate with potential voters and individuals who may later

decide to serve as a volunteer in one of the Plaintiffs' organizations (Amended Complaint, ¶¶ 109-113).

The claims are based on the requirements of the law that: (1) third party agents return completed voter registration forms within 48-hours of their completion; and (2) third party agents may only acquire fifty blank New Mexico voter registration forms at a time. Plaintiffs also take issue with the civil and criminal penalties applied to violations of Section 1-4-49 as well as the training required of putative third party voter registration agents. The fifty form limit and training requirement are discussed separately below. The 48-hour requirement and civil and criminal penalties are discussed together.

1. The fifty form limit does not excessively burden Plaintiffs free speech rights.

The Court has recognized that the expressive act of assisting voters in the registration process is protected First Amendment conduct. The Court has also recognized that Plaintiffs have adequately pled that Section 1-4-49 unconstitutionally burdens that right. The undisputed material facts, however, belie that claim.

a. The fifty form limit does not infringe on Plaintiffs' expressive conduct.

Plaintiffs contend that their voter registration activities are hampered by the fact that they cannot get more than fifty blank voter registration forms at a time. The facts do not support this contention. 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." 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.) Such requests are routinely granted. 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.) Indeed, NMPIRG was able to run a successful voter registration drive in 2006 in spite the fifty form limit. (*See* Ex. 7, pg. 426 (“As a result, we were able to successfully overcome the barriers we anticipated. Although our volunteers were still required to go through a voter registration training and, in some cases, did need to pick up voter registration forms individually at the registrar’s office, the registrar’s office came to regard our efforts as important and unique enough to allow Jamison to pick up and drop off large batches of voter registration forms on behalf of the other volunteers.”))

Moreover, none of the Plaintiffs has indicated any intention of conducting the kind of large-scale registration drive that the fifty form limit – even if rigidly applied – would significantly impede. 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).) Given NMPIRG’s admitted success in the 2006 election cycle – a non-Presidential year – it is hard to believe that the fifty form limit would have hampered their efforts in 2008 either. 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.) Under these circumstances, it strains credulity to suggest that FAWCO is hampered in its New Mexico voter registration activities by the fifty form limit.

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.)

In light of these facts, it is clear that the fifty form limit does not substantially burden Plaintiffs' free speech rights connected to the expressive conduct of assisting citizens in the act of voter registration. Not only is there no evidence that any third party voter agent has run out of forms, but given the free availability of the federal voter registration form, it is actually impossible for an agent to run out of forms in any way for which the State is culpable.

b. The fifty form limit does not infringe on Plaintiffs' protected speech incidental to the process of voter registration.

Plaintiffs' claim that the fifty form limit burdens their speech incidental to the voter registration process fails for the same reasons. The fifty form limit is hardly a burden at all; it is routinely relaxed and because of the ready availability of the federal form, the New Mexico voter registration form is ultimately superfluous to voter registration activity in any event. Plaintiffs are free to engage whomever they chose in whatever conversations they deem appropriate, and the fifty form limit does not burden such exchanges in any way.

c. The fifty form limit does not infringe on Plaintiffs' protected associational rights.

Finally, Plaintiffs' claim that the fifty form limit burdens their associational rights also fails. Plaintiffs are free to recruit whomever they desire for their organizations, and they do not need more than fifty blank New Mexico voter registration forms to do so. None of the Plaintiffs has ever been denied a request for additional forms when needed, and they are all free to use the federal form with impunity.

2. The 48-hour requirement and attendant penalties for its violation do not excessively burden Plaintiffs' protected speech rights.

Plaintiffs also contend that the 48-hour requirement unconstitutionally burdens their free speech rights. There is no question regarding the contours of that requirement. The only question is whether having to return or mail a completed voter registration form within 48 hours of its completion imposes such a burden on Plaintiffs' voter registration conduct as to render it unconstitutional. The undisputed facts suggest that it does not.

a. The 48-hour requirement does not infringe on Plaintiffs' expressive conduct.

The 48-hour requirement only potentially burdens expressive conduct if it chills voter registration. Plaintiffs, of course, claim that it does, and offer their own volitional cessation of voter registration activities as evidence of such chilling. As the Court has already recognized, the law does not place that power solely in Plaintiffs' hands. The question is whether the cessation of voter registration activity is a reasonable response to the 48-hour requirement and the potential civil and criminal penalties for violating that requirement. Frankly, compliance with the 48-hour requirement is a simple matter of promptly returning completed voter registration forms. In spite of all Plaintiffs' hand-wringing, there is no evidence suggesting that 48 hours is too short a period of time in which to do so. Indeed, NMPIRG seems to believe that hand delivery of completed forms poses no special problem. (*See* Ex. 7, pp. 216, 217 (In response to a question about how to turn in forms, NMPIRG's representative responds "in person is best – no reason not to, you can walk from campus.")))

Moreover, the same fear Plaintiffs profess regarding compliance with the 48-hour requirement would grip them if Section 1-4-49 required that forms be submitted by book closing rather than within 48-hours of their completion. A third party registration agent who had misplaced or forgotten about completed voter registration forms would still face potential

penalty. This highlights the reason for the 48-hour deadline – if the forms are not returned, the affected voters are wholly disenfranchised. The fear that they will not be able to competently register voters is not a sufficient basis on which to sustain Plaintiffs’ challenge to Section 1-4-49.

Plaintiffs also express concern that somebody could be subjected to criminal penalties for little more than negligence; i.e. inadvertently leaving a completed form in the trunk or in one’s backpack. This is not what the law contemplates. Negligence of the type Plaintiffs describe is not punishable by criminal sanctions. The criminal penalties only apply to willful conduct; *i.e.* a situation in which an agent intentionally fails to turn in the forms.

New Mexico’s civil penalties are constitutional. As an initial matter, they are substantially less severe than those struck down by the court in *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006). The Florida law at issue there set out three categories of fines: (1) a fine of \$250 for each application turned in to an election official beyond the ten-day deadline; (2) a fine of \$500 for each application turned in to an election official after the date on which a voter must submit an application to be eligible to vote in the next upcoming election; and (3) a fine of \$5,000 for each application collected by a third party registration agent but never submitted to the appropriate election official. *See Fla. Stat. Ann. § 97.0575(3)(a)-(c)*. Moreover, the Florida law did not provide for any cap on the specified fines.

By contrast, a violation of Section 1-4-49 is punishable by a “civil penalty of two hundred fifty dollars (\$250) for each violation, not to exceed five thousand dollars (\$5,000).” NMSA 1978, § 1-4-49(D). Plaintiffs’ contend that these fines are oppressive, but Plaintiffs are hardly faced with the “threat of crippling fines” that confronted the Florida organizations. *League of Women Voters*, 447 F. Supp. 2d at 1339. Moreover, none of the Plaintiffs (or their

members) has ever been charged with a single fine for failing to comply with the 48-hour requirement.

Ultimately, there is nothing unconstitutional about applying civil penalties to negligent conduct. An agent who takes a completed voter registration form from a voter thereby affirmatively and voluntarily assumes the obligation of ensuring that the voter is actually registered. Negligence is not a sufficient excuse for failing to meet that obligation. Third party agents cannot wrap themselves in the flag and wax poetic about their efforts to enfranchise the traditionally disenfranchised if, through their own negligence, they destroy the trust those traditionally disenfranchised people have placed in them. 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.)

Plaintiffs also contend that “organizations are bound by the forty-eight-hour rule even if they provide advice about the form . . . but do not physically collect any of the completed forms.” Amended Complaint, ¶ 118. This contention misreads Section 1-4-49. The provision is, and as a practical matter only can be, concerned with the conduct of a third party voter registration agent after that person has taken physical custody of a completed voter registration form. Any other reading of the statute is nonsensical. If an agent has not taken a completed form, he or she cannot return it to the appropriate election official by *any* deadline.

b. The 48-hour requirement does not infringe on Plaintiffs’ protected speech incidental to the process of voter registration.

Plaintiffs may engage whomever they want in whatever speech they choose. The ability to discourse with potential voters has nothing whatsoever to do with how quickly an agent must return a completed voter registration form. The quality, and quantity, of any discourse in which

Plaintiffs engage during the voter registration process is unchanged whether a third party agent must return a completed voter registration form within 24 hours, 48 hours, or two weeks.

As with Plaintiffs' claim that the 48-hour requirement burdens their expressive conduct, this argument fails. Compliance with the 48-hour requirement is not nearly so difficult as Plaintiffs suggest. It has no impact of any kind on their speech incidental to the voter registration process, and summary judgment in the Secretary's favor is appropriate.

c. The 48-hour requirement does not infringe on Plaintiffs' protected association rights.

Just as Plaintiffs may engage whomever they chose in whatever discourse they please incident to the process of registering voters, they may also associate with whomever they chose at any time they choose. The 48-hour requirement does not make it even slightly more difficult to exercise those associational rights, including any attempt to recruit potential voters as members of Plaintiffs' organizations.³ Plaintiffs are equally capable of exercising their associational rights regardless of how long the law allows them to keep a completed voter registration form.

3. The training requirement does not excessively burden Plaintiffs' protected speech rights.

As noted above, the training required of third party voter registration agents is minimally invasive. The longest training session described in the record was two-and-a-half hours, and training is necessarily more time-consuming with larger groups that ask more questions. In NMPIRG's experience, the typical training session is thirty minutes long. Moreover, election officials routinely accommodate groups in their requests for training at odd hours or locations,

³ Plaintiffs also complain that the forty-eight hour deadline for returning completed voter registration forms burdens their associative rights because it gives them less time to "collect and enter voter contact information" in their own databases. Amended Complaint, ¶ 111. Plaintiffs are not constitutionally entitled to such data mining. *See Zemel v. Rusk*, 381 U.S. 1, 17, (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.")

and the Secretary is willing to make such training available via telephone or the internet. Accordingly, no third party voter registration agent is required to meet an excessively burdensome training requirement.⁴

Training is important to ensure that potential agents do their jobs the right way. They need to know the kinds of problems that prevent a completed registration application from being processed and they need to know what each part of the form in order to intelligently answer questions from voters. They need, for example, to know whether a voter must identify a political party preference. They also need to know that a form cannot be processed if the applicant does not affirmatively indicate on the form that he or she is a United States citizen and at least 18 years old.

Although Plaintiffs' complain that the training is arduous, the record evidence suggests otherwise. It is a minimal burden Plaintiffs must shoulder in return for being entrusted with the enfranchisement of New Mexico's voters.

C. Section 1-4-49 Serves New Mexico's Compelling State Interest In The Integrity Of Its Electoral Process In A Manner No More Burdensome Than Necessary.

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

⁴ The Secretary concedes that it would be unreasonable to require members of Plaintiff FAWCO to personally attend a training session in New Mexico in light of its overseas operations. And while no internet training is currently available, the Secretary has no objection to such training and, in fact, intends to implement it.

votes of eligible voters,” *Id.* at 1619, and also the interest in protecting public confidence in the electoral system. Regarding the latter, the Court noted that “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Id.* at 1620. These interests, along with the interest of ensuring that New Mexico voters are not disenfranchised, justify Section 1-4-49.

Section 1-4-49 was passed to prevent voter fraud, a paramount state interest identified in *Crawford*. Of equal importance is guarding against the disenfranchisement of a state’s citizens. If third party registration agents engage in voter registration fraud, they have harmed the electoral system because the voter who was unexpectedly turned away at the polls is unlikely to return. Moreover, the voters most likely to be affected by such conduct are precisely the kind of voters Plaintiffs profess to empower: young voters, the elderly, and minorities. (*See Barreto Report*, pg. 4.) Ultimately, New Mexico’s interests in passing Section 1-4-49 are both to protect the electoral system from fraud and to guarantee participation in our democratic system.

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

Plaintiffs’ alleged injury is insignificant. As detailed above, compliance with Section 1-4-49 requires minimal effort on Plaintiffs’ part; indeed, it only requires Plaintiffs to competently perform the task they have set out to accomplish. To avoid penalty under Section 1-4-49, Plaintiffs must: (1) fill out a short registration form and submit it to the Secretary of State; (2)

ensure that their third party voter registration agent number appears on every completed voter registration form they submit to either the Secretary of State or a County Clerk; and (3) place in the mail or personally deliver, within forty-eight hours, each completed registration certificate. None of these requirements place a substantial burden on Plaintiffs' voter registration efforts or, accordingly, their protected speech interests.⁵

The second step in the *Anderson* analysis is the identification and evaluation of "the precise interests put forward by the State" to justify the challenged law. *Anderson*, 460 U.S. at 789. Those interests are maintaining the integrity of the electoral system and protecting the election franchise of New Mexico citizens, interests of paramount importance.

The final step in the *Anderson* analysis is weighing the "legitimacy and strength" of the State's interests in light of "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. The legitimacy and strength of New Mexico's interests implicated by Section 1-4-49 are unquestionable. The burdens of which Plaintiffs complain are a small price to pay to ensure that New Mexico's citizens are treated fairly and that the trust they place in third party voter registration agents is not abused. Application of the *Anderson* test to Section 1-4-49 and to Title 1, Chapter 10, Part 25 of the New Mexico Administrative Code compels the conclusion that the challenged laws are constitutional.

D. Section 1-4-49 Does Not Violate Article II, Section 17 Of The New Mexico Constitution.

While it may be true that New Mexico courts "have interpreted [the] state constitution to provide broader protection than the First Amendment," *State v. Rendleman*, 2003-NMCA-150, ¶

⁵ Plaintiffs contend that there is no legitimate interest justifying pre-registration requirements for individual voter registration agents. See Amended Complaint, ¶ 122. This Court has already identified that interest as a "safeguard against fraud and the appearance of fraud" in the voter registration process. *American Ass'n of People With Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1237 (D.N.M. 2008) ("AAPD"). The Court has also recognized the interest in being able to trace fraudulent registration conduct to the person responsible. *Id.* Such tracing is impossible without pre-registration.

57, 134 N.M. 744, Plaintiffs have not stated a separate cause of action under Article II, Section 17. It is insufficient to simply restate the allegations in Count I and hope that the challenged law might be invalid under the New Mexico Constitution even if it survives First Amendment scrutiny. There is no reason the *Anderson* test should not apply with equal force in examining Plaintiffs' free speech claim under Article II, Section 17. The reasons supporting the constitutionality of Section 1-4-49 under the federal constitution apply with equal force here, and Plaintiffs' claim should be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Secretary of State respectfully requests that this Court: (1) grant summary judgment to the Secretary on Counts I and V of Plaintiffs' Amended Complaint; (2) order all parties to pay their own costs; and (3) provide Defendant any additional relief to which she may be entitled.

DATED: July 2, 2010

Respectfully submitted,

GARY K. KING
NEW MEXICO ATTORNEY GENERAL

/s/ Scott Fuqua _____
Scott Fuqua
Assistant Attorney General
New Mexico Attorney General's Office
408 Galisteo Street
Santa Fe, NM 87501
(505)827-6920 – Telephone
(505)827-6036 – Facsimile

Attorney for Defendant
Mary Herrera

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing motion on Plaintiffs' counsel of record via electronic filing with the CM/ECF filing system on July 2, 2010.

/s/ Scott Fuqua
Scott Fuqua