

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

AMERICAN ASSOCIATION OF PEOPLE
WITH DISABILITIES, FEDERATION OF
AMERICAN WOMEN'S CLUBS
OVERSEAS, INC., NEW MEXICO PUBLIC
INTEREST RESEARCH GROUP
EDUCATION FUND, and SOUTHWEST
ORGANIZING PROJECT,

Plaintiffs,

v.

MARY HERRERA, in her capacity as
Secretary of State,

Defendant.

No. CIV 08-00702 JOB

**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**

INTRODUCTION

When a criminal statute fails to specify the standard of conduct it requires, leaving “men of common intelligence [to] necessarily guess at its meaning,” the law is unconstitutionally vague. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (internal quotation marks and citation omitted). Plaintiffs have obtained new evidence over the course of discovery in this action—from the State and County officials charged with enforcing the law—that illuminates the inconsistent application and divergent understanding of New Mexico’s third-party voter registration law, N.M. Stat. Ann. 1978, § 1-4-49. Accordingly, this Court should reconsider its dismissal of their claim that the law is unconstitutionally vague and grant Plaintiffs’ motion to alter or amend the judgment.

In its February 5, 2010 Memorandum Opinion and Order (“Order”) (Doc. No. 91), this Court relied, as it must, only on the allegations in the Amended Complaint. But the Court invited Plaintiffs to move for reconsideration on their claim that New Mexico’s third-party voter registration agent statute is void for vagueness (Count II of Plaintiffs’ Amended Complaint), if new facts surfaced that called into question the Court’s dismissal of their facial vagueness challenge. As the Court explained: “If, at some later point, the Plaintiffs uncover facts that cast[] the Court’s legal decision on the facial challenge into doubt, the Plaintiffs can move the Court to reconsider its legal ruling based on the subsequently uncovered facts.” (Order at 55 n.9.)¹

¹ In its Order, this Court denied Defendant’s motion to dismiss Plaintiffs’ as-applied claims under the First Amendment of the federal Constitution and Article II, Section 17 of the New Mexico Constitution, and dismissed Plaintiffs’ National Voter Registration

Plaintiffs have uncovered such facts. After conducting depositions with at least ten New Mexico election officials—five County Clerk officials² and five senior employees in the New Mexico Secretary of State’s office³—Plaintiffs have obtained evidence demonstrating that there is widespread confusion among the officials charged with administering the statute regarding two of its most important provisions: (1) what constitutes “assist[ing] persons to register,” and (2) when the statute’s 48-hour rule for turning in voter registration forms applies. This new evidence demonstrates that Defendant’s statements—that “assist” “clearly encompasses more than simply providing a registration form to a potential voter” and that the 48-hour rule only pertains to agents who take possession of a completed form (*see* Def.’s Mot. to Dismiss at 14 (Doc. No. 78))—are not accurate. This new evidence also demonstrates that although this Court took judicial notice that the statute has plain meaning, the statute’s meaning is not plain

Act (NVRA) claim, procedural due process claim, state non-delegation claim, vagueness claim, overbreadth claim, and a claim under Article II, Section 8 of the New Mexico Constitution. Plaintiffs limit their motion to reconsider to the vagueness claim dismissed by Order of this Court.

² As of March 5, 2010, Plaintiffs have conducted depositions of the following County Clerk officials: (1) Mario Jimenez, Doña Ana County Chief Deputy Clerk; (2) Douglas Shaw, Chaves County Chief Deputy Clerk; (3) Maggie Toulouse Oliver, Bernalillo County Clerk; (4) Maria Elena Rodela, Rio Arriba County Bureau of Elections Chief; and (5) Denise Lamb, Santa Fe County Chief Deputy Clerk.

³ As of March 5, 2010, Plaintiffs have conducted depositions of the following senior employees in the Secretary of State’s office: (1) Don Francisco Trujillo II, Deputy Secretary of State; (2) Kelli Fulgenzi, Administrator, Bureau of Elections; and (3) Larry Dominguez, Elections Coordinator for the New Mexico Secretary of State; (4) Mary Herrera, Secretary of State; and (5) Manuel Vildasol, Administrator. Since the transcripts for Mary Herrera and Manuel Vildasol are not yet available, Plaintiffs may supplement this filing once they receive both transcripts.

to the County Clerks and Secretary of State senior employees who testified to their confusing and contradictory interpretations of the statute. Accordingly, this Court should amend its prior judgment and reinstate Plaintiffs' void-for-vagueness claim.

STANDARD OF REVIEW

Plaintiffs file this motion at the invitation of the Court. A party may file a Rule 59(e) motion when, *inter alia*, the movant presents “new evidence previously unavailable.”⁴ *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *see also Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). The decision whether to grant or deny such a motion is committed to the discretion of the district court. *See Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10th Cir. 1988).

ARGUMENT

The New Mexico third-party voter registration law—which imposes criminal penalties for noncompliance on those engaged in expressive conduct, speech intertwined with conduct, and expressive association under the First Amendment—fails to provide fair notice of the meaning of two of its most important provisions, and leaves the law open to selective and arbitrary enforcement. For these reasons, N.M. Stat. Ann. 1978, § 1-4-49 is unconstitutionally vague.

⁴ To the extent this motion is deemed a Rule 59(e) motion, it is timely. A Rule 59(e) motion must be filed “no later than 28 days after entry of the judgment.” Fed. R. Civ. P. 59(e). The Court’s judgment was entered on February 5, 2010, and the 28-day filing deadline falls on March 5, 2010, which is the day on which Plaintiffs’ file their motion. Prior to amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2009, the filing deadline for a Rule 59(e) motion was 10 days after entry of judgment. *See Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991).

I. The Void-for-Vagueness Doctrine

A statute is void for vagueness when it (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) lacks standards to the degree that it invites selective or arbitrary enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). “What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008). See also *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 621 (1976) (striking down a law that “does not sufficiently specify what those within its reach must do in order to comply”).

“The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.” *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Economic regulation is subject to a less strict vagueness test; laws with criminal penalties are subject to a stricter vagueness test; and laws that impinge on the freedom of speech and association are reviewed under the most stringent vagueness test, which demands a high degree of clarity in such laws. *Id.* at 499 (“[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”); *Lawson*, 461 U.S. at 358 n. 8 (noting that “where a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to

invalidate a criminal statute on its face even when it could conceivably have had some valid application” (internal citation omitted).

In assessing whether a statute is vague, courts look “to the words of the ordinance itself, to the interpretations the court below has given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (quotation marks omitted). *See also Hynes*, 425 U.S. at 622 n.6 (striking down an ordinance in part because it lacked “a history of ‘less formalized custom and usage’ that might remedy the vagueness problems” (quoting *Parker v. Levy*, 417 U.S. 733, 754 (1974))). When the officials charged with enforcing the law are themselves confused about its application, courts have found such laws to be impermissibly vague. *See, e.g., Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1581 (M.D. Tenn. 1989) (finding the terms “substantial or significant” unconstitutionally vague because “[c]learly, if the regulating authority cannot determine the establishments which are subject to its authority, the establishments themselves cannot be expected to determine whether they need to be licensed or not”); *Cimarron Alliance Found. v. City of Oklahoma City*, 290 F. Supp. 2d 1252, 1263 (W.D. Okla. 2002) (holding an ordinance to be vague in part because the city manager’s deposition “testimony explained only a few reasons that he has used to recommend granting or denying an application, and there is no suggestion that those reasons would provide the exclusive standards in deciding whether to issue a permit”).

II. Newly Available Evidence Establishes That New Mexico’s Voter Registration Law Is Unconstitutionally Vague

Plaintiffs’ newly obtained evidence establishes that N.M. Stat. Ann. § 1-4-49 fails to pass constitutional muster under both independent grounds of the vagueness test: it fails to provide fair notice of when and how it applies, and it invites wholly arbitrary enforcement.

A. The Voter Registration Law Provides No Fair Notice of Its Meaning.

The new evidence confirms that the law fails to provide a person of ordinary intelligence with fair notice of when and how the law (and its threat of criminal sanction for engaging in First Amendment activities) applies. As an initial matter, no definition in any New Mexico statute or regulation, nor internal guidance from the Secretary of State, nor common practice or usage provides for precisely what the circumstances are that (1) subject a person to liability for “assist[ing]” with voter registration, or (2) necessitate compliance with the 48-hour rule and the means by which to comply with the 48-hour rule. (*See* Am. Compl. ¶¶ 121-129, at 39-41.) For that reason, Plaintiffs have argued that § 1-4-49 specifies no standard of conduct, such that “men of common intelligence must necessarily guess at its meaning.” *Coates*, 402 U.S. at 614 (internal quotation marks and citation omitted).⁵

⁵ Although the “fact that close cases can be envisioned [does not] render[] a statute vague,” the Supreme Court has held that “[w]hat renders a statute vague is” “the indeterminacy of precisely what that fact is” that subjects a person to criminal liability. *Williams*, 128 S. Ct. at 1846. That standard is amply met here. Section 1-4-49 does not specify the facts under which someone is deemed to “assist” a person to register to vote or the facts under which someone may comply with the 48-hour requirement. Unlike the statute challenged in *Williams*, the central problem with § 1-4-49 is not that the intent to commit a particular covered action is difficult to prove; it is that the type of activities

This Court dismissed Plaintiffs’ vagueness claim on the grounds that “to ‘assist’ a voter is a concept of plain import and while the Plaintiffs may speculate about possible misinterpretations of the term, the plain meaning of the statute is clear.” (Order at 58.) But that reasoning has been undermined by newly available evidence. Subsequent to the close of briefing and hearing on Defendant’s Motion to Dismiss, the Court’s legal conclusion that the statute is not vague has been called into serious question by the deposition testimony of numerous state and county officials charged with enforcing § 1-4-49.

First, various election officials have enunciated diametrically opposed interpretations of when a party “assists” another person to register to vote—and therefore becomes subject to the requirements of § 1-4-49. For example, at the motion to dismiss stage of this case, Defendant took the position that merely handing out a form would not constitute assistance under the law. (Def’s Mot. to Dismiss at 14.) However, officials charged with the day-to-day enforcement of the law gave widely divergent answers to questions on that very issue:

- Some election officials believe merely handing out forms **does not** constitute “assist[ance]” under the law. (*See, e.g.*, Dominguez Dep. Tr. at 117 (attached as Ex. A); Fulgenzi Dep. Tr. at 131-35 (attached as Ex. B); Toulouse Oliver Dep. Tr. at 192 (attached as Ex. C).)
- Other election officials believe that merely handing out forms **does** constitute assistance. (*See, e.g.*, Lamb Dep. Tr. at 68-69 (attached as Ex. D); Jimenez Dep. Tr. at 170-73 (attached as Ex. E).)

covered by the statute are themselves indeterminate, leading election officials and prospective third-party registration agents alike to guess at when the requirements of § 1-4-49 are triggered.

- Meanwhile, the Deputy Secretary of State believes that merely handing out *state forms* constitutes assistance, but just handing out *federal forms* does not. (See Trujillo II Dep. Tr. at 78-79 (attached as Ex. F).)

Similarly, election officials were of different minds on whether who initiates the voter assistance—the voter or the third-party voter registration agent—affects whether the law’s provisions apply:

- Some officials believe that when a voter requests assistance § 1-4-49 does not apply, but when a person solicits someone to register the law would apply. (See *id.* at 78-79.)
- Other election officials believe that § 1-4-49 is applicable both when an agent solicits a voter to register and when a voter asks an agent for a registration form. (See Shaw Dep. Tr. at 141-42 (attached as Ex. G).)

Thus, a person trying to determine whether he or she needs to register as a third-party voter registration agent for simply handing out registration forms would be told “**Yes**” if he or she asked County Clerk officials in Doña Ana or Santa Fe Counties or some (but not all) employees at the Secretary of State’s office, and “**No**” if he or she sought guidance from other employees at the Secretary of State’s office, County Clerk officials in Bernalillo County, or the statements in the Secretary of State’s brief (*see* Def.’s Mot. to Dismiss at 14 (claiming that “‘Assist,’ as that term is used in Section 1-4-49(A) clearly encompasses more than simply providing a registration form to a potential voter.”)).

If the officials who are expert in election law and deal with § 1-4-49 on a regular basis have no consistent understanding of the term “assists,” then the possibility that a person of ordinary intelligence—or even superior intelligence— would have no way of knowing *ex ante* whether his or her actions are covered by the law is a real, not speculative, danger caused by § 1-4-49’s vagueness. (See Fulgenzi Dep. Tr. at 131 (“Q.

What does the ‘substantial assistance’ entail? A. I think that’s unclear.”.) Even if the word “assist” might have a familiar dictionary definition, its usage in § 1-4-49 to define the type of voter registration activity subject to liability is, as evinced by the election officials’ inconsistent responses, far from clear. *Cf. City of Chi. v. Morales*, 527 U.S. 41, 57 (1999) (holding that “the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of ‘loitering,’ but rather about what loitering is covered by the ordinance and what is not”).

Second, there is also widespread confusion among those charged with enforcing § 1-4-49 regarding the application of the law’s 48-hour rule. Section 1-4-49.B provides that “[o]rganizations employing registration agents or using volunteer registration agents shall deliver or mail a certificate of registration to the secretary of state or county clerk within forty-eight hours of its completion by the person registering to vote or deliver it the next business day if the appropriate office is closed for that forty-eight-hour period.” Contrary to Defendant’s assertion that the 48-hour rule only applies when an agent takes custody of the completed form (*see* Def.’s Mot. to Dismiss at 14-15), at least one of the election officials charged with administering the law believes that agents are subject to the 48-hour rule even if they **do not** take possession of the completed form. (*See* Jimenez Dep. Tr. at 172 (“Q. [E]ven if I am not present for any of the filling out of the registration form, the second it’s completed, that 48 hours is triggered and I, as the agent, am responsible for having that form returned within the 48 hours? A. Yes, sir, you are.”).) There are also divergent interpretations among election officials regarding when the clock begins to run on the 48-hour deadline:

- The clock starts running when a third-party agent receives a blank registration form from a County Clerk’s office. (*See* Rodela Dep. Tr. at 65 (attached as Ex. H).)
- The clock starts running the moment a voter completes the registration form, even if not handed to an agent. (*See* Jimenez Dep. Tr. at 172.)
- The clock starts running when a voter signs the registration form. (*See* Fulgenzi Dep. Tr. at 54-56.)
- The clock starts running when a voter give a completed registration form to a third-party agent. (*See* Def.’s Mot. to Dismiss at 9-10.)

In addition, there are inconsistent interpretations over when the clock stops and a third-party registration agent has fulfilled his requirement under the 48-hour deadline, particularly when using the mail:

- Defendant has stated that a completed form must be “place[d] in the mail or personally deliver[ed]” within 48 hours. (*See* Def.’s Mot. to Dismiss at 16.)
- Others charged with daily enforcement of the law testify that a completed form must be postmarked or received within 48 hours or the agent is in violation of the law. (*See, e.g.,* Dominguez Dep. Tr. at 82; Jimenez Dep. Tr. at 140-42; Fulgenzi Dep. Tr. at 54-56.)

Indeed, the law is so opaque that one official provided contradictory interpretations even within his own deposition. (*See* Trujillo II Dep. Tr. at 59 (at first stating that the 48-hour rule is satisfied if a registration form is placed in the mail within 48 hours, but then moments later declaring that such a mailing must be postmarked within 48 hours to meet the requirement).)

And even the Bureau of Elections Administrator admitted that the 48-hour rule is confusing—which is no surprise in light of the differing interpretations described above. (*See* Fulgenzi Dep. Tr. at 56 (“It is conflicting, it is, that 48 hours is conflicting, but, yes,

I would say that when we receive them, we stamp them, and we are as close to that 48-hour rule as possible is what we look for.”.)

B. The Voter Registration Law Invites Arbitrary Enforcement.

Since a person of ordinary intelligence would have no fair notice of what activities qualify as “assist[ing]” a person to register to vote and when the 48-hour time-period commences, that alone is sufficient to find that the statute is unconstitutionally vague. Independently, the law is also impermissibly vague because the discretion accorded to officials in administering § 1-4-49 leaves the enforcement of the law to the arbitrary interpretations and whims of County Clerks and Secretary of State officials. *Kolender*, 461 U.S. at 360-361 (identification requirement unconstitutional because it accords police “full discretion”); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (“Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections . . . [thereby] entrusting lawmaking ‘to the moment-to-moment judgment of the policeman on his beat.’”) (quoting *Gregory v. Chi.*, 394 U.S. 111, 120 (1969) (Black, J., concurring)).

In this regard, whether § 1-4-49 and its accompanying regulations are unconstitutionally vague does not turn on whether New Mexico officials harbor ill will toward Plaintiffs; it is well established that “[w]ell-intentioned prosecutors and [even] judicial safeguards do not neutralize the vice of a vague law.” *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964). Indeed, it is not even material that New Mexico officials have *already* enforced the law in an arbitrary manner. Rather, the law is vague because it is so open-ended that it creates substantial potential for arbitrary and discriminatory enforcement:

[W]here a policy is unwritten, unclear, and undisseminated, the fact that it has not yet been used discriminatorily does not save it from invalidation under the First Amendment. The vice of conferring unfettered discretion on government officials to determine which messages may be conveyed is not avoided by their past pattern of not making a discriminatory decision. The vice inheres in the opportunity for discrimination, and the First Amendment requires that opportunity to be held to an acceptable minimum by a clear and well understood policy that appropriately limits the discretion of the officials who must administer it.

Lebron v. AMTRAK, 69 F.3d 650, 662 (2d Cir. 1995) (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) and *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-59 (1988)).

As the new evidence reveals, there is a striking lack of guidance given to County Clerks on how to interpret the statute. (See Toulouse Oliver Dep. Tr. at 121 (“Q. Have you been given guidance on that? A. Not to my knowledge. I think we just try to follow norms as they’ve been established in our office and through the experience that we’ve had with people coming in and wanting multiple registration forms.”); Trujillo II Tr. at 62 (“Q. Is there someone in the Secretary of State’s Office responsible for providing direction to the County Clerks regarding the 48-hour requirement? A. No.”).)

Indeed, the potential for arbitrary enforcement and lack of clear standards has led one official in the Doña Ana County Clerk’s office to affirmatively discourage third-party voter registration agents from handing out the forms, thereby curtailing First Amendment activities under his belief regarding the intent of the statute—a position at odds with that taken by Defendant in this case. (See Jimenez Dep. Tr. at 173 (“[W]e tell them they are their forms. They are not to hand them out like candy. They are their forms. They are going to register people to vote. You register them in person and bring those forms back

or mail them to us. Don't hand them out. We instruct them not to hand them to people to take home.”.) This new evidence reveals that § 1-4-49 “is so imprecise that discriminatory enforcement is a real possibility.” *Gentile*, 501 U.S. at 1051.

In short, as the Bernalillo County Clerk, who serves the most populous county in New Mexico, admitted in response to a question about her understanding of the third-party voter registration law, “I don't believe that the law is explicit enough.” (Toulouse Oliver Dep. Tr. at 213.) She is correct.

CONCLUSION

For the foregoing reasons, Plaintiffs move this Court under Rule 59(e) of the Federal Rules of Civil Procedure to reconsider its dismissal of their claim that N.M. Stat. Ann. 1978, § 1-4-49 is unconstitutionally vague.

Respectfully Submitted,

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s/ Edward Ricco

By _____

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Attorneys for Plaintiffs

I certify that on March 5, 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 _____
Edward Ricco

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IN THE UNITED STATES DISTRICT COURT
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AMERICAN ASSOCIATION OF PEOPLE
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GROUP EDUCATION FUND, and SOUTHWEST
ORGANIZING PROJECT,

Plaintiffs,

vs. No. CIV 08-00702 JOB

MARY HERRERA, in her capacity as
Secretary of State,

Defendant.

DEPOSITION OF LARRY DOMINGUEZ

Monday, January 11, 2010
9:06 a.m.
315 Paseo de Peralta
Santa Fe, New Mexico

PURSUANT TO THE FEDERAL RULES OF CIVIL
PROCEDURE this Deposition was:

TAKEN BY: GUY G. BRENNER, ESQ.
ATTORNEY FOR THE PLAINTIFFS

REPORTED BY: EDITH ARNOLD FLORES, RPR, NM CCR #208
Cumbre Court Reporting, Inc.
2019 Galisteo Street - Suite A-1
Santa Fe, New Mexico 87505

1 to vote or we're not going to process that voter
2 registration form.

3 Q. Well, let me ask you this. If I am a voter
4 registration agent and I register Jessica here, for
5 example, and she fills out the form at six p.m.
6 tonight, and at five p.m. on Wednesday -- today is
7 Monday -- five p.m. on Wednesday, so within the
8 48-hour period I drop it in the mail box, but the mail
9 has already been picked up that day so it gets a
10 postmark for Thursday, and let's say the Secretary of
11 State's Office receives that voter registration on
12 Saturday, have I violated the law?

13 A. I believe you have.

14 Q. And so it either has to be received by the
15 -- so is your understanding of the 48-hour requirement
16 that it has to be either received by the Secretary of
17 State or the county clerk within 48 hours of
18 completion, or it has to be postmarked within 48 hours
19 of completion?

20 A. That is my understanding.

21 Q. You started to anticipate my question
22 before about enforcement of the 48-hour requirement.
23 What happens -- well, taking a step back. When you
24 receive a form, a voter registration form filled out
25 with the assistance of a third-party voter

1 Q. Sure. If an agent merely hands out a form
2 to a prospective voter and does nothing else, are they
3 covered by the -- to your understanding, are they
4 covered by the challenged laws, by the voter
5 registration laws we're talking about?

6 A. I don't believe that applies to them
7 because they're not assisting the voter.

8 Q. So in your mind, merely handing out a form
9 is not assistance?

10 A. I don't believe so.

11 Q. Has this been your belief since 2007?

12 A. Yes.

13 Q. Is this something you inform the agents of
14 when you're training them?

15 A. Yes.

16 Q. So you inform the agents if all they do is
17 hand out the form, they are not assisting a voter and
18 are not subject to the requirements of the law?

19 A. Yes, because they're not helping them fill
20 out the actual document.

21 Q. Do you train county clerks on this point?

22 A. No.

23 Q. So county clerks may or may not have the
24 same understanding?

25 A. They may or may not have the same

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GROUP EDUCATION FUND, and SOUTHWEST
ORGANIZING PROJECT,

Plaintiffs,

vs. No. CIV 08-00702 JOB

MARY HERRERA, in her capacity as
Secretary of State,

Defendant.

REPORTER'S CERTIFICATE

I, EDITH ARNOLD FLORES, CCR NO. 208, DO
HEREBY CERTIFY that on Monday, January 11, 2010, the
Deposition of LARRY DOMINGUEZ was taken before me at
the request of, and sealed original thereof retained
by:

ATTORNEY FOR THE PLAINTIFFS
GUY G. BRENNER, ESQ.
O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, D.C. 20006-4001

I FURTHER CERTIFY that copies of this
Certificate have been mailed or delivered to all
counsel, and parties to the proceedings not

1 represented by counsel, appearing at the taking of
2 the Deposition:

3 I FURTHER CERTIFY that examination of this
4 transcript and signature of the witness was requested
5 by the witness and all parties present.

6 On a letter was mailed or
7 delivered to regarding obtaining
8 signature of the witness, and corrections, if any,
9 were appended to the original and each copy of the
10 Deposition.

11 I FURTHER CERTIFY that the recoverable cost
12 of the original and one copy of the Deposition,
13 including exhibits, to Guy G. Brenner, Esq., is
14 \$_____.

15 I FURTHER CERTIFY that I did administer the
16 oath to the witness herein prior to the taking of this
17 Deposition; that I did thereafter report in
18 stenographic shorthand the questions and answers set
19 forth herein; and the foregoing is a true and correct
20 transcript of the proceeding had upon the taking of
21 this Deposition to the best of my ability.

22 I FURTHER CERTIFY that I am neither
23 employed by nor related to nor contracted with (unless
24 excepted by the rules) any of the parties or attorneys
25 in this case, and that I have no interest whatsoever

1 in the final disposition of this case in any court.

2

3

EDITH ARNOLD FLORES, RPR
Certified Court Reporter No. 208
License Expires: 12/31/10

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Plaintiffs,

vs. No. CIV 08-00702 JOB

MARY HERRERA, in her capacity as
Secretary of State,

Defendant.

DEPOSITION OF KELLI FULGENZI
VOLUME I

Monday, January 11, 2010
1:45 p.m.
315 Paseo de Peralta
Santa Fe, New Mexico

PURSUANT TO THE FEDERAL RULES OF CIVIL
PROCEDURE this Deposition was:

TAKEN BY: JESSICA L. THORN, ESQ.
ATTORNEY FOR THE PLAINTIFFS

REPORTED BY: EDITH ARNOLD FLORES, RPR, NM CCR #208
Cumbre Court Reporting, Inc.
2019 Galisteo Street - Suite A-1
Santa Fe, New Mexico 87505

1 registration agents behave?
 2 A. How they register voters.
 3 Q. How they register voters in New Mexico,
 4 okay.
 5 Now, with respect to the 48-hour
 6 requirement that you referenced before, can you please
 7 describe your understanding of that requirement.
 8 A. When an agent receives a completed voter
 9 registration card, they have a 48-hour turn around to
 10 turn it in to the Secretary of State or the respective
 11 county clerk.
 12 Q. Can agents hand-deliver these?
 13 A. Yes.
 14 Q. Can they mail them?
 15 A. Yes.
 16 Q. So if an agent were to place these voter
 17 registration cards in the mail, when would they have
 18 to reach the Secretary of State's Office?
 19 A. Within the 48-hour rule.
 20 Q. So would there need to be a time stamp?
 21 A. Well, they would be time-stamped when
 22 they're received, and what would be considered is the
 23 date the voter signs the card.
 24 Q. It's the date that the voter signs the
 25 card?

1 A. Um-hum. It's when they receive it if they
 2 personally register someone.
 3 Q. So if, say, a guy registered to vote with a
 4 third-party voter registration agent, and he signed
 5 the card yesterday and I sent it in the mail tomorrow,
 6 would I be in violation of the 48-hour rule?
 7 A. According to the time that you just gave,
 8 yes.
 9 Q. And if I put it in the mail today but it
 10 didn't get to the Secretary of State's Office until
 11 Friday, would I be in violation of the 48-hour rule?
 12 A. It would have to be received within that 48
 13 hours, so yes.
 14 Q. Would a postmark be sufficient?
 15 A. Yes.
 16 Q. So if I -- if the voter registration form
 17 was postmarked today and it reached the Secretary of
 18 State's Office by Friday, would I be in violation of
 19 the 48-hour rule?
 20 A. No, because it would be postmarked. We
 21 would understand that you attempted.
 22 Q. So it is not just the date that is on the
 23 voter registration card? It has to be the postmark?
 24 A. I see what you're saying.
 25 Q. It's confusing.

1 A. It is conflicting, it is, that 48 hours is
 2 conflicting, but, yes, I would say that when we
 3 receive them, we stamp them, and we are as close to
 4 that 48-hour rule as possible is what we look for.
 5 Q. But if you received a voter registration
 6 card that was postmarked today, the voter signed it
 7 yesterday and the date was signed yesterday, and you
 8 received it on Friday, would you still allow that
 9 person to register the vote?
 10 A. Of course.
 11 Q. Okay.
 12 A. Of course. We've received them after the
 13 date, and we still don't disenfranchise the voter.
 14 Q. Do you do anything to the third-party voter
 15 registration agent?
 16 A. We have turned things over, concerns from
 17 county clerks that we've received or issues to the
 18 FBI, but we have not, that I know of in my history
 19 that I have been there, have not done something to a
 20 third-party agent specifically.
 21 Q. Specifically for just a violation of the
 22 48-hour rule?
 23 A. Correct.
 24 Q. Have you ever turned over any incidences
 25 where a third-party voter registration agent violated

1 the 48-hour rule to the FBI?
 2 A. No, not to my knowledge.
 3 Q. Okay. So you said before that you provide
 4 -- you will be providing trainings to third-party
 5 voter registration agents. Do you provide -- will you
 6 be providing trainings to county clerks?
 7 A. Yes. Well, in election school we do make
 8 sure that they have all of our manuals. We go through
 9 our manuals. When rules are promulgated they are
 10 distributed. We have kind of a link just for county
 11 clerks, so anything that is promulgated by the
 12 Secretary, all 33 county clerks or deputies receive
 13 it.
 14 Q. Is this link, is it a web site?
 15 A. No. It is an e-mail, like a Google list.
 16 Q. Okay.
 17 A. It is like a group listing, I guess you
 18 could call it.
 19 Q. What is the name of this Google group?
 20 A. It's just the county clerk list. It is
 21 sos-nmcc or something to that effect.
 22 Q. In providing trainings to the third-party
 23 voter registration agents, what do you tell them about
 24 the 48-hour requirement?
 25 A. Never to disenfranchise a voter.

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1 Q. Per the direction given by the Secretary of
2 State's Office?
3 A. Correct. So that would be surprising to me.
4 Q. Would you please turn to page 20 of this manual.
5 It's Bates labeled SOS 36. And there is a bold,
6 underlined headline that says, "Line 9 - Name of person
7 who assisted in filling out this form."
8 A. Um-hm.
9 Q. And it says that, "This line is to be filled in
10 only if a registration agent provided substantial
11 assistance in filling out the form for the applicant."
12 What does the "substantial assistance" entail?
13 A. I think that's unclear. "This line is to be
14 filled in only if a registration agent provided
15 substantial assistance."
16 I think the intention, and like I said, I think
17 every person would probably read this differently, would
18 be that they would fill it in completely would be
19 "substantial," or a majority of the form.
20 Q. By "they," who do you mean would fill it in
21 completely?
22 A. Well, what it says is, "This line is to be
23 filled in only if a registration agent provided
24 substantial assistance." So if the agent provided
25 substantial assistance to the voter who is filling out the

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1 form.
2 Q. And just to clarify, by "substantial
3 assistance," what does that mean?
4 A. If the voter had questions regarding the
5 completion of the form, I think is the intention of that.
6 Q. So if the voter had questions, if the
7 third-party voter registration agent was involved in
8 answering the questions, would that be "substantial
9 assistance"?
10 A. I think that is what the intention is, but I
11 hate to speculate on behalf of what he wrote.
12 Q. Have you seen this paragraph before?
13 A. Yes, I have.
14 Q. Were you trained on using this manual?
15 A. Yes.
16 Q. Did the person who trained you tell you anything
17 about how to instruct County Clerks or third-party voter
18 registration agents to comply with this portion?
19 A. Not this -- when we provide the training, we
20 don't read the manual verbatim, line for line. As you can
21 pretty well imagine, most persons would probably get up
22 and leave. It's a lengthy document. So we do provide it
23 to them. We do ask them to read it. And so I don't think
24 that that particular section was read, to my recollection.
25 Q. Did you ever receive any questions from either

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1 County Clerks or third-party voter registration agents
2 about what constitutes "substantial assistance"?
3 A. No.
4 Q. Did you ever ask the person who trained you
5 about what constitutes substantial assistance?
6 A. No. I think, in my mind, it meant just
7 assisting the voter.
8 Q. So is there a difference between "substantial
9 assistance" and just "assistance" then?
10 A. Apparently, the way this is worded. In my mind,
11 no. I think the third-party agent is there to assist the
12 voter.
13 Q. So, in your mind, if a third-party voter
14 registration agent does anything to assist the voter, they
15 should fill out this line?
16 A. Yes.
17 Q. What if the third-party voter registration agent
18 just provides the voter with the form?
19 A. And they take the form and they don't actually
20 return it?
21 Q. Or if the voter just takes the form, and that's
22 all that's done.
23 A. Well, then obviously they can't fill out line 9
24 if they don't even have the form, but one of the things
25 that is recommended in this manual is they keep a log of

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1 that.
2 Q. So if the third-party voter registration agent
3 simply provides a form to a voter, would you direct them
4 to put their information in line 9?
5 A. No, but I would -- and you're correct, in this
6 manual it does ask that they keep a log or a ledger. And
7 that is for that purpose; so that they know if that voter
8 turns in the registration card or not.
9 Q. So is it the third-party voter registration
10 agent's responsibility to ensure that a voter who they
11 provide a form to returns that form?
12 A. Well, there's no way they would be able to.
13 Q. So by keeping a ledger and keeping track of --
14 A. The numbers are assigned of the voter
15 registration cards.
16 Q. So what is the voter registration agent's
17 responsibility then once they give the voter a voter
18 registration form?
19 A. Well, if the voter decides to take the form,
20 obviously, they are not going to have -- it's going to
21 alleviate them from that responsibility of returning the
22 form, but at the same time, I think it would be in their
23 best interest to make a notation of it.
24 Q. But would they have to put -- would a
25 third-party voter registration agent have to put his or

1 her identification in line 9?

2 A. No, they wouldn't be able to. I would recommend
3 that they would do that -- as the voter completes the
4 form, they then would add that in line 9 before they
5 submit it to the respective County Clerk or the Secretary
6 of State.

7 Q. So then would you say that a voter registration
8 agent who simply provides a form to a voter is not
9 assisting that voter?

10 A. I think they enfranchise them by giving them a
11 form, but I don't think that -- if the voter takes the
12 form, it takes it out of their possession. It removes it
13 from their possession. There's no way that they could
14 actually turn that form in.

15 Q. So at that point you would say the voter
16 registration agent has no further responsibilities?

17 A. Well, like I said, since they are assigned those
18 cards by number to their VAR ID, and like I said in our
19 training manual we try to encourage that, is to keep
20 track. Even if they don't know the voter's name, they can
21 make simply an annotation saying that on this date, they
22 gave the voter the card, and the card is no longer in
23 their possession or something to that effect.

24 Q. I just have a few more questions to clarify some
25 of the testimony from yesterday.

1 A. He received a card from a voter registration
2 agent. He took the card from the agent. So it didn't
3 have the agent's ID. And then he walked it into the
4 county clerk's office, but he was trying to say that the
5 agent had not submitted it. And we let him know, since it
6 was in his possession, there would be no way for obviously
7 the agent to submit. So we clarified with the clerk where
8 he was registered.

9 Q. So in your mind, did the third-party voter
10 registration agent do anything wrong with respect to that
11 incident?

12 A. No, other than the gentleman didn't have an ID
13 number for the registration agent or anything; so there
14 was no way that we could tell. We could actually look at
15 the card number, the registration card number and compare
16 it to the VRA to find out which voter registration agent
17 gave the gentleman the card. And so the clerk could have
18 contacted the agent and asked if that card was given to
19 this particular gentleman, but there was nothing done
20 incorrectly.

21 Q. So the third-party voter registration agent
22 didn't have to put his or her number on the card that they
23 gave to the voter?

24 A. He did not, in this instance.

25 Q. Would you say that's improper?

1 A. Okay.

2 Q. Do you know how many voters registered in 2008
3 to vote?

4 A. I don't, off the top of my head.

5 Q. Is this something that you could get off a Web
6 site or database at the Secretary of State's Office?

7 A. Yes. We would be able to compile that data from
8 our Voter Registration Election Management System, VREMS.

9 Q. You could just run a report by year?

10 A. Correct.

11 Q. And this report would detail how many voters
12 were registered?

13 A. Correct.

14 Q. And how many voters actually voted?

15 A. Yes. It would be part of our canvassing
16 results.

17 Q. Yesterday, going back to one of the incidences
18 you referred to, I think it was man from Santa Fe had an
19 issue with his voter registration?

20 A. Um-hm.

21 Q. And he claimed that he had not been registered
22 properly?

23 A. Um-hm.

24 Q. Do you recall who this person was that assisted
25 him to register?

1 A. I believe most agents, when they are turning in
2 the cards and they are looking for accuracy and
3 completeness, is when they actually put their numbers on
4 there, when they give the person the receipt.

5 Q. Are third-party voter registration agents
6 responsible for ensuring the accuracy of the information
7 on the voter registration cards?

8 A. Well, there's no way -- I guess I misspoke.
9 It's not really accuracy -- the completeness, to make sure
10 all of the lines have been complete I think is what they
11 look for.

12 Q. And that's all that they're told they're
13 responsible to look for?

14 A. Correct. And I think in the manual, it does
15 give examples of stuff like that. Like if they use
16 something like "Ms. John Doe," that is discouraged, you
17 know, to use a correct name. If the voter does say that
18 is their name, of course, they're not to argue with them.

19 Q. Do third-party voter registration agents have to
20 look at voter's identification?

21 A. No, they do not.

22 Q. So again they're just ensuring the completeness?

23 A. Correct.

24 Q. Do they have to do anything else?

25 A. They need to turn them in.

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1 THE DEPONENT: We're done? Thank you.
 2 (The Deposition concluded at 9:32 a.m.)
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1 American Association of People with Disabilities, et al.
 2 -vs- Mary Herrera
 3 SIGNATURE/CORRECTION PAGE
 4 If there are any typographical errors to your
 5 Deposition, please indicate them below:
 6 PAGE LINE
 7 Change to
 8 Change to
 9 Change to
 10 Any other changes to your Deposition are to be
 11 listed below with a statement as to the reason
 12 for such change:
 13 PAGE LINE CORRECTION REASON FOR CHANGE
 14
 15
 16
 17
 18 I, KELLI FULGENZI, do hereby certify that I have
 19 read the foregoing pages of my testimony, Volume II, as
 20 transcribed, and that the same is a true and correct
 21 record of the testimony given by me in this Deposition on
 22 January 12, 2010, except for the changes made.
 23
 24 _____ Date Signed KELLI FULGENZI
 25

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1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF NEW MEXICO
 3 AMERICAN ASSOCIATION OF PEOPLE
 4 WITH DISABILITIES, FEDERATION OF
 5 WOMEN'S CLUBS OVERSEAS, INC.,
 6 NEW MEXICO PUBLIC INTEREST
 7 RESEARCH GROUP EDUCATION FUND,
 8 and SOUTHWEST ORGANIZING PROJECT,
 9
 10 Plaintiffs,
 11 vs. NO. CIVIL 08-00702
 12 MARY HERRERA, in her capacity as
 13 Secretary of State,
 14
 15 Defendant.
 16
 17 REPORTER'S CERTIFICATE
 18 I, DEBORAH O'BINE, CCR No. 63, DO HEREBY CERTIFY that
 19 on January 12, 2010, the Deposition of KELLI FULGENZI,
 20 Volume II, was taken before me at the request of, and
 21 sealed original thereof retained by:
 22 FOR THE PLAINTIFFS
 23 JESSICA L. THORN
 24 O'MELVENY & MYERS LLP
 25 1625 Eye Street, NW
 Washington, D.C. 20006-4001
 I FURTHER CERTIFY that copies of this Certificate
 have been mailed or delivered to all Counsel, and parties
 to the proceedings not represented by counsel, appearing
 at the taking of the deposition.
 I FURTHER CERTIFY that examination of this transcript
 and signature of the witness was REQUESTED by the witness
 and all parties present. On a letter was mailed

Page 150

1 or delivered to regarding obtaining
 2 signature of the witness, and corrections, if any, were
 3 appended to the original and each copy of the Deposition.
 4 I FURTHER CERTIFY that the recoverable cost of the
 5 original and one copy of the Deposition, including
 6 exhibits, to JESSICA L. THORN is \$_____.
 7 I FURTHER CERTIFY that I did administer the oath to
 8 the witness herein prior to the taking of this Deposition;
 9 that I did thereafter report in stenographic shorthand the
 10 questions and answers set forth herein, and the foregoing
 11 is a true and correct transcript of the proceeding had
 12 upon the taking of this Deposition to the best of my
 13 ability.
 14 I FURTHER CERTIFY that I am neither employed by nor
 15 related to nor contracted with (unless excepted by the
 16 rules) any of the parties or attorneys in this case, and
 17 that I have no interest whatsoever in the final
 18 disposition of this case in any court.
 19
 20 DEBORAH O'BINE
 21 New Mexico CCR No. 63
 22 License Expires: 12-31-2010
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 08-00702 JOB

AMERICAN ASSOCIATION OF PEOPLE)
WITH DISABILITIES, FEDERATION OF)
AMERICAN WOMEN'S CLUBS OVERSEAS,)
INC., NEW MEXICO PUBLIC INTEREST)
RESEARCH GROUP EDUCATION FUND, and)
SOUTHWEST ORGANIZING PROJECT,)

Plaintiffs,)

vs.)

MARY HERRERA, in her capacity as)
Secretary of State,)

Defendant.)

DEPOSITION OF MAGGIE TOULOUSE OLIVER

February 17, 2010
9:02 a.m.

201 3rd Street NW, Suite 2200
Albuquerque, NM 87102

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE,
this deposition was:

TAKEN BY: ADAM C. GOLDSTEIN, ESQ.
ATTORNEY FOR THE PLAINTIFFS

REPORTED BY: KATHLEEN H. O'DONNELL, RPR
NEW MEXICO CCR #75
CUMBRE COURT REPORTING
2019 Galisteo, Suite A-1
Santa Fe, NM 87505

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1 did you say that if an individual wishes to assist
 2 another person to register to vote, they have to
 3 become certified through the County Clerk's office?
 4 A. If they want to use the state voter
 5 registration form. Obviously, if they want to use
 6 the federal form, that's not necessary.
 7 Q. But did you say if they wanted to assist
 8 another person to register to vote?
 9 A. In the sense as they're acting as a
 10 third-party agent. I guess I should be specific that
 11 if, for example, you have a blind grandfather and
 12 he's filling out a form and he needs you to read him
 13 the information or something like that, I mean, that
 14 would not require one to become a third-party agent.
 15 Or if a husband comes in to register to vote and
 16 fills out a form and takes one home to his wife and,
 17 you know, informally guides her as to, you know, oh,
 18 don't forget to check this box or something, no, that
 19 would not require.
 20 But if an individual's going to engage in,
 21 you know, the systematic activity of registering
 22 voters, either as part of an organization or because
 23 they personally want to register as many voters as
 24 they can just because they believe in the democratic
 25 process, then, yes, that would require them, in order

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1 to use the state form, to become a certified
 2 third-party agent.
 3 Q. Okay. Can you help me understand at what
 4 point the prospective agent or third-party agent has
 5 crossed the line into sufficient activities to need
 6 to register?
 7 A. Where I think -- I think where my office
 8 would attempt to draw the line would be at the number
 9 of forms that they're asking for. If a person comes
 10 into the office and says I'm going to register to
 11 vote and my coworkers all want to register to vote as
 12 well, can I take back 10 forms with me? We would
 13 probably say, sure, here's 10 forms. If they came in
 14 and said, I want to be able to register other people
 15 to vote, then that's the point at which we would
 16 conduct a training. Or if they say, you know, I
 17 have, you know, I work for Intel. And I want to do a
 18 voter registration drive at Intel, that's the point
 19 at which we would want them to become a registered
 20 third-party agent.
 21 Q. Is 10 the cutoff your offices use or was
 22 that just an example?
 23 A. That was an arbitrary example, but we issue
 24 50 to a third-party agent, 50 at a time. So, I would
 25 say, you know, and I'm -- you know, I honestly don't

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1 know on a case-by-case basis how we're treating these
 2 situations. But if it's -- again, if it's a one-time
 3 thing and they want to take forms with them to give
 4 to other people, you know, either their family or
 5 their coworkers, we're not going to say you need to
 6 become an agent, but it's just going to depend on the
 7 situation and on the context. If they want to do
 8 something more systematic and/or more long-term,
 9 that's the point at which we're going to encourage
 10 them to become an agent. I don't want to say that
 11 there's a number cutoff for forms. It's more the
 12 context in which they want to conduct or assist with
 13 voter registration.
 14 Q. So if an individual wants to help a small
 15 number of other people one-time register, at one
 16 event, Bernalillo County does not view that as rising
 17 to the level where the third-party laws apply?
 18 A. Again, it's just, you know, and I'm sorry to
 19 be so nit-picky, but it's going to depend on the
 20 specifics. If you're coming in saying I want to take
 21 forms home to my family or back to my office for a
 22 few people, that's one thing. If you're saying I am
 23 going to a, you know, Romero family reunion, you
 24 know, where there's going to be 100 Romeros, or, you
 25 know, I'm going to go to the old folks' home where my

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1 grandmother lives and register all the people there,
 2 that would fall, you know, under -- either of those
 3 latter two examples, to me, would fall under the need
 4 to register as a third-party agent.
 5 Q. Have you been given guidance on that?
 6 A. Not to my knowledge. I think we just try to
 7 follow norms as they've been established in our
 8 office and through the experience that we've had with
 9 people coming in and wanting multiple registration
 10 forms.
 11 The other need for it, when you get to a
 12 certain number of forms and, again, 50 is the number
 13 that we use, but when you're getting into those large
 14 number of forms is that, quite frankly, especially
 15 during an election year, I mean, those forms are a
 16 hot commodity. And because we have to go through a
 17 process, and even more specifically, recently had to
 18 pay for our own because we couldn't get our order
 19 approved by the Secretary of State, you know, we have
 20 to be responsible and frugal. We can't just be
 21 giving out hundreds of forms that may or may not ever
 22 come back. I mean, it's a waste of money. It's a
 23 waste of taxpayer dollars and our own resources.
 24 Q. But I guess I'm still trying to -- I don't
 25 want to get past to the other side of this.

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1 Thursday, we would still process the form and not
2 treat it any differently.

3 And the other thing in regard to getting so
4 specific on the times is that there's not -- we
5 time-stamp the form when it comes in, but there's not
6 a time-stamp as to when it's been completed or even
7 when it was postmarked. So we have to use the
8 loosest possible, you know, if we were -- we, or
9 anybody, would have to use the loosest possible
10 interpretation of what time that form was completed,
11 so, on that date.

12 Q. So if your office received a form, again,
13 that indicates that it was filled out on a Wednesday,
14 excuse me, on a Thursday, and you didn't receive the
15 form until sometime later and it was postmarked that
16 Monday, you'd understand that to be a violation of
17 the law?

18 MR. LANDERS: Objection, asked and answered.

19 A. Yeah, I answered that.

20 Q. BY MR. GOLDSTEIN: Can you answer it again?

21 A. I would understand that to be a violation.

22 Q. What does Bernalillo County tell third-party
23 agents regarding when the third-party registration
24 laws apply?

25 A. I guess we tell them that they always apply

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1 in regard to when they're acting in their capacity as
2 third-party agents.

3 Q. What does it mean to act in their capacity
4 as a third-party agent?

5 A. To assist other individuals in filling out
6 and returning voter registration forms to either our
7 office or the Secretary of State's office.

8 Q. What does it mean to assist an individual
9 fill out a registration form?

10 A. A typical case would be that the agent
11 encounters an individual, inquires if they are
12 interested in registering to vote, provides them with
13 a voter registration form, answers questions, as the
14 individual has, during the course of filling out the
15 form, or perhaps goes into more detailed explication
16 to the individual prior to or during filling out the
17 form. Takes this tab. Hands it to them. Let's them
18 know they can contact the Bernalillo County Clerk's
19 office to inquire as to the status of their form, and
20 then signs their own name and ID number on the form
21 and then returns it to our office.

22 Q. So I understand, in that situation, the
23 third-party agent is walking the prospective voter
24 through the form, but is the prospective voter
25 filling out the form him or herself?

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1 A. A voter, I think -- a voter should fill out
2 the form his or herself. Certainly a third-party
3 agent can fill it out for them and have the voter
4 sign, if that is their preference.

5 Q. But it would be assistance, even if the
6 prospective voter was filling it out for himself?

7 A. Yes. The exception would be, I encounter --
8 I'm acting as a third-party agent. I encounter a
9 prospective voter, ask if the voter is interested in
10 registering to vote. The voter says yes, but I don't
11 have time to right now. Can I take a form with me?
12 The voter registration agent gives that person the
13 form and they go and do what they will with it.

14 Q. And in that scenario, is that assistance?

15 A. In my mind, that's not assistance, but I
16 couldn't say as to whether the law would consider
17 that assistance or not.

18 Q. And in this hypothetical where a third-party
19 agent hands a blank form to a prospective voter, and
20 the prospective voter leaves, when that prospective
21 voter fills out the application, does the 48-hour
22 requirement apply?

23 A. I don't believe it does in that situation.

24 Q. In that situation, should the third-party
25 agent's VRA number be on the registration form?

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1 A. I don't think it should.

2 Q. In that situation, is the third-party agent
3 responsible for that form at all?

4 A. In the sense that that form has been issued
5 under their number, there is no tracking mechanism
6 associated with it, but in terms of, you know, again,
7 I would -- assigning accountability if there were
8 ever a legal question on the form, that would not be
9 up to me to determine, so I couldn't say.

10 Q. What would you advise, or what does
11 Bernalillo County advise, in the third-party agent
12 training?

13 A. We -- if a person does not have the time or
14 does not --

15 MR. LANDERS: Hold on. I'm going to object
16 to the form. And the basis for the objection to the
17 form is it assumes that that's part of the training.
18 I think the more appropriate question is do you
19 advise, as opposed to what do you advise.

20 You can answer it.

21 A. We don't go out of our way to say if you
22 wish to give a form to a voter, they can take it with
23 them. If the question was asked if a voter wants a
24 form to take with them, we would say yes, you can
25 give them a form to take with them.

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

No. CIV 08-00702 JOB

AMERICAN ASSOCIATION OF PEOPLE)
WITH DISABILITIES, FEDERATION OF)
AMERICAN WOMEN'S CLUBS OVERSEAS,)
INC., NEW MEXICO PUBLIC INTEREST)
RESEARCH GROUP EDUCATION FUND, and)
SOUTHWEST ORGANIZING PROJECT,)

Plaintiffs,)

vs.)

MARY HERRERA, in her capacity as)
Secretary of State,)

Defendant.)

DEPOSITION OF DENISE LAMB

January 6, 2010
9:12 a.m.
315 Paseo de Peralta
Santa Fe, NM 87501

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE,
this deposition was:

TAKEN BY: GUY G. BRENNER, ESQ.
ATTORNEY FOR THE PLAINTIFFS

REPORTED BY: KATHLEEN H. O'DONNELL, RPR
NEW MEXICO CCR #75
CUMBRE COURT REPORTING
2019 Galisteo, Suite A-1
Santa Fe, NM 87505

1 lots of voter registration opportunities all the time
2 and a high level of political awareness amongst the
3 electorate. And so, people will often be extremely
4 enthusiastic and think they're going to register
5 thousands of people and they will stand in front of
6 Wal-Mart all day and get six voters.

7 So that said, we try not to dampen their
8 enthusiasm too much. And if they are going, say, to
9 the Fourth of July pancake breakfast on the Plaza
10 where there are going to be thousands of people, we
11 may make an exception and give them additional forms.
12 We also tell them that the national form is available
13 online, and they can download additional voter
14 registration forms.

15 Q. And is this something that's mentioned in
16 every training?

17 A. Pretty much. Mostly when people, you know,
18 express a worry that they may not have enough forms
19 and our office would be closed on the weekend, we
20 always remind them that the federal form can be used
21 and is accepted.

22 Q. And when you mention the form, do you
23 mention anything that they should do special -- any
24 special treatment they should apply to that national
25 voter registration form?

1 A. No.

2 Q. Okay. During your training, do you talk at
3 all about at what point the law applies to the voter
4 registration agent?

5 A. I'm sorry. I don't understand that.

6 Q. That's a good reason because it's not a very
7 good question. What might help is I'm going to have
8 marked as Exhibit 6 a copy of the statute.

9 (Deposition Exhibit No. 6 was marked.)

10 Q. BY MR. BRENNER: If I can direct your
11 attention to the paragraph A. It says, "Registration
12 agents who either register or assist persons to
13 register to vote on behalf of an organization that is
14 not a state or federal agency shall register with the
15 Secretary of State," and it goes on.

16 Do you see that?

17 A. Uh-huh.

18 Q. Do you have any understanding of what the
19 word assist means in that sentence?

20 A. Well, it's very difficult to divine the
21 intent of our New Mexico legislature, but my general
22 sense of that is that it refers to people providing
23 voter registration forms and answering their
24 questions about the registration process.

25 Q. And I understand that this is your opinion,

1 but is providing forms sufficient to constitute
2 assistance, in your view?

3 A. Sometimes.

4 Q. And in what cases would it -- you say
5 sometimes. That suggests that in some cases, it
6 would; in other cases, it would not. What's the --

7 A. Well, there are people who register to vote
8 who clearly require more assistance in filling out
9 the registration form, just like people may require
10 assistance filling out tax forms.

11 Q. Sure.

12 A. And so, people have varying capabilities
13 when it comes to forms. And so, occasionally, you
14 may have to provide more assistance.

15 For example, you may have a person who has a
16 major disability and you actually fill out the form
17 for them and they make their mark. There are
18 different levels of disability. Somebody may have a
19 learning disability or be dyslexic. There are all
20 kinds of situations where the level of assistance may
21 be greater or lesser, depending on the person you're
22 registering to vote.

23 Q. Is merely handing out a form and doing
24 nothing else, in your view, assistance?

25 A. Yes, because you're providing them with the

1 major tool that they need in order to register to
2 vote.

3 Q. Okay. I take it from your discussion of
4 processing these forms you don't engage in any
5 analysis of whether or not a registration form was
6 provided with the assistance of a third-party agent
7 or not; is that correct?

8 A. That is correct.

9 Q. Okay. How often are the training sessions
10 for third-party registration agents conducted?

11 A. Whenever they ask. Whenever they're there.
12 We do it on the spot or at the request of any
13 organization or political party.

14 Q. Have you ever provided them -- I take it you
15 provide them in person; correct?

16 A. Yes.

17 Q. Have you ever provided them by phone?

18 A. We've never been asked to provide them by
19 phone. It's a little difficult to explain a form
20 over the telephone.

21 Q. Do you know if someone were to ask to be
22 accommodated in that way, if that would be a request
23 that you would accommodate?

24 A. Well, I suppose we would attempt to
25 accommodate it, but I don't know how effective it

1 you.

2 MR. FUQUA: That was three questions, Guy,

3 as opposed to one. I know, it's really hard to do.

4 Q. BY MR. FUQUA: I just want to clarify

5 something. Towards the beginning of your deposition,

6 there was a question about whether or not higher

7 scrutiny is applied to a federal form than to a state

8 form. And I'm pretty sure that your answer was no,

9 but because of the way the question was worded and

10 the way the answer came out, I just want to clarify.

11 In your experience and to your knowledge,

12 does any county clerk apply a higher scrutiny to a

13 federal voter registration form than to a state voter

14 registration form?

15 A. No, they don't.

16 Q. A couple of questions about the 50-form

17 limit. Has any third-party voter registration agent

18 ever returned to your office blank or unused voter

19 registration forms?

20 A. Yes.

21 Q. And in terms of tracking those forms,

22 because the forms are bar-coded and because each

23 third-party voter registration agent puts his or her

24 number on the form, is it possible, then, using those

25 tracking mechanisms to find out if an agent has

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

3 No. CIV 08-00702 JOB

4 AMERICAN ASSOCIATION OF PEOPLE)
5 WITH DISABILITIES, FEDERATION OF)
6 AMERICAN WOMEN'S CLUBS OVERSEAS,)
7 INC., NEW MEXICO PUBLIC INTEREST)
8 RESEARCH GROUP EDUCATION FUND, and)
9 SOUTHWEST ORGANIZING PROJECT,)
10 Plaintiffs,)
11 vs.)
12 MARY HERRERA, in her capacity as)
13 Secretary of State,)
14 Defendant.)

15 REPORTER'S CERTIFICATE

16 I, KATHLEEN H. O'DONNELL, RPR, CCR #75, DO

17 HEREBY CERTIFY that on January 6, 2010, the

18 deposition of DENISE LAMB was taken before me at the

19 request of, and sealed original thereof retained by:

20 ATTORNEY FOR THE PLAINTIFFS
21 GUY G. BRENNER, ESQ.
22 O'MELVENY & MYERS, LLP
23 1625 Eye Street NW
24 Washington, D.C. 20006-4001

25 I FURTHER CERTIFY that copies of this

certificate have been mailed or delivered to all

counsel, and parties not represented by counsel,

appearing at the taking of the deposition.

I FURTHER CERTIFY that the examination of this

1 actually used all the forms that he or she took?

2 A. Yes. We, in fact, what we do is after the

3 2008 election, we had third-party agents bringing in

4 boxes of unused forms. The Obama organization was

5 very good. We had requested them to bring us the

6 forms. And we had to get into the database and

7 de-credit that agent from those forms. And that way,

8 we were able to use the forms over again in the

9 office rather than just having them be thrown out.

10 Q. And, finally, on the question of what

11 constitutes assistance under the statute, in your

12 view, if a person is helping a voter fill out a voter

13 registration form, does it make sense to you to

14 ensure that the person who's providing that

15 assistance knows what they're doing?

16 A. Absolutely.

17 Q. That's all I've got for you. Thank you.

18 MR. BRENNER: I believe you are done. Thank

19 you.

20 (A discussion was held off the record.)

21 (The deposition was concluded at 12:07 p.m.)

22

23

24

25

1 transcript and signature of the witness was waived by

2 the witness and all parties present.

3 I FURTHER CERTIFY that the recoverable cost of

4 the original and one copy of the deposition,

5 including exhibits, to GUY G. BRENNER, ESQ., is

6 \$_____.

7 I FURTHER CERTIFY that I did administer the

8 oath to the witness herein prior to the taking of

9 this deposition; that I did thereafter report in

10 stenographic shorthand the questions and answers set

11 forth herein, and the foregoing is a true and correct

12 transcript of the proceeding had upon the taking of

13 this deposition to the best of my ability.

14 I FURTHER CERTIFY that I am neither employed by

15 nor related to nor contracted with (unless excepted

16 by the rules) any of the parties or attorneys in this

17 case, and that I have no interest whatsoever in the

18 final disposition of this case in any court.

19 DATED this 13th day of January, 2010.

20

21

22 KATHLEEN H. O'DONNELL, RPR
23 New Mexico CCR #75
24 License Expires: 12/31/10

25

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

AMERICAN ASSOCIATION OF PEOPLE

WITH DISABILITIES, et al.,

Plaintiffs,

v.

CIV 08-00702 JOB

MARY HERRERA,

Defendant.

The Oral Deposition of MARIO JIMENEZ, taken at the request of the Plaintiffs, pursuant to Federal Rules of Civil Procedure, before Truenea Teasley, CCR in the State of New Mexico, on Thursday, January 28, 2010, from 9:04 a.m. to 1:36, at 790 Avenida de Mesilla, Las Cruces, New Mexico 88005.

1 come down to our office.

2 **Q. But since you tell people that they must be**
3 **returned to the office within 48 hours --**

4 **A. Let me clarify that. They can bring it to our**
5 **office in person within 48 hours or drop it in a Post**
6 **Office Box within 48 hours.**

7 **Q. But when I asked you what you tell people, you**
8 **said you tell them it has to be returned to the office**
9 **within 48 hours?**

10 A. Let me go over it like you are an agent. You
11 are an agent. You come in. Here is your stock of 50
12 forms. This stack of 50 forms must be returned to our
13 office within 48 hours. If it's going to land on a
14 weekend, the 48-hour rule would then go over to a
15 Monday.

16 If it's going to be a Monday, it would be
17 the following Tuesday and/or you can go ahead and drop
18 it in the post office, and if it's postmarked within
19 those 48 hours it will be accepted as well.

20 So anything that comes into our -- I'm
21 not going to say anything or -- but I do notify the
22 Secretary of State's Office if it's, like, a week
23 after. Then, yeah, we'll let them know. Hey, look,
24 this agent turned in forms after the 48 hours.

25 **Q. And you are sure that every time you've given**

1 **a training you've made sure to distinguish dropping**
2 **this in the mail from returning it to your office?**

3 A. With ACORN, no, I haven't because all those
4 were brought in in person. They had somebody who
5 coordinated that, and each and every single form to be
6 brought in until I used to, when we started going over
7 them, we did go over the mail. Let's go ahead and skip
8 that part because we don't do that anyways. So, other
9 than them, yes, everybody has gone over the 48 hours in
10 the mail.

11 **Q. When you are listening to someone else doing**
12 **the training, have you ever heard them forget to**
13 **mention the distinction between postmark and being**
14 **returned to the office?**

15 A. No, sir, I haven't.

16 **Q. And the distinction, as I understand it, as**
17 **you've just explained it is it can be postmarked in 48**
18 **hours?**

19 A. Uh-huh.

20 **Q. What if it's dropped in the mail but not**
21 **postmarked within 48 hours?**

22 A. Uh-huh. There's no way to distinguish it. I
23 wouldn't do anything with that form.

24 **Q. To be more specific, an example where on a**
25 **Thursday evening a form is filled out.**

1 A. Yes, sir.

2 Q. 48 hours later it's Saturday evening, and it's
3 dropped in the mailbox. Mail is different in various
4 Zip codes. This mail doesn't get picked up or
5 postmarked until the following Monday. That's four
6 days. It's postmarked four days after the date of
7 completion. When your office receives it, what do they
8 do with it?

9 A. Actually, that's four days because you bypass
10 your Saturday and Sunday. Monday is your 48 hours
11 because you've got Friday and Monday. You bypass
12 Saturday and Sunday.

13 Q. Okay. You get the form Monday evening, and
14 you drop it in the mail 48 hours later. Wednesday
15 evening it gets postmarked and it is three days later
16 when your office receives the form. What do you do?

17 A. If it's postmarked after, then, again, that's
18 a form that would be referred to the Secretary of
19 State. That's one that was received after the 48
20 hours; not necessarily received, but in that case was
21 returned after the 48 hours.

22 Q. Postmarked?

23 A. Returned, because the day it's postmarked is
24 the day that it's "returned".

25 Q. And is that without exception, putting

1 A. Yes they are, but let me clarify. If they
2 utilize a state form, they must become an agent. If
3 they want any forms out of our office, any state forms,
4 not federal forms, they must become an agent. If you
5 want to go and register three people, you must become
6 an agent.

7 **Q. So if I'm only using the federal form, I don't**
8 **need to register at all?**

9 A. I can't tell you otherwise. The law doesn't
10 state.

11 **Q. What's your understanding of the law?**

12 A. My understanding of the law is, like I
13 mentioned, if you are utilizing our forms, you must
14 become a third party agent in order to track those
15 forms. Federal forms, I can't track. I can't account
16 for them.

17 **Q. And once someone is registered and has a pack**
18 **of forms, at what point are they assisting someone else**
19 **to vote?**

20 A. You are assisting someone else to vote once
21 you are asking them if they would like to register to
22 vote. That's assisting somebody to vote.

23 **Q. Actually, my question was intended to be**
24 **assisting someone to register to vote.**

25 A. When you are asking them if they would like to

1 register to vote, that's voter assistance.

2 Q. That's all it takes?

3 A. That's all it takes.

4 Q. So if I -- I have my 50 forms. I'm a
5 registered agent. I walk up to you and say, Would you
6 like to register to vote? Even if you say no, I've
7 assisted you to register to vote?

8 A. You are attempting to assist me to vote.
9 That's what you are doing.

10 Q. And if you say yes and take a form from me and
11 walk away, have I assisted you to register? Have I
12 assisted you to register to vote?

13 A. Have you assisted me? Yes, you have. And are
14 you responsible for that form? Yes, which is another
15 thing that's gone over in our training. People can
16 register and we let them know other places out in the
17 county people can register to vote at or they can even
18 give us a call because that's -- let me get to where
19 you are going at.

20 Now, a lot of times people will ask what
21 if they don't want to use the form? What if they don't
22 want to give them the form back? They can give us a
23 call or directly come to our office, and they could
24 register or we let them know of other locations
25 throughout the city where people can register in

1 person. So, essentially, again, they are responsible
2 for those 50 forms.

3 **Q. So if I give -- in the example I was giving, I**
4 **give you the federal -- I give you one of my New Mexico**
5 **State Forms that's registered to me as a third party**
6 **agent. You take it. You go home. You fill it out**
7 **that night and you don't return it for two months. So,**
8 **you've blown the doors off this 48-hour requirement.**
9 **Have I violated the statute?**

10 **A. The statute -- the way the statute reads, yes,**
11 **sir.**

12 **Q. So even if I am not present for any of the**
13 **filling out of the registration form, the second it's**
14 **completed, that 48 hours is triggered and I, as the**
15 **agent, am responsible for having that form returned**
16 **within the 48 hours?**

17 **A. Yes, sir, you are.**

18 **Q. Even if I'm not in the room for any of the --**
19 **when any of the information is being put on the form?**

20 **A. Yes, sir, you are. You were assigned those 50**
21 **forms.**

22 **Q. Is this communicated in the training?**

23 **A. Yes, sir, it is, that they are responsible for**
24 **those 50 forms. And, again, the question is asked,**
25 **What if they don't want to give me the form back? They**

1 can scratch it out. You can tell them to give our
2 office a call and we'll mail them a form.

3 **Q. But you tell them in the training?**

4 A. We let them know that the voter -- that the
5 registrant -- that they need to bring that form back
6 with them. And that's, again, why we get some back
7 that are incomplete because they didn't want to
8 complete the form, which I already mentioned.

9 And our phone number is on the back of
10 every single registration form. So, they can give them
11 our number. We can mail them a form or they are
12 directed to another location.

13 **Q. So, in the training, you tell them if someone**
14 **takes one of these forms from you, fills it out at**
15 **home, whether you are nowhere near them, and fails to**
16 **return it within 48 hours of completing it in their own**
17 **home, that agent violated the law? You tell them that**
18 **in training?**

19 A. Because we tell them they are their forms.
20 They are not to hand them out like candy. They are
21 their forms. They are going to register people to
22 vote. You register them in person and bring those
23 forms back or mail them to us. Don't hand them out.
24 We instruct them not to hand them to people to take
25 home.

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CERTIFICATION

I, the officer before whom the foregoing deposition was taken, do hereby certify that I personally recorded the testimony of the witness whose testimony appears in the foregoing deposition; that said deposition is a true record of the testimony given by said witness; that I am neither attorney for, related to, nor employed by any of the parties to the action in which this deposition is taken, and that I am not a relative or employee of any attorney employed by the parties hereto, or financially interested in the action.

Truenea Teasley
Certificate No. 64
Expires: 12-31-2010

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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,

vs. No. CIV 08-00702 JOB

MARY HERRERA, in her capacity as
Secretary of State,

Defendant.

DEPOSITION OF DON FRANCISCO TRUJILLO II

January 12, 2010
10:22 a.m.
Rodey Law Firm
315 Paseo de Peralta
Santa Fe, New Mexico 87501

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE,
this Deposition was:

TAKEN BY: CHARLES E. BORDEN
ATTORNEY FOR THE PLAINTIFFS

REPORTED BY: DEBORAH O'BINE
NEW MEXICO CCR #63
CUMBRE COURT REPORTING, INC.
2019 Galisteo, Suite A-1
Santa Fe, New Mexico 87505

1 We make sure they're legally sound. We fill out the
 2 appropriate paperwork. And we file it with State Archives
 3 and Records.
 4 Q. And when are you allowed to engage in an
 5 emergency rulemaking?
 6 A. I don't remember the specifics.
 7 Q. You rely on counsel to tell you whether it's
 8 allowed or not?
 9 A. We do.
 10 Q. With respect to the Challenged Laws and that
 11 48-hour requirement that we talked about a moment ago, can
 12 you explain to me what your precise understanding is of
 13 that requirement? What does a voter registration agent
 14 have to do to comply with that requirement?
 15 A. Well, my understanding is that if you're the
 16 third-party voter registration agent, and you've just
 17 registered me to vote, you have to turn it in within 48
 18 hours to your County Clerk so that I can make sure that
 19 I'm in the voter registration system so that if an
 20 election comes up, I can go vote. Whether it's -- you
 21 know, if you're registering me in February, well, I may
 22 want to go do early voting for a municipal election. So I
 23 want to make sure I'm in the system as early as possible
 24 and make sure that my paperwork isn't mishandled or left
 25 someplace where somebody could get -- you know, identity

1 theft basically, because my Social Security number and
 2 everything else is on there.
 3 So I think it's a security measure. I believe
 4 it to be a security measure because of the information
 5 that's on that form going to be turned in, and also the
 6 fact that I, as the new voter, want to be in the system as
 7 soon as possible.
 8 Q. Can a third-party agent comply with this
 9 requirement by placing a registration form in the mail
 10 within 48 hours?
 11 A. To the best of my knowledge, yes.
 12 Q. Does it have to be postmarked within the 48-hour
 13 period?
 14 A. To the best of my knowledge, yes.
 15 Q. Can you think of any circumstances in which it
 16 would be acceptable for a third-party voter registration
 17 agent to not turn the form in within the 48-hour period?
 18 A. Sure. You come to register me to vote, and I
 19 fill out the form, and then I say, "You know what, I'm
 20 going to turn it in myself. I don't feel comfortable
 21 giving you" -- "Now that I've thought about it and filled
 22 it out, I don't feel comfortable giving it to you with my
 23 Social Security number and all my information on it; so
 24 don't worry about it. I'll go turn it in to the County
 25 Clerk myself, or I'll drop it in the mail myself."

1 Q. So a third-party voter registration agent is not
 2 subject to the 48-hour requirement if they don't take
 3 ultimate possession of the form, the completed form?
 4 A. I would believe that to be true, yes. You can't
 5 be held accountable for something that you have no control
 6 over. Are you going to beat me up to take it away from
 7 me?
 8 Q. Do you provide direction to the County Clerks on
 9 this 48-hour requirement in the election schools?
 10 A. I don't recall if we have in the past. We may
 11 have, but I don't recall.
 12 Q. Are you aware of how the County Clerks are
 13 enforcing this 48-hour requirement?
 14 A. I am not.
 15 Q. Are you aware of any counties that instruct
 16 third-party voter registration agents that the 48-hour
 17 clock begins at the time they pick up forms and not from
 18 the time the form is completed?
 19 A. No.
 20 Q. Are you aware of any instances where the
 21 Secretary of State's Office -- I apologize. Are you aware
 22 of any instances where a third-party voter registration
 23 agent turned in completed forms after the 48-hour period?
 24 A. I don't remember specifics, but I believe there
 25 were reports that in Dona Ana County, some had been turned

1 in after the 48 hours, yes.
 2 Q. Were they turned in before the close of voter
 3 registration in that case?
 4 A. I don't recall.
 5 Q. Do you know how that case was resolved?
 6 A. I don't.
 7 Q. In your opinion, what would happen if a
 8 third-party voter registration agent failed to turn in a
 9 form within the 48-hour period through no fault of their
 10 own?
 11 A. Through no fault of their own, what would happen
 12 to them?
 13 Q. Yes. For example, if they had a medical
 14 emergency, got rushed to the hospital?
 15 A. I mean, I believe if there's a reasonable
 16 explanation. For example, if the complaint came to the
 17 Secretary of State's Office that you hadn't turned it in
 18 within 48 hours, and there was a reasonable explanation as
 19 to why that didn't happen, a medical emergency, then I
 20 don't believe anything would happen.
 21 Q. Are you aware of any specific statutory
 22 exceptions or regulatory exceptions to the 48-hour
 23 requirement?
 24 A. No.
 25 Q. Is there someone in the Secretary of State's

1 Office who is responsible for monitoring compliance with
 2 the 48-hour requirement?
 3 A. No. Again, we don't monitor people.
 4 Q. Is there someone in the Secretary of State's
 5 Office responsible for providing direction to the County
 6 Clerks regarding the 48-hour requirement?
 7 A. No.
 8 MR. FUQUA: Charles, pardon the interruption. I
 9 was just wondering how much longer you wanted to go before
 10 we break for lunch or what your thinking was on that
 11 subject?
 12 MR. BORDEN: If everyone wouldn't mind, I would
 13 like to go a little bit longer.
 14 MR. FUQUA: Sure.
 15 MR. BORDEN: We can sort of work through a
 16 couple of these issues regarding the requirements of the
 17 third-party voter registration agents, I think maybe at
 18 that point we will be at a good breaking point.
 19 MR. FUQUA: Sure.
 20 MR. BORDEN: Is that okay with you?
 21 THE DEPONENT: Sure, that's fine.
 22 MR. FUQUA: Sorry to interrupt.
 23 (A discussion was held off the record.)
 24 Q. (BY MR. BORDEN) I think we talked about this a
 25 little bit earlier, but do the Challenged Laws impose any

1 requirements on the number of forms that a third-party
 2 voter registration agent can receive from a County Clerk
 3 or the Secretary of State's Office?
 4 A. I'm sorry. Repeat that one more time.
 5 Q. Do the Challenged Laws place any limits or
 6 impose any requirements on the number of forms that a
 7 third-party voter registration agent can receive from the
 8 County Clerk or Secretary of State?
 9 A. Well, from what I understand in the
 10 administrative rules, it states that they can obtain up to
 11 50 forms. And from what I understand that's being
 12 challenged in this lawsuit is that requirement, basically
 13 you want to remove that requirement so that it doesn't
 14 specify a limit.
 15 In my opinion, I would even want to restrict it
 16 more from a pure cost standpoint. The voter registration
 17 form is the most expensive form that the Secretary of
 18 State's Office produces. It's a great form. It's a one-
 19 stop shop, but because it has everything self-contained
 20 within it, it makes it the most expensive form that we
 21 produce.
 22 So let's say you, as the third-party voter
 23 registration agent, you're all gung ho to go out and
 24 register voters because it's the excitement of that time,
 25 and you go out and you register two or three people, and

1 the rest of those forms are thrown in the bottom of your
 2 trunk. So you have 47, 48 forms that are very expensive
 3 to produce that will just go to waste and will never ever
 4 be used.
 5 And so I strongly feel, and based on a pure cost
 6 standpoint, because, ultimately, the law says that the
 7 Secretary of State shall provide these forms to the County
 8 Clerks. And then there's an administrative rule that says
 9 the County Clerk shall provide these to, you know --
 10 there's a whole slew of all the people they need to be
 11 provided to, but ultimately through the Secretary of
 12 State's Office, the taxpayer is paying for those forms,
 13 and if they're not ultimately being used, there needs to
 14 be more accountability on third-party registration agents,
 15 in my opinion.
 16 Q. Why is the voter registration form so expensive?
 17 A. Because it is a self-contained mailer. It has
 18 the privacy notice on it. It's more than two color. It
 19 has very perforated edges so that the voter gets a receipt
 20 and other things like that. It's oversized. It's a
 21 different size. In its makeup, it's a great form. The
 22 problem is that it's very expensive.
 23 Q. Can you give me an estimate of how expensive
 24 each form would be?
 25 A. Sure. It costs \$47 and some odd cents, almost

1 \$48 for every hundred that are prepared. Now, that is
 2 only the preparation of 100 of those forms. Now, if it's
 3 mailed to the -- if I mail to you as the Secretary of
 4 State or the County Clerk or whoever, I mail to you, then
 5 there's the postage. You fill it out, mail it back to me,
 6 there's the postage. So in each instance, there's
 7 variables. But for the most part, just the bare bottom
 8 cost of what it costs to produce the form, it's almost \$48
 9 per hundred, which adds up.
 10 Q. Besides the cost issue, is there any other
 11 reason for why the Challenged Laws imposed this 50-form
 12 limit, as far as you know?
 13 A. I don't know why the 50-form limit was -- I
 14 don't know who picked the number 50. I mean, I have no
 15 idea what their thought process was, as opposed to 100 or
 16 10. But as far as not putting any limit, I think there's
 17 a problem with not putting any limit, because if you come
 18 in to me, and I'm your County Clerk, and you ask me for
 19 1,000 forms, and you multiply that hundred times \$48 and
 20 then the potential postage that may or may not be
 21 involved, and I say, that's unreasonable. I'm only going
 22 to give you 100. And when you turn in those 100, and I
 23 can check them off, then, sure, whether they're mailed to
 24 me or whatever, if I start imposing some kind of strict --
 25 what's the term I'm trying to think -- the word isn't

1 registration form?
 2 A. Repeat that one more time, please.
 3 Q. Sure. I'll rephrase it, actually.
 4 These third-party registration agent
 5 requirements, do they apply to anyone who provides any
 6 assistance to any person in filling out a voter
 7 registration form?
 8 A. If I understood your question correctly, no, it
 9 doesn't pertain to anyone. Let's say that I go to the
 10 County Clerk's Office and ask for a voter registration
 11 form, and I say I'll either mail it to you or I'll bring
 12 it back to you, and my brother helps me because he
 13 understands the form better than I do. I don't know. I
 14 have a question. He's not a third-party voter
 15 registration agent. I'm asking him for his help. He's
 16 not coming up to me and asking me, "Can I register your
 17 vote?" I'm soliciting his help. Then no.
 18 Q. So does the third-party voter registration
 19 agent's requirements turn on whether or not you're
 20 soliciting somebody to help you?
 21 A. To the best of my knowledge, yes. If I'm
 22 volunteering to register you to vote, then I need to be a
 23 third-party voter registration agent. If I'm simply
 24 asking somebody to help me fill out the form correctly
 25 because I'm confused or whatever, then I'm the one asking

1 for assistance. They're not imposing themselves on me.
 2 Q. Would a person be a third-party voter
 3 registration agent if they just handed forms out?
 4 A. Yes.
 5 Q. Even if they provided no direction to the
 6 person? All they did was just hand them the form, and
 7 say, "Here, registering to vote is important"?
 8 A. I would say they need to be a third-party voter
 9 registration agent in order to have the ability to do
 10 that, if it was a state form. If it was a federal form,
 11 they can go out and print them like candy and do whatever
 12 they want with them.
 13 Q. And just to make sure I understand the
 14 distinction you're drawing here, if a person affirmatively
 15 takes action to get another person to register to vote,
 16 they need to be a third-party voter registration agent?
 17 A. In my opinion, yes.
 18 Q. But if they're asked to assist somebody in
 19 filling out their form, they do not need to be considered
 20 a third-party voter registration agent?
 21 A. In my opinion, yes.
 22 Q. I just want to circle back on something we were
 23 talking about a moment ago regarding the 48-hour limit.
 24 What do you understand the penalty to be if a person fails
 25 to comply with the third-party voter registration agent

1 law?
 2 A. Again, I believe it to be a fourth-degree
 3 felony.
 4 Q. And that's true if they violate any aspect of
 5 the law?
 6 A. To the best of my knowledge, it's true if they
 7 don't turn it in within 48 hours after it's been filled
 8 out and given back to them.
 9 Q. What if they comply with the 48-hour limit, but
 10 they fail to register as an agent?
 11 A. I have no idea what the penalty is. Incarcerate
 12 them for life. I don't know. Sorry.
 13 Q. Does a person -- and this is just following up
 14 on what we were talking about earlier. Does a person have
 15 to deliberately fail to comply with the third-party voter
 16 registration agent requirements to violate the statute?
 17 A. I'd say the law is the law, and ignorance of the
 18 law is no excuse. So no.
 19 Q. So just to clarify, an accidental or inadvertent
 20 failure to comply would still be a violation, in your
 21 view?
 22 A. In black and white, yes.
 23 Q. And the issue would be at that point whether or
 24 not the Secretary of State's Office wished to pursue those
 25 sorts of cases?

1 A. Correct, based on a reasonable explanation.
 2 Q. Who in the Secretary of State's Office is
 3 responsible for dealing with violations of the third-party
 4 voter registration laws?
 5 A. If there are any violations that are reported to
 6 the Secretary of State's Office, ultimately, I would be
 7 responsible.
 8 Q. Are you aware of any violations to the
 9 third-party voter registration laws?
 10 A. I don't recall except for that one ACORN case I
 11 mentioned earlier. And I don't remember what we did with
 12 that. I don't recall for the life of me.
 13 Q. Just so I understand the ACORN case, were the
 14 individuals who were working for ACORN in that case not
 15 properly registered third-party voter registration agents?
 16 A. No. To the best of my knowledge, if I recollect
 17 correctly, there was a particular third-party voter
 18 registration agent that was working under the auspices or
 19 was connected with ACORN, and was getting paid whatever
 20 they were getting paid by ACORN to go out for every voter
 21 registration they turned in, and they were turning in
 22 false voter registration forms, false voters. They didn't
 23 really exist. That was the basis of that case.
 24 Q. So just to be clear, it sounds like you're
 25 saying these were properly registered individuals. They

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF NEW MEXICO
 3 AMERICAN ASSOCIATION OF PEOPLE
 4 WITH DISABILITIES, FEDERATION OF
 5 WOMEN'S CLUBS OVERSEAS, INC., NEW
 6 MEXICO PUBLIC INTEREST RESEARCH
 7 GROUP EDUCATION FUND, and
 8 SOUTHWEST ORGANIZING PROJECT
 9 Plaintiffs,
 10 vs. No. CIV 08-00702 JOB
 11 MARY HERRERA, in her capacity as
 12 Secretary of State,
 13 Defendant.

REPORTER'S CERTIFICATE

14 I, DEBORAH O'BINE, CCR No. 63, DO HEREBY CERTIFY that
 15 on January 12, 2010, the Deposition of DON FRANCISCO
 16 TRUJILLO II was taken before me at the request of, and
 17 sealed original thereof retained by:

18 FOR THE PLAINTIFFS
 19 CHARLES E. BORDEN
 20 O'MELVENY & MYERS LLP
 21 1625 Eye Street, NW
 22 Washington, D.C. 20006-4001

23 I FURTHER CERTIFY that copies of this Certificate
 24 have been mailed or delivered to all Counsel, and parties
 25 to the proceedings not represented by counsel, appearing
 at the taking of the deposition.

I FURTHER CERTIFY that examination of this transcript
 and signature of the witness was REQUESTED by the witness
 and all parties present. On a letter was mailed
 or delivered to regarding obtaining

1 signature of the witness, and corrections, if any, were
 2 appended to the original and each copy of the Deposition.

3 I FURTHER CERTIFY that the recoverable cost of the
 4 original and one copy of the Deposition, including
 5 exhibits, to CHARLES E. BORDEN is \$_____.

6 I FURTHER CERTIFY that I did administer the oath to
 7 the witness herein prior to the taking of this Deposition;
 8 that I did thereafter report in stenographic shorthand the
 9 questions and answers set forth herein, and the foregoing
 10 is a true and correct transcript of the proceeding had
 11 upon the taking of this Deposition to the best of my
 12 ability.

13 I FURTHER CERTIFY that I am neither employed by nor
 14 related to nor contracted with (unless excepted by the
 15 rules) any of the parties or attorneys in this case, and
 16 that I have no interest whatsoever in the final
 17 disposition of this case in any court.

18
 19 DEBORAH O'BINE
 20 New Mexico CCR No. 63
 21 License Expires: 12-31-2010
 22
 23
 24
 25

1 Mexico Rules of Civil Procedure (and the
2 provisions stated on the record or attached
3 therein).

4 A P P E A R A N C E S :

5 APPEARING FOR THE PLAINTIFFS:

6 MS. JESSICA THORN, ESQ.
7 MR. ADAM GOLDSTEIN, ESQ.
8 O'MELVENY & MYERS LLP
9 1625 EYE STREET, NW
10 WASHINGTON, D.C. 20006-4001
11 202-383-5300

12 APPEARING FOR THE DEFENDANT:

13 MR. SCOTT FUQUA, ESQ.
14 OFFICE OF THE ATTORNEY GENERAL
15 P O BOX 1508
16 SANTA FE, NM 87504
17 505-827-6920

18 REPORTED BY: GINA R. GRUBEN, CCR-RPR
19 NM CCR #43, TX CCR #2987
20 GINA GRUBEN, INC.
21 COURT REPORTING SERVICE
22 1008 PLAZA DEL SOL
23 ROSWELL, NM 88203
24 575-623-4462
25 gina@courtreportersite.com

GINA R. GRUBEN, CCR-RPR 575-623-4462

TR-3

18 A The federal form.
19 Q Mainly because it's easier to track the
20 New Mexico form?
21 A Well, for one we're going to have to
22 ship those forms to them and they're going to
23 have to ship 'em back. This one, they can just
24 print off [sic] line, right there on their
25 computer.

GINA R. GRUBEN, CCR-RPR 575-623-4462

TR-141

1 Q At what point -- and now I'm going to
2 the application of the laws to the agents. At
3 what point does assistance trigger the
4 application of the challenged laws to an
5 agent's activities? I'll rephrase that.

6 So if an agent has forms, at what
7 point -- what does the agent have to do to
8 quote, unquote assist a voter to -- in such a
9 way that the requirements of the law will be
10 triggered?

11 A If they issue them -- if they help
12 somebody register to vote, that's it. As soon
13 as they either request to register somebody to
14 vote or that person asks them, can I register
15 to vote, right then.

16 Q Okay. So if the agent actually
17 solicited the voter and said -- went up to 'em
18 and said, I want to help you register to
19 vote --

20 A Yeah.

21 Q -- then automatically that would count
22 as assistance?

23 A Yes. If they register that person to
24 vote. If that person went, no, I don't want to
25 register to vote, then, no.

GINA R. GRUBEN, CCR-RPR 575-623-4462

TR-142

1 Q But it goes the other way as well? If
2 an individual voter asks for help from an
3 agent --

4 A Uh-huh. They are assisting that person
5 to register to vote as soon as that person
6 comes up and says, I want to register to vote,
7 they can't turn down anybody. They have to
8 register everybody that comes up to 'em.

9 Q Does handing out the forms place
10 registration agents under the laws'
11 requirements?

12 A Well, if they're handing out forms and
13 everything, they're responsible for those
14 forms. Those numbers are responsible --
15 they're responsible for those.

16 Now whether they get turned back in or
17 not, you know, that's the voter -- if they're
18 handing 'em out that's why we want to have
19 something in place to say, hey, I gave this to
20 somebody and they have it. It's in their

21 hands, they're responsible for it. Now that
22 takes the responsibility off of your
23 third-party register.

24 Q I have a few questions about the
25 penalties under the laws. Are you aware of any

GINA R. GRUBEN, CCR-RPR 575-623-4462

TR-143

1 violations of the challenged laws in Chaves
2 County?

3 A Other than not getting it turned in
4 after the 48 hours, that's about it. I mean,
5 you hear -- you hear stuff all the time of
6 people throwing away voter registrations and
7 stuff like that, but, again, you can't -- you
8 can't prove it.

9 Q And have you reported any violations of
10 the laws?

11 A Other than -- myself? No.

12 Q And has anyone in your office?

13 A Anyone in my office, yes.

14 Q Okay. And what --

15 A I know that it was reported about the
16 -- being turned in after the dead -- the close
17 of the books. I know that one was. The rest
18 of the stuff I believe that I turned in was all
19 -- had to do with ballots and stuff like that.

20 Q And so that incident you're referring
21 to about the forms that were turned in after
22 the close of the books, that was the lady we

douglas shaw 012710.txt

20 (Deposition concluded at 1:32.)

21

22

23

24

25

GINA R. GRUBEN, CCR-RPR 575-623-4462

TR-205

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3

4 AMERICA ASSOCIATION OF PEOPLE
5 WITH DISABILITIES, FEDERATION
6 OF AMERICAN WOMEN'S CLUBS
7 OVERSEAS, INC., NEW MEXICO
8 PUBLIC INTEREST RESEARCH GROUP
9 EDUCATION FUND, and SOUTHWEST
10 ORGANIZING PROJECT,

11 Plaintiffs,

12 vs. Case no. CIV-08-00702

13 MARY HERRERA, in her capacity
14 as Secretary of State,

15 Defendant.

16

17 CERTIFICATE OF COMPLETION OF DEPOSITION

18

19 I, GINA R. GRUBEN, RPR, NM CCR #43, TX

20 CSR #2987, DO HEREBY CERTIFY that on the 27th

day of January, 2010, the deposition of Jess

Douglas Shaw was taken before me at the request

of The Plaintiff, and sealed original thereof

retained by:

21 douglas shaw 012710.txt
22 MS. JESSICA THORN, ESQ.
23 MR. ADAM GOLDSTEIN, ESQ.
24 O'MELVENY & MYERS LLP
1625 EYE STREET, NW
WASHINGTON, D.C. 20006-4001
202-383-5300

25 I FURTHER CERTIFY that copies of this

GINA R. GRUBEN, CCR-RPR 575-623-4462

TR-206

1 certificate have been mailed or delivered to
2 counsel of record, and parties not represented
3 by counsel.

4 I FURTHER CERTIFY that examination of
5 this transcript and signature of the witness
6 was REQUESTED by the witness and all parties
7 present. On the 22nd day of February, 2010, a
8 letter was delivered to Jess Shaw regarding
9 signature of the witness.

10 I FURTHER CERTIFY that the
11 recoverable cost of the original and one copy
12 of the deposition, including exhibits to Ms.
13 Thorn is \$848.25.

14 I FURTHER CERTIFY that I did
15 administer the oath to the witness herein prior
16 to the taking of this deposition, that I did
17 thereafter report in stenographic shorthand the
18 questions and answers set forth herein, and the
19 foregoing is a true and correct transcript of
20 the proceeding had upon the taking of this
21 deposition to the best of my ability.

22 I FURTHER CERTIFY that I am neither
Page 196

douglas shaw 012710.txt

23 employed by nor related to nor contracted with
24 (unless excepted by the rules) any of the
25 parties or attorneys in this case, and that I

GINA R. GRUBEN, CCR-RPR 575-623-4462

TR-207

1 have no interest whatsoever in the final
2 disposition of this case in any court.

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GINA R. GRUBEN, CCR-RPR
NM CCR #43; TX CSR #2987;
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 08-00702 JOB

AMERICAN ASSOCIATION OF PEOPLE)
WITH DISABILITIES, FEDERATION OF)
AMERICAN WOMEN'S CLUBS OVERSEAS,)
INC., NEW MEXICO PUBLIC INTEREST)
RESEARCH GROUP EDUCATION FUND, and)
SOUTHWEST ORGANIZING PROJECT,)

Plaintiffs,)

vs.)

MARY HERRERA, in her capacity as)
Secretary of State,)

Defendant.)

DEPOSITION OF MARIA ELENA RODELA

January 6, 2010
1:11 p.m.
315 Paseo de Peralta
Santa Fe, NM 87501

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE,
this deposition was:

TAKEN BY: ADAM C. GOLDSTEIN, ESQ.
ATTORNEY FOR THE PLAINTIFFS

REPORTED BY: KATHLEEN H. O'DONNELL, RPR
NEW MEXICO CCR #75
CUMBRE COURT REPORTING
2019 Galisteo, Suite A-1
Santa Fe, NM 87505

1 if I'll issue them to them on the 5th, I'll tell them
2 you have so many days to bring them. So that's why
3 we just give them 10. That's why we just give them
4 10, because they can fill out 10 within the 48-hour
5 period. If they can't, then they can notify us if
6 they can't fill them out within the 48-hour period.
7 That's how come we don't give them more than 10 voter
8 registrations.

9 Q. What starts the clock ticking on the
10 48 hours?

11 A. Once they receive them.

12 Q. Once the third-party voter registration
13 agent receives --

14 A. The voter registration from our office.

15 Q. From you? So your understanding is that in
16 order to comply with the 48-hour requirement, someone
17 has to return a completed form to your office within
18 48 hours of obtaining the form from your office?

19 A. See, and what happens is some of the voter
20 agents that go into our office, sometimes they don't
21 take all 10 of them. They only take -- sometimes
22 they only take like five, and they'll come back for
23 the rest of them later, but they only take what they
24 think they can fill out. They don't take all of them
25 at the same -- sometimes they don't take all of them.

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

No. CIV 08-00702 JOB

AMERICAN ASSOCIATION OF PEOPLE)
WITH DISABILITIES, FEDERATION OF)
AMERICAN WOMEN'S CLUBS OVERSEAS,)
INC., NEW MEXICO PUBLIC INTEREST)
RESEARCH GROUP EDUCATION FUND, and)
SOUTHWEST ORGANIZING PROJECT,)

Plaintiffs,)

vs.)

MARY HERRERA, in her capacity as)
Secretary of State,)

Defendant.)

REPORTER'S CERTIFICATE

I, KATHLEEN H. O'DONNELL, RPR, CCR #75, DO
HEREBY CERTIFY that on January 6, 2010, the
deposition of MARIA ELENA RODELA was taken before me
at the request of, and sealed original thereof
retained by:

ATTORNEY FOR THE PLAINTIFFS
ADAM C. GOLDSTEIN, ESQ.
O'MELVENY & MYERS, LLP
1625 Eye Street NW
Washington, D.C. 20006-4001

I FURTHER CERTIFY that copies of this
certificate have been mailed or delivered to all
counsel, and parties not represented by counsel,

1 appearing at the taking of the deposition.

2 I FURTHER CERTIFY that the examination of this
3 transcript and signature of the witness was requested
4 by the witness and all parties present. On _____, a
5 letter was mailed or delivered to MARIA ELENA RODELA
6 regarding obtaining signature.

7 I FURTHER CERTIFY that the recoverable cost of
8 the original and one copy of the deposition,
9 including exhibits, to ADAM C. GOLDSTEIN, ESQ., is
10 \$_____.

11 I FURTHER CERTIFY that I did administer the
12 oath to the witness herein prior to the taking of
13 this deposition; that I did thereafter report in
14 stenographic shorthand the questions and answers set
15 forth herein, and the foregoing is a true and correct
16 transcript of the proceeding had upon the taking of
17 this deposition to the best of my ability.

18 I FURTHER CERTIFY that I am neither employed by
19 nor related to nor contracted with (unless excepted
20 by the rules) any of the parties or attorneys in this
21 case, and that I have no interest whatsoever in the
22 final disposition of this case in any court.

23 DATED this 13th day of January, 2010.

24 _____
25 KATHLEEN H. O'DONNELL, RPR
New Mexico CCR #75