

IN THE UNITED STATES DISTRICT COURT
FOR THE 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,) No. CV 08-702 JOB/WDS
)
v.)
)
MARY HERRERA, in her capacity as)
Secretary of State,)
)
Defendant.)
)

X

UNOPPOSED MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

FREEDMAN BOYD HOLLANDER
GOLDBERG & IVES P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

1600 El Camino Real
Menlo Park, CA 94025
(650) 752-2000

BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL
OF LAW
161 Avenue of the
Americas, 12th Floor
New York, NY 10013
(212) 998-6130

Counsel for Plaintiffs

Dated: August 27, 2008

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Plaintiffs respectfully move for leave to file a supplemental brief responding only to an argument that Defendant conceded in her response, but proceeded to dispute at the preliminary injunction hearing—whether voter registration activity constitutes First Amendment activity.

In Defendant’s response brief, she agreed that the challenged law at issue in this case was subject to the balancing framework set forth in Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), but disagreed as to the level of scrutiny that must be applied. (Def.’s Mem. in Opp’n to Pls.’ Application for a Prelim. Inj. at 8, 12.) The Anderson framework is used to analyze challenges to state election laws which affect, as the Court found all election codes which govern the registration of voters “inevitably” do, the individual’s “right to vote and [the] right to associate with others for political ends.” Anderson, 460 U.S. at 788. Given that these rights are unquestionably protected by the First Amendment, Plaintiffs reasonably believed that Defendant only contested the level of scrutiny and the severity of the burden. Accordingly, Plaintiffs did not belabor in their reply brief the seemingly conceded point that First Amendment activity was at issue.

At the hearing, however, Defendant argued that Section 1-4-49 affected conduct that was not covered by the First Amendment and proceeded to parse Plaintiffs’ voter registration process into activity that was protected by the First Amendment and conduct that was not.

Plaintiffs now respectfully move for leave to file the attached supplemental brief, which addresses only the narrow issue of whether voter registration activity constitutes First Amendment activity. Plaintiffs’ interest in submitting the attached brief is not to

repeat the arguments made in previous briefs, but to provide the Court with Plaintiffs' views as to why voter registration activity is protected by the First Amendment.

Defendant has stated that she does not oppose this motion. Should the Court grant Plaintiffs' Unopposed Motion for Leave, Plaintiffs further request that the Court direct the Clerk of the Court to docket the attached brief.

Dated: New York, New York
August 27, 2008

Respectfully Submitted,

FREEDMAN BOYD HOLLANDER GOLDBERG
& IVES, P.A.

By: /s/ David H. Urias
John W. Boyd
David H. Urias
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

BRENNAN CENTER FOR JUSTICE AT
NYU SCHOOL OF LAW
Myrna Pérez
Wendy R. Weiser
(admitted *pro hac vice*)
Myrna Pérez
(admitted *pro hac vice*)
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6130

DAVIS POLK & WARDWELL
Daniel F. Kolb
(admitted *pro hac vice*)
Sharon Katz
(admitted *pro hac vice*)
Neal A. Potischman
(admitted *pro hac vice*)
Anna Thea Bridge
(admitted *pro hac vice*)
David J. Lisson
(admitted *pro hac vice*)

Rosanna Garza Lipscomb
(admitted *pro hac vice*)

450 Lexington Avenue
New York, NY 10017
(212) 450-4000
1600 El Camino Real
Menlo Park, CA 94025
(650) 752-2000

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 27 day of August 2008, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Scott Fuqua
Assistant Attorney General
Litigation Division
Office of the New Mexico Attorney General
408 Galisteo Street
Santa Fe, NM 87501
(505) 827-6920
sfuqua@nmag.gov

Shannon Robinson
6743 Academy Road, NE
Suite A
Albuquerque, NM 87109-3372
(505) 998-6600
srdist17@aol.com

B.J. Crow
Bowles & Crow
P.O. Box 25186
Albuquerque, NM 87125-5186
(505) 217-2680
bj@bowlesandcrow.com

Jason Bowles
201 Third St. NW
Suite 1370
Albuquerque, NM 87125
(505) 217-2680
jason@bowlesandcrow.com

Patrick Joseph Rogers
Modrall Sperling Roehl Harris & Sisk PA
P.O. Box 2168
(505) 848-1800
patrogers@modrall.com

/s/ Myrna Pérez
Myrna Pérez

Plaintiffs respectfully submit this supplemental memorandum in support of their Motion for Preliminary Injunction.

Argument

Section 1-4-49 of the New Mexico Statutes imposes a severe burden on Plaintiffs' First Amendment rights. The uncontested testimony shows that Section 1-4-49 has largely—and in some cases, completely—deterred each of the Plaintiffs from engaging in any voter registration activity. The affidavits and expert report further establish that this deterrence is the natural and inevitable effect of the challenged law.

The net effect of the law is a drastic decrease in the one-on-one political conversations that are characteristic of voter registration drives. This injury to Plaintiffs' core speech and associational rights is exactly the kind of injury that the Supreme Court has found especially problematic in cases involving election-related regulations, and is exactly the kind of injury deserving First Amendment protections.

At the preliminary injunction hearing, Defendant argued that the restrictions and the penalties imposed by the law reach only conduct and not speech, and that conduct is not entitled to First Amendment protections. This Court should reject the argument that voter registration activity can be parsed into component pieces, and that the First Amendment does not protect Plaintiffs' voter registration drives.

Part A of this memorandum responds to Defendant's attempt to parse out specific voter registration activity as conduct unprotected by the First Amendment. Part B explains how the regulations at issue impede protected First Amendment activity.

A. Collecting and Submitting Applications Is Inextricably Intertwined with the Speech and Association Involved in Plaintiffs' Efforts to Register Voters

It is axiomatic First Amendment doctrine that conduct that is “characteristically intertwined” with speech and association is protected. The Court’s analysis in Meyer v. Grant, 486 U.S. 414 (1988), directly answers Defendant’s contention that collecting and submitting forms is not speech.¹ Meyer makes clear that the First Amendment is not concerned with what particular segment of an activity is being regulated. Rather, in assessing the burden imposed on First Amendment activity, the Meyer Court looked to whether the specific conduct being regulated was part of an activity that is “characteristically intertwined” with protected speech and association. See 486 U.S. at 422 n.5 (quoting Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980)). If so, and if the law has the “inevitable effect of reducing the total quantum of speech on a public issue,” then the First Amendment requires that it be judged under exacting scrutiny. Meyer, 486 U.S. at 423. The law at issue in Meyer did not directly regulate an expressive activity; paying petition circulators is not itself a speech or associative act. But that did not matter; what was important to the Court was that the ultimate effect of prohibiting those payments was that there would be fewer one-on-one conversations about important political issues. Id. at 424. For the same reasons, in Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 194–95 (1999) (“ACLF”), the Court struck down the requirement that petition circulators be registered

¹ Where, as here, an election law severely burdens core political speech and association, Anderson v. Celebrezze, 460 U.S. 780 (1983) requires the law to survive “strict” or “exacting” scrutiny. Burdick v. Takushi, 504 U.S. 428, 434 (1992); see Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (a state election scheme that imposes “severe burdens” on constitutional rights survives only if it is “narrowly tailored and advance[s] a compelling state interest”); Swanson v. Worley, 490 F.3d 894, 902 (11th Cir. 2007); Green v. Mortham, 155 F.3d 1332, 1336 (11th Cir. 1998); League of Women Voters of Florida v. Cobb, 447 F. Supp. 2d 1314, 1331 n.21 (S.D. Fla. 2006) (rejecting defendants’ argument for rational basis review). The Meyer Court applied strict scrutiny to the regulation at issue.

voters. The requirement did not directly regulate core speech or association, but it had the effect of reducing the pool of circulators. The key phrase in this line of cases, “characteristically intertwined,” comes from a Supreme Court case striking down a law limiting door-to-door charitable solicitation, Schaumburg. The full passage from that case provides:

Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

Id. at 632 (quoted in Meyer, 486 U.S. at 422 n.5).

Schaumburg is precisely analogous to the present case. Irrespective of whether collecting registration forms, standing alone, could be subject to reasonable, non-discriminatory regulations, the evidence in this case makes clear that collecting forms is “characteristically intertwined” with the protected speech and association that take place in voter registration drives. The undisputed affidavits show that when Plaintiffs conduct voter registration drives they engage potential voters in face-to-face conversations. They encourage citizens to register to vote, discuss the importance of civic participation, and they exhort citizens to exercise their right to vote to advance shared political, economic, and social positions. The Supreme Court has repeatedly recognized that this kind of “interactive communication concerning political change” is the heart of the First Amendment’s protections. See e.g., Meyer, 486 U.S. at 422; see also ACLF, 525 U.S. at 186.

Indeed, collecting and submitting forms is protected by the First Amendment for at least four reasons. First, penalizing the collection and submission of forms has the

inevitable effect of limiting Plaintiffs’ voter registration activity and their intertwined speech and association. The evidence shows not only that it is likely that the “the flow of information and advocacy” in Plaintiffs’ voter registration drives would cease if collection were penalized but also that it in fact has almost entirely ceased. (See Affidavit of Robert Rodriguez (Potischman Decl. to Pls’ Application for Prelim. Inj. Ex. A ¶¶ 23, 27) (“Rodriguez Aff.”); Affidavit of Katryn E. Fraher (Potischman Decl. to Pls’ Application for Prelim. Inj. Ex. B ¶¶ 15–16) (“Fraher Aff.”); Affidavit of Jamison Tessneer (Potischman Decl. to Pls’ Application for Prelim. Inj. Ex. C ¶ 8) (“Tessneer Aff.”); Affidavit of James Dickson (Potischman Decl. to Pls’ Application for Prelim. Inj. Ex. F ¶¶ 21, 26) (“Dickson Aff.”); and Affidavit of Lucy Stensland Laederich (Potischman Decl. to Pls’ Application for Prelim. Inj. Ex. G ¶¶ 21–22) (“Laederich Aff.”).)

Second, if Plaintiffs do not collect and submit the forms they distribute, it is far less likely that the citizens they target will be registered. If those voters are not added to the rolls, then Plaintiffs cannot associate with them in the electoral process.

Third, restrictions on collection prevent Plaintiffs from developing a list of the citizens they register so they can contact them again later. (See Fraher Aff. ¶ 23.) Some Plaintiffs try to ensure not only that voters get registered, but also that they learn about the issues and get out to vote. (See Rodriguez Aff. ¶¶ 18–19.) Registration alone is not enough to ensure voter participation, or to enable Plaintiffs to continue to associate with registrants to advance shared political goals. Collecting forms is necessary to facilitate further communication and association with registrants.

Fourth, although Plaintiffs’ claims do not turn on this, the collection and submission of forms do have some intrinsic associative and communicative values.

These additional associative and communicative aspects of collecting forms highlight the cohesive and integrated nature of the political activity at stake here. By going into communities and seeking out those who are disenfranchised, Plaintiffs communicate their interest and investment in those individuals' enfranchisement and participation in the political process. The law, in effect, has prevented Plaintiffs from associating with registrants to submit registration forms.

Even if the physical act of distributing and collecting registration applications, were not, standing alone, subject to First Amendment protection (and it is), it would be protected because of its inextricable connection to fundamental expressive activity. In Schaumburg, the Court made clear that even though solicitation itself is not fully protected speech, heightened scrutiny is nonetheless applicable because charitable solicitation is “characteristically intertwined” with pure speech. 444 U.S. at 632. In other words, the decision depended not on the communicative nature of the solicitation act, but rather on the speech that accompanied that act. Similarly, Meyer did not rest on a finding that initiative petition circulation itself is speech. Rather, the Court found that the regulation of petition circulators implicates speech because it has the effect of limiting petition supporters' ability to convey other political messages—namely, messages about the issues they seek to advance through the petition process. Meyer, 486 U.S. at 422–23 (focusing on ability of petitioners to “convey [plaintiffs'] message” and “to make the matter the focus of statewide discussion”).

The defendants in Schaumburg and Meyer attempted to parse a cohesive activity into discrete components, and their attempts were fully rejected by the Court. The Schaumburg Court concluded “It is urged that the ordinance should be sustained because

it deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money. But this represents a far too limited view of our prior cases.” 444 U.S. at 628. The Meyer Court, rejecting the argument put forth in the state’s brief, 1987 WL 880992 at *12, “that a [circulator] voluntarily links his conduct with a speech component does not transform the conduct into speech,” held that the state’s “refusal to permit appellees to pay petition circulators restricts political expression” because the “inevitable effect” of the state law was to “reduc[e] the total quantum of speech on a public issue.” Meyer, 486 U.S. at 422–23.

This Court should similarly reject Defendant’s attempt to parse out particular aspects of the cohesive activity of voter registration drives. Under Meyer, Schaumburg, and a host of other Supreme Court cases, the touchstone of the First Amendment is not the specific aspect of an activity that is being regulated, but rather whether that activity as a whole is typically accompanied by protected speech or association. Voter registration plainly is, and the restrictions and penalties imposed by the law have had the effect of deterring that entire activity, even if the law’s restrictions arguably focus only on the act of collecting forms.

B. Section 1-4-49 Regulates First Amendment Activity

Registering to vote and encouraging others to register to vote are inherently political acts, as the Supreme Court has recognized. See ACLF, 525 U.S. 182, 195–96 (1999) (“[T]he choice [to register or] not to register implicates political thought and expression.”). Restrictions such as Section 1-4-49, which regulate participants in the

political process, as opposed to the mechanics of the electoral process, inhibit speech and association, as explained by the Court in Meyer because:

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

486 U.S. at 422–23.

As was the case with the restrictions challenged in Meyer, Section 1-4-49 intrudes upon protected First Amendment activity.

1. Certification and Training Requirements Diminish Speech and Association

The certification and training requirements of Section 1-4-49 impede Plaintiffs' core political speech and association, in violation of the First Amendment. In ACLF, the Supreme Court invalidated Colorado laws that required ballot initiative circulators to be registered voters because the law "limi[ts] the number of voices who will convey [the initiative proponents'] message and, consequently, cut[s] down the size of the audience [proponents] can reach." ACLF, 525 U.S. at 194–95 (quoting Meyer, 486 U.S. at 422) (second and fourth alterations in original) (internal quotation marks omitted). Colorado advanced numerous state interests, including fraud detection, which the Court found insufficient. ACLF, 525 U.S. at 192. Moreover, Colorado argued that it did not impose a severe burden on anyone's First Amendment rights because "it is exceptionally easy to register to vote." See id. at 195. The Court nevertheless held the registered voter prerequisite unconstitutional. See id. at 197.

The certification and training requirements of Section 1-4-49 similarly inhibit Plaintiffs' core political speech and association both by limiting the number of

individuals who participate in their voter registration drives, and causing the attendant effect of limiting the size of the audience they can reach. The required certification and training, at this time, can only be accomplished in person, presenting substantial obstacles to groups like Plaintiffs who rely largely on volunteers with limited amount of time to contribute to the activity. (See Rodriguez Aff. ¶¶ 30–32; Fraher Aff. ¶ 18; Tessneer Aff. ¶ 9; Dickson Aff. ¶¶ 24, 27b; Laederich Aff. ¶ 24.) Moreover, these requirements require significant planning in advance of registration, preclude volunteers from spontaneously participating, and in some cases, dissuade would-be volunteers from participation at all. (See Rodriguez Aff. ¶ 38; Fraher Aff. ¶¶ 16, 18; Tessneer Aff. ¶ 9.) Given the diminution of speech caused by these activities, even if the training and certification were “exceptionally easy,” these requirements would implicate the First Amendment.

2. Tracking Requirements Interfere With Plaintiffs’ First Amendment Right to Anonymous Association

Plaintiffs, their employees, and those who seek to use Plaintiffs’ services (i.e., prospective registrants) have a First Amendment right to speak and associate anonymously. See ACLF, 525 U.S. at 199 (citing approvingly McIntyre v. Ohio Election Commission, 514 U.S. 334 (1995), where the Court held that the Ohio’s restrictions on anonymous circulation of pamphlets violated the First Amendment); see also NAACP v. Alabama, 357 U.S. 449, 461–63 (1958) (holding unconstitutional the forced disclosure of the names and addresses of NAACP’s members). The tracking provisions of Section 1-4-49 link each registration agent to a particular voter, thus impeding each voter’s right to associate anonymously with third-party organizations. Testimony from AAPD demonstrates that the right to anonymous association facilitates their registration activities. (See Dickson Aff. ¶ 25.) Without anonymity, the citizens AAPD would target

are less likely to register. (Id.) If the citizens Plaintiffs target are not added to the rolls, then Plaintiffs cannot associate with them in the electoral process. The tracking provision of Section 1-4-49 therefore inhibits core political speech by reducing speech and association.

3. Form Limitations Reduce Free Speech and Association

Section 1-4-49 imposes an artificial restriction on the amount of speech that can occur by limiting to fifty the number of registration forms a registration agent may have. (See Tessneer Aff. ¶ 14; Rodriguez Aff. ¶¶ 33, 35; Fraher Aff. ¶ 21.) By doing so, Section 1-4-49 limits the number of registration-related conversations to fifty until a later date whereby the registration agent is able to return to the office to get another fifty forms. As a result of the challenged law, there will be missed opportunities to register citizens. The law not only reduces free speech but also reduces the number of citizens able to vote and to associate with Plaintiffs by making their voices heard through the ballot box. Accordingly, fewer citizens will join Plaintiffs by casting ballots for candidates who support their causes, sign petitions to advance Plaintiffs' goals, and effectively associate with Plaintiffs.

Defendant, justifying the restriction with administrative interests, argues that Plaintiffs can avoid this injury by photocopying or printing federal forms and doctoring these forms so that they will conform to the law's requirements. See Tr. of Prelim. Inj. Hr'g at 151–156. The Supreme Court explicitly rejects this kind of argument in Meyer, stating that a law that “leaves open ‘more burdensome’ avenues of communication, does not relieve its burden on First Amendment expression. The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” Meyer, 486 U.S. at 424.

4. Forty-Eight Hour Turn Around Requirement Reduces Speech and Association

Especially when coupled with strict civil and criminal penalties, the 48-hour turn around requirement reduces the number of speech conversations and participants. The evidence shows that would-be registration agents are deterred from engaging in registration activity because of the difficulty in complying with such a limited turn around period that is backed by hefty fines. Without these conversations, the communities Plaintiffs target are not engaged and mobilized in the political process. Moreover, in the now rare case when registration activity is performed, the 48-hour turn around requirement largely prevents Plaintiffs from developing a list of the citizens they register so they can contact them again later. (See Fraher Aff. ¶ 23; Rodriguez Aff. ¶¶ 18–19.) Some Plaintiffs have noted that their registration activity ordinarily would include educating their registrants about issues and getting them out to vote. This later speech and association is effectively eliminated on account of Section 1-4-49’s turn around requirements.

5. Punitive Civil and Criminal Fines Impede Speech and Association

In the present case, the inevitable and direct effect of Section 1-4-49 is and has been to shut down or severely curtail Plaintiffs’ voter registration drives and to chill volunteers and members from participating in those drives. This has significantly “reduc[ed] the total quantum of speech.” Meyer, 486 U.S. at 423. The testimony is undisputed that the civil and criminal fines and penalties are directly connected to the abandonment or dramatic curtailing of their registration activity. (Fraher Aff. ¶ 26; Tessneer Aff. ¶ 17; Dickson Aff. ¶ 22; Laederich Aff. ¶ 27; Rodriguez Aff. ¶¶ 29–29.) In League of Women Voters, the court held that the “threat of fines rationally chilled

Plaintiffs’ exercise of free speech and association, as well as that of Plaintiffs’ volunteers” and caused them to “completely or nearly completely cease[]” their “constitutionally protected activities.” 447 F. Supp. 2d 1314 at 1338–39. In a case like this, where the turn around time is even stricter and the caps even higher, Plaintiffs’ cessation or near cessation of voter registration activities is certainly rational.

* * *

Three different district courts in three different states, have held, consistent with Supreme Court precedent, that restrictions on third party voter registration drives impede core First Amendment rights to speech and association. See e.g., Ass’n of Community Organizations for Reform Now v. Cox, No. 06-CV-1981, slip op. at 16 (N.D. Ga. Sept. 27, 2006); Project Vote v. Blackwell, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006); League of Women Voters of Florida v. Cobb, 447 F. Supp. 2d 1314, 1316 (S.D. Fla. 2006). First Amendment protection is at its “zenith” in this case because the challenged law severely burdens speech and association that is “at the core of our electoral process and of the First Amendment freedoms.” Meyer, 486 U.S at 425–26.

Dated: New York, New York
August 27, 2008

Respectfully Submitted,

FREEDMAN BOYD HOLLANDER GOLDBERG
& IVES, P.A.

By: /s/ David H. Urias _____

John W. Boyd

David H. Urias

20 First Plaza, Suite 700
Albuquerque, NM 87102
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161 Avenue of the Americas, 12th Floor
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1600 El Camino Real
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Counsel for Plaintiffs

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Scott Fuqua
Assistant Attorney General
Litigation Division
Office of the New Mexico Attorney General
408 Galisteo Street
Santa Fe, NM 87501
(505) 827-6920
sfuqua@nmag.gov

Shannon Robinson
6743 Academy Road, NE
Suite A
Albuquerque, NM 87109-3372
(505) 998-6600
srdist17@aol.com

B.J. Crow
Bowles & Crow
P.O. Box 25186
Albuquerque, NM 87125-5186
(505) 217-2680
bj@bowlesandcrow.com

Jason Bowles
201 Third St. NW
Suite 1370
Albuquerque, NM 87125
(505) 217-2680
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/s/ David H. Urias
David H. Urias