

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

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)
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

**RESPONSE TO PLAINTIFFS’ SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs, in their attempt to argue that the act of voter registration is “characteristically intertwined” with the often political speech incident to voter registration drives, misread *Meyer v. Grant*, 486 U.S. 414 (1988) and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) in the same way as the court in *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006). Because the act of assisting a potential voter in the registration process is easily divorced from the political speech incident to that act, and because NMSA 1978, § 1-4-49 has no impact on the latter, Plaintiffs’ challenge to the law fails.

I. ASSISTING IN VOTER REGISTRATION IS NOT SPEECH CONDUCT PROTECTED BY THE FIRST AMENDMENT.

Plaintiffs contend that “[i]t is axiomatic First Amendment doctrine that conduct that is ‘characteristically intertwined’ with speech and association is protected.” Plaintiffs’ Supplemental Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction (“Supp. Mem.”), pg. 3. Defendant does not contest this assertion, but this fact alone is insufficient to support Plaintiffs’ argument. Plaintiffs’ must show that the act of assisting an individual in the voter registration process is intrinsically intertwined with Plaintiffs’ constitutionally protected speech incident to that act. This Plaintiffs cannot do.

Plaintiffs rely principally on two cases in support of their argument. The first is *Meyer v. Grant*, 486 U.S. 414 (1988). Plaintiffs contend that *Meyer* stands for the proposition “that the First Amendment is not concerned with what particular segment of an activity is regulated.” Supp. Mem., pg. 3. *Meyer*, however, does not apply so broadly. The First Amendment is, of course, concerned with *expressive* conduct. If protected speech is so closely intertwined with conduct that would not otherwise be protected, the latter conduct may, in certain circumstances, come under the umbrella of the protected speech. But the focus of the First Amendment is, nonetheless, expressive conduct, *not* speech incidental to non-expressive conduct.

In *Meyer*, the Court considered a Colorado statute that provided for inclusion on a general election ballot of proposed laws or state constitutional amendments if the supporters of the proposal could obtain a sufficient number of petition signatures in a six-month period. The law also made it a felony to pay petition circulators. *Meyer*, 486 U.S. at 415-16. A group proposing an amendment to the Colorado Constitution sued the State of Colorado seeking a declaration that the prohibition on paid petition circulators violated the First Amendment. *Id.* at 417. The district court upheld the law, and the Tenth Circuit affirmed. On rehearing en banc, the Tenth Circuit reversed, finding that “the record demonstrated that petition circulators engage in the communication of ideas while they are obtaining signatures and that the available pool of circulators is necessarily smaller if only volunteers can be used.” *Id.* at 419.

The Court held that the communication of ideas identified by the Tenth Circuit was protected by the First Amendment: “Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.” *Id.* at 421. The Court then turned to an examination of whether those discussions were tied inextricably to the circulation of a petition:

The circulation of an initiative petition *of necessity* involves *both* the expression of a desire for political change *and* a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as “core political speech.”

Id. (emphasis added) (footnote omitted).

The link identified by the *Meyer* Court between the circulation of a petition and the speech incident to such circulation simply does not exist between registering a person to vote and

speech incident to voter registration drives. As the Court noted, it is functionally impossible to circulate a petition without a discussion of the petition's purpose. The two activities are thus inextricably linked. The same is not true in the voter registration context. It is not only possible, but very easy to register to vote without engaging in any protected speech. The Secretary of State and the County Clerks of New Mexico do so every time they register a new voter. Simply put, the registration of a voter is a clerical act, not a constitutionally protected speech act.

The separation between assisting in voter registration and the speech accompanying that act is even clearer when the latter element is viewed in isolation. Section 1-4-49 does not in any way prevent Plaintiffs from having meaningful, political conversations with New Mexico citizens about the right to vote, the importance of the election franchise, or the issues facing the nation heading into the 2008 Presidential Election. Importantly, Section 1-4-49 would allow Plaintiffs (and similar organizations) to hand out blank federal voter registration forms to *anyone they choose*. But providing material assistance in completing a voter registration form or affirmatively accepting the obligation to return the completed form to the proper election official is a clerical task, not a speech act.

Assisting in the completion of a voter registration form consists of explaining how the form works and answering questions about the information a voter must provide. Examples include explaining that a person must use their legal name and answering questions about whether a person should provide their home or work address. While this assistance requires some form of communication, it is not political speech.¹ The act of physically returning a completed form to the appropriate election official is an even more clearly clerical task.

¹ Answering a question about how a voter should complete the party affiliation portion of the form might be political speech, but is still easily separable from the completion of the form itself because a declaration of party affiliation is not necessary for successful registration.

Plaintiffs rightly contend that the *Meyer* Court was concerned about the Colorado law's impact on face-to-face communication, but wrongly assert that Section 1-4-49 has a similar effect. In *Meyer*, the Court was unimpressed that the challengers of the law could disseminate their ideas in a different manner:

That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication does not relieve its burden on First Amendment expression.

Id. at 424 (citation omitted). Section 1-4-49 does not require Plaintiffs to find an "avenue of communication" other than a voter registration drive in order to disseminate their ideas. Plaintiffs can hand a blank federal voter registration form to whomever they choose and engage the recipient in whatever core political discussion they desire, and they can do so entirely free from the requirements of Section 1-4-49. As noted above, Section 1-4-49 is only relevant to Plaintiffs' conduct when they have taken it upon themselves to either materially assist in or complete the voter registration process.

Finally, the Court in *Meyer* identified two ways in which the Colorado law limited protected speech:

The refusal to permit appellees to pay petition circulators restricts political expression in two ways: 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.

Id. at 422-23. Section 1-4-49 does not implicate either of these concerns. Initially, Plaintiffs do not have as their goal the placement of any policy or constitutional proposal on the general election ballot. There is therefore no effort to make any matter "the focus of statewide

discussion.” Moreover, Section 1-4-49 does not limit the number of people Plaintiffs may employ or accept as volunteers. The Colorado law contained an *express prohibition* on the use of certain personnel. Section 1-4-49 has no even remotely analogous provision.² It thus has not, contrary to Plaintiffs’ assertion, reduced the total quantum of speech. *See* Supp. Mem., pg. 3.

For the same reason, Plaintiffs’ reliance on *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), is similarly misplaced. The *Buckley* Court struck down a Colorado law requiring petition circulators to be registered voters because, in comparison to *Meyer*, “[t]he requirement that circulators be not merely voter eligible, but registered voters . . . decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators.” *Buckley*, 525 U.S. at 194. Again, the Colorado law at issue in *Buckley* was an express prohibition on the use of certain individuals to circulate petitions, something to which Section 1-4-49 is simply not analogous.

Plaintiffs next contend that *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) “is precisely analogous to the present case.” Supp. Mem., pg. 4. This contention is erroneous. Plaintiffs note that when they “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.” *Id.* There is no dispute that such discussion often accompanies voter registration efforts. Plaintiffs, however, assume the *necessity* of this pairing, and it is that necessity – or, more precisely, the lack thereof – that

² Plaintiffs contend that Section 1-4-49 scares away potential volunteers. Defendant has already addressed this argument and will not rehash that discussion here other than to say that Plaintiffs must prove more than just their members are unwilling to participate in voter registration drives; they must prove that this reaction by their members is a *reasonable* reaction to the law.

distinguishes this case from *Meyer* and *Schaumburg*. The mere fact that two things happen at the same time is not proof of causation, but only coincidence.

Plaintiffs quote the appropriate language from *Schaumburg* regarding the linkage between solicitation and speech protected by the First Amendment, but ignore the disconnect between *Schaumburg* and this case. The *Schaumburg* Court properly recognized that efforts to solicit financial contributions to a charitable entity *necessarily* entail discussions about that entity and its purposes. In the very next sentence following the language quoted by Plaintiffs, in which the Court acknowledged the interconnectedness of solicitation and protected speech, the *Schaumburg* Court noted that “[c]onvassers in such contexts are *necessarily* more than solicitors for money.” *Village of Schaumburg*, 444 U.S. at 632 (emphasis added). And, quoting favorably from the Seventh Circuit opinion then under review, the *Schaumburg* Court also noted that “[t]hese organizations characteristically used paid solicitors who ‘necessarily combine’ the solicitation of financial support with the ‘functions of information dissemination, discussion, and advocacy of public issues.’” *Id.* at 635.

In both *Meyer* and *Schaumburg*, the conduct regulated by the law at issue was so fundamentally linked with the protected speech incident to that conduct as to be wholly inseparable. In each case, it is not difficult to see why. Persuading a person to sign a ballot initiative petition *necessarily requires* protected speech about the ballot initiative itself. Similarly, persuading a person to financially contribute to an organization *necessarily requires* protected speech about that organization. Providing material assistance to a person in completing a voter registration form does not require speech about any topic. Neither does accepting the responsibility of returning the completed form to the proper election official.

Meyer and *Schaumburg* are readily distinguishable from the case before this Court, and do not compel the result urged by Plaintiffs.

Plaintiffs identify four ways in which “collecting and submitting forms is protected by the First Amendment.” Supp. Mem., pg. 4. First, Plaintiffs argue that “penalizing the collection and submission of forms has the inevitable effect of limiting Plaintiffs’ voter registration activity and their intertwined speech and association.” *Id.* Defendant has already addressed the argument that Section 1-4-49 both limits Plaintiffs’ voter registration activity and Plaintiffs’ speech incidental to that activity. Regarding the latter claim, the speech and conduct at issue are simply not inextricably intertwined, and Section 1-4-49 does not limit in any way Plaintiffs’ ability to engage in that speech. Regarding the former claim, Plaintiffs must, again, prove more than the fact that they have self-limited their voter registration activity. They must demonstrate that such self-limitation is an appropriate response to the law.

Plaintiffs next argue that the collection of completed voter registration forms ensures future political speech because if the voters “are not added to the rolls, then Plaintiffs cannot associate with them in the electoral process.” Supp. Mem., pg. 5. Plaintiffs fail to explain, however, why they have a constitutional right to easily identify and locate the specific individuals with whom they interact in the voter registration process. And, more importantly, Section 1-4-49 does not limit such interaction. Plaintiffs are free to take contact information from whomever will provide it and “associate with” those individuals “in the electoral process.” In other words, the addition of the citizens targeted by Plaintiffs to the voter rolls is a sufficient, but not a necessary, condition to later association.

Next, Plaintiffs put forth the related argument that Section 1-4-49 restricts future speech because it prevents “Plaintiffs from developing a list of the citizens they register so they can

contact them again later.” Supp. Mem., pg. 5. Defendant has already addressed this argument. While it is certainly permissible for Plaintiffs to add to their databases the names and addresses of the people they register to vote, Plaintiffs have no constitutional right to do so.³ And, as with Plaintiffs’ argument regarding the voter rolls, Section 1-4-49 allows Plaintiffs to take whatever contact information people are willing to provide and use it to communicate with those individuals in the future. In any event, Plaintiffs cite no case, and Defendant cannot locate one, in which a court has struck down a law on the basis of speculative injury to a speech act that might occur at some indefinite, distant point in the future.

Finally, Plaintiffs argue that “the collection and submission of forms do have some intrinsic associative and communicative values.” Supp. Mem., pg. 5. Plaintiffs do not, however, identify what those values are other than to say that “[b]y 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.” *Id.*, pg. 6. Assuming that this symbolic speech is constitutionally protected, it is not limited in any way by Section 1-4-49. Plaintiffs are free to travel into the same disenfranchised communities and communicate the same interest in the enfranchisement of the residents of those communities by providing them with a federal voter registration form. Section 1-4-49 has therefore *not* “prevented Plaintiffs from associating with registrants to submit registration forms.” Supp. Mem., pg. 6.

Ultimately, Plaintiffs misstate the holdings of *Meyer* and *Schaumburg*. The decisions in those cases did not depend “on the speech that accompanied” a particular act. Supp. Mem., pg. 6. And the “touchstone of the First Amendment” is not whether a regulated activity “as a whole

³ Even if such a right existed, Section 1-4-49 does not significantly burden that right. Compliance with the forty-eight hour return requirement simply requires Plaintiffs to be efficient and organized in their information collection efforts.

is typically accompanied by protected speech or association.” Supp. Mem., pg. 7. Rather, the question is whether the regulated activity and the accompanying speech are *necessarily* intertwined such that one *must* accompany the other. In both *Meyer* and *Schaumburg* such a connection existed between the regulated activity and the constitutionally protected speech. That connection is absent in this case. Section 1-4-49 regulates conduct that is easily separated from the accompanying speech, and Plaintiffs’ First Amendment challenge to the law fails.

II. THE REQUIREMENTS OF SECTION 1-4-49 DO NOT DIMINISH PLAINTIFFS’ SPEECH AND ASSOCIATIONAL RIGHTS.

Plaintiffs argue that Section 1-4-49’s certification and training requirements, registration requirements, form limitation, forty-eight hour return requirement, and civil and criminal penalties infringe on their speech and associational rights. Each claim is considered below.

A. The Training and Certification Requirements Do Not Burden Plaintiffs’ Speech or Associational Rights.

Plaintiffs contend that the training and certification requirements of Section 1-4-49 “can only be accomplished in person.” Supp. Mem., pg. 9. This factual assertion is incorrect. Training can be arranged via telephone or, technology permitting, the internet. Even in-person training is not difficult to arrange, as the County Clerks and the Secretary of State will accommodate reasonable requests to hold off site, after hours training sessions. Plaintiffs also complain that “these requirements require significant planning in advance of registration [and] preclude volunteers from spontaneously participating.” *Id.* This complaint, however, does not give rise to a cognizable claim. By requiring Plaintiffs to improve their internal organization, Section 1-4-49 has hardly infringed on their constitutional rights.

Plaintiffs cite to *Buckley* for the proposition that even hurdles that are “exceptionally easy” to clear may be unconstitutional. *Buckley*, however, does not stand for so broad a

proposition. In *Buckley*, the Court rejected Colorado’s argument that a law requiring petition circulators to be registered voters was not burdensome on speech because “it is exceptionally easy to register to vote.” *Buckley*, 525 U.S. at 195. The Court did not reject this argument because even low hurdles are excessively burdensome to speech, as Plaintiffs seem to imply. Indeed, such a jurisprudential approach would vitiate entirely the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and the myriad cases applying that test. Instead, the Court rejected Colorado’s argument because the refusal to register to vote can itself, in some circumstances, be a speech act: “But there are also individuals for whom, as the trial record shows, the choice not to register implicates political thought and expression. . . . For these voter-eligible circulators, the ease of registration misses the point.” *Buckley*, 525 U.S. at 195-96. Thus, the fact that New Mexico’s training and registration requirements are “excessively easy” is wholly relevant to this Court’s analysis.

B. The Registration Requirements Do Not Burden Plaintiffs’ Speech or Associational Rights.

Plaintiffs next argue that the registration requirement, which gives the State the ability to track a fraudulent voter registration form to its source, infringes on their right to associate anonymously. Specifically, Plaintiff AAPD suggests that potential voters are less likely to register with an AAPD registration agent because that person could later be identified as disabled. This fear, however, is entirely unrealistic. In order for this to happen, some enterprising individual would need to identify the voter as an attractive candidate for an investigation of some sort, pull that voter’s registration card, and work backwards from the third party voter registration agent number on that form to identify the organization that facilitated the registration. To describe this sequence as unlikely is to understate the matter.

Moreover, the whole scenario is easily avoided by simply providing the potential voter with a blank federal voter registration form. Plaintiffs tie this to their speech and associational rights by again contending that “[i]f the citizens Plaintiffs target are not added to the rolls, then Plaintiffs cannot associate with them in the electoral process.” Supp. Mem., pg. 10. But if Plaintiffs were able to identify the citizens they have targeted such that they were able to conduct a voter registration drive involving those citizens, Plaintiffs will be able to identify them again in the future. Plaintiffs are obviously not relying on the voter rolls to identify potential voters.

C. The Fifty Form Limit Does Not Burden Plaintiffs’ Speech or Associational Rights.

In an attempt to resuscitate their claim that the fifty form limit is an excessive burden on their First Amendment rights, Plaintiffs contend that the *Meyer* Court rejected the argument put forth by Defendant, namely that Plaintiffs can avoid entirely the fifty form limit by using the federal voter registration form: “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.” Supp. Mem., pg. 10. Plaintiffs, of course, need not “doctor” any federal form to comply with Section 1-4-49. They need only include their third party voter registration agent number on the form, hardly a burdensome requirement.

The *Meyer* Court’s pronouncement that leaving open “more burdensome” avenues of speech “does not relieve [the] burden on First Amendment expression” is thus inapposite. Given their ability to use the federal form, Plaintiffs cannot identify *any* significant burden imposed on them by the flexible fifty form limitation. They also, therefore, cannot demonstrate a burden to their speech, and their claim fails.

D. The Forty-Eight Hour Return Requirement Does Not Burden Plaintiffs' Speech or Associational Rights.

Once again, Plaintiffs contend that the forty-eight hour return requirement infringes on their associational rights because it “prevents Plaintiffs from developing a list of the citizens they register so they can contact them later.” Supp. Mem., pg. 11. As already noted, the construction of such a database is permissible, but not constitutionally protected, and Plaintiffs cite no authority to the contrary.

E. The Civil and Criminal Penalties Do Not Burden Plaintiffs' Speech or Associational Rights.

Finally, Plaintiffs press their claim that the civil and criminal penalties in Section 1-4-49 chill their speech and have forced them to shut down their voter registration activities. This issue has been thoroughly briefed and the parties discussed it at great length in the August 19, 2008 preliminary injunction hearing before this Court. Defendant has nothing of substance to add to the arguments it has already made to the Court on this issue other than to say that Plaintiffs seem to have lost sight of who's interests are really at stake in this litigation – currently unregistered, voter-eligible New Mexico citizens.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiffs' request for a preliminary injunction, order all parties to bear their own costs, and provide any further relief to which Defendant may be legally or equitably entitled.

DATED: August 28, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing motion on Plaintiffs' counsel of record via electronic filing with the CM/ECF filing system on August 28, 2008.

/s/ Scott Fuqua
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