

**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,)

v.)

CIVIL ACTION NO: 1:08-cv-00702-JB

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

Defendant,)

JUSTINE FOX YOUNG,)
NINA MARTINEZ, VICKY PEREA, RHODA)
COAKLEY and the REPUBLICAN PARTY)
OF NEW MEXICO,)

Defendant-Interveners.)

**INTERVENERS’ ANSWER TO THE COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Interveners Justine Fox Young, Nina Martinez, Vicky Perea, and the Republican Party of New Mexico, by and through their undersigned counsel, hereby answers the complaint for declaratory and injunctive relief as follows:

1. Interveners admit the allegations in Paragraph 1.
2. Interveners admit the allegations in Paragraph 2.
3. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 3.

4. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 4.
5. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 5.
6. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 6.
7. Interveners admit the allegations in Paragraph 7.
8. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 8. Interveners specifically deny that the County Clerks of New Mexico have in place systems...that are designed to prevent...the registration process from becoming a mechanism for fraudulent voting.
9. Paragraph 9 does not contain factual allegations such that Interveners are required to either admit or deny Paragraph 9. To the extent Paragraph 9 does contain such allegations, Interveners deny those allegations.
10. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 10.
11. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 11.
12. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 12.
13. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 13.

14. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 14.

15. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 15.

16. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 16.

17. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 17.

18. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 18.

19. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 19.

20. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 20.

21. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 21.

22. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 22.

23. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 23.

24. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 24.

25. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 25.

26. Interveners do not have sufficient information to either admit or deny the allegation that the American Association of People with Disabilities “has suspended efforts to establish a coalition in New Mexico and has decided not to establish a voter-registration program in the state in 2008.” Interveners deny the remaining allegations in Paragraph 26.

Interveners specifically deny that New Mexico’s voter registration law severely burdens AAPD’s ability to run a state-wide voter-registration program.

27. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 27.

28. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 28.

29. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 29.

30. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 30.

31. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 31.

32. Interveners deny the allegation that “the challenged law is vague and fails to specify when one has ‘assisted’ voter registration sufficient to cause the law to apply.”

Interveners do not have sufficient information to either admit or deny the remaining allegations in Paragraph 32.

33. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 33.

34. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 34.

35. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 35.

36. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 36.

37. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 37.

38. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 38.

39. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 39.

40. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 40.

41. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 41.

42. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 42.

43. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 43.

44. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 44.

45. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 45.

46. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 46.

47. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 47.

48. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 48.

49. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 49.

50. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 50.

51. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 51.

52. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 52.

53. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 53.

54. Interveners admit the allegations in Paragraph 54.

55. Interveners admit the allegations in Paragraph 55.

56. Interveners admit the allegations in Paragraph 56.

57. Interveners admit the allegations in Paragraph 57.

58. Interveners admit the allegations in Paragraph 58.

59. Interveners admit that neither NSMA 1978, § 1-4-49 nor 1.10.25.9 NMAC contain an express training requirement for third party registrars. Interveners do not have sufficient information to either admit or deny the remaining allegations in Paragraph 59.

60. Interveners deny the allegations in Paragraph 60.

61. Interveners deny the allegations in Paragraph 61.

62. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 62.

63. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 63.

64. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 64.

65. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 65.

66. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 66.

67. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 67.

68. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 68.

69. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 69.

70. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 70.

71. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 71.

72. Interveners deny the allegations in Paragraph 72.

73. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 73.

74. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 74.

75. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 75.

76. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 76.

77. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 77.

78. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 78.

79. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 79.

80. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 80.

81. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 81.

82. Interveners deny that the criminal and civil penalties contained in NMSA 1978, § 1-4-49 “constitute a severe threat to individuals who work and volunteer for Plaintiffs.”

Interveners also deny that the challenged law has a “chilling effect on Plaintiffs’ speech and association.” Interveners do not have sufficient information to either admit or deny the remaining allegations in Paragraph 82.

83. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 83.

84. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 84.

85. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 85.

86. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 86.

87. Interveners deny the allegations in Paragraph 87.

88. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 88.

89. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 89.

90. Interveners do not have sufficient information to either admit or deny the allegations in Paragraph 90.

91. Paragraph 91 does not contain factual allegations such that Interveners are required to either admit or deny Paragraph 91. To the extent Paragraph 91 does contain such allegations, Interveners deny those allegations.

92. Interveners deny that NMSA 1978, § 1-4-49 and 1.10.25.7-10 NMAC “impose severe burdens on Plaintiffs.” Interveners admit the remaining allegations in Paragraph 92.

93. Interveners deny the allegations in Paragraph 93.

94. Interveners deny the allegations in Paragraph 94.

95. Interveners deny the allegations in Paragraph 95.

96. Interveners deny the allegations in Paragraph 96.

97. Interveners deny the allegations in Paragraph 97.

98. Interveners deny the allegations in Paragraph 98.

99. Paragraph 99 does not contain factual allegations such that Interveners are required to either admit or deny Paragraph 99. To the extent Paragraph 99 does contain such allegations, Interveners deny those allegations.

100. Interveners deny the allegations in Paragraph 100.

101. Interveners admit the allegations in Paragraph 101.

102. Interveners admit the allegations in Paragraph 102.

103. Interveners admit the allegations in Paragraph 103.

104. Interveners deny the allegations in Paragraph 104.

105. Interveners deny the allegations in Paragraph 105.

106. Interveners deny the allegations in Paragraph 106.

107. Interveners deny the allegations in Paragraph 107.

108. Paragraph 108 does not contain factual allegations such that Interveners are required to either admit or deny Paragraph 108. To the extent Paragraph 108 does contain such allegations, Interveners deny those allegations.

109. Interveners deny that NMSA 1978, § 1-4-49 and 1.10.25.7-10 NMAC “impose severe financial and administrative burdens on Plaintiffs.” Interveners admit the remaining allegations in Paragraph 109.
110. Interveners deny the allegations in Paragraph 110.
111. Interveners deny the allegations in Paragraph 111.
112. Interveners deny the allegations in Paragraph 112.
113. Interveners deny the allegations in Paragraph 113.
114. Interveners deny the allegations in Paragraph 114.
115. Interveners deny the allegations in Paragraph 115.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim upon which relief may be granted.
2. Plaintiffs Failed To Utilize The NVRA’s Mandatory Process Prior to Commencing Suit.
 - a. Under Section 11(b) of the NVRA, 42 U.S.C. § 1973gg-9(b), no Plaintiff may bring suit against the state government without first giving “*written notice* of the violation to the chief election official of the State involved.”
 - b. The notice must be given by “the aggrieved person” who is to be the Plaintiff.
Id. § 1973gg-9(b)(1)-(2).
 - c. The only exception is for violations within 30 days of Election Day. *Id.*
§ 1973gg-9(b)(2).
 - d. For violations occurring 120 days or more before Election day, the suit cannot be filed until 90 days “after receipt of [the] notice[.]” For violations occurring between 31 and 89 days before Election Day, suit cannot be filed until 20 days after receipt of notice. *Id.* § 1973gg-9(b)(2).

- e. Here, no such notice was given.
 - i. There was, allegedly, an in-person meeting in 2006, between the Secretary of State and “voting-rights advocates.” Compl. ¶¶ 88-90. But the Complaint does not specify who the participants were and, in any event, there was no written notice of the violations at issue in this case.
 - ii. Plaintiffs included, as Exhibit I to Potischman’s Declaration in support of the Motion for Preliminary Injunction, a letter from “Project Vote” to the Secretary of State. But Project Vote isn’t a plaintiff in this suit.
3. Plaintiffs Have Failed To Allege Standing.
- a. Article III of the U.S. Constitution limits the federal courts’ jurisdiction to “cases” and “controversies.” U.S. Const., art. III, § 3.
 - b. “Standing to sue” is one of the elements of that jurisdictional requirement. *Raines v. Byrd*, 521 U.S. 811, 818 (1997).
 - c. Among the elements that constitute the “irreducible constitutional minimum” of standing, *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000), is “causation” — *i.e.*, the actual injury suffered by the plaintiff and to be redressed by the court must have been caused by the Defendant, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
 - d. With respect to that “causal connection”: “the injury has to be fairly trace[able] to the challenged action of the defendant” *Id.*
 - e. “To the extent that an injury is self-inflicted or is due to the plaintiff’s own fault, the causal chain is broken.” 15 Moore’s Federal Practice § 101.43[4] at p. 101-62 (3d. ed. 2008).

f. Specifically, Plaintiffs cannot satisfy the standing requirement if their alleged injuries are actually the result of their own conduct, and not the results of the legal requirements they challenge in court. *McConnell v. FEC*, 540 U.S. 93, 228 (2003).

i. In *McConnell*, Plaintiffs lacked standing to challenge § 307 of the Bipartisan Campaign Reform Act (re limits on hard money), because “[t]heir alleged [injury] stems not from the operation of § 307, but from their own personal ‘wish’ not to solicit or accept large contributions, *i.e.*, their personal choice.” *Id.*

g. Such is the case here: Defendants argue that the New Mexico laws erecting “procedural roadblocks” have decreased registration levels in violation of the NVRA, but in fact the alleged decreases are the direct result of their own decisions simply not to attempt to comply with the regulations. *See, e.g.*, Pl. Mot. for Prelim. Injunc. at 37 n.9 (citing Dickson Aff. ¶¶ 21, 28 (“AAPD has suspended efforts to establish a coalition ... and has decided not to establish a voter registration program”); Rodriguez Aff. ¶¶ 33-35, 37 (“I did not request any additional forms and am unaware of how one would obtain additional forms. ... The 50-form limit is onerous and *would* present an additional barrier if *were we to attempt to engage in large-scale voter registration.*”); Fraher Aff. ¶ 21 (“It was a very inefficient process.”); Tessneer Aff. ¶ 14 (“The trips were a tremendous waste of time and money that could have been spent actually registering new voters.”)).

4. Plaintiffs’ Request For Equitable Relief Is Barred By Laches.

- a. Laches is an equitable defense, barring Plaintiffs' from unduly delaying suits for equitable relief.
- b. "Plaintiffs, especially, have the burden of complaining of injuries promptly, before defendants come to rely on the status quo. '[E]quity aids the vigilant, not those who slumber on their rights.'" *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1017 (10th Cir. 2004) (quoting *Allred v. Chynoweth*, 990 F.2d 527, 536 n.6 (10th Cir.1993)).
- c. "Thus, when a plaintiff is complaining of irreparable injury from a long-established state of affairs, a court may naturally ask why, if the injury is so pressing as to warrant preliminary relief, the plaintiff waited so long before bringing a claim." *Id.* (citing 11A Wright, Miller, & Kane, Federal Practice and Procedure § 2946, at 113-16 (2d ed.1995)).
- d. In the Tenth Circuit, the federal standard for laches governs federal claims, and the state standard for laches governs state claims. *See Steiner Corp. v. Johnson & Higgins of California*, 135 F.3d 684, 693 (10th Cir. 1998) (applying state laches standards to state law claims); *Maloney-Crawford Tank Corp. v. Rocky Mountain Natural Gas Co.*, 494 F.2d 401, 403-04 (10th Cir. 1974) (applying federal laches standards to claims brought under federal law); *see also* 4 Wright & Miller, Federal Practice and Procedure § 1045 (3d ed. 2002) (noting that "[w]hen an action is founded on a state-created right is maintained in the federal courts . . . the forum state's law determines . . . the standard for laches").
- e. Laches is a very nuanced doctrine, the application of which will require a fair amount of detail. But suffice it to say, for the pleading of the Affirmative

Defense in the Answer, that Plaintiffs make clear throughout their complaint that their or those with which they've worked have been aware of these issues since 2006. *See* Compl. ¶¶ 88 *et seq.* (“*In 2006, voting-rights advocates met with then-New Mexico Secretary of State Rebecca Vigil-Giron ...*”); *See* Compl., Potischman Decl., Exh. A ¶¶ 23-34 (Rodriguez Aff.) (“*Since New Mexico’s third-party registration law was enacted, SWOP has significantly reduced our voter registration activity For instance, SWOP did not register any voters in advance of the October 2005 Albuquerque mayor election*”).

- f. It would be inequitable for the Court to allow Plaintiffs to bring this suit *three years* after they apparently learned of the new laws, and *three months* away from a Presidential election. Plaintiffs’ artfully crafted complaint contains few objective benchmarks of such critical matters as how many New Mexico voters have actually been registered by the American Association of People With Disabilities or the Women’s Clubs Overseas, Inc prior to the enactment of the statute at issue. Plaintiffs do not explain the public reports of the “historic” numbers of registrations by their comrade in “non-partisan” registrations, Acorn. (Dkt. 36, Reply Brief of Martinez , et al proposed Interveners, Exhibit 2). By delaying their suit *for no apparent reason for more than three years*, and yet alleging that extraordinary circumstances exist to justify a preliminary injunction, Plaintiffs attempt to create a perception of the need for immediate action by their failure to act for more than three years. Of course a request for a preliminary injunction may avoid the usual discovery process attendant to most suits and particularly suits requesting the court to substitute Plaintiffs’ judgment for the

decisions of the New Mexico Legislature on the issue of the proper and reasonable regulation of on the New Mexico election process. Plaintiffs have delayed a challenge and then requested extraordinary relief to avoid a thorough consideration of the matters and create the illusion of both a problem and an emergency.

- g. The *Plaintiffs* have the burden of bringing their suit promptly, *see O Centro, supra*, and in this case they've dramatically failed to carry that burden.
5. The challenged statutes and procedures are limited, reasonable and proper regulations and procedures to address the need for an orderly, honest, open and efficient registration and election process. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (U.S. 1983) (when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.).
6. At this time, Interveners do not know which, if any, additional Affirmative Defenses may apply. Interveners have neither knowingly nor intentionally waived any applicable Affirmative Defenses. If Interveners later learn that additional Affirmative Defenses may apply, Interveners will seek leave to amend their Answer to raise such other Affirmative Defenses.

Respectfully submitted,

/s/ Patrick J. Rogers

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I hereby certify that a true and correct copy hereof was served on all counsel of record via the United States District Court for the District of New Mexico's CM/ECF filing system this 22nd day of August 2008.

/s/ B.J. Crow

Bowles & Crow