

**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

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

Defendant,)

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

Defendant-Interveners.

**DEFENDANT- INTERVENERS’ RESPONSE TO PLAINTIFFS’ MOTION FOR A
PRELIMINARY INJUNCTION**

Defendant-Interveners, Justine Fox Young, Nina Martinez, Vicky Perea, Rhoda Coakley, and Republican Party of New Mexico, by and through their undersigned counsel, hereby file their response to the Plaintiffs’ motion for a preliminary injunction and state as follows:

I. PLAINTIFFS LACK STANDING TO BRING THIS SUIT

A request for a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure does not constitute an independent basis for federal jurisdiction. *See Citizens Concerned for Separation of Church & State v. City of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980) (“[R]ule 65 does not confer either subject matter or personal jurisdiction on the court.”).

Thus, at the preliminary injunction stage, the burden is on the moving party "to establish a reasonable probability of ultimate success on the issue of jurisdiction when the action is tried on the merits." *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1018 (10th Cir. 1990).¹

This Court lacks jurisdiction to hear this case. Article III of the U.S. Constitution limits the federal courts' jurisdiction to "cases" and "controversies." U.S. Const., art. III, § 3. "Standing to sue" is one of the elements of that jurisdictional requirement. *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

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). With respect to that "causal connection": "the injury has to be fairly trace[able] to the challenged action of the defendant" *Id.* "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).

Plaintiffs cannot satisfy the standing requirement if their alleged injuries are actually the result of their own conduct, and not the result of the legal requirements they challenge in court. *McConnell v. FEC*, 540 U.S. 93, 228 (2003). In *McConnell*, Plaintiffs lacked standing to challenge section 307 of the Bipartisan Campaign Reform Act (*i.e.*, limits on "hard money" donations), because "[t]heir alleged [injury] stems not from the operation of § 307, but from their

¹ In determining whether the moving party has met this burden, the Tenth Circuit has instructed that "'[r]easonable probability' is, to us, something less than 'preponderance of the evidence.'" *Nat'l Union Fire Ins. Co. v. Kozeny*, 19 Fed. Appx. 815, 822 (10th Cir. 2001); *Meintzer v. State Human Servs. Dep't*, 2007 U.S. Dist. LEXIS 55659, 16-18 (D.N.M. May 21, 2007).

own personal ‘wish’ not to solicit or accept large contributions, *i.e.*, their personal choice.” *Id.* 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 decreases² are the direct result of *their own decisions simply not to attempt to comply with the regulations.*³ At least one county clerk has expressed that she attempted to schedule training sessions under the Voter Registration Act with the Obama campaign but the campaign cancelled the sessions due to “lack of interest,” further demonstrating that any harm to Plaintiffs flows from their voluntary decisions. Exhibit A, Affidavit of Rhoda Coakley. Having called for court redress but having no injury actually caused by Defendants’ actions, Plaintiffs lack standing to maintain this suit, and the Court lack jurisdiction to entertain this suit.

II. PLAINTIFFS DO NOT SATISFY THE STANDARD FOR A PRELIMINARY INJUNCTION

A. Legal Standard

"It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is clear and unequivocal." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)(internal quotations omitted). To show that the extreme remedy of a preliminary injunction should issue, "[a] party seeking an injunction from a federal court must invariably show that it does not have an adequate remedy at law." *N. Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1306 (1984). Federal courts have the

² Plaintiffs American Association of People with Disabilities and the Federation of Women’s Clubs Overseas, Inc do not present any evidence of any person with first hand knowledge that either organization has actually registered any New Mexican voter prior to 2005. Plaintiffs and Plaintiffs experts do not address the “historic” number of registrations post 2005 by a sister registration organization, ACORN.

³ *See, e.g.*, Pl. Mot. for Prelim. Inj. 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 *were we to attempt to engage in large-scale voter registration.*” (emphasis added)); 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.”); but see Exhibit A, Affidavit of Rhoda Coakley, Chaves County Clerk.

inherent equitable power to issue a preliminary injunction only when it is necessary to protect a movant's entitlement to a final equitable remedy. *Chavez v. Bd. of Educ. of Tularosa Mun. Sch.*, 2007 U.S. Dist. LEXIS 17091, 21-22 (D.N.M. Feb. 13, 2007); *See also De Beers Consol. Mines v. United States*, 325 U.S. 212, 219-223 (1945). The Supreme Court and the Tenth Circuit have explained that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1220 (10th Cir. 2003) ("In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits.") (quoting *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986)).

Before a district court may issue a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, the moving party must establish that: "[i] [it] will suffer irreparable injury unless the injunction issues; [ii] the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; [iii] the injunction, if issued, would not be adverse to the public interest; and [iv] there is a substantial likelihood [of success] on the merits." *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992). The movant bears the burden of demonstrating that those equitable factors weigh in its favor. *See Automated Mktg. Sys., Inc. v. Martin*, 467 F.2d 1181, 1183 (10th Cir. 1972).

As this Court noted in *Steinmetz v. Steinmetz, et. al*, there are

three types of specifically disfavored preliminary injunctions [for which] a movant must 'satisfy an even heavier burden of showing that the four [preliminary injunction] factors... weigh heavily and compellingly in movant's favor before such an injunction may be issued': (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits.

Steinmetz v. Steinmetz, CV-08-0629 Judge Browning, Memorandum Opinion and Order at 3 quoting, *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F. 3d 973, 975 (10th Cir. 2004) (en banc), *aff'd* 546 U.S. 418 (2006).

B. Application

1. Disfavored Injunction.

Plaintiffs' requested relief falls within the first category of disfavored injunctions because granting Plaintiffs their requested relief would "alter the status quo." Moreover, Plaintiffs requested relief falls within the third category of disfavored injunctions because it would afford essentially all relief requested. Presently, all parties are operating under the law governing voter registration, that being the Voter Registration Act. Granting Plaintiffs' request to bar enforcement of that Act alters the status quo and affords Plaintiffs all the relief they could obtain at a trial on the merits. For these two initial reasons and the reasons that follow, this Court should deny Plaintiffs' motion.

2. Irreparable injury.

Plaintiffs have also not established the elements required for entry of a preliminary injunction. There is no irreparable injury that the Plaintiffs will suffer if the injunction does not issue. Plaintiffs' claim in their motion that the Voter Registration Act (the Act) chills political speech and that the chilling of political speech "unquestionably constitutes irreparable injury." In oral argument before this Court, however, Plaintiffs' counsel appeared to concede, as he must, that no court, heretofore had found a First Amendment right to register voters and could completely abolish third party registration of voters. Exhibit B, Transcript of Hearing, August 19, 2008, pg. 53-56 (Plaintiffs' counsel concedes there is no First Amendment right to third party registrations). Moreover, the Act does not directly restrict speech and is content neutral. For the reasons stated below, because the Act does not burden and certainly does not "severely" burden

core speech, there is no irreparable injury to Plaintiffs. There is no record evidence of *irreparable* harm to any Plaintiff. Plaintiffs do not claim that New Mexico has prevented their ability to register voters, or that New Mexico has enforced the new law against them. Plaintiffs present no evidence that any valid registration card has ever been rejected or that any single person who wants to register has been denied or even inconvenienced. Rather, Plaintiffs claim (three years subsequent to the enactment of the Act) only that they have curtailed their own efforts based on their interpretation of the law. Pl.'s Mem. at 43. The character and magnitude of the harm complained of is not as severe as Plaintiffs would have the Court believe. The law does not put any direct restrictions on interactions. Rather, it simply regulates in a fair, non-discriminatory manner, an administrative aspect of the electoral process: that is, the third parties that handle voter registration applications.

3. Damage to New Mexico.

Moreover, any threatened injury to Plaintiffs does not outweigh the damage the proposed injunction would cause to the State of New Mexico. New Mexico unquestionably has a legitimate interest in ensuring that voters are properly and timely registered and in protecting its voters from third-party fraud or unintentional or negligent mishandling of registration applications. *League of Women Voter's of FL v. Browning*, No. 08-24213, (Aug. 6, 2008). The proposed injunction would hinder this legitimate state interest, causing damage to NM's voter registration process. Contrary to Plaintiffs' allegations, there is ample evidence of fraud in the electoral process in New Mexico. As the attached exhibits illustrate, recent election fraud in New Mexico has included: (1) payment of monies for voter registrations by ACORN to a crack user, Exhibit C, Search Warrant; (2) fraudulent voting by persons in others names, Exhibit D, Statement of Rose-Mary McGee and attachments, (3) failure to register voters by third party

registration groups, Exhibit E, Affidavit of Ingrid Bober (discussing ACORN's failure to register her); (4) irregularities in requests for new registration cards for certain voters without their consent, Exhibit F, Affidavit of Fred Chanatry and accompanying documents; (5) registration of deceased voters, Exhibit G, Affidavit of Patricia Laven (her father attempted to be registered 2.5 years after his death with a different social security number); (6) attempts to register voters who have been out of state for several years, Exhibit H, statement of James Dickey (Arizona resident for 9 years attempted to be registered); (7) Exhibit I, numerous other instances of election fraud including by election officials (series of news articles); Exhibit J, Deposition of Jaime Diaz, August 31, 2004 (describing procedures and how voting registration fraud can occur including registration of underage voters by third party registration groups). The threatened injury to Plaintiffs is minimal, and does not outweigh the damage New Mexico would suffer in being unable to protect these legitimate interests.

4. Injunction would be adverse to the public interest

It is in the public's interest to have a third-party voter registration system that ensures voters are properly and timely registered. It is also in the public's interest to have a system that protects voters from third-party fraud or unintentional or negligent mishandling of registration applications. It is in the public's interest to require the identification of these registration agents, in order to inform the public of the nature of these organizations and the people they employ. See Exhibit I. It is in the public's interest and the interests of open government and the First Amendment to require ACORN and all persons registering voters to promptly turn in the registrations. No valid purpose is served by allowing ACORN or any persons registering voters to hide or delay disclosure of the registration which prevents review and contact by other candidates, political parties, members of the public, or in appropriate cases, law enforcement

officials. A prompt delivery of voter registration forms should also reduce the opportunities for disenfranchisement of Republican voters due to break-ins at these “non-partisan” organizations. See Exhibit A, I. The New Mexico law ensures these goals and an injunction hindering this law would be adverse to the public interest, open and honest elections, and the First Amendment.

5. Plaintiffs do not have a likelihood of success on the merits

As set forth in the discussion that follows, Plaintiffs simply do not demonstrate a substantial likelihood of success on the merits of their claims.

III. THE NEW MEXICO LAW DOES NOT VIOLATE THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

A. New Mexico Law Does Not Severely Burden the Plaintiffs’ First Amendment Rights because it Does Not Restrict Core Political Speech.

Constitutional challenges to specific provisions of a State’s election are not resolved by any “litmus-paper test” that will separate valid from invalid restrictions. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Instead, courts use a balancing test to determine whether a challenged regulation violates the First Amendment. *Only* regulations that *severely* burden *core political speech* are subject to “strict scrutiny.” *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (“Election regulations that impose a severe burden on associational rights are subject to strict scrutiny”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny’”); *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000) (“[S]trict scrutiny is applied where the government restricts the overall quantum of speech available to the election or voting process.”). On the other hand, *non-discriminatory* restrictions on *election procedures* need only be justified by “legitimate state interests.” *See Crawford*, 128 S. Ct. at 1616 (asking whether state election regulation was “justified by relevant and legitimate state interests sufficiently weighty to justify

the limitation” (internal quotation marks omitted)); *Wash. State Grange*, 128 S. Ct. at 1192 (“If a statute imposes only modest burdens . . . then ‘the State’s important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions’ on election procedures.”) (quoting *Anderson*, 460 U.S. at 788; *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (“[W]e have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.”)).

New Mexico’s third-party voter-registration law does not restrict core political speech. Rather, it merely “regulates an administrative aspect of the electoral process.” Indeed, there is nothing inherently expressive about the act of collecting voter registration applications.

For that reason, this case is akin to those in which the Supreme Court has upheld election laws which imposed reasonable constraints on the mechanics of the election process. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), for example, the Supreme Court upheld a state law prohibiting “fusion” candidates from appearing on ballots because “[b]allots serve primarily to elect candidates, not as forums for political expression.” By the same token, voter registration forms serve primarily to register voters, “not as forums for political expression.” Attributing such administrative aspects of the electoral process “a more generalized expressive function would undermine the ability of states to operate fairly and efficiently.” *Burdick*, 504 U.S. at 438.

The Plaintiffs do not address those cases. Rather, they point to cases in which the Supreme Court has invalidated laws restricting the distribution of initiative petitions and campaign literature. See *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 194-95 (1999) (invalidating state law which required initiative-petition circulators to be state residents); *McIntyre*, 514 U.S. at 357 (invalidating state law prohibiting the distribution of

anonymous campaign literature). But those activities, unlike the collection of voter-registration forms, *do* involve core political speech because they involve “interactive communication concerning political change.” *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

The act of collecting voter registration forms is entirely distinct from the kind of interactive political communication involved in the distribution of petitions or campaign literature. Voter-registration does not involve political advocacy, but is merely a step in the process of participating in the election process. This distinction was recently recognized by the Southern District of Florida in upholding a third-party voter-registration law similar to New Mexico’s. *League of Women Voters of Florida v. Browning*, 2008 WL 3200654 (S.D. Fla. Aug. 6, 2008) (“*LWVF II*”). There, the court noted that third-party registration regulations are different than regulations on petition distribution because they do not “directly regulate[] the conditions under which plaintiffs c[an] interact with members of the public regarding an issue of political concern” but rather “regulate[] an administrative aspect of the electoral process”). *LWVF II*, slip op. at *21-*22. For this reason, third-party voter-registration laws, New Mexico’s, are upheld so long as they are reasonable, non-discriminatory restrictions on election procedures. *See id.*, slip op. at *20. New Mexico’s law is non-discriminatory and justified by the State’s legitimate interests in regulating the voter-registration process.

B. New Mexico’s Interest in Promoting an Orderly Third-Party Registration Process Justifies the Reasonable, Non-Discriminatory Restrictions Imposed by New Mexico Law.

Under Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, the individual states have the right to enact procedural requirements regarding elections. This power has long been held to extend to “supervision of voting” and “prevention of fraud and corrupt

practices [and] counting of votes.” *Smiley v. Holm*, 235 U.S. 355, 366 (1932); *see also Cook v. Gralike*, 531 U.S. 510, 523 (2001).

New Mexico has a legitimate interest in protecting the integrity of the election process from fraud. New Mexico also has an important, legitimate interest in promoting an orderly third-party registration process. The law at issue serves these interests in at many ways.

First, the law ensures that voter registration applications are properly and timely submitted. *See Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1333 (S.D. Fla. 2008) (upholding state voter-registration deadline because it “directly advance[d] the important interest which the state and the public share in orderly and accurate elections”). Second, the law helps to identify and hold third-party voter registration organizations and individuals accountable for the applications they collect. Most importantly, the New Mexico law prevents fraud. *See Crawford*, 128 S. Ct. at 1618-19. As the Supreme Court has recently opined, although “there is no evidence of extensive fraud in U.S. elections . . . [it does] occur and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.” *Id.* at 1618. Indeed, two federal district courts have very recently upheld similar laws under the state’s legitimate interests in avoiding voter fraud. *See LWVF II League of Women; Gonzalez v. State of Arizona*, CV-06-1268, (D. Ariz. Aug. 20, 2008).

Moreover, unlike other third-party voter-registration laws which have been invalidated (in cases cited by the Plaintiffs), New Mexico’s law is entirely non-discriminatory. *Cf. League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314, 1334-35 (S.D. Fla. 2006) (“*LWVF I*”) (invalidating state third-party registration regulations which discriminated between different types of third-party registration organizations); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694,

704 & 707 (N.D. Ohio 2006) (same). Indeed, in upholding Florida’s amended third-party registration law, the District Court for the Southern District of Florida noted that the “most significant[.]” distinction between that law and the prior, unconstitutional Florida law was that the amended law did “not discriminate” between different types of third-party registration organizations. *See LWVF II*, slip op. at *23. Here, because New Mexico’s law affects *all* third-party voter registration groups *evenly*, and because it is justified by legitimate state interests in promoting an orderly voter-registration process, New Mexico’s law must be upheld.

C. New Mexico Law is Not Unconstitutionally Overbroad.

The Supreme Court has stated that the “strong medicine of overbreadth invalidation” is only applicable if a law’s restriction of protected speech is “substantial . . . relative to the scope of the law’s plainly legitimate applications.” *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003). As discussed above (and conceded by Plaintiffs’ counsel at oral argument), New Mexico’s law does not infringe on protected speech because the collection of voter registration forms is not political speech. Moreover, even if the law does infringe slightly on the Plaintiff’s First Amendment rights, such restrictions are certainly not “substantial” relative to the law’s “plainly legitimate” justifications in regulating the voter-registration process.

IV. THE NEW MEXICO LAW IS NOT UNCONSTITUTIONALLY “VAGUE”

A statute is unconstitutionally vague only if it fails to give the Plaintiffs “fair notice” of its prohibitions. *See LWVF II*, slip op. at *15 (noting that the vagueness doctrine “incorporates notions of fair notice or warning” and is “designed to prevent the innocent from being trapped by failing to give fair notice of what is prohibited” (internal citations and quotation marks omitted) (citing *Smith v. Goguen*, 415 U.S. 566, 572 (1974))). Here, the commonly understood meaning of the term “assist” gives the Plaintiffs more than sufficient notice of the scope of New Mexico’s voter-registration laws. “Assist” means “to give support or aid.” Webster’s Third International

Dictionary 132 (2002). It is therefore clear that the statute applies to anyone who distributes and collects voter registration forms. Because the commonly understood meaning of “assist” provides the plaintiffs with fair notice, the Plaintiffs vagueness challenge must fail. *See LWVF II*, slip op. at *18-19 (rejecting vagueness challenge where the “common meaning” of the challenged term was clear).

V. THE NEW MEXICO LAW DOES NOT VIOLATE THE NATIONAL VOTER REGISTRATION ACT

A. By Failing To Exhaust Mandatory Administrative Remedies, Plaintiffs Are Barred From Asserting Their NVRA Claims In Court

Plaintiffs’ complaint fails as a matter of law because Plaintiffs failed to exhaust remedies under the National Voter Registration Act’s (NVRA) mandatory process prior to commencing suit. Under Section 11(b) of the NVRA, 42 U.S.C. § 1973gg-9(b), no Plaintiff may bring suit against a state government without first giving “*written notice* of the violation to the chief election official of the State involved.” The notice must be given by “the aggrieved person” -- the Plaintiff. *Id.* § 1973gg-9(b)(1)-(2). The only exception is for violations within 30 days of Election Day. *Id.* § 1973gg-9(b)(2). 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). Here, no such notice was given. There was, allegedly, an in-person meeting in 2006, between the Secretary of State and “voting-rights advocates.” Compl. ¶¶ 88-90. 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, however. 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 is not a plaintiff in this suit. Failure to give proper notice thus bars Plaintiffs’ claims altogether.

B. Plaintiffs Identify No Substantive NVRA Provision That Conflicts With New Mexico Law

Plaintiffs make several unfounded allegations that the New Mexico law violates the NVRA. Plaintiffs argue that the law conflicts with the NVRA’s purpose. Plaintiffs focus on the NVRA’s prefatory statements of purpose as to “increas[ing] the number of eligible citizens who register to vote,” 42 U.S.C. § 1973gg(b)(1), and dampening “discriminatory and unfair registration laws and procedures that can . . . disproportionately harm voter participation by various groups, including racial minorities,” *id.* § 1973gg(a)(3). Plaintiffs argue that those statements of general purpose — and not the NVRA’s specific, substantive standards — conflict-preempt New Mexico law, because New Mexico law is, *e.g.*, “an obstacle to the full accomplishment of congressional objectives.” Pl. Mem. at 36 (quoting *In re Timberon Water Co.*, 114 N.M. 154, 158 (1992)). However, NVRA’s prefatory statements of purpose are statements of general policy that do not by themselves suffice to preempt New Mexico law. *See Commonwealth Ed. Co. v. Montana*, 453 U.S. 609, 633 (1981).

Instead, “[c]onflict preemption requires that the state or local action be a *material impediment* to the federal action . . . or thwart the federal policy *in a material way*.” *Mt. Olivet Cemetary Ass’n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir. 1998) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis added). Such a direct and material conflict is *required* for conflict-preemption, because “pre-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.” *Commonwealth Edison*, 453 U.S. at 634.

Charles Wesley Educ. Fund, Inc. v. Cox, 408 F.3d 1349, 1354-55 (11th Cir. 2005) is inapposite. There, local law conflicted with the NVRA’s express *requirement* that the state accept timely voter registrations. *See* 42 U.S.C. §§ 1973gg-2(a)(2), 1973gg-6(a)(1). The case did not turn on the NVRA’s prefatory statements of policy. Nor do Plaintiffs’ other cases govern this case. In *Wilson v. United States*, 1996 WL 297051 at *1 (N.D. Cal. 1996), for example, the parties *agreed* that the state regulations violated the NVRA, and in *Commonwealth of Virginia v. United States*, 1995 WL 928433 at *1 (E.D. Va. 1995), the parties *agreed* that the state regulation violated the NVRA. Here, there is no support for the argument that the general-purpose statements of the NVRA support conflict preemption of New Mexico law.

The sheer scope of Plaintiffs’ argument is breathtaking. Under Plaintiffs’ description of the preemptive scope of the NVRA, any state regulation that makes third-party voter-registration collection efforts even *marginally* more complicated would be categorically conflict-preempted by the NVRA’s statements of purpose. Furthermore, Plaintiffs’ aggressive reading of the NVRA would nullify the NVRA’s *other* purposes, such as “protect[ing] the integrity of the electoral process,” 42 U.S.C. § 1973gg(b)(3), and “ensur[ing] that accurate and current voter registration

rolls are maintained,” *id.* § 1973gg(b)(4). Plaintiffs’ arguments, if accepted, “would contravene the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dep’t of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 340-41 (1994) (quoting *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)) (quotation marks omitted)

C. New Mexico’s Alleged “Procedural Roadblocks to Conducting Voter-Registration Drives” Do Not Conflict With The NVRA

Plaintiffs challenge the initial fifty-form allocation, the alleged “training” requirement, and the penalties assessed against registration agents who submit late forms. Pl. Mem. at 37-38. But *none* of those restrictions actually *conflict* with the NVRA’s requirements for making available and accepting registrations. Those restrictions only standardize the process by which other groups can *gather* registrations. The law allots voter registration forms to registration groups in traceable packets of 50 forms each, with the Secretary of State and County Clerk each retaining discretion to increase the quantity. N. M. Admin. Code §§ 1.10.25.8(C), 1.10.25.10(B). Plaintiffs have not shown that the initial fifty-form allocation prevents other groups from increasing the number of registered voters. Although the law allots forms in packets of 50, the plaintiffs admit that NMPIRG has been allowed to take out as many as 200 forms at a time. *See* Pl.’s complaint at ¶ 74. Those restrictions have not been shown to *materially decrease* the number of registrations that would be submitted to such a degree as to offend the national policy. Those restrictions *promote* the NVRA’s purpose of “protect[ing] the integrity of the electoral process,” 42 U.S.C. § 1973gg(b)(3), and the policy of “ensur[ing] that accurate and current voter registration rolls are maintained,” *id.* § 1973gg(b)(4).

Also, the New Mexico law does not prohibit the use of federal voter-registration forms. Plaintiffs base this argument *solely* on alleged conversations that their workers had with county

officials. Pl. Mem. at 39. This alleged prohibition is *nowhere* reflected in the state law. Further, the New Mexico law does not violate or conflict with the NVRA's purpose of promoting voter participation by "various groups." As with the alleged "Procedural Roadblocks" discussed above, New Mexico's procedures do not actually *conflict with* the requirements of the NVRA. In fact, New Mexico's procedures *promote* the NVRA's purpose of protecting electoral integrity and ensuring the accuracy of voter rolls.

VI. NEW MEXICO LAW DOES NOT VIOLATE THE NEW MEXICO CONSTITUTION

A. No Violation of the Right To Free Speech Of N.M. Const. Art. II § 17.

In contrast to Plaintiffs' assertion, the challenged law is a content-neutral restriction upon speech for which the New Mexico Constitution provides no greater protection than the First Amendment. There is no need to proceed, as suggested by the Plaintiff, to an "interstitial analysis" of the rights concurrently guaranteed by the state and federal constitutions and to determine whether the free speech clauses of both constitutions should be interpreted differently. *See* Pl. Mem. at 40. New Mexico courts have already determined the issue.

It is well established that the protections afforded to speech with respect to content-neutral time, place, and manner restrictions by the state and federal constitutions are identical. As the case cited by Plaintiffs states: "[A]pplicable precedents have determined that the protection of the federal and state constitutions are the same, at least with respect to content-neutral restrictions." *State v. Randleman*, 2003-NMCA-150 ¶ 58, 134 N.M. 744, 760, 82 P.3d 554, 570 (N.M. App. 2003) (quoting *State v. Ongley*, 118 N.M. 431, 432, 882 P.2d 22, 23 (N.M. App. 1994), *modified on other grounds by State v. Gomez*, 1997-NMSC-006, ¶ 32, 122 N.M. 777, 932 P.2d 1; *see Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 146, 646 P.2d 565, 573 (1982)). Claims of unconstitutional abridgment of free speech should be analyzed

under the same standards under the state and federal constitutions. The cases that Plaintiff cites for the proposition that New Mexico courts "have interpreted [the] state constitution to provide broader protection than the First Amendment," Pl. Mem. at 41, deal with *content-based* restrictions on speech. See *City of Farmington v. Fawcett*, 114 N.M. 537, 546, 843 P.2d 839, 848 (N.M. App. 1992) (applying a broader "tolerance" standard under the New Mexico Constitution to obscenity laws than the "acceptance" standard required by the First Amendment); *State v. Rendleman*, 2003-NMCA-150, ¶ 58, 134 N.M. 744, 760, 82 P.3d 554, 570 (N.M. App. 2003) (interpreting the New Mexico Constitution to require the less restrictive *Miller/Fawcett* obscenity analysis to certain depictions of children rather than the more restrictive *Ferber* test).

In order to constitute a legitimate time, place, and manner restriction on speech, such restrictions: 1) must be justified without reference to content of regulated speech; 2) must serve a significant governmental interest; and, 3) in so doing, must leave open ample alternative channels for communication of information. *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 600 P.2d 258 (1979). Even if New Mexico courts had not already settled the issue of whether the New Mexico Constitution provides greater protection against restrictions on content-neutral speech, Plaintiff's attempt to distinguish the two free speech provisions as "structurally different" are unpersuasive. Plaintiffs merely point to the fact that whereas the First Amendment to the U.S. Constitution only prohibits Congress from abridging the right to free speech, Article II, Section 17 of the New Mexico Constitution "*affirmatively* grants the right to free speech." Pl. Mem. at 41 (emphasis in original). Plaintiff makes no attempt to demonstrate how this difference in syntax bears upon the issue of the substantive protection of speech from content-neutral restriction. Neither do Plaintiffs cite to a court precedent that would sustain a plausible distinction. "There is a presumption that all legislative acts . . . are constitutional." *Fawcett*, at

540, 843 P.2d at 842. An appellate court must uphold legislation unless satisfied beyond all reasonable doubt that the legislation is unconstitutional. *State v. Ball*, 104 N.M. 176, 718 P.2d 686 (1986). “The burden is therefore upon the party attacking the constitutionality of the enactment to show that the act is invalid.” *Fawcett*, at 540, 843 P.2d at 842; *Jones*, 87 N.M. at 488, 535 P.2d at 1339; *State v. Smith*, 98 P.3d 1022, 1029, 136 N.M. 372, 379, 2004-NMSC-032, ¶ 32 (2004) (“every presumption is to be indulged in favor of the validity and regularity of legislative enactments”) (internal quotations omitted). While the Plaintiffs assert that the New Mexico Constitution provides “broader protection than the First Amendment,” Pl. Mem. at 41, they make no suggestion of how far that protection might extend or against what standard a court might evaluate content-neutral restrictions on speech under this “broader protection.”

B. No Violation Of The Right To Free And Open Elections Under N.M. Const. Art. II § 8.

While Plaintiffs have alleged that the challenged voter registration law prevents them from “associat[ing] and communicat[ing] prior to the casting of . . . ballots,” PI Memo at 42, it has not demonstrated exactly how the law prevents Plaintiffs or their members from engaging in such activities. Plaintiffs fail to carry their burden of proving the unconstitutionality of the statute with respect to Article II, Section 8 of the New Mexico Constitution. Plaintiffs cite only a single case, *Gunaji v. Macias*, 2001 -NMSC- 028, 130 N.M. 734, 31 P.3d 1008, for the proposition that restrictions on the activities of third-party voter registration groups violate the provisions of Article II, Section 8 of the New Mexico Constitution, which states: “All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. However, *Gunaji*, the first case to interpret Article II, Section 8, dealt with a situation where a ballot machine erroneously left off the names of two lawful candidates from the ballot. The court in *Gunaji* stated “[a]n election is only ‘free and

equal’ if the ballot allows the voter to *choose between the lawful candidates* for that office and that the same principle should guide our interpretation of the ‘free and open’ clause in article II, section 8.” *Gunaji*, 2001 -NMSC- 028 at ¶ 29, 130 N.M. at 742, 31 P.3d at 1016 (emphasis added). Thus *Gunaji* is not applicable to the present case as Plaintiffs have not shown how the challenged law impinges on their right to “choose between lawful candidates” for any political office. The language cited by the Plaintiffs as the holding in *Gunaji* (“no election can be free and equal ... if any substantial number of persons entitled to vote are denied the right to do so.”) is *not* from the holding of *Gunaji* —actually is from a 1915 case decided by the Supreme Court of Kentucky, interpreting *that* state’s constitution. *See Wallbrecht v. Ingram*, 164 Ky. 463, 175 S.W. 1022, 1026-27 (1915).

The New Mexico courts have on several occasions upheld as valid, certain content-neutral restrictions on issues related to the franchise such as ballot access to third parties. “The state . . . has a legitimate interest in regulating the size of the ballot so as to minimize voter confusion and to prevent the overwhelming of voting machines.” *Dillon v. King*, 87 N.M. 79, 82, 529 P.2d 745, 748 (1974) (upholding statute requiring candidates for primary to obtain a stated percentage of signatures based upon the number of voters in the previous election); *see People’s Constitutional Party v. Evans*, 83 N.M. 303, 491 P.2d 520 (1971).

C. No Violation Of Right To A “Pure” Election Under N.M. Const. Art. VII § 1

The Petitioners misplead the provision of the New Mexico Constitution. In their Complaint at ¶¶ 108-15, Plaintiffs cite to Article VII, Section 3 of the New Mexico Constitution asserting that it guarantees them the right to “pure elections” within the state. Art VII, Section 3 contains no such right. NM Const. Art. VII § 3 (“The right of any citizen of the state to vote . . . shall never be restricted, abridged or impaired on account of religion, race, language or color, or

inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution.”). The Plaintiffs obviously intended to cite Article VII, *Section I* (“The legislature shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise.”)

Plaintiffs improperly attempt to conflate their Free Speech claim with their claims under the provisions of the New Mexico Constitution governing the conduct of elections. No New Mexico court has interpreted either Article II, Section 8 (right to “free and open” elections) or Article VII, Section 1 (right to “pure” elections) to be implicated by an infringement of the right to speech or association. Article VII, Section 1 more properly stands for the authority of the legislature to ensure the secrecy and integrity of ballots and the freedom of elections from fraud, rather than the interpretation Plaintiffs advocate. Thus the courts have held: “[I]t is probably better that individual voters and candidates should suffer in a given instance than that the doors to fraud and imposition may open and the secrecy and purity and security of elections be destroyed.” *Calkins v. Stearley*, 140 N.M. 802, 808, 149 P.3d 118, 124 (N.M. App. 2006) (quoting *State ex rel. Read v. Christ*, 25 N.M. 175, 199-200, 179 P. 629, 637 (1919)) (upholding the mandatory application of NMSA 3-8-43(C) which states that where a voter is not listed on the signature roster and cannot provide a certificate of eligibility, the voter is to cast a challenged [provisional] ballot which is to be placed in the ballot box and not counted). The better interpretation of “purity” is the freedom from fraud or illegality. *See Kiehne v. Atwood*, 93 N.M. 657, 662, 604 P.2d 123, 128 (1979). “We hold that one who votes illegally forfeits the right of secrecy. The purity of the election demands that the illegal votes be purged.”). “We hold that, as to the affidavits in question, swearing to and subscribing by the voter and attesting to by a notary or other official are not mere technicalities. The statutes prescribing these duties are not simply

directory. The acts called for are significant safeguards against fraud and mistake, are necessary to preserve the purity of our elections, and are mandatory duties.” *Id.* at 668, 604 P.2d at 134.

A plain reading of the constitutional provision suggests that it intends to address issues related to electoral fraud. “The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of elective franchise.” N.M. Const. Art VII § 1. That is a legitimate state interest. That legitimate interest - and the parties’ and voters’ practices and expectations under the current registration system - should not be materially altered, especially where Plaintiffs bring their sweeping challenge to the Voter Registration Act at the eleventh hour, within two months of the November presidential election.

CONCLUSION

Plaintiffs’ motion for a preliminary injunction should be denied. Plaintiffs have not met the legal standard of establishing the four factors under a Rule 65 analysis. Any minimal threatened injury to Plaintiffs does not outweigh the damage the proposed injunction would cause to the State of New Mexico or the adversity it would have to the public interest. Furthermore, Plaintiffs do not have a likelihood of success on the merits. The Act does not violate the First Amendment because it does not restrict core political speech it encourages political discussion, and it is justified by the State’s legitimate interest in, among other interests, eliminating voter registration fraud and voter fraud. Also, the Act is not overbroad, nor does it violate the National Voter Registration Act or the New Mexico Constitution. Instead, the Act supports the NVRA and the New Mexico Constitution’s purpose of protecting electoral integrity and ensuring the accuracy, purity, and equality of our electoral process.

WHEREFORE, Defendant-Intervenors respectfully request this Court deny the Plaintiffs’ Motion for a Preliminary Injunctions.

Respectfully submitted,

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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 25th day of August 2008.

/s/ Jason Bowles
Bowles & Crow