

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

THE AMERICAN CIVIL LIBERTIES  
UNION OF NEW MEXICO; THE  
LEAGUE OF WOMEN VOTERS OF  
ALBUQUERQUE/BERNALILLO  
COUNTY, INC.; SAGE COUNCIL  
NEW MEXICO COALITION TO END  
HOMELESSNESS; ANNE KASS;  
ALEXANDRA KAZARAS, and  
BARBARA GROTHUS,  
Plaintiffs/Appellees,

v.

MILLIE U. SANTILLANES,  
Defendant/Appellant.

USCA No. 07-2067

---

**APPELLANT'S SUPPLEMENTAL BRIEF**

---

Appeal from the United States District Court  
for the District of New Mexico  
The Honorable M. Christina Armijo, United States District Judge  
District Court No. CIV 05-1136 MCA/WDS

Respectfully submitted:

CITY OF ALBUQUERQUE  
Robert M. White  
City Attorney

Michael I. Garcia  
Robert D. Kidd  
Assistant City Attorneys  
Attorneys for Defendant/Appellant  
P. O. Box 2248  
Albuquerque, NM 87102  
Telephone: (505) 768-4500

June 17, 2008

## INDEX

<u>Burdick v. Takushi</u> 504 U.S. 428, 439, 112 S.Ct. 2059 119 L.Ed. 2d 245 (1992).....	1
<u>Crawford v. Marion County Election Bd.</u> 533 U.S. ___, 128 S.Ct. 1610 (2008).....	1
<u>Crawford v. Marion County Election Bd.</u> 472 F.3d 949, 952 (7th Cir. 2007).....	3
<u>Storer v. Brown</u> 415 U.S. 724, 738, 94 S.Ct. 1274, 39 L.Ed. 2d 714 (1974).....	1
<u>Washington State Grange v. Washington State Republican Party</u> 128 S.C.t. 1184 (2008).....	3

The central impact of Crawford v. Marion County Election Bd., 533 U.S. \_\_\_\_, 128 S.Ct. 1610 (2008), on the present case, is to set the proper standard of review and balancing approach that the district court should have applied to the City of Albuquerque’s 2005 Charter Amendment (the “Voter ID law”). In Crawford’s lead opinion, Justice Stevens concluded, “on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.” Id. at 1623, (quoting Storer v. Brown, 415 U.S. 724, 738, 94 S.Ct. 1274, 39 L.Ed. 2d 714 (1974)). More specifically, “the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” Crawford, 128 S.Ct. at 1621. Rather, in light of its “broad application to all Indiana voters, we conclude that it ‘imposes only a limited burden on voters’ rights.’” Id. at 1623 (quoting Burdick v. Takushi, 504 U.S. 428, 439, 112 S.Ct. 2059 119 L.Ed. 2d 245 (1992)).

Justice Scalia’s concurring opinion approached the law more categorically in determining Indiana’s Voter ID law to be constitutional: “The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes.” Id. at 1625. “The Indiana law affects different voters differently, *ante*, at 1642-1643, but what petitioners view as the law’s several light and heavy burdens are no more than the different *impacts* of the single burden that the law

uniformly imposes on all voters.” *Id.* (italics original). Because everyone must present a photo identification, which could be obtained for free, and the law drew no classifications, much less discriminatory ones, the law was neutral and valid on its face, with the burdens at issue being “minimal and justified.” *Id.* at 1624-25.

Applying either of the two approaches that resulted in the judgment upholding Indiana’s SEA 483 to the facts here and to Albuquerque’s Voter ID law, the same result must follow in upholding Albuquerque’s law as constitutional. First, and most obviously, Albuquerque’s Voter ID law is nearly identical to Indiana’s, and where it is not, Albuquerque’s is even *less* restrictive and *less* burdensome than Indiana’s. Both require a “current valid”<sup>1</sup> photo identification for in-person voting, but unlike Indiana, Albuquerque does not require that the photo identification be government issued. It may include “any card issued by a government agency, driver’s license, student identification card, commercial transaction card, insurance card, union card, a professional association card or the voter identification card issued by the City Clerk.” *Applt. App. p. 024*

Beyond that, by presenting two documents showing a name and address, a wide variety of which is acceptable, and in the absence of such documents but with an affidavit, the Albuquerque City Clerk will actually issue a photo identification to a voter on the spot free of charge. *Applt. App. 025*. Both laws allow for provisional ballots voters may cast that will ultimately be counted once they have complied with the identification

---

<sup>1</sup> Notably, the Supreme Court in *Crawford* found no difficulty assigning the words “current” and “valid” their ordinary meaning. 128 S.Ct. 1617-18. To the extent slightly different approaches by different individuals to applying a law would result in the law itself being unconstitutional on its face, then practically any law is subject to this challenge.

requirement, thereby mitigating any burden that requirement might have imposed. Crawford, 128 S.Ct. at 1621; Applt. App. 025-26. Finally, both laws provide an exemption for individuals who object to being photographed on religious grounds. Crawford, 128 S.Ct. at 1613; Applt. App. 025. And both are neutral and generally applicable to the voters within the respective jurisdictions. And though not a matter of law, but of simple observation, any travel burdens the laws place on voters is less for citizens in the Albuquerque city limits than for voters throughout the State of Indiana.

In view of Crawford's determination that Indiana's SEA 483 imposed only "limited" (Justice Stevens) or "minimal and justified burdens" (Justice Scalia) on Indiana's voters, the inescapable conclusion is that the lesser burdens Albuquerque's Voter ID law imposes are even *more* limited and minimal. See Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007) ("A strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger.") (citations omitted); see also Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184 (2008) (reversing the Ninth Circuit Court of Appeals for failing to give appropriate weight to magnitude of burden in sustaining a preelection, facial attack on Washington statute that regulated primaries) (cited in Crawford, 128 S.Ct. at 1622). Accordingly, the district court erred in weighing these burdens as severe.

The principal justification for both Indiana's and Albuquerque's photo identification laws was to prevent in-person voter fraud at elections. Applt. App. 023. The district court here noted that preventing voter fraud and giving voters confidence in

the integrity of elections is an important and compelling governmental interest. Applt. App. p. 666. Nevertheless, the court found the City's restrictions not narrowly tailored. Applt. App. 674. The district court, however, added to the City's burden by analyzing its lesser restrictions as possible loopholes for fraud. Applt. App. 670-74 This is a nearly impossible standard to overcome where lesser restrictions, lighter burdens, and more accommodations to the right to vote equate to loopholes that make the law not sufficiently, narrowly tailored; reasoning that by not doing enough, the Voter ID law somehow does too much. Nothing in Crawford or other voting rights cases can be read as requiring that all types of possible fraud must be addressed at once, or that laws that address in-person voter fraud require a simultaneous attack on absentee voter fraud. The district court was correct in determining that preventing fraud represented a compelling governmental interest, but it erred in concluding that the compelling interest required further restrictions.

As to the compelling interest, Crawford agreed there was one, but added that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process," something an electoral process cannot do "if no safeguards exist to deter or detect fraud or to confirm the identity of voters." 128 S.Ct. at 1620 (quoting the Carter-Baker Report). These and the state interests identified as justifications for SEA 483 were both neutral and sufficiently strong to reject a facial attack on the statute. Id. at 1624.

The Supreme Court and the Seventh Circuit Court of Appeals both recognized the chilling effect voter fraud has on the election process by discouraging voter participation.

Not to mention the very real disenfranchisement that occurs when someone's vote is stolen, when another's vote is nullified, and when a close election is decided in error as a result. Moreover, it is worth noting that *voters* voted for the 2005 Amendment to the City's Charter that required the photo identification. Applt. App. 023, 605 In view of the slight burdens the voters of Albuquerque voted to impose on themselves, and considering the universally recognized compelling governmental interest in preventing voter fraud, Albuquerque's Voter ID law is constitutional.

A consequence of the inappropriate weight the district court assigned to the burden on plaintiffs' right to vote, and its application of strict scrutiny<sup>i</sup>, was to put the separate summary judgment burden of proof and persuasion upon the City. Applt. App. 641. Crawford, however, shows that the City had no such burden of proof when it upheld Indiana's SEA 483 on a record that contained "no evidence of any such fraud actually occurring in Indiana at any time in its history." Instead, the Supreme Court noted that flagrant examples of fraud existed in other parts of the country throughout the Nation's history and showed that the risk of voter fraud is real and can affect the outcomes of close elections. 128 S.Ct. at 1619. Accordingly, the district court's requirement for more evidence of actual in-person voter fraud from the City, without which it found the Voter ID law unconstitutional, was erroneous.

---

<sup>i</sup> See Burdick, 504 U.S. at 432 ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.")

Conversely, the Supreme Court placed little or no value on evidence of voters who arguably had some difficulty gathering the required documents to vote, but “none of whom expressed a personal inability to vote under SEA 483.” Crawford, 128 S.Ct. at 1622-23. See also Id. at 1624-25 (stating that the premise of a special burden on some voters is irrelevant where the burden is minimal, generally applicable, and non-discriminatory) (Scalia, J. concurring). That lack of evidence in Crawford even further blunts an attack on Albuquerque’s Voter ID law, where not a single plaintiff presented evidence that Albuquerque’s law prevented him or her from voting, or created anything more than a limited burden to present the required documentation. This lack of evidence, or even relevance of a possible, special burden on some individual voters, in the face of the compelling governmental interest in preventing fraud, is fatal to plaintiffs’ attack on Albuquerque’s Voter ID law.

In the end, the discussion in this case concerns nothing more than getting one’s picture taken and showing it at an election. This is a commonplace thing, which occurs in everyday matters ranging from driving a car and going to college, to cashing a check and flying on an airplane. It is too far a stretch that something so simple and commonplace suddenly becomes a substantial burden only when applied to voting. In Crawford, the majority recognized the reality of the requirement for what it was—at the most a minor inconvenience in exercising the right to vote with multiple safeguards built in to ensure the right, and at the same time a helpful deterrent against voter fraud. In doing so, Crawford continued the Burdick balancing test, under which Albuquerque’s neutral and generally applicable requirement to present a photo identification for in-

person voting presents slight burdens against a compelling governmental interest. And notably, even if a voter chose not to vote in-person because of this law, it would not mean the end of his right to vote, because absentee voting would still be available to him.

Accordingly, the City respectfully asks this Court to find constitutional its 2005 Charter Amendment requiring in-person voters to present a photo identification. Apart from the Supreme Court's Crawford decision, the City does not attempt here to otherwise revisit its appellate briefs in this case, but incorporates their arguments by reference.

Respectfully submitted,

CITY OF ALBUQUERQUE  
Robert M. White  
City Attorney

/s/ Electronically signed  
Michael I. Garcia  
Robert D. Kidd  
Assistant City Attorney  
Attorney for Defendants/Appellee  
P.O. Box 2248  
Albuquerque, New Mexico 87103  
(505) 768-4500

**CERTIFICATE OF COMPLIANCE**  
**REGARDING ELECTRONIC SUBMISSION**

Pursuant to Emergency General Order filed October 4, 2004, as amended May 23, 2005, I hereby certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submission has been scanned for viruses with the most recent version of Trend Micro Office Scan 7.3 and, according to the program, is free of viruses.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Electronically signed  
Michael I. Garcia  
Assistant City Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of June, 2008, I served the required number of true and accurate copies of Appellees Brief in Chief on the Clerk of the United States Court of Appeals for the Tenth Circuit and opposing counsel at the following addresses, by depositing them at 1135 Broadway, NE, Albuquerque, New Mexico, first class postage prepaid.

Charles K. Purcell, Esq.  
Andrew G. Schultz, Esq.  
Rodey Dickason Sloan Akin & Robb, PA  
P.O. Box 1888  
Albuquerque, NM 87103-1888

George L. Bach, Jr., Esq.  
ACLU of New Mexico  
P.O. Box 566  
Albuquerque, NM 87103

Joseph P. Kennedy, Esq.  
1000 Second Street NW  
Albuquerque, NM 87102-2216

James R. Scarantino, Esq.  
714 Montclair NE  
Albuquerque, NM 87110

Philip B. Davis, Esq.  
814 Marquette NW  
Albuquerque, NM 87102

/s/ Electronically signed  
Michael I. Garcia  
Assistant City Attorney