

**No. 07-2067**

**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,**

**vs.**

**MILLIE SANTILLANES, ALBUQUERQUE  
CITY CLERK,**

**Defendant/Appellant.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
HON. M. CHRISTINA ARMIJO, UNITED STATES DISTRICT JUDGE  
(D.N.M. No. CIV 05-1136 MCA/WDS)**

**APPELLEES' SUPPLEMENTAL BRIEF**

**RODEY, DICKASON, SLOAN,  
AKIN & ROBB, P.A.**

**Andrew G. Schultz**

**Charles K. Purcell**

**Post Office Box 1888**

**Albuquerque, N.M. 87103**

**Telephone: (505) 765-5900**

**AMERICAN CIVIL LIBERTIES  
UNION OF NEW MEXICO**

**George Bach, Staff Attorney**

**Post Office Box 566**

**Albuquerque, N.M. 87103**

**Telephone: (505) 243-0046**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

I. The *Crawford* Opinion ..... 2

II. Discrimination Against Non-Absentee Voters ..... 6

III. Vagueness ..... 11

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### CASES

<u>Anderson v. Celebrezze</u> , 460 U.S. 780 (1983) .....	4
<u>Bankers Life &amp; Casualty Co. v. Crenshaw</u> , 486 U.S. 71 (1988) .....	9
<u>Burdick v. Takushi</u> , 504 U.S. 428 (1992) .....	4, 10
<u>Bush v. Gore</u> , 531 U.S. 98 (2000) .....	11
<u>In re Canvass of Absentee Ballots of November 4, 2003 General Election</u> , 843 A.2d 1223 (Pa. 2004) .....	8
<u>Christian Heritage Academy v. Oklahoma Secondary School Activities Association</u> , 483 F.3d 1025 (10th Cir. 2007) .....	9
<u>Coalition for Equal Rights, Inc. v. Ritter</u> , 517 F.3d 1195 (10th Cir. 2008) .....	9
<u>Crawford v. Marion County Election Board</u> , 128 S. Ct. 1610 (2008) .....	passim
<u>In re General Election for Township Council</u> , 589 A.2d 1085 (N.J. Super. Ct. Law Div. 1990) .....	9
<u>Hooper v. Bernalillo County Assessor</u> , 472 U.S. 612 (1985) .....	10
<u>Horseman v. Keller</u> , 841 N.E.2d 164 (Ind. 2006) .....	10

<u>Indiana Democratic Party v. Rokita</u> , 458 F. Supp. 2d 775 (S.D. Ind. 2006), <u>aff'd sub nom.</u> , <u>Crawford v. Marion County Election Board</u> , 472 F.3d 949 (7th Cir. 2007) and <u>aff'd</u> , 128 S. Ct. 1610 (2008) . . . . .	3, 8
<u>Kolender v. Lawson</u> , 461 U.S. 352 (1983) . . . . .	12
<u>Louisiana v. United States</u> , 380 U.S. 145 (1965) . . . . .	12
<u>Washington State Grange v. Washington State Republican Party</u> , 128 S. Ct. 1184 (2008) . . . . .	13

**STATUTES**

Ind. Code § 3-5-2-40.5(3)(2006) . . . . .	1, 3
Ind. Code § 3-5-2-40.5(4)(2006) . . . . .	1, 3
Ind. Code § 3-11-8-25.1(2006) . . . . .	3
Ind. Code § 3-11-10-26(a)(2006) . . . . .	3
Ind. Code § 3-11-10-26(b)(2006) . . . . .	3
Ind. Code § 3-11-10-26(c)(2006) . . . . .	3
Ind. Code § 3-11-10-26(d)(2006) . . . . .	3
NMSA 1978, §3-9-3(A) (1999) . . . . .	8
NMSA 1978, § 3-9-7(B) (2003) . . . . .	8

The Court directed the parties to file supplemental briefs addressing the impact of Crawford v. Marion County Election Board, 128 S. Ct. 1610 (2008), on this matter. (See Order (May 16, 2008).) In Crawford, the Supreme Court upheld an Indiana statute that requires all in-person voters – including “absentee” voters who do not cast their ballots by mail – to present photographic identification (1) that ““was issued by the United States or the state of Indiana,”” and (2) that ““(A) is not expired; or (B) expired after the date of the most recent general election.”” 128 S. Ct. at 1620 n.16 (quoting Ind. Code § 3-5-2-40.5(3), (4) (2006)); see id. at 1613. The Court rejected the contention that the law places unconstitutional burdens on persons who are eligible to vote but who lack the requisite identification. See id. at 1620-23.

Crawford establishes that photographic identification requirements are not per se unconstitutional. But it does not save the particular ordinance at issue in this case from invalidation. Unlike the Indiana statute that the Court considered in Crawford, the October 2005 amendment to the Albuquerque City Charter (“Albuquerque’s photo ID law”) draws an irrational line between voters at the polls – the only voters whom the ordinance requires to present photographic identification – and the entire class of “absentee” voters, even those who hand-carry their ballots to the clerk’s office, those who actually fill out their ballots there as late as the day of the election, and those who end up casting substitute ballots at their own precincts because they claim not to have received their absentee ballots through the mail. Moreover, unlike the

Indiana law – which carefully specifies the kinds of photographic identification that qualify – Albuquerque’s photo ID law demands “current” and “valid” identification without defining either term, thereby vesting election judges with almost limitless discretion to decide which otherwise qualified voters will be permitted to vote and which ones will be denied that fundamental right. Consequently, notwithstanding Crawford, this Court should affirm the district court’s decision to enjoin Albuquerque’s photo ID law.

**I. The Crawford Opinion**

The very first page of the lead opinion<sup>1</sup> in Crawford sets that precedent apart from the present case in at least two important respects:

At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

[T]he statute applies to in-person voting . . . . The requirement does not apply to absentee ballots submitted by mail.

---

<sup>1</sup>Justice Stevens wrote the opinion, in which two Justices concurred. 128 S. Ct. at 1613. Three other Justices concurred in the judgment but argued that the lead opinion was excessively solicitous of the rights of – and excessively concerned about the burdens on – individual voters. See id. at 1624 (Scalia, J., concurring in the judgment). Finally, three Justices dissented. See id. at 1627 (Souter, J., dissenting); id. at 1643 (Breyer, J., dissenting). Plaintiffs assume that the lead opinion represents the narrowest – and hence the controlling – rationale for upholding the Indiana statute. Accordingly, this brief refers to the lead opinion as the opinion of the Court.

128 S. Ct. at 1613 (emphasis added). As the opinion goes on to explain, the only acceptable forms of photographic identification under the statute are those that (1) “[are] issued by the United States or the state of Indiana,” and (2) “include[] an expiration date” that has not yet passed or that passed “after the date of the most recent general election.” Id. at 1620 n.16 (quoting Ind. Code § 3-5-2-40.5(3), (4) (2006)). And as the lower courts’ opinions make clear, although the statute does not apply to absentee ballots “submitted by mail,” id. at 1613, it does apply to absentee ballots “cast[] . . . in person at a county clerk’s office prior to election day.” Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 786 (S.D. Ind. 2006),<sup>2</sup> aff’d sub nom., Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), and aff’d, 128 S. Ct. 1610 (2008).

The Supreme Court “agree[d] with the unanimous view of [the lower court] judges” that at least some of the petitioners had standing to challenge the statute “and that there [was] no need to decide whether the other petitioners also ha[d] standing.” 128 S. Ct. at 1615 n.7; see id. at 1614 & n.5 (describing petitioners); see also id. at 1627 n.2 (Souter, J., dissenting) (likewise agreeing). Thus, Crawford does nothing

---

<sup>2</sup> Rokita cites Ind. Code § 3-11-8-25.1 for this proposition. A more illuminating statute is § 3-11-10-26, which provides that “[a]s an alternative to voting by mail, a voter is entitled to cast an absentee ballot before an absentee voter board” – until noon on the day before the election (or noon on election day for “uniformed services voter[s]”) – if he shows proper identification. Ind. Code § 3-11-10-26(a) to (d) (2006).

to undermine Plaintiffs' standing in the present case. To the contrary, it renders all the more unfathomable the City Clerk's assertion that "Crawford held that plaintiffs lacked standing." (Aplt.'s [Principal] Br. pt. III(B) [hereinafter City Clerk's Br.] )

On the merits, however, the Supreme Court held that "the evidence in the record [was] not sufficient to support a facial attack on the validity of the entire statute." Crawford, 128 S. Ct. at 1615. The Court undertook to evaluate the statute under the "flexible standard" set forth in Anderson v. Celebrezze, 460 U.S. 780 (1983), and later elaborated in Burdick v. Takushi, 504 U.S. 428 (1992). See Crawford, 128 S. Ct. at 1616 n.8 (internal quotation marks omitted). That standard generally upholds "evenhanded restrictions" designed to "protect the integrity and reliability of the electoral process itself," and it requires courts to "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burdens imposed by its rule." Id. at 1616 (internal quotation marks & citations omitted).

Indiana sought to justify its statute as a means of "moderniz[ing] election procedures," "detering and detecting voter fraud," and "safeguarding voter confidence." Id. at 1617. The Court regarded all three objectives as legitimate. See id. It was apparently unimpressed by the fact that "[t]he record contain[ed] no evidence of any [in-person voter impersonation] fraud actually occurring in Indiana at any time in its history." Id. at 1619.

Against these state interests, the Court weighed the burdens “imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the [statute’s] requirements.” Id. at 1620. The Court initially observed that “[f]or most [such] voters,” the inconvenience of a trip to the county Bureau of Motor Vehicles to obtain the identification card that the state issues for free “surely does not qualify as a substantial burden on the right to vote.” Id. at 1621. While acknowledging that the statute imposed “a somewhat heavier burden” on the elderly, the poor, and the homeless – who would be required to cast a provisional ballot at the polls, and then to travel to the circuit court clerk’s office within ten days of the election to execute an affidavit of indigency, see id. at 1621, 1613-14 & n.2 – the Court found it “unlikely that such a requirement would pose a constitutional problem unless it [was] wholly unjustified.” Id. at 1621. “And even assuming that the burden may not be justified as to a few voters,” the Court concluded that “on the basis of the evidence in the record it [was] not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that [was] fully justified.” Id. at 1621-22. Lacking evidence that the statute imposed “excessively burdensome requirements” on any particular class of voters, and believing that “the statute’s broad application to all Indiana voters . . . impose[d] only a limited burden,” the Court rejected the petitioners’ facial challenge to the law. Id. at 1623 (internal quotation marks & citations omitted)..

In light of this ruling, Plaintiffs concede that Crawford almost certainly forecloses the argument contained in part III(A) of Plaintiffs’ principal brief – that Albuquerque’s photo ID law unconstitutionally burdens the voting rights of persons who lack any photographic identification. If Indiana lawfully can require elderly, poor, and homeless voters to journey to their county seat to obtain the state-issued identification card before an election – or to go there to sign an affidavit of indigency afterwards – then the City of Albuquerque most likely can compel its voters to make their way to the City Clerk’s office for similar purposes.

But unlike the Court in Crawford, the district court in the present case did not place primary emphasis on the difficulties that Albuquerque’s photo ID law creates for persons who are entirely bereft of photographic identification. Instead, the district court focused on (1) the law’s differential treatment of absentee and non-absentee voters, and (2) its standardless grant of discretion to individual election judges to determine whether any particular voter’s photographic identification is “current” and “valid.” (See Aplees.’ Corrected Br. pts. III(B) to (C).) Crawford probably narrows the first of these concerns, but does not eliminate it. Regarding the second one, however, Crawford has nothing to say.

## **II. Discrimination Against Non-Absentee Voters**

In explaining why Indiana’s statute did not appear to impose excessive burdens on any class of voters, the Crawford Court observed that “although it may not be a

completely acceptable alternative, the elderly in Indiana are able to vote absentee without presenting photo identification.” 128 S. Ct. at 1622. This sanguine view of the law’s inapplicability to “absentee” voters – coupled with the Court’s frank admission that Indiana had recently experienced absentee voter fraud but had never seen the kind of “in-person voter impersonation” that the photo identification requirement was designed to combat, see id. at 1618-19 – suggests that the Court did not consider the argument that Plaintiffs make in the present case. Plaintiffs contend that in view of absentee voting’s dubious history and potential for fraud, Albuquerque denies equal protection to voters at the polls by failing to require photographic identification from absentee voters. (See Aplees.’ Corrected Br. pt. III(B).)

But if the Crawford Court did evaluate such an argument, the Court’s refusal to sustain it would be understandable. The Indiana statute requires photographic identification from every voter who casts a ballot in person, even those who vote absentee; only mail-in absentee voters are exempt. See supra p. 3 & n. 2. And in Indiana, absentee voting is a privilege reserved for “certain poor, elderly, and institutionalized voters and for religious objectors,” Crawford, 128 S. Ct. at 1625 (Scalia, J., concurring in the judgment), rather than a lifestyle choice made available to all; its capacity for mischief is therefore minimized. Under these circumstances, it was not altogether illogical for Indiana to conclude (as the City Clerk argues here, see City Clerk’s Br. at 10-15, 27-28) that “absentee voting is an inherently different

procedure from in-person voting,” Rokita, 458 F. Supp. 2d at 830-31, and that requiring mail-in absentee voters to enclose photographic identification – without requiring them to present themselves for comparison with their photographs – would be more burdensome than beneficial.

In Albuquerque, by contrast, anyone can vote absentee. See NMSA 1978, § 3-9-3(A) (1999). Even more importantly, although an “absentee” voter may personally deliver his ballot to the Clerk’s office,<sup>3</sup> may wait until arriving there to fill it out, and may even vote at his precinct on election day if he attests that he never received his absentee ballot through the mail, in none of these instances must he show photographic identification. (See Aplees.’ Corrected Br. at 6-7, 45-46.) There is no justification for this disparate treatment among in-person voters. Under the City’s scheme, one class of in-person voter is required to show photographic identification on pain of disenfranchisement, while the other remains free to impersonate.

The question is not whether, under Burdick-style balancing, the City’s interest in preventing fraud outweighs the burden on non-absentee voters; only “evenhanded

---

<sup>3</sup>State law mandates that a voter who chooses to deliver an absentee ballot to the City Clerk’s office – instead of mailing it – must do so personally. See NMSA 1978, § 3-9-7(B) (2003). This requirement “has the obvious and salutary purpose,” “grounded in hard experience,” of providing some assurance “that the ballot was filled out by the actual voter”; permitting delivery by a third party “would undermine the statute’s very purpose as a safeguard against fraud.” In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223, 1232-33 (Pa. 2004). And yet the City Clerk makes no effort to check the deliverer’s photographic identification.

restrictions” can sensibly be analyzed in this fashion. See Crawford, 128 S. Ct. at 1616 (internal quotation marks & citation omitted). The question, instead, is whether Albuquerque’s photo ID law can withstand even rational-basis scrutiny. Because the Equal Protection Clause “keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike,” Coalition for Equal Rights, Inc. v. Ritter, 517 F.3d 1195, 1199 (10th Cir. 2008) (internal quotation marks & citation omitted) (footnote omitted), “arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review,” Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988). “When there is an inadequate or nonexistent connection between the classification and [its] purpose, . . . the classification [fails even] under rational basis scrutiny.” Christian Heritage Academy v. Okla. Secondary Sch. Activities Ass’n, 483 F.3d 1025, 1033 (10th Cir. 2007).

The line drawn by Albuquerque’s photo ID law is completely “arbitrary and irrational.” Bankers Life, 486 U.S. at 83. If “[t]here is no justification to exempt an absentee voter from [an identification] requirement which would be stringently enforced if he voted in person,” In re Gen. Election for Twp. Council, 589 A.2d 1085, 1088 (N.J. Super. Ct. Law Div. 1990), there is even less justification for exempting an “absentee” voter who does vote in person. “Although the legislature has included numerous provisions in our code meant to protect the integrity of absentee ballots

cast, those provisions cannot safeguard the ballots and the intent of the individual voters to the extent that provisions surrounding Election Day procedures can.” Horseman v. Keller, 841 N.E.2d 164, 173 (Ind. 2006) (footnote omitted).

Plaintiffs recognize that the city constitutionally may choose to attack one problem at a time, and that a statute is not invalid merely because it fails to do everything that could have been done. But even if the city rationally believed that its photo ID law would be better than nothing; the fundamental issue is whether the distinction drawn by that law “rationally furthers a legitimate state purpose.” Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985). An ordinance requiring photographic identification from every voter whose surname begins with the letters A through M cannot be defended on the ground that the City has chosen to leave the problem of fraud in the N-through-Z cohort for another day. Albuquerque’s photo ID law likewise makes no sense, and cannot withstand constitutional scrutiny.

The constitutional problems are compounded by the law’s dilution of votes cast at the polls. If photographic identification is indeed “necessary” to fight in-person impersonation fraud, Burdick, 504 U.S. at 434, then absentee voters who are excused from presenting such identification when they hand-carry their ballots to the Clerk’s office or when they vote there are presumably getting away with electoral murder. “[T]he right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal

dignity owed to each voter.” Bush v. Gore, 531 U.S. 98, 104 (2000). Albuquerque’s photo ID law denies that fundamental right to voters at the polls by devaluing their ballots in relation to the ballots cast absentee, without any discernible reason for doing so. The Crawford Court never considered such a scenario, and the holding in that case does not require this Court to uphold Albuquerque’s photo ID law.

### **III. Vagueness**

As Plaintiffs have shown, Albuquerque’s photo ID law naturally lends itself to arbitrary and uneven enforcement. (See Aplees.’ Corrected Br. pt. III(C).) The law calls for “current valid” photographic identification without defining the terms “current” or “valid.” It sets forth a laundry list of potentially eligible documents, including not only driver’s licenses and other government-issued items, but also “student identification card[s], commercial transaction card[s] such as ... credit or debit card[s], insurance card[s], union card[s], [and] professional association card[s].” (Aplt. App. at 24.) Neither the law itself nor its implementing regulations explain how an election judge should evaluate the “currency” of identification that lacks an expiration date, or the “validity” of a driver’s license or of any other form of identification with which the judge is personally unfamiliar. The City Clerk and her own deputy could not agree about the law’s meaning. The question in each case, the Clerk suggested, depends on whether the election judge “in her heart ... just kn[ows]” that the would-be voter is an imposter. (Aplt. App. at 423.) When fundamental

voting rights are at stake, the unconstitutionality of such an indeterminate and standardless system is plain. See Louisiana v. United States, 380 U.S. 145, 153 (1965) (“The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar.”)

Whatever else may be said about the Indiana statute at issue in Crawford, it does not suffer from vagueness. Only photographic identification issued by the federal government, or by Indiana itself, suffices – and then only if it bears an expiration date in the future or “after the date of the most recent general election.” Crawford, 128 S. Ct. at 1620 n.16 (internal quotation marks & citation omitted). The statute offers no room for differing interpretations; photographic identification either qualifies or it does not. The personal predilections of election judges cannot come into play.

In stark contrast, the burden of uncertainty that Albuquerque’s photo ID law imposes on the electorate is both palpable and unacceptable. No voter is completely safe from the possibility of arbitrary enforcement because no standards or definitions control each election judge's discretion in determining, on a case by case basis, what he will accept as a "current valid" photo identification. Albuquerque’s photo ID law “fail[s] to meet constitutional standards for definiteness and clarity,” Kolender v. Lawson, 461 U.S. 352, 361 (1983), and thus renders all voters vulnerable to its



Pursuant to the Court's General Order (Aug. 10, 2007) concerning electronic submission of documents, we hereby certify that:

1. We have e-mailed the foregoing brief to

Randy M. Autio  
[rautio@cabq.gov](mailto:rautio@cabq.gov)

Joseph P. Kennedy  
[kolawjpk@qwest.net](mailto:kolawjpk@qwest.net)

Philip B. Davis  
[davisp@swcp.com](mailto:davisp@swcp.com)

James R. Scarantino  
[jrscarantino@yahoo.com](mailto:jrscarantino@yahoo.com)

on this 17<sup>th</sup> day of June, 2008.

2. All required privacy redactions have been made, and with the exception of those redactions, this document is an exact copy of the written document filed with the Clerk.

3. This digital submission has been scanned for viruses with the most recent version of Symantec Antivirus (program 10.1.0.394, revision 3, June 15, 2008) and, according to the program, is free of viruses.

/ s / Andrew G. Schultz

Andrew G. Schultz