

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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,

vs.

CIV 05-1136 MCA/WDS

MILLIE U. SANTILLANES, ALBUQUERQUE
CITY CLERK,

Defendant.

DEFENDANT'S STATEMENT OF POSITION
AS DIRECTED BY THE COURT IN ITS
MEMORANDUM OPINION AND ORDER

Defendant Millie Santillanes (hereinafter defendant or the city), by and through her undersigned attorneys, submits this statement of position as directed by the court in its Memorandum Opinion and Order issued February 12, 2007.

I. INTRODUCTION

It its memorandum opinion and order issued February 12, 2007, the court invalidated the city's voter identification law, now codified at Article XIII, § 14 of the Albuquerque City Charter (hereinafter the voter ID law). The court determined that the voter ID law violated the equal protection clause. The court directed additional briefing by the parties to address the appropriate election procedures to be applied in the absence of the voter ID law and to address the court's jurisdiction. The city's position is that the court lacks jurisdiction to address what law applies. Alternatively, the city requests that the court abstain

from reaching that issue and if the court does reject these arguments, that the applicable law is the state Municipal Election Code.

II. ARGUMENT

- A. The court lacks subject matter jurisdiction to address the issue on which further briefing was requested.

In its Memorandum Opinion and Order, the court directed additional briefing to “ensure that the parties are clear on what election procedures apply in the absence of the October 2005 Charter Amendment. . . .” Memo.Op., p. 4. The court, however, does not have jurisdiction to address this question and should not do so.

1. The issue was not raised in the complaint.

Nowhere in the complaint did plaintiffs request that this court address whether and, if so, which law should be applied to govern municipal elections. The amended complaint sought to enjoin enforcement of the city’s voter ID law, but the complaint did not even mention state law, let alone assert that the court should exercise its jurisdiction to determine which specific state law should be deemed applicable.

The court cannot grant relief not requested or even anticipated in the complaint and lacks jurisdiction to go beyond what has been sought. The city thus requests that this court decline to address the question on which additional briefing is sought because plaintiffs have not pursued a claim for the relief being considered.

2. There is no federal question implicated by which state election law is applicable.

When filed, the complaint in this case asserted federal constitutional claims as bases for invalidating the voter ID law. The court has addressed and

resolved each of those claims in its memorandum opinion and order; there is no federal claim remaining for decision.

The additional issue to be briefed does not arise under federal law. While the original complaint asserted that the voter ID law should be invalidated on federal constitutional grounds, the remaining issue arises solely under state law and plaintiffs have not sought to invoke the court's supplemental jurisdiction.

Further, the Help America Vote Act, 42 U.S.C.A. Section 15301 *et seq.* (hereinafter HAVA), a federal enactment, is not implicated in a municipal election. The State Election Code in-person voter identification requirements were passed by the New Mexico Legislature, in part, in response to the requirements of HAVA which requires the states to implement the provisions of that law. The requirements of HAVA, however, apply only to elections where the ballot includes election for a federal office. Sandusky County Democratic Party v. Blackwell, 387 F. 3d 565 (6th Cir. 2004); 116 Stat. 1666 (HAVA was enacted "to assist in the administration of Federal elections"). While the court did not make a specific finding as to the applicability of HAVA, it is clear that, unless the election is federal or includes some federal issue, HAVA, which was not incorporated into the Municipal Election Code, will not apply to municipal elections.

In the absence of a federal question or some federal constitutional claim, the court lacks jurisdiction to address the issue raised. What state law is applicable is not within this court's jurisdiction to decide.

3. There is no basis for equitable jurisdiction.

The court framed the question on which additional briefing has been sought as requiring a declaration as to what law should be applied in any

future municipal election. Plaintiffs have submitted their memorandum in response to the court's request for additional briefing and the city agrees to some extent with plaintiffs' position. Plaintiffs' position is that, in essence, the case is not ripe for resolution because it is not clear what law will be applied in the next city election. While the city does not believe that plaintiffs' speculation that the city will not offer lesser protection than is provided under the State Election Code or plaintiffs' reference to inadmissible information, plaintiffs' position that the case is not ripe for review is appropriate.

At this point, all that has occurred is that the court has invalidated the city's voter ID requirements. How a subsequent election is to be conducted has not been resolved. It would be premature for this court to render what is basically an advisory opinion as to what law should be applied. The court is prohibited from rendering advisory opinions yet to enter any order specifying this court's opinion as to what law should be applied would be nothing more than advisory, in the absence of any specific case being presented to the court.

B. This court should abstain from considering the applicability of state election laws.

Although the city's position is that there is no basis for the court to invoke its equitable jurisdiction and that the court lacks subject matter jurisdiction, the court should also abstain from ruling on a matter that is already adequately addressed by state law.¹ The issue of abstention may be

¹ Before applying the abstention doctrine of Burford v. Sun Oil Co., 319 U.S. 315 (1943), subject matter jurisdiction in the abstaining court must first exist, Doughty v. Underwriters at Lloyd's, London, 6 F.3d 856, 860 (1st Cir. 1993) "Because abstention, by definition, assumes the existence of subject matter jurisdiction in the abstaining court-after all, one must have (or, at least, presume the presence of) subject matter jurisdiction in order to decline the exercise of it..."

raised *sua sponte* by the trial court. Barichello v. McDonald, 98 F.3d 948, 955 (7th Cir.1996).

Burford v. Sun Oil Co., 319 U.S. 315 (1943) first recognized that federal courts should abstain from considering certain issues. In New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) the court defined the use of Burford abstention:

From these cases, and others on which they relied, we have distilled the principle now commonly referred to as the “Burford doctrine.” Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”

New Orleans Public Service, Inc., 491 U.S. at 361 (*citing Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1245 (1976)).

Grimes v. Crown Life Insurance Co., 857 F.2d 699 (10th Cir. 1988) reached the same conclusion, finding that abstention was warranted when federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern:

Although there are several situations in which this narrow exception to the exercise of jurisdiction is recognized as appropriate by the Supreme Court, the type most applicable in this situation is the abstention recognized in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) (Supreme Court held the exercise of federal jurisdiction improper to review decisions made by a Texas commission to regulate and conserve the pumping of oil and gas in Texas). In Burford, the Supreme Court held that federal courts should exercise their discretionary power to refuse to hear cases within their jurisdiction when to do so would impair the “independence of state governments in carrying out their domestic policy.” *Id.* at 318, 63 S.Ct. at 1099.

(quoting Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S.Ct. 380, 385, 79 L.Ed. 841 (1935)). In a later abstention case involving a different kind of abstention, the Supreme Court characterized Burford abstention as appropriate where:

“there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.... In some cases, however, the state question itself need not be determinative of state policy. *It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.*”

Grimes, 857 F.2d at 703 (*emphasis in original*). Abstention by this court is warranted in the interpretation of the state’s regulatory scheme applicable to municipal elections.

City Charter, Article II, Section 2, states that unless the City Charter provides otherwise, the state State Municipal Election Code will be followed. Plaintiffs and the court believe that there is an issue as to what election law will govern given this court’s invalidation of the city voter ID law. Plaintiffs state that it is not clear what the position of the city is regarding implementation of the state election laws.

If there is any question it is what state election law is applicable: the State Election Code or the Municipal Election Code. Determining which state law applies is an issue which should not be addressed by a federal court. This reticence is confirmed in Burford: “[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law;” Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106 (1984); Colorado River, 424 U.S. at 814, 96 S.Ct. at 1244-45; *see also* Gow v. Carney, 1986 WL 12307 (N.D. Ill., 1986) [not reported in F.Supp.](“In short, if there is a problem here, it is one of local

governmental officials failing to implement state law. The courts of the State of Illinois provide the remedy for that problem, and that is where this suit belongs”).

The state election codes involved in this case constitute a comprehensive and very specific regulation by the state of municipal elections in New Mexico. The subject matter is the administration of municipal elections that do not include federal candidates or federal questions, an area traditionally one of state concern. Imposition of this court’s opinion as to the administration of the state election codes would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern, the conduct of municipal elections in New Mexico.

Courts have found that abstention is appropriate when state election cases are before the court:

“[I]n all cases implicating state/federal relations, federal courts ought to intrude into state affairs no more than is absolutely necessary.” A federal court should abstain from deciding cases to avoid needless conflict with a state's administration of its own affairs. This is especially true in cases involving state voting law issues. “[O]ur federal system contemplates that states will be primarily responsible for regulating their own elections.”

Casarez v. Val Verde County, 957 F. Supp. 847, 851 (W.D. Tex., 1997) (*citations omitted*).

Plaintiffs agree that it is not necessary for the court to resolve the issue of the applicability of the State Election Code and State Municipal Election Code. For this court to render an opinion in this case regarding the applicability of state law which is not currently at issue would be to needlessly insert confusion into the state election process. All municipalities in New Mexico conduct elections pursuant to the State Municipal Election Code. An

interpretation of that code by this Court in the pending case would be binding only on the City of Albuquerque. If other jurisdictions administer the code differently, any ruling by this court would create needless conflict with the state-wide administration of the State Municipal Election Code and possibly with state court interpretations of state law.

The City Council may act to clarify voter identification provisions by adopting Section 1-12-10 of the State Election Code which requires voter identification in its Charter if there is a perceived need for such clarification. Further, the state legislature could amend Section 3-8-41 of the Municipal Election Code to incorporate the voted identification requirements of the State Election Code contained in § 1-12-10. In the absence of something more than a simple invalidation of Albuquerque's voter ID law, there is no basis, however, for the federal court to issue a ruling.

That abstention is particularly appropriate for interpretation of election laws was addressed in Kasper v. Hayes, 651 F.Supp. 1311 (N.D. Ill., E. Div. 1987) plaintiffs challenged application of a canvassing provision of state election law to the method of registering voters. The court stated:

The Constitution strictly limits the power of federal courts to interfere with local elections. "The Constitution is not an election fraud statute, ... [and] [i]t is not every election irregularity ... which will give rise to a constitutional claim and an action under section 1983.'" Bodine v. Elkhart County Election Board, 788 F.2d 1270, 1272 (7th Cir.1986). Only "willful conduct which undermines the organic processes by which candidates are elected" implicates the Constitution and § 1983. Hennings v. Grafton, 523 F.2d 861, 864 (7th Cir.1975). As in Hennings, the allegations in this case suggest "at most irregularities caused by mechanical or human error and lacking in invidious or fraudulent intent; [they do] not show conduct which is discriminatory by reason of its effect or inherent nature." *Id.*

This limitation on the authority of the federal judiciary is essential in order to ensure that the conduct of elections remains in the

hands of the local officials chosen for this purpose by the public or their representatives. For this reason, higher courts have cautioned against unwarranted judicial intervention in local elections. “The very nature of the federal union contemplates separate functions for the states. If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute,” and state election laws would become largely superfluous. Bodine, *supra* at 1272 (quoting Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir.1980)).

651 F.Supp. at 1315.

This court, too, should abstain from addressing the question to be briefed by the parties. What election law is to be applied to subsequent municipal elections is not an issue to be resolved in this proceeding. The city requests that the court abstain from addressing the issue.

- C. State law is not applicable to city elections; if state law is applied, the Municipal Election Code, not the State Election Code, is applicable.

The court’s opinion permitted the parties to submit additional briefs as to what law is to be applied given the court’s conclusion invalidating the city’s Voter ID requirement. As argued above, the city’s position is that this court lacks jurisdiction to address what law applies because the issue was not asserted in the complaint and because the court should abstain from becoming involved in the interpretation of state election laws. If the court does decide to exercise jurisdiction, it is the state municipal election code, not the state election code, which is applicable.

Section 3-8-1 E. of the Municipal Election Code provides:

The Municipal Election Code shall govern the conduct of all aspects of all municipal elections except when the Municipal Election Code is silent or is in conflict with the state Election Code [Chapter 1 NMSA 1978] with respect to any procedures or protections required of the state by federal law, then the state Election Code shall govern, as appropriate. The provisions of the Municipal Election Code shall not apply to home rule municipalities or municipalities incorporated under special act

unless the Municipal Election Code is adopted by reference by such municipality.

This provision establishes the hierarchy for applicability of state election laws:

First: Election Codes of home rule municipalities apply first.

Second: The State Election Code applies if its provisions are required by federal law.

Third: The Municipal Election Code unless it is silent.

1. The State Election Code Voter Identification Provision is not applicable.

Section 3-8-41 of the State Municipal Election Code regulates the identification of voters when voting in person in an election governed by the Municipal Code.

A. When a person presents himself at the polls to vote, he shall announce his name and address in an audible tone of voice and locate his name and number in the registered voter list posted for such purpose. An election clerk shall locate the person's name and number in the signature roster. The person shall then sign his name in the signature roster, or if he is unable to write, the election clerk shall sign his name in the signature roster which shall be initialed by an election judge in the signature roster. Thereupon, a challenge may be interposed as provided in the Municipal Election Code ...

For the Election Code voter identification provision to apply to municipal elections pursuant to Section 3-8-1 E. of the Municipal Election Code would require that the Municipal Election Code be silent on the subject of voter identification when voting in person or that the Municipal Election Code conflict with the Election Code. The only difference between the Election Code and the Municipal Election Code is that the Election Code adds the "required voter identification" provision which is not in the Municipal Election Code. Because the general subject of voter identification is covered in both the Election and Municipal Election Codes, this difference is not the type of omission described

in Section 3-8-1 E. of the Municipal Election Code which requires conflict as a prerequisite to application of the Election Code. The mere fact that the two Codes treat identification requirements differently does not place them in conflict.

The Election Code is not more specific than the Municipal Election Code. A specific statute prevails over the general where the conflict cannot be harmonized. State v. Gabaldon, 92 N.M. 230, 585 P.2d 1352 (App. 1978); State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936). Absent an irreconcilable conflict, a specific statute prevails over the general statute only if the legislature clearly expressed an intention to repeal. It is the duty of the courts to regard each statute as effective whenever the statutes are capable of co-existence. Morton v. Mancari, 417 U.S. 535 (1974).

There is no conflict between the Election Code and the Municipal Election Code and the legislature has expressed no intention to repeal any provisions of the Municipal Election Code. The legislature has chosen to treat non-partisan municipal elections differently from partisan elections that are subject to the Election Code.

2. The City Charter Provisions mandate application of only the provisions of the Municipal Election Code.

The Municipal Election Code specifically exempts home rule municipalities from coverage of that Code unless the Municipal Election Code is adopted by reference by the municipality. Section 3-8-1E. Although the City of Albuquerque has adopted the Municipal Election Code in its Charter, it has done so with limitations. Article II, Section 2 of the Albuquerque City Charter provides:

Section 2. REFERENCE TO STATE LAW.

(a) The Municipal Election Code, Chapter 3, Articles 8 and 9, NMSA 1978, as amended and as supplemented from time to time, shall govern the conduct of all aspects of municipal elections, **except where inconsistent with the terms of this Charter, in which event this Charter shall control.**

[Emphasis added]. Even if the Municipal Election Code is viewed as having an omission as to voter identification requirements for purposes of in-person voting, under § 3-8-1 E., it is the city's voter ID law, contained in a provision of the City Charter, which provides for the method of voter identification, not the State Election Code. Because the court has invalidated the city's voter ID law, the Municipal Election Code provisions are the applicable in-person voter identification provisions and will require only a verbal identification by the voter pursuant to § 3-8-41. The appropriate law to be applied is what was in effect and what was applied in municipal elections prior to the city's enactment of its voter ID ordinance.

III. CONCLUSION

For the reasons discussed in this brief, the city respectfully requests that the court not proceed with further ruling in this matter. The court should either determine that it lacks jurisdiction to address the application of state law or should abstain from issuing a ruling. Finally, if the court does address any state law issue, the law to be applied is the State Municipal Election Code.

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Respectfully submitted,

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I hereby certify that a true copy
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