

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 REPLY 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

ORAL ARGUMENT REQUESTED

Paula I. Forney
Assistant City Attorney
Attorney for Defendant/Appellant
Albuquerque, NM 87102
Telephone: (505) 768-4500

November 8, 2007

TABLE OF AUTHORITIES

Supreme Court Cases:

Anderson v. Celebrezze, 460 U.S. 780 (1983). 4

Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007). 1, 3

Burdick v. Takushi, 504 U.S. 428 (1992). 1, 2, 4

Purcell v. Gonzales, ___ U.S. ___, 127 S.Ct. 5 (2006). 3

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Circuit Court Cases:

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Gonzales v. Arizona, 485 F.3d 1041 (9th Cir. 2007). 3

Cases from Other Jurisdictions:

Common Cause/Georgia v. Billups, 439 F.Supp.2d 1294 (N.D.Ga. 2006), *remanded sub nom. Common Cause/Georgia v. Cox*, No. 05-15784 (11th Cir. Feb. 9, 2006), *followed in Common Cause/Georgia v. Billups*, 2006 U.S. Dist. LEXIS 56100 (N.D. Ga. 2006). 3

Indiana Democratic Party v. Rokita, 458 F.Supp.2d 775 (S.D.Ind. 2006). 3, 5

In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 13089 (Mich. 07-18-07). 3

Other Authorities:

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Brief or Respondents in Opposition to the Petitions, 2007 WL 2261608. 5

ARGUMENT

On February 12, 2007, Honorable Christina Armijo entered a Memorandum Opinion and Order invalidating Appellant City of Albuquerque's (hereinafter the city) ordinance requiring voter identification in municipal elections. Applt.App.p. 605. The city appealed to this court on March 7, 2007. The city and appellees have filed their briefs and a brief of *amicus curiae* has been filed.

In its brief in chief, the city argued: 1) that imposition of the voter identification did not violate any constitutional provisions and 2) that plaintiffs lacked standing to challenge the voter identification requirements. The city argued, based on Burdick v. Takushi, 504 U.S. 428, 432 (1992), that the voter identification requirements should not be subject to strict scrutiny, but that rational basis review was the appropriate standard. Judge Armijo applied a "strict scrutiny light," standard suggested in a dissenting opinion in Crawford v. Marion County Election Board, 472 F.3d 949, 954 (7th Cir. 2007) which the city challenged in its brief in chief.

As argued by the city, Burdick rejected the assumption that any law which imposes a burden on the right to vote must be subject to strict scrutiny. 504 U.S. at 434. Instead, where an election law imposes only "reasonable, non-discriminatory restrictions" . . . 'the State's important regulatory interests are generally sufficient to justify' the restrictions." 504 U.S. at 434 (*internal citations and quotations*

omitted). The city asserted that its voter identification provisions did not violate other state or federal laws, that its requirements were not void for vagueness, that the voter identification requirements satisfied equal protection concerns and that the remaining findings of Judge Armijo were not factually or legally supportable.

The city also questioned Judge Armijo's determination that plaintiffs had standing to challenge its voter identification law. As argued by the city, appellees had failed to identify any individual who had been prohibited from voting because he or she lacked valid identification. No identified plaintiff/appellee had any personal interest in the litigation and, according to Judge Armijo, "Plaintiffs have not identified a single voter who has been denied the right to vote." *Applt.App.p.* 638. Instead, Judge Armijo found standing based solely on the threat of such injury. *Applt.App.p.* 638.

In their response brief, appellees argued against the city's position, asserting that while Burdick set forth the appropriate test to be applied, application of the test mandated invalidation of the city's ordinance. Appellees also argued that they had standing to assert these claims, having suffered the requisite injury in fact and satisfying the causation and redressibility requirements of standing.

Judge Armijo, the city and appellees all addressed in detail decisions regarding voter identification from other circuits, state and federal courts. *See, e.g., Crawford; Purcell v. Gonzales*, ___ U.S. ___, 127 S.Ct. 5 (2006); Gonzales v.

Arizona, 485 F.3d 1041 (9th Cir. 2007); Common Cause/Georgia v. Billups, 439 F.Supp.2d 1294 (N.D.Ga. 2006), *remanded sub nom.* Common Cause/Georgia v. Cox, No. 05-15784 (11th Cir. Feb. 9, 2006), *followed in* Common Cause/Georgia v. Billups, 2006 U.S.Dist.LEXIS 56100 (N.D. Ga. 2006); and In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 13089 (Mich. 07-18-07). These cases are not identical to the pending appeal but they do consider and address some of the issues before the court. *See* city's brief in chief, at pp. 51 – 53.

Indiana Democratic Party v. Rokita, 458 F.Supp.2d 775 (S.D.Ind. 2006), *aff'd sub nom.*, Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007), *consolidated with* Indiana Democratic Party v. Rokita, *cert. granted* No. 07-21, 2007 WL 1999963 (Sept. 25, 2007) (hereinafter Rokita), upheld Indiana's voter identification law which is similar to Albuquerque's ordinance, against the same challenges presented in this case.

The courts in Rokita found that at least one of the plaintiff associations had standing to challenge Indiana's law. The circuit court also affirmed the district court's rejection of the application of a strict scrutiny standard to Indiana's voter identification law, stating: "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that

elections are operated equitably and efficiently.” Rokita, 472 F.3d at 952 (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983)).

The court applied the Burdick balancing test, noting the district court’s finding that the statistical evidence presented in that case was “totally unreliable” due to methodological flaws. 472 F.3d at 952. The circuit court balanced the possibility of voter fraud on one hand and the potential for discouraging voter participation on the other, concluding that the analysis and conclusions of the district court supported upholding the voter identification requirements.

The Rokita Court also affirmed rejection of the plaintiffs’ equal protection claim which is the same claim raised by appellees in this case. The district court in this case found a violation of equal protection because the same voter identification requirement imposed on in-person voters was not imposed on absentee voters. Rokita rejected the equal protection challenge based on the underinclusion of absentee voters, asking “But how would that work? The voter could make a photocopy of his driver's license or passport or other government-issued identification and include it with his absentee ballot, but there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo.” Rokita, 472 F.3d at 954.

Literally every issue raised before Judge Armijo in this case was addressed and resolved by the district and circuit courts in Rokita. The United States Supreme Court has granted *certiorari* in Rokita and will, in some manner address matters which are at issue before this court. The issues presented in Rokita are identical to the arguments raised before and ruled on by the district court in this case. *See, e.g.*, Petition for a Writ of *Certiorari*, 2007 WL 2726047; Brief or Respondents in Opposition to the Petitions, 2007 WL 2261608. For this court to consider the pending action prior to the Supreme Court issuing a decision in Rokita would be a misuse of judicial time and resources. If all of the issues raised in the pending appeal are not addressed in Rokita, certainly the opinion in that case will provide some guidance as to those and other issues. If there are distinctions between the voter identification laws in Albuquerque and those in Indiana, the appropriate time to address those differences is in the context of the Supreme Court's decision in Rokita.

The parties have fully briefed this appeal given the law prior to the grant of *certiorari* in Rokita. It would make no sense for further briefing on the issues in this appeal to occur before the Supreme Court has addressed the identical issues. Any additional briefing would be of no value because it would be superseded by the Supreme Court's wisdom. The city has previously moved for a stay of this appeal pending the Supreme Court decision in Rokita. The city has also requested

that, after a decision is issued in that case, that the parties be permitted to address through supplemental briefs, the impact of a Supreme Court decision on the appeal pending before this court.

While the city has not specifically replied to appellees' response to the city's brief in chief, any reply would be of no value to the parties or this court. The city thus respectfully requests that how to address this appeal be reevaluated when an opinion is issued and in light of the decision of the Supreme Court.

CITY OF ALBUQUERQUE
Robert M. White
City Attorney

/s/ Electronically signed
Paula I. Forney
Mark Shoesmith
Assistant City Attorney
Attorney for Defendants/Appellee
P.O. Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionately spaced and contains approximately 1,500 words.

I relied on my word processor to obtain the count and the software is Microsoft Word 2003 Standard.

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

/s/ Electronically signed
Paula I. Forney
Assistant City Attorney

**CERTIFICATE OF COMPLIANCE
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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.

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/s/ Electronically signed
Paula I. Forney
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2007, I served the required number of true and accurate copies of Appellees Reply Brief 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
Paula I. Forney
Assistant City Attorney