IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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CLERK-ALBUQUERQUE

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,

v.

No. CV 05-1136 MCA/WDS

MILLIE U. SANTILLANES, ALBUQUERQUE
CITY CLERK,

Defendant.

REPLY IN SUPPORT OF PLAINTIFFS'MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs, and hereby submit their reply memorandum in support of their motion for summary judgment.

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I. The State Election and Municipal Election Codes

In the memorandum in support of Plaintiffs' motion for summary judgment, Plaintiffs discussed how the State Election Code governed procedures for Albuquerque municipal elections. The sole exception to that general statement of law is the the voter i.d. requirement which established procedures other than those of the State Election Code. Defendants in their response argue that the State Municipal Election Code controls, not the State Election Code. This argument is immaterial generated some unnecessary confusion. Plaintiffs' primary reliance on the State Election Code is correct, as that law takes precedence over the Municipal Election Code in every instance except for Albuquerque's voter i.d. law.

Under NMSA § 3-8-1.E of the Municipal Election Code, the State Election Code prevails where the Municipal Election Code is silent or inconsistent with the State Election Code. Under NMSA § 1-1-19.B., the Municipal Election Code thus incorporates the State Election Code and makes it applicable, as described, to municipal elections. By adopting the Municipal Election Code Albuquerque, in turn, has adopted this order of precedence. Accordingly, for voting in Albuquerque elections, the ultimate source of authority as to what is required and permitted remains the State Election Code.

The State Election Code is inconsistent with Albuquerque's voter i.d. law. The State Election Code permits citizens to cast a vote without showing the photo i.d. required for Albuqeurque elections. In this one instance it does not supercede Albuquerque's law because the city expressly exempted the photo i.d. provision from the Municipal Election Code, and thus from the rule of precedence for the State Election Code.

Defendant Santillanes has not denied that the procedures for absentee voting required by the State Election Code are observed in Albuquerque elections. She has not asserted that she follows any procedures inconsistent with the State Election Code.

Generally, the State Election and Municipal Election Codes are identical or quite similar in most respects relevant to this case. For instance, the Municipal Election Code and the State Election Code both provide that any registered voter may vote by absentee ballot. Cf. §§3-9-3 and 1-6-3.A. Under both codes a voter may obtain an application for an absentee ballot in person from the clerk's office, and deliver it in person. Cf. §§ 3-9-4.C. and 1-6-5.F. Under both codes voters may receive their absentee ballot in person at the clerk's office, and mark their ballot in a booth set up in clerk's office. Cf. §§ 3-9-4.I. &K. and 1-6-5.F. Under both codes, the clerk's office is not by law considered a polling place, **Id.**, so the Albuquerque voter i.d. ordinance, which covers only voters approaching "the polling place," would not apply to marking of absentee ballots in the clerk's office.

Another example goes to who may deliver an absentee ballot. The Municipal Election Code provides that only the voter may deliver the completed ballot. § 3-9-7.B. But the State Election Code allows the ballot to be delivered by the voter, a family member or a caregiver. § 1-6-10.1. Under NMSA § 3-8-1.E., the State Election Code prevails, and in Albuquerque elections an absentee ballot may be delivered by the voter, a family member or a caregiver, regardless of the inconsistent Municipal Election Code.

A final example pertains to election-day delivery of absentee ballots. Under the Municipal Election Code, the only in-person delivery of an absentee ballot mentioned is to the clerk's office. This is inconsistent with the State Election Code that permits a voter to deliver their absentee ballot to their regular polling place on election day. § 1-12-8.2.

Under NMSA § 3-8-1.E., the State Election Code prevails over the inconsistent (or silent) Municipal Election Code, and an Albuquerque voter may deliver their absentee ballot to their regular polling place on election day.

Because the legislative scheme gives priority to the State Election Code over the Municipal Code this way, it is easier to refer directly to the State Election Code. This is a valid way to understand voting in Albuquerque because, only with respect to the voter i.d. law, has Albuquerque not adopted all the provisions of the Municipal Election Code. In any event, the material provisions of both codes are substantially similar, and Defendant has not argued to the contrary.

II. In The Absence of Albuquerque's Voter I.D. Law, The State Election Code Identification Procedures Would Control

For the first time in this litigation, Defendant argues that the State Election Code voter identification procedures, the "unique identifier" system, would not apply to Albuquerque elections if the voter i.d. law is struck down. This point was made by Plaintiffs in their opposition to the unsuccessful motion to intervene of three individuals. In its ruling denying that motion, the Court also discussed how, if the voter i.d. law is struck down, Albuquerque elections would default to the state system for voter identification. At no time, until their response brief, did Defendant ever take issue with that proposition of law.

Defendant now argues that in the absence of the City's voter i.d. law, the question of voter identification would not be governed by the State Election Code, but only by the Municipal Election Code. This argument is clearly incorrect. The section of the Muncipal Election Code upon which Defendant relies, NMSA § 3-8-41, permits someone to vote if they do no more than say their name and address. But The State Election Code

does not permit anyone to cast a vote unless they produce "the required voter identification." NMSA § 1-12-10.B. That "required voter identification" is far more than the name and address required under the Municipal Election Code. At the very least, under the State Election Code, before voting, a voter must produce their name, date of birth and the last four digits of their Social Security number, their "unique identifier." NMSA §§ 1-1-24.B.; 1-6-4.C.

On the issue of what identification is required to allow a person to vote, the Municipal Election Code is inconsistent with the State Election Code. It allows a person to vote with less personal identification information than is required by the State Election Code. Accordingly, the State Election Code prevails. NMSA § 3-8-1.E. Therefore, in the absence of the voter i.d. challenged in this litigation, persons wishing to vote in Albuquerque elections would have to produce, at a minimum, their name, date of birth and "unique identifier."

III. <u>The Voter I.D. Law Is Inescapably Void for Vagueness.</u>

The voter i.d. law requires that a voter at the polls produce a "current valid photo i.d." It does not provide any definition of the term "current" or "valid." In her response, Defendant has not eliminated this problem. Indeed, she has created even more uncertainty.

The least vague of the two terms is probably "current." But even Defendant cannot define that term, and her view conflicts with that of her deputy. In Defendant's deposition, she stated that a driver's license could be considered "current" even if it had expired. Santillanes depo., pp. 22-23, Ex. G to Memorandum in Support of Plaintiffs' Motion for Summary Judgment." And, even though the deputy city clerk says in her

affidavit that precinct election judges are trained that the expiration date on a photo i.d. must be after the election date, Defendant, who is her superior, and the person charged under state and municipal law with administering elections, states she would never dictate to an election judge what constitutes a "current" photo i.d. (Id.). So, even though the deputy city clerk states election judges receive certain training, the City Clerk herself repeatedly stated in her deposition that she will leave it up to each election judge to "make the call" as to what constitutes a "current valid" photo i.d. Apparently, the training described by the deputy city clerk is only advisory. Each individual election judge will be "the ultimate authority for making the call on what constitutes a valid i.d." Santiallanes depo., p. 50, lines 12-15, Ex. G to Memorandum in Support of Plaintiffs' Motion for Summary Judgment."

Tellingly, Defendant has produced nothing, such as a set of specific regulations, that would be binding upon election judges in exercising their discretion in determining what constitutes a "current valid" photo i.d. This omission is consistent with her deposition testimony that the decision as to what constitutes a "current valid" i.d. is left to the discretion of each election judge.

Defendant's counsel makes the argument that the terms "current" and "valid" are so commonly understood they are not vague. But that argument fails decidedly in the face of the admission from the City Clerk herself that she cannot say what "valid" means (Santillanes depo., 37-38, Ex. G to Memorandum in Support of Plaintiffs' Motion for Summary Judgment.).

Providing dictionary definitions does not save the voter i.d. law from being unconstitutionally vague. The Webster's definition of "vague" offered by Defendant's

counsel is "having legal efficacy of force, executed with proper legal authority and formalities." But this begs the question. The election judges are left to decide for themselves whether each photo i.d. presented to them will have the "legal efficacy or force" to be considered "valid." There is no objective standard dictating to election judges what is "legal." *What is "legal," i.e., "valid," is what the election judge says it is.* This would be the same as authorizing police officers to arrest people for "illegal" conduct, and letting them decide what is "legal."

Rather than clear away the vagueness problem, Defendant has merely proven it by giving a definition that confirms the unlimited discretion of each election judge to determine what is "valid." This concern is the strongest reason for striking down vague laws. ***Kolender v. Lawson,*** 461 U.S. 352, 358 (1983).

Even the dictionary definition of "current" does not eliminate the vagueness problem. The Webster's definitions offered of "current" are "occurring or existing at the present" and "generally accepted, used, practices or prevalent at the moment." Does this mean that the address on the i.d. must be "existing at the moment," or that the photograph on the i.d. be a current photo, showing the voter as the exist at the present? No one can say, because nothing in the law defines what constitutes a "current" photo i.d. Defendant, in fact, has confirmed she will leave it to the discretion of each election judge to determine whether the photograph is satisfactorily current. The vague i.d. law allows an election judge to reject a photograph on the basis of the very concerns raised by Plaintiffs Kass and Grothus, that the photograph on their driver's license is not, in fact, "current" because they have lost weight, changed their hair, wear eyeglasses and otherwise have dramatically changed their appearance.

Tellingly, the deputy clerk does not state that election judges are given any training about whether a current address will be required, or if the photograph of the voter must be current. Apparently, this determination is left to each election judge, as Defendant has testified.

It might be possible to argue that the phrase "current valid driver's license" is not hopelessly vague. The reference point for defining those terms is at least suggested by the pertinent state motor vehicle code, which likely says what constitutes a "current valid driver's license." This would at least limit the discretion of an election judge. There would be some objective standard by which to measure the correctness of his decision that a driver's license was or was not "current" and "valid."

But the Albuquerque voter i.d. law does not say "current valid driver's license." It says "current valid photo i.d.," and for the meaning of that phrase there is no reference manual. As Defendant showed in her deposition, the definition of those terms is completely disconnected from the provisions of the New Mexico driver's license laws. She thinks an expired driver's license can be "current" and "valid." She also said that the address on the license need not be current, even though New Mexico law requires that for a driver's license to be valid it must show the driver's current address. NMSA § 66-5-15. Since she cannot offer of a definition of what constitutes a "valid" photo i.d., as Plaintiffs have pointed out, she—and the election judges come election day—cannot help but to make up definitions as they go along.[1]

[1] The list of cases at the bottom of page 12 of Defendant's brief is most unhelpful. Those cases do not discuss whether the terms "current" and "valid" are vague, but appear to be merely the result of a simple Westlaw word search, without any other significance.

Whether the 369 or 171 election judges will each provide their own definition for the terms "current" and "valid" is beside the point. Plaintiffs will accept Defendant's count. And, Defendant's argument that no election judge will make the decision on their own, but that the decision will be made by the three judges at consolidated precinct polling places, only compounds the problem. Instead of 171 or 369 separate subject decision makers, operating without any limits on their discretion, according to Defendant we now have 3 times 171 election judges providing their own definitions of "current" and "valid."

Albuquerque's voter i.d. law is the most poorly drafted attempt in the nation at a law requiring voters to produce photographic identification. In none of the other cases working their way through the Federal courts can there be found any comparable law that requires voters to present a "current valid photo i.d." without providing any definition of those terms. Perhaps a voter photo i.d. law can be written which is not so vague it does not violate the U.S. Constitution. Albuquerque's voter i.d. law is not that law.

IV. Plaintiffs Have Standing for Their First Amendment Claims

National Paint & Coatings Assoc. v. City of Chicago, 803 F. Supp. 1335 (N.D.Ill. 1992), does not stand for the proposition for which it is cited by Defendant. Defendant at page 14 of her response says this case stands for the proposition that "Speculative danger of arbitrary enforcement does not render ordinances void for vagueness. ***National Paint*** does not say that anywhere in the opinion. Indeed, ***National Paint*** supports Plaintiffs' case.

The District Court found that plaintiffs in that case had standing to raise a facial challenge to the vagueness of a new law because they anticipated engaging in the conduct

at which the challenged law aimed. **Id.** at 141. Because the law was new, it had yet been enforced against plaintiffs. "As such," the District Court wrote, "plaintiffs have not, and could not, allege any specific instances of discriminatory or unfair enforcement. Under the circumstances, we are confined to the language in the ordinance..." **Id.** at 149. Contrary to suggestion in Defendant's brief, the District Court struck down the challenged law.

Furthermore, as this case involves a fundamental right, the voter i.d. law must pass the strictest vagueness test. ***Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.***, 455 U.S. 489, 499 (1982). And because Plaintiffs raise a First Amendment challenge to a void law, they enjoy the expanded, more lenient prudential standing allowed for First Amendment void for vagueness claims. This argument was covered more expansively in Plaintiffs' Response to Defendant's Motion for Summary Judgment.

V. Defendant Does Not Seriously Dispute Plaintiffs' Substantive First Amendment Claims.

Defendant has not engaged in any serious disputation of the substantive First Amendment Claims raised by Plaintiffs Kass and Grothus. To repeat the argument briefly, Plaintiffs contend that the act of voting in person at the polls in symbolic speech protected by the First Amendment. Defendant at one point concedes this argument. Defendant's Memorandum in Response to Plaintiffs' Motion for Summary Judgment, p. 9 ("[T]hese plaintiffs have the first amendment right to vote in a specific manner...."). But Defendants barely make any argument to counter Plaintiffs' extensive arguments about how the First Amendment rights of Kass and Grothus are being infringed by subjecting them to them to greater burdens in voting in person. Defendants simply have

failed seriously to dispute the substantive First Amendment claims raised in Plaintiffs' Motion for Summary Judgment.

VI. Albuquerque's Voter I.D. Law Violates The Equal Protection Clause.

Defendant has done nothing to show that Albuquerque's voter i.d. law is not utterly irrational. It treats voters entering the same precinct place on the same day differently. Those persons wishing to cast their vote in a voting booth at the precinct must satisfy an election judge that they have "current valid" photo identification. A voter dropping off an absentee ballot at the precinct polling place on election day need provide no photographic identification. NMSA §1-12-8.2. A voter personally picking up an application, receiving an absentee ballot and casting it in the clerk's office need show no photo i.d. NMSA §§ 3-9-4.I. &K. and 1-6-5.F. Moreover, a voter can personally deliver their absentee ballot and never have to show photo i.d., and a third party can drop off an absentee ballot for someone else, whose identity is never examined. NMSA § 1-6-10.1.

Furthermore, Defendant has not denied that Albuquerque's voter i.d. law actually permits voter impersonation to occur that would not occur under New Mexico's overarching voter identification scheme. As shown in the Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pp. 36-37, a person wishing to commit voter impersonation can easily obtain a photo i.d. from the City Clerk in the target's name. The impersonator need produce no documentation or personalized information in order to obtain a clerk-issued photo i.d. They need only give the name of a registered voter, state they have none of the documents listed in the voter i.d. law, and the Clerk is required to issue them the photo i.d. This allows someone to circumvent the New Mexico "unique identifier" system that would weed out such facile lawbreaking at the polls. It also

circumvents the minimal security measures required for obtaining an absentee ballot, which is the same "unique identifier" information required by state law.

Because Albuquerque's voter i.d. law is so irrational, it cannot survive either strict scrutiny or intermediate scrutiny. Once again, Defendant completely ignored the Tenth Circuit's "quantum of expression" test for applying strict scrutiny, all but an admission that under Tenth Circuit precedent strict scrutiny should be applied here. But Defendant also failed to make the required showing under intermediate scrutiny to justify the disparate treatment of in-person and absentee voters.

Defendant closes her brief by citing ***Williamson v. Lee Optical of Okla.***, 348 U.S. 483 (1955). But that case establishes the test of minimal rationality, the lowest form of scrutiny, for examining equal protection challenges to economic regulations that do not affect fundamental constitutional rights or discriminate against certain minorities. But this is a case involving the fundamental right to vote, and the minimal rationality test of that case is inappropriate.

The intermediate, or balancing test of ***Burdick v. Takashi***, 504 U.S. 428 (1992), requires substantially more than conceiving a legitimate reason that can support a challenged law, all that is required under the test of minimal rationality. Under ***Burdick*** Defendant does have a burden of proof that must be satisfied before the balancing test can even operate. One, Defendant must put forward the "precise" justifications for the challenged law. Two, Defendant must show that the burden on plaintiffs is necessary to accomplish those precise interests. As the Court explained:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for

> the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 433-34 (citations omitted).

Defendant has not shown any need to subject the rights of in-person voters to greater burdens than absentee voters. Defendant has not shown even a hypothetical instance where voter fraud may occur in the face of New Mexico's "unique identifier" voter identification system for in-person voters. Defendant's only argument is that New Mexico's voter identification system would not apply in the absence of Albuquerque's own voter i.d. law. As shown above, that argument is simply incorrect. Also, as explained in Plaintiff's opening brief, pp. 36-37, Defendant cannot explain how applying a higher burden to in-person voters is necessary when the very same law creates a way to commit voter impersonation (the Clerk-issued i.d.) that otherwise would not be possible.

The fact that the voter i.d. law does create an exception for absentee voters is a legitimate means to show its irrationality. If the purpose is to prevent voter impersonation, then Defendant needs to explain why the avenue most accommodating to voter impersonation is not subjected to the same voter i.d. requirements for in-person voters. "A person is allowed to point to the existence of an exemption in order to demonstrate the irrationality of a prohibition to which he is subject, even if the exemption itself does not harm him by offering an advantage to a rival. This is a common way of making an equal protection challenge." ***Kucharek v. Hanaway,*** 902 F.2d 513, 517 (7th Cir. 1990)(Posner, J.).

Nor does Defendant address the question of why in-person votes should be treated with less dignity than absentee votes. Absentee votes receive the benefit of the heightened security of photo i.d. for in-person votes, but in-person votes receive no

similar benefit with respect to absentee votes. Absentee votes are permitted to be cast without requiring any photo verification that the person casting the vote is in fact permitted to cast that vote. Defendant never attempts to explain why in-person voters should receive less assurance that their votes will not be diluted through voter impersonation than is granted to absentee voters.

Defendant uses the testimony of Denise Lamb, former Director of the Secretary of State's Bureau of Elections, to show there are other forms of fraud associated with absentee balloting in addition to voter impersonation.[2] Ms. Lamb's testimony highlights how much more prone absentee voting is to illegal conduct than in-person voting. But that fact only strengthens Plaintiffs' argument that the exemption of absentee voting from the photo i.d. requirements applied to in-person voters is irrational.

Defendant in her response repeats the false argument that requiring photo i.d. of absentee voters is not possible. She argues the only way to implement this would be to require that a copy of a photo be included inside the absentee ballot envelope, thus not permitting any verification that the photo is of the person casting the absentee vote. But as Plaintiffs have repeatedly shown, absentee voters do come into personal contact with election officials when they pick up their application or ballot, or when they deliver their ballot. Defendant cannot possibly offer any argument that an absentee voter who is voting in the Clerk's office, or dropping off their ballot at their regular precinct polling

[2] Defendants object to Plaintiffs using any testimony from Ms. Lamb because they withdrew her as an expert witness. Plaintiffs tried to be careful in their opening brief to use only fact testimony from Ms. Lamb, testimony based upon her actual observations, and cite to no opinion testimony. Defendants, though, introduce opinion testimony from Ms. Lamb. They thus have waived any objections they can raise to the use of Ms. Lamb's testimony in this case.

place on election day, cannot be made to produce the same form of photo i.d. required of citizens who may be standing in the line in very room at the very same time.

Defendant tries to argue that a provisional ballot is a remedy for any difficulty in producing a photo i.d. acceptable to an election judge. This argument fails to consider the fact that a provisional ballot is not counted unless the voter travels to City Hall, and there convinces some unknown employee of the Clerk's office that their photo i.d. should be accepted. In making that call, the City Clerk and her employees are operating under the same vague "current valid" language as the election judge. Things do not improve for the voter by going to the Clerk's office. As we have seen, the City Clerk herself cannot say what "valid" means. Thus, the provisional ballot is no remedy at all, but just another step for a voter trying to exercise their right to vote under the power of officials vested with unlimited discretion to determine whether their photo i.d. is acceptable.

In arguing that the disappointed voter can obtain a photo i.d. from the Clerk within the ten day canvass after the election, Defendant only reinforces the conclusion that the photo i.d. law is irrational. As Plaintiffs have shown, no i.d. at all is required to obtain the Clerk-issued photo i.d. Thus, Defendant is arguing that a voter turned away at the polls because of unsatisfactory photo identification can vote by going to the Clerk's office and there obtaining a photo i.d. requiring no identification, which is then immediately prsented to the same Clerk so their vote can be counted. Securing the integrity of the vote is not served by this pointless dance.

Lastly, the argument that the availability of a Clerk-issued i.d. within the ten-day canvass period after election day cures any constitutional defect in the voter i.d. law also violates the doctrine of ***Harman v. Forsssenius,*** 380 U.S. 528 (1965)(alternate means for

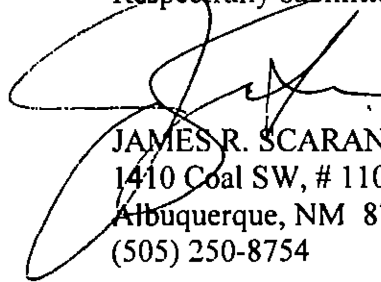
voter to avoid unconstitutional imposition on right to vote does not save the unconstitutional requirement from being invalidated).

Plaintiffs have explained their standing to raise their due process claims both in their opening brief, and again in their brief in response to Defendant's cross-motion for summary judgment. Defendant raised no new arguments on that issue in their response to Plaintiffs' motion for summary judgment.

VII. Conclusion

The facts in this case are not in material dispute. Albuquerque's voter i.d. law is unconstitutionally vague and irrational. It violates the First and Fourteenth Amendments and should be declared unconstitutional.

Respectfully submitted,



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This 25th day of October, 2006