

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED ^W
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

06 OCT 25 AM 10:45

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,

vs.

No. CIV 05-1136 MCA/WDS

**MILLIE U. SANTILLANES,
ALBUQUERQUE CITY CLERK,**

Defendant.

**PLAINTIFFS' RESPONSE TO BRIEF OF *AMICUS CURIAE* AMERICAN
CENTER FOR VOTING RIGHTS LEGISLATIVE FUND**

77

INTRODUCTION

The amicus brief of the American Center for Voting Rights Legislative Fund (“ACVR”) is misleading or irrelevant or both.

The ACVR brief purports to address the amicus brief filed by the Brennan Center for Justice at NYU School of Law (“Brennan Center”). While plaintiffs maintain that Albuquerque’s photo ID voter requirement (“the Voter ID Law”) should be evaluated under a strict scrutiny standard, the Brennan Center brief demonstrates that under the *Burdick* balancing test, even under a less strict standard, the Voter ID Law is unconstitutional. *See Burdick v. Takushi*, 504 U.S. 428 (1992).

As the Brennan Center brief shows, the Voter ID Law discriminatorily burdens the voting rights of disadvantaged groups – low income, elderly, disabled and homeless persons – and is not necessary to achieve the city’s goal of preventing impersonation fraud by in-person voters. Relying on several studies, the Brennan Center brief shows that such impersonation fraud is unsubstantiated and highly unlikely and that the Voter ID Law is a disproportionate response to this remote and largely hypothetical risk, given the numerous less burdensome alternatives adopted by New Mexico, 46 other states, and the federal government.

The ACVR brief largely ignores the question of whether this regulation is necessary to achieve Albuquerque’s legitimate interests, and instead purports to show that impersonation fraud is a serious threat. As we show below, ACVR’s claims are based entirely on newspaper stories similar to those which were already discredited in the Brennan Center brief, on polls that are neither relevant nor persuasive, and on a supposed non-partisan, nationwide trend that is in fact a highly partisan voter suppression effort

that already has been invalidated in two of the three states where photo ID requirements were enacted.

ARGUMENT

I. Impersonation Fraud Is A Remote And Unsubstantiated Danger

The Brennan Center brief relies on several comprehensive expert studies showing that impersonation fraud is at best a remote and insubstantial danger. These studies include the Minnite Study, the most thorough survey of election fraud undertaken to date (*see* Brennan Center Br. at 9-10); a 2006 report conducted by the U.S. Department of Justice (*see id.* at 10-11); a judicial investigation of alleged fraud in the 2004 gubernatorial election in Washington State (*see id.* at 12-13); and a study of fraud in Ohio elections, which included a survey of each of the state’s 88 county Boards of Elections. (*See id.* at 13-14.) These studies show that claims of voter fraud, and in particular, impersonation fraud, are largely unsubstantiated. ACVR simply ignores these reports’ conclusions.

ACVR itself refers to no study. Instead, ACVR proceeds to rely on news stories, some of which the Brennan Center cited merely to show that these stories, frequently cited by proponents of photo ID requirements, either had nothing to do with impersonation fraud or were discredited. (*See* Brennan Center Br. at 12-15.) Thus:

- ACVR cites an article from the *Detroit News* that suggests Detroit’s registration rolls are poorly maintained, and that individuals may have voted in the name of the dead. (*See* ACVR Br. at 9.) But the same article notes that clerical errors by poll workers “were so pervasive that it is difficult to determine in many instances who actually voted.” Lisa M. Collins, *In Michigan, Even Dead Vote*, *Detroit News*, Feb. 26, 2006. (*See* Brennan Center Br. at 14-15.)
- ACVR relies on a *Chicago Tribune* article that found various dead persons remained on Florida’s voting rolls. (*See* ACVR Br. at 9.) But problems with

the integrity of registration rolls are effectively addressed by requiring proper maintenance of the lists, not by requiring voters to present photo ID. Moreover, the persistence of out-of-date or inaccurate registration rolls open the door to absentee ballot fraud, a verified, frequently occurring problem which is not addressed by the Voter ID Law and is a far more serious threat to electoral integrity than is the potential for impersonation fraud.

- ACVR refers to a *New York Daily News* story describing voters registered in both New York and Florida. (*See id.*) But, even assuming that both states required voters to show photo ID, this would not prevent a fraudulent voter from voting in both states, either by absentee ballot or in-person. Here, too, the problem is maintaining accurate registration lists.
- Similarly, ACVR cites a *Kansas City Star* article which notes that voters may have voted twice in various elections, either by voting in two Missouri counties or once in both Missouri and Kansas. (*See id.* (citing Greg Reeves, *One Person, One Vote? Not Always*, *Kansas City Star*, Sept. 5, 2004).) Notably, the source on which ACVR relies states that it is impossible to confirm the putative reports of voter fraud, “because the state computer files contain many errors that show people voting who did not actually vote.” In any event, a photo ID law like Albuquerque’s would not prevent double voting by individuals who have registered in two counties or states.
- Finally, ACVR’s reliance on newspaper reports of double voting in Colorado and Florida, suspected voting by ineligible felons in Colorado, and bloated registration rolls in Missouri (*see* ACVR Br. at 9-10), also cannot justify the Voter ID Law, because a photo ID requirement will not prevent these forms of non-impersonation fraud.

The news reports of double voting, voting by ineligible felons, and poorly maintained registration rolls on which ACVR relies are irrelevant, because a photo ID requirement does nothing to address these problems.

ACVR also relies on a quote from the report of the Carter-Baker Commission on Federal Election Reform, (*see* ACVR Br. at 8), which the Brennan Center brief shows relies entirely on some of the very same discredited news accounts relied on by ACVR. (*See* Brennan Center Br. at 15-16.) The Carter-Baker Commission took no expert testimony and conducted no studies of its own. (*See id.*) Its report does not demonstrate that impersonation fraud is more than a remote and unproven problem. Moreover, as the

Brennan Center brief shows, the Carter-Baker Commission's recommendation of the use of REAL IDs for voter identification was contingent on certain safeguards that are not present in Albuquerque. (*See id.* at 16.) As both President Carter and Secretary Baker made clear, without those safeguards, a photo ID requirement threatens to disenfranchise many voters who do not have driver's licenses or other photo identification. (*See id.*)

Finally, while the Brennan Center showed why, as a practical matter, impersonation fraud is a highly unlikely scenario, (*see* Brennan Center Br. at 17-18), ACVR offers the most outlandish hypothetical that only proves the Brennan Center's point. Claiming that "[i]mpersonation fraud is not difficult to engineer," (ACVR Br. at 14), ACVR posits a conspiracy in which poll workers pass on to their co-conspirators the names of registered voters who have not yet cast ballots, so that these impostors can present themselves at the polls and impersonate legitimate voters. Such a nefarious scheme, which would require numerous participants in a carefully choreographed venture, would surely bear a serious risk of exposure to the harsh penalties for voter fraud. The absence of any evidence that such a scheme ever occurred merely shows how far-fetched this hypothetical is. Moreover, by positing that such a complicated, risky, and unlikely scheme is necessary to carry out impersonation fraud, ACVR only proves that impersonation fraud is not a serious risk. Indeed, it also shows that if such a conspiracy is required to carry out impersonation fraud, a photo ID could not prevent it, for if criminal poll workers are willing to conspire with voter impersonators, they would in all likelihood allow impostors to vote whether or not there was a photo ID or any other identification requirement.

II. ACVR's Reliance On Polling Data And On An Alleged Nationwide, Non-Partisan Trend Is Irrelevant And Misleading

Lacking actual evidence of impersonation fraud, ACVR relies on alleged public perceptions of fraud reflected in polls and an alleged non-partisan trend to require photo IDs for in-person voters. It suffices to say that neither polls nor nationwide trends justify imposing unnecessary or unreasonable burdens on the right to vote of disadvantaged groups. One of the basic tenets of our constitutional democracy is that fundamental constitutional rights are not subject to plebiscite. *See Lucas v. Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713, 736-37 (1964) (“[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.”) (quotation marks and citation omitted). The very purpose of the fundamental individual rights guaranteed by the Constitution is to protect voiceless, disadvantaged minorities like those affected here from infringement of their rights by unsympathetic or even hostile majorities.

Accordingly, notwithstanding alleged public perceptions, two versions of a photo ID law enacted by the Georgia legislature have been enjoined as violating the federal and Georgia Constitutions,¹ and the Missouri Supreme Court just last week struck down the photo ID law enacted by the Missouri legislature as a violation of the Missouri

¹ A federal district court enjoined two versions of Georgia's photo ID law as violating the U.S. Constitution, *see Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (“*Common Cause F*”); *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) (“*Common Cause II*”). In addition, after a Georgia state court temporarily enjoined the photo ID law based on the Georgia constitution, *see Lake v. Perdue*, No. 06-cv-119207, Temporary Restraining Order (Fulton Cty. Ga. Sup. Ct. July 7, 2006), available at http://www.fcdr.com/Editorial/pdf/pdf%20archive/a_m.pdf, the Georgia Supreme Court denied the State's request for a stay of that decision, *see Perdue v. Lake*, No. S06M1856 (Ga. July 12, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/orderupholdingTRO.pdf>. Georgia's photo ID law will not be enforced in this Fall's elections.

Constitution.² In doing so, the Missouri Supreme Court rejected precisely the same argument ACVR advances here, concluding that although “[supporters] argue that the Photo-ID Requirement nonetheless should remain in place because it will reassure voters who ‘perceive’ that fraud exists . . . this justification places too great an encumbrance on the right to vote of [voters] who cannot show the . . . photo IDs the statute requires.”

Weinschenk v. State, ___ S.W.3d ___, 2006 WL 2959284, at *2 (Mo. Oct. 16, 2006).

Moreover, as we discuss below, ACVR’s description of the polling data is seriously misleading, and the so-called non-partisan, nationwide trend is in fact a highly partisan effort that many consider a voter suppression scheme. See Joyce Purnick, *Stricter Voting Laws Carve Latest Partisan Divide*, N.Y. Times, Sept. 26, 2006, at A1.

A. The Polling Data

Although ACVR seeks to justify photo ID requirements like the Voter ID Law by pointing to polling data it claims shows “widespread public support,” (see ACVR Br. at 15), the polls cited by ACVR suffer from significant flaws that undermine their utility. More importantly, ACVR mischaracterizes their findings.

ACVR claims that one poll implies widespread public support for photo ID laws, but the poll it relies on does not establish this support. (See ACVR Br. at 11 n.16 (citing Wendy W. Simmons, *Black Americans Feel Cheated by Election 2000*, Gallup News Service, Dec. 20, 2000).) The Gallup poll on which ACVR relies did not even address photo ID requirements. Moreover, while it did report that two-thirds of Americans had little confidence in the fairness of the 2000 election – and that 68% of African Americans

² See *Weinschenk v. State*, ___ S.W.3d ___, 2006 WL 2959284 (Mo. Oct. 16, 2006), affirming *Weinschenk v. State*, No. 06AC-CC00656 (Cole Cty. Mo. Cir. Ct. Sept. 14, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MophotoID.pdf>.

felt “cheated” after that election – much of this sentiment reflected concerns that votes would not be counted and was entirely unconnected to any threat of impersonation fraud. (See Simmons at 6.)

Moreover, the other polls relied on by ACVR are meaningless. They do not identify which portion of those surveyed are voters who already have photo IDs and for whom a photo ID requirement is no burden at all, and which portion, if any, are disadvantaged voters – persons of color or low income, elderly, disabled or homeless persons – who do not have photo IDs and for whom a photo ID requirement does impose the burden and inconvenience of obtaining the required photo ID.

Thus, ACVR also claims that 81% of respondents in a Wall Street Journal/NBC poll supported photo ID requirements, (*see* ACVR Br. at 15), but this poll (the “Hart and McInturff Study”) surveyed a sample consisting of respondents who were 75% white, and 64% of whom had at least some college education. Hart and McInturff Study at 2, 21. The views of this unrepresentative population do not accurately reflect the national perspective on photo ID laws.

Similarly, the polls ACVR says illustrate that residents of Missouri, Pennsylvania, and Washington State support photo ID requirements in overwhelming numbers do not provide the required demographics. Moreover, the polls of Missouri and Pennsylvania voters were organized by ACVR itself, and provide little to no explanation of the methodologies used. (*See* ACVR Br. at 15 n.22 (citing ACVR, Press Release: Missourians Strongly Favor Photo ID Plan); *id.* at 16 n.23 (citing ACVR, Press Release: Pennsylvanians Support ID Requirements at the Polls).) And, although it is axiomatic that the phrasing of survey questions can be determinative of the answers given, *see*

Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 387 (7th Cir. 1953), the polls organized by ACVR provide no indication of the specific questions used to elicit respondents' answers. There is also no indication of the questions used to determine Washingtonians' views on photo ID laws. (See ACVR Br. at 16 n.24 (citing <http://www.effwa.org/files/pdf/Poll%20results-public.pdf>.)

Thus, even if public opinion were relevant to the constitutional analysis here – and it is not – the polls ACVR relies on in claiming widespread support for photo ID laws do not substantiate the conclusions ACVR draws from them.

B. The So-Called Nationwide, Non-Partisan Trend

Despite ACVR's claims, there is no such nationwide, non-partisan trend in favor of adopting laws that require in-person voters to show photo ID. As the Brennan Center demonstrated, in 47 states, voters may vote in person without showing a photo ID. (See Brennan Center Br. at 21-25.) ACVR states that photo IDs are required of voters in seven states, but as the Brennan Center showed, although photo IDs are *requested* of voters in these seven states, voters who do not have photo IDs are given less onerous alternatives in four of the seven states – Florida, Hawaii, Louisiana, and South Dakota. (See *id.* at 24-25.) Only three states – Georgia, Indiana, and Missouri – have adopted laws that do not provide less burdensome alternatives to photo ID, but as noted, the photo ID statutes in Georgia and Missouri have been struck down. And although ACVR relies heavily on the district court's opinion upholding Indiana's photo ID law, (see ACVR Br. at 2-3 (citing *Indiana Democratic Party v. Rokita*, 2006 WL 1005037, 2006 U.S. Dist. LEXIS 20321 (S.D. Ind. Apr. 14, 2006)), that decision is on appeal to the Seventh Circuit, which heard oral argument on October 18, 2006, and is sub judice.

Moreover, it can hardly be claimed that the enactment of photo ID laws in Georgia, Indiana and Missouri was non-partisan. Those states' statutes were enacted largely on straight party line votes, over objections that the statutes were totally unnecessary to prevent impersonation fraud and would disenfranchise disadvantaged groups.³

ACVR also attempts to demonstrate widespread support for voter ID laws by citing H.R. 4844, a bill that was recently approved by the U.S. House of Representatives. But H.R. 4844 shows no bipartisan consensus favoring photo ID requirements. The bill was passed by a thin margin along nearly straight party lines – only 4 Democrats and 3 Republicans crossed party lines – and the bill came under withering criticism from civil rights groups. *See, e.g.*, Letter from Mary G. Wilson, President, League of Women Voters, to Members of the House of Representatives, Sept. 19, 2006, *available at*

³ Georgia's photo ID law was passed by that state's House of Representatives by a vote of 89 Republicans and 2 Democrats in favor and 72 Democrats and 3 Republicans opposed. In the Georgia Senate, the vote was 31 Republicans and no Democrats in favor and 18 Democrats and 2 Republicans against. *See Common Cause I*, 406 F. Supp. 2d at 1331. Georgia's Secretary of State urged rejection of the photo ID law because it was "unnecessary" and created "a very significant obstacle to voting on the part of hundreds of thousands of Georgians, including the poor, the infirm and the elderly who do not have drivers licenses because they are either too poor to own a car, are unable to drive [a] car, or have no need to drive a car." *Id.* at 1332. Similarly, Indiana's photo ID law was adopted after a bitter "partisan legislative disagreement," *Rokita*, 2006 WL 1005037, at *1, in which "Republicans passed the measure largely on party lines as an anti-fraud measure, while Democrats bitterly opposed what they said would disenfranchise voters." Scott Lauck, *Missouri's Voter ID Law Under Scrutiny*, Missouri Lawyers Weekly, 2006 WLNR 14177807, Aug. 14, 2006. Missouri's experience was no different. The Missouri Secretary of State strongly opposed the photo ID bill, noting that it was entirely unnecessary to prevent impersonation fraud, that voter disenfranchisement was a far greater danger than impersonation fraud, and that the bill "only had the support of one political party." Letter from Robin Carnahan, Missouri Secretary of State, to Matt Blunt, Missouri Governor (May 11, 2006), *available at* <http://www.sos.mo.gov/inc/05-11-06Carnahan-to-Blunt-VoterID.pdf>.

http://www.lwv.org/AM/Template.cfm?Section=Election_Reform&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6478; Lawyers' Committee for Civil Rights Under Law, Press Release: Lawyers Committee Disappointed in House Vote in Support of Harmful Voter ID Bill, Sept. 20, 2006, *available at* http://www.lawyerscomm.org/2005website/publications/press/press092006_a.html. Moreover, the Senate has not even begun to consider this legislation.

Finally, ACVR claims that a "widespread" trend is established because photo ID bills are pending in several states. (*See* ACVR Br. at 16.) But the introduction of bills which have not been enacted plainly does not establish a non-partisan, nationwide trend.

III. The Remote or Hypothetical Risk Of Impersonation Fraud Does Not Justify The Burdens Imposed On Disadvantaged Voters

The Brennan Center brief explains that Albuquerque's Voter ID Law is an unreasonable and disproportionate response to the fear or perception of impersonation fraud that is essentially unsubstantiated. (*See* BrennanCenter Br. at 19-25.) ACVR's brief largely ignores these arguments.

The Voter ID Law plainly burdens disadvantaged voters who currently lack a photo ID. As the Missouri trial court said in striking down that state's photo ID law:

The photo ID burden placed on the voter may seem minor or inconsequential to the mainstream of our society for whom automobiles, driver licenses, and even passports are a natural part of everyday life. However, for the elderly, the poor, the under-educated, or otherwise disadvantaged, the burden can be great if not insurmountable, and it is those very people outside the mainstream of society who are the least equipped to bear the costs or navigate the many bureaucracies necessary to obtain [photo IDs].

Weinschenk v. State, No. 06AC-CC00656 (Cole Cty. Mo. Cir. Ct. Sept. 14, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MophotoID.pdf>. (See also Brennan Center Br. at 5.)

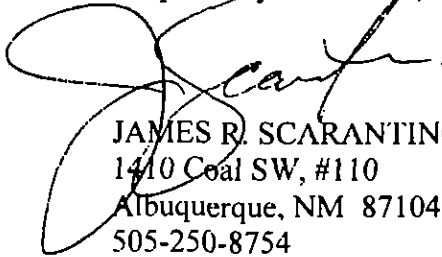
In evaluating the constitutionality of the Voter ID Law, the Court must weigh the burdens it imposes against Albuquerque's interest in deterring impersonation fraud, and the extent to which this interest makes the Voter ID Law necessary. See *Burdick*, 504 U.S. at 434. The Brennan Center demonstrates that, given the wide variety of adequate and less burdensome means used to combat impersonation fraud under federal law and in 47 states, including New Mexico, a photo ID requirement is entirely unnecessary. The Missouri Supreme Court reached a similar conclusion, noting that while "the Photo-ID Requirement is intended to prevent only impersonation of a registered voter and will not affect absentee ballot or registration fraud . . . [the state] legislature has already eliminated the opportunity to commit voter impersonation fraud with the enactment of the precautions it adopted in response to the federal Help America Vote Act ("HAVA")." *Weinschenk*, 2006 WL 2959284, at *1. These laws, like New Mexico's, include a variety of less onerous voter identification requirements as alternatives to a photo ID.

The Voter ID Law, therefore, cannot be considered a reasonable, proportionate response to the remote and unsubstantiated risk of impersonation fraud.

CONCLUSION

ACVR's brief contributes nothing of value to the resolution of the issues before this Court. For the reasons set forth in plaintiffs' moving and reply briefs and the Brennan Center's amicus brief, the plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,



JAMES R. SCARANTINO
1410 Coal SW, #110
Albuquerque, NM 87104
505-250-8754

COUNSEL FOR PLAINTIFFS

I hereby certify that I served
a true and correct copy of
the foregoing by U.S. mail
upon:

Paula Forney
Mark Shoesmith
Assistant City Attorneys
P.O. Box 2248
Albuquerque, NM 87102

And

Patrick J. Rogers
Modrall, Sprling, Roehl, Harris & Sisk
500 4th St. NW # 1000
Albuquerque, NM 87102

This 25th day of October, 2006

