

**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.

**BRIEF OF *AMICUS CURIAE*
AMERICAN CENTER FOR VOTING RIGHTS LEGISLATIVE FUND IN
SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION and IN
OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTION**

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INTERESTS OF THE AMICUS

The American Center for Voting Rights Legislative Fund (“ACVR”) is a nonpartisan, national non-profit organization devoted to commonsense election reforms that increase confidence in our electoral system. ACVR was founded on the belief that public confidence in our electoral system is the cornerstone of our democracy. The organization was established to further the common good and general welfare of citizens of the United States by educating the public about the importance of participating in our electoral process, and by supporting efforts to increase public participation and confidence in our electoral process. ACVR supports election reforms such as those developed by the bipartisan Commission on Federal Election Reform co-chaired by former President Jimmy Carter and former Secretary of State James Baker (the “Carter-Baker Commission”) that will make it easy to vote but hard to cheat. ACVR is dedicated to protecting the rights of all citizens to participate in the electoral process free of intimidation, discrimination or harassment. Where necessary, ACVR also defends the right of voters to participate in the electoral process. ACVR works for equal access to the ballot for all eligible citizens irrespective of race, gender or partisan affiliation. ACVR neither supports nor endorses any political party or candidate.

SUMMARY OF ARGUMENT

Opponents of the Albuquerque voter ID law were not successful before the City Council or the voters of Albuquerque. They have come to this Court invoking the First Amendment, the Fourteenth Amendment and the specter of the “poll tax” to convince this Court that the “burden” on the constitutional rights of “many” persons (none of whom can actually be located) must be vindicated and the law overturned. Summary Judgment in

favor of the Defendant is warranted because the Albuquerque voter ID law is a step in the right direction to prevent fraud and to provide public confidence in the voting process.

The remaining Plaintiffs and the Brennan Center do not cite any expert testimony offered or admitted in this case to support the very broad allegations of the complaint before this Court. In the Indiana proceedings concerning the Indiana ID statute, in which the American Civil Liberties Union (“ACLU”) and the Brennan Center also opposed an even more restrictive version of voter identification, the expert testimony offered to support the same allegations was not well received: “The Democrats submitted an expert report prepared by Kimball W. Bruce (the ‘Bruce Report’) . . . but the court found the analysis and conclusions utterly incredible and unreliable.” *Indiana Democratic Party v. Rokita*, 2006 WL 1005037, 2006 U.S. Dist. LEXIS 20321 *62 (S.D.Ind. April 14, 2006), *appeal docketed*, Nos. 06-2218 and 06-2317 (7th Cir. June 19, 2006). Although Plaintiffs herein promised to provide experts to support the same broad allegations of constitutional infirmity that were made in Indiana, they have been unable to locate any expert testimony to support the complaint.

In an attempt to overcome their lack of admissible expert testimony, Plaintiffs try to substitute the strongly held personal preferences of several non-experts who provide non-admissible evidence, conclusory personal opinions, and irrelevant personal experiences. Unfortunately for Plaintiffs, their personal preferences, no matter how strongly held, are no substitute for admissible expert opinions that might provide a valid basis for considering Plaintiffs’ constitutional attack on the City Council and the voters’ attempt to address voter fraud in Albuquerque. Because Plaintiffs fail to offer any expert opinion, this Court has even less reason than the Indiana Court to consider Plaintiffs’ unsupported and unsupportable allegations: “. . . Plaintiff’s case is based on the implied

assumption that the Court should give these constitutional and statutory provisions an expansive review based on little more than their own personal and political preferences.”

Id. at *2.

With all due respect, this Court should decline Plaintiffs’ invitation to substitute their policy preferences in place of the decisions of the Albuquerque voters and City Council. This Court should honor the institutional restraints recognized by the *Rokita* court (*citing* Chief Justice Kozinski of the 9th Circuit):

It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us . . . Expanding some [provisions] to gargantuan proportion while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it’s using our power as federal judges to constitutionalize our personal preferences.

Id. at *6 (*citing* *Silveira v. Lockyear*, 328 F.3d 567, 568-69 (9th Cir. 2003) (C.J. Kozinski *dissenting*)).

Plaintiffs have no First Amendment or any other constitutional basis to invalidate the Albuquerque voter ID law, particularly when none of the “many” persons who might be “burdened” can actually be located. To the extent this Court is inclined to consider the Plaintiffs and the Brennan Center’s citation to newspaper articles, political science theories, treatises, polls and other inadmissible materials, it should, like the City Council and the voters of Albuquerque, conclude that photo identification is a significant, valid, and appropriate means to deter fraud and increase voter confidence in the election process.

The Supreme Court has recognized, “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). Such regulation, by helping to ensure that elections are fair and honest, protects rather than

interferes with the right to vote. Regulations such as the Albuquerque voter ID law currently before this Court, help ensure that elections are fair and honest and protect the right to vote. Contrary to Plaintiffs' contentions, the Albuquerque voter ID law only interferes or burdens those persons interested in less than honest elections.

In balancing these two interests – the right to vote and the state's (and citizens') interest in fair and honest elections – the United States Supreme Court has adopted a “flexible standard” of review in which the rigorousness of the inquiry depends on the extent of the burden that the regulation imposes on the right to vote. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Regulations imposing severe burdens on the right to vote are subject to strict scrutiny; those imposing burdens that are not severe are subject to less intensive scrutiny, and “reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests.” *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring).

Reasonable photo ID requirements easily satisfy the flexible standard of review specified by the Supreme Court in *Burdick*. Albuquerque's photo ID law is part of a nonpartisan, nationwide movement with significant public support to adopt measures designed to improve our nation's election system.¹ Photo ID requirements are highly popular, nondiscriminatory efforts that are clearly related to preventing fraud and increasing voter confidence – two important (indeed compelling) government interests. Contrary to the Plaintiffs' assertions, voter fraud – including votes cast illegally in the name of another legal voter or a fictional voter – is a significant problem in the United States, and photo ID requirements will help to prevent it. *See Rokita* at *34-35, 193.

¹ The United States House of Representatives recently passed a national photo identification requirement. *See* H.R. 4844, the Federal Election Integrity Act of 2006 (September 20, 2006).

Photo ID requirements impose at most an incidental or minor burden on the right to vote and – contrary to critics’ claims – do not discriminate against minority (or other) voters. Indeed, Plaintiffs have been unable to find a single person in the entire City of Albuquerque who will be unable to vote due to the photo ID requirement. Further, by increasing voter confidence in the election results, photo ID requirements will increase voter participation.

Albuquerque’s photo ID requirement is also consistent with the 2005 recommendations of the bipartisan Carter-Baker Commission,² which recognized that, with the enactment of the new federal REAL ID program, photo ID is a fundamental part of living in modern society, and requiring people to present photo ID before voting will increase confidence in our nation’s elections.

ARGUMENT

Photo ID Laws Are A Reasonable Measure to Prevent Vote Fraud and Increase Voter Confidence.

In numerous decisions going back more than 20 years, the Supreme Court has made clear that a “flexible standard” of review is to be applied to state regulations of the electoral process. If the burden imposed on the right to vote is not severe, “reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests.” *Clingman*, 544 U.S. at 603 (O’ Connor, J., concurring).

As the Court explained in *Burdick*:

Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” . . . [W]hen a state election law

² Commission on Federal Election Reform, *Building Confidence in US. Elections* (Sept. 2005), available at <http://www.american.edu/ia/cfer/report/report.html>.

provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.

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

In the years since *Burdick*, the Court has continued to explain that reasonable, nondiscriminatory restrictions on voting rights are subject to this flexible standard of review and will be upheld if they serve important interests. In *Clingman* the Court’s most recent decision, the Court upheld Oklahoma’s semi-closed primary system, holding that it did not violate the right to freedom of association. *See Clingman*, 544 U.S. at 584.

To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign related disorder.

Id. at 593 (quotation and citations omitted).

Photo ID laws generally, and the Albuquerque voter ID law particularly, easily satisfy this flexible standard of review. Although critics portray identification laws as unnecessary, burdensome, and discriminatory, the evidence shows just the opposite.

A. Photo ID Laws Support Important Government Interests.

Photo ID laws serve important – indeed, critical – state interests: preventing voter fraud (and the attendant dilution of the votes of legitimate voters) and enhancing public confidence in the electoral process. The importance of these state interests is beyond doubt. *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-789 (1978) (“Preserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance”) (citations and brackets omitted).

As the Supreme Court explained more than 120 years ago: “In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.” *Ex parte Yarbrough*, 110 U.S. 651, 666-67 (1884). Moreover, it should be remembered that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The Brennan Center, affiliated with the New York University School of Law, premises its brief on the theory that voter identification fraud is simply not a legitimate problem for consideration in Albuquerque.³ This invitation to substitute the Plaintiffs’ preferences for the conclusions of Albuquerque voters and City Council also ignores the findings in the City Council’s preamble to the Amendment. *See* Ex. A to Plaintiffs’ Brief in Support of Plaintiffs’ Motion for Summary Judgment at 1-2 (Dkt. 66) (“Whereas the integrity of the voting process is essential for the public to have confidence in the election process . . . photo voter identification will help . . . prevent votes from becoming fraudulent . . . [and] eliminate the possibility of having a person’s vote stolen by an

³ The Brennan Center’s actual familiarity with the Albuquerque ID law and the Albuquerque experience is not clear. The Brennan Center’s arguments do not consider the specifics of the Albuquerque ID law and the substantive differences with the state laws at issue in Indiana and Georgia. The Brennan Center argues that the City need not concern itself with fraud because the federal government has already done so in HAVA (Help America Vote Act, 42 U.S.C. § 15301, *et seq.*). The theory that HAVA applies to non-federal elections is not explained. The HAVA preamble is to the contrary: “. . . to assist in the administration of Federal elections . . . certain Federal election laws and programs . . . for States and units of local government with responsibility for the administration of Federal elections . . .” PL 107-252, Oct. 29, 2002. *See also* § 42 U.S.C. 15482(a).

imposter, as was the case with at least one Albuquerque citizen in the 2004 election . . .”); *see also Voter Photo ID Law Endorsed*, Albuquerque Journal, September 23, 2006, Section A, pp. 1-2 (“The Democratic and Republican candidates for secretary of state both vowed Friday to push for a state law requiring New Mexico voters to show photo identification before casting their ballots. ‘My platform calls for security for your vote. We need photo ID in the state of New Mexico,’ [said Vickie] Perea... ‘The photo ID is the solution. I am also in favor,’ said [Mary] Herrera.”).

Voter fraud concerns are not limited to Albuquerque but rather are a pervasive national concern and voter fraud is a reality. *Rokita* at *34-35; *see also Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (“Voting fraud is a serious problem in U.S. elections”), *cert. denied*, 544 U.S. 923 (2005). Contrary to Plaintiffs’ and the Brennan Centers’ representations, there is ample evidence that in-person voter fraud (*i.e.*, fraud by people voting in person, as opposed to absentee or mail-in ballots) remains a problem in this country. The report of the bi-partisan Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker, provides several examples of in-person fraud:

The November 2004 elections also showed that irregularities and fraud still occur. In Washington, for example, where Christine Gregoire was elected governor by a 129-vote margin, the elections superintendent of King County testified . . . that ineligible ex-felons had voted and that votes had been cast in the names of the dead.... In Milwaukee, Wisconsin, investigators said they found clear evidence of fraud, including more than 200 cases of felons voting illegally and more than 100 people who voted twice, used fake names or false addresses, or voted in the name of a dead person.... By one estimate, for example, there were over 181,000 dead people listed on the voter rolls in six swing states in the November 2004 elections, including almost 65,000 dead people listed on the voter rolls in Florida.⁴

⁴ Commission on Federal Election Reform, *supra* n. 1, at 4.

There is much more evidence of in-person vote fraud and the potential for such fraud.⁵

- The *Detroit News* reported that, “Detroit’s election records are so plagued with mistakes and inconsistencies-including voter registry rolls packed with as many as 20,000 dead people and roughly 100,000 wrong addresses-that the overall integrity of Detroit elections is in question.... Across Michigan, 132 people were listed as having voted in November’s local elections although they had recently died.”⁶
- The *Chicago Tribune* analysis in December 2004 found that Florida had more than 64,000 dead people on its voter rolls.⁷ The *New York Daily News* has reported that some 46,000 people were illegally registered to vote in both Florida and New York City (and that between 400 and 1,000 registered voters voted twice in at least one election).⁸
- In September 2004, the *Kansas City Star* found more than 300 people may have voted twice in the same election in Missouri in 2000 and 2002, and the number “could be even higher.”⁹
- The U.S. Department of Justice has sued Missouri over its inflated voter rolls, noting that in some jurisdictions more than 150% of the voting age population was registered to vote.¹⁰
- “Hundreds of Coloradans are being investigated for voter fraud in the November [2004] elections. Prosecutors in at least 47 counties are probing cases involving

⁵ For historical background on the problem of election fraud in the United States, *see generally* Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition-1742-2004* (2005), and John Fund, *Stealing Elections How Voter Fraud Threatens Our Democracy* (2004); *see also* American Ctr. For Voting Rights, *Vote Fraud, Intimidation & Suppression in the 2004 Presidential Election* (Aug. 2005), available at <http://www.ac4vr.com/reports/072005/default.html>; Testimony of Mark F. (Thor) Hearne, II, before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Property Rights, available at http://www.acvr.com/app/library/Hearne_Testimony_Election_Observers.pdf.

⁶ Lisa M. Collins, *In Michigan, Even Dead Vote*, *Detroit News*, Feb. 26, 2006, at 1A. For further background regarding fraud in Michigan, see Brief and Appendix for Michigan Republican Party as Amicus Curiae, *In re Request for Advisory Opinion Regarding Constitutionality of 2005 P.A. 71*, No. 130589 (Mich. filed July 19, 2006) (describing rampant fraud and containing death certificates for current voters in Michigan).

⁷ Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, *Chicago Trib.*, Dec. 4, 2004, at C13.

⁸ Russ Buettner, *Exposed Scandal of Double Voters*, *N.Y. Daily News*, Aug. 22, 2004, at 4.

⁹ Greg Reeves, *One Person, One Vote? Not Always*, *Kansas City Star*, Sept. 5, 2004, et al.

¹⁰ *Missouri Voter Lists Draw Suit*, *Columbia Daily Trib.* (Nov. 23, 2005), available at <http://www.columbiatribune.com/2005/Nov/20051123NewsOO9.asp>.

accusations of forged signatures, felons voting or people who attempted to vote twice.”¹¹

- It was reported in January 2005 that the FBI and U.S. Attorney’s office were investigating 59 cases of double voting in Duval County, Florida.¹² In Broward County, officials referred at least 30 cases of double voting to the Florida Department of Law Enforcement.¹³

Nor does it take a substantial amount of voter fraud to alter the results of an election. The 2001 National Commission on Electoral Reform reported that, since 1948, individual state presidential election results have been decided 31 times by less than 1% of the votes cast; about 4% of Senate and 2% of House seats are won by a margin of less than 1% of the votes cast; 5% of gubernatorial races are won by less than 1% of the votes cast; and in any given year the probability that there is at least one election within 1% is 71% for Senate and 99% for House elections.¹⁴ The 2000 Presidential vote count in New Mexico credited Senator Gore with a 366 vote lead when the Secretary of State refused to review numerous discrepancies in the county vote canvasses. The 2004 Presidential vote count in New Mexico was similarly within 1% of the two candidates. Votes do matter and accurate and honest voting procedures are the legitimate province of the Albuquerque City Council and Albuquerque voters.

The brief filed by *Amicus Curiae* Brennan Center argues there is no evidence or insufficient evidence of in-person voter fraud. Brennan Center, p. 7. Evidence certainly exists, but the underlying premise is seriously flawed: the citizens and the city may act to address a potential problem on a prophylactic basis. ID opponents are careful never to

¹¹ Susan Greene & Karen E. Crummy, *Voter Fraud Probed in State Double Dippers*, Denver Post, Mar. 24, 2005, at A-01.

¹² David DeCamp, *Double Voting Being-Investigated*, Fla. Times-Union, Jan. 25, 2005, at B-1.

¹³ Amy Sherman, *Double –Voter’s Names Going to Prosecutors*, Miami Herald, Nov. 14, 2004, at 5B.

¹⁴ *Reports of the Task Force on the Federal Election System*, Aug. 2001.

discuss what proof is necessary to convince them. Perhaps multiple convictions, upheld on appeal? But neither the citizens of Albuquerque and the City Council, nor any legislative branch, is obligated to wait until “proof” sufficient to satisfy all opponents of voter fraud measures is produced. It is appropriate for the City Council and the citizens of Albuquerque to adopt regulations to prevent vote fraud. It is not necessary to wait until after your most precious possessions are robbed to begin locking the door.

Legislatures ... should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986); see also *Federal Election Comm’n v. Nat’l Right to Work Comm.*, 459 U. S. 197,210 (1982) (“Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”); *Timmons v. Twin Cities Area News Party*, 520 U.S. 351, 364 (1997) (“Nor do we require elaborate, empirical verification of the weightiness of the State’s asserted justifications.”).

Moreover, the City may take action to avoid the appearance of fraud as well as its actual occurrence. A Rasmussen Reports poll found that 58% of Americans believed that there was “a lot” or “some” fraud in American elections,¹⁵ and a Gallup poll after the 2000 election showed that 67% of adults nationally had only “some” or “very little” confidence in the way votes are cast and counted in our country.¹⁶ Public perceptions grounded on publicly reported evidence of fraud are a further justification for fraud-

¹⁵ Richard L. Hasen, *Beyond the Margin of Litigation. Reforming US. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee. L. Rev. 937,942 (2005).

¹⁶ Wendy W. Simmons, *Black Americans Feel “Cheated” by Election 2000*, Gallup News Serv., Dec. 20, 2000.

prevention requirements like Albuquerque’s voter ID law. *See, e.g., McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 143 (2003) (“Our cases have made clear that the prevention of corruption *or its appearance* constitutes a sufficiently important interest” (emphasis added)); *Nat’l Right to Work Comm.*, 459 U.S. at 208 (observing “the importance of preventing ... the eroding of public confidence in the electoral process through the appearance of corruption”); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (upholding campaign contribution limits in part to avoid “the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse”).

The Brennan Center also complains that Albuquerque’s ID requirement does not address “all” other possible forms of fraud. However, the extent and the order in which to address actual or potential problems in the electoral system is a quintessentially legislative judgment that will not ordinarily be disturbed by the courts. There is no requirement that the fraud Plaintiffs perceive must be addressed before any fraud may be addressed. The Supreme Court upheld an Illinois law that precluded pretrial detainees from voting by absentee ballot holding:

. . . [A] legislature traditionally has been allowed to take reform “one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,” and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969) (citations omitted) (emphasis added); *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

Furthermore, the Brennan Center wrongly dismisses the significance of voter ID requirements in preventing voter fraud. For example, the Brennan Center attempts to minimize the scope of impersonation fraud by asserting that “other evidence ... suggests

that many suspected cases of ‘ghost voting’ ... are actually the result of clerical errors.” Brennan Br. at 12 n. 9. The only “evidence” cited by the Brennan Center for that broad claim is based on multiple hearsay and the conclusory, inadmissible reporters’ *speculation* that a handful of ghost votes *might* have been explained by clerical error. *Id.*

There is actual evidence that clerical errors in fact open the door to fraud and make it difficult, if not impossible, to uncover the evidence necessary to prosecute voter-fraud crimes. A joint federal-local law enforcement task force in Milwaukee found “clear evidence of fraud in the Nov. 2, 2004 election,” including hundreds of felons voting and “more than 100 individual instances of suspected double-voting, voting in names of persons who likely did not vote, and/or voting in names believed to be fake.”¹⁷ The U.S. Attorney charged 18 people with felonies, including four cases of “double voting,” which could involve impersonation fraud.¹⁸ Further prosecutions were impeded by widespread recordkeeping failures:

the task force has found widespread record keeping failures and separate areas of voter fraud. These findings impact each other. Simply put: it is hard to prove a bank embezzlement if the bank cannot tell how much money was there in the first place. Without accurate records, the task force will have difficulty proving criminal conduct beyond a reasonable doubt in a court of law.

Preliminary Findings of Joint Task Force, May 10, 2005. The U.S. Attorney publicly noted the difficulties of bringing prosecutions: “I don’ t know how you are going to prove a case when there is no paper trail.”¹⁹ Indeed, it is likely that much impersonation fraud

¹⁷ Greg J. Borowski, *Inquiry Finds Evidence of Fraud in Election*, Milwaukee Journal Sentinel, May 11, 2005.

¹⁸ Steve Schultze, *No Vote Fraud Plot Found*, Milwaukee Journal- Sentinel, Dec. 6, 2005.

¹⁹ Schultze, *supra* n.18.

goes undetected. As the district court in *Rokita* noted, “without a photo identification requirement it is nearly impossible to detect in-person voter impersonation.” *Id.*, *134.

Impersonation fraud is not difficult to engineer. Operatives working the polls can determine who has (and has not) voted and pass this information on to persons with incentives to vote fraudulently. In most non-rural locations, poll workers are powerless to challenge potential imposters. After the voting occurs, there is little or no chance of catching perpetrators. In the unlikely event that the real voter comes in later to vote, the imposter will be long gone, and even if the costly effort to attempt to determine whether people fraudulently voted in the names of dead people or other registered voters is undertaken, there is no way to find and punish the imposters after the fact.

In short, the number of prosecutions and convictions for impersonation fraud can hardly be expected to be an accurate measure of such fraud. Moreover, given the relative ease with which parties can commit impersonation fraud and the low risk of getting caught, evidence that people and parties are committing *other* forms of election and voter fraud makes it reasonable for the Albuquerque voters to conclude that impersonation fraud is a serious concern that impacts both the perception of a fair election and the election itself. Photo ID requirements are an obvious method for advancing the important government interests of reducing voter fraud and increasing public confidence in elections.

B. Photo ID Provisions Are a Reasonable Response to Voter Fraud and Impose An Insignificant “Burden” on the Right To Vote.

Photo ID requirements such as those adopted by the Albuquerque voters are a reasonable response to the evidence of and concerns about voter fraud, and impose, at most, a minor burden on the right to vote. Indeed, Plaintiffs have been unable to locate a

single voter who does not already possess a form of voter identification which is sufficient for him or her to vote in a City election.

The reasonableness of photo ID requirements is demonstrated in part by the widespread public support they garner. In Albuquerque, the photo ID law passed with 73% of the vote, with “overwhelming” support of Republicans and Democrats, Anglos, Hispanics and across income levels.²⁰ Nationwide, a Wall Street Journal/NBC poll conducted in April 2006 showed that 81% of respondents nationwide supported (and only 7% opposed) photo ID requirements.²¹ Similar results were found in polls in Missouri (89% support)²² and Pennsylvania (82% support).²³ The Evergreen Freedom Foundation found similar levels of support in Washington.²⁴ *Rokita* at *36.

The Brennan Center next attacks photo ID on the grounds that better maintenance of Albuquerque’s voter registration rolls would be “the best means” of combating ghost voting (Brennan Br. at 7) and argues that Albuquerque’s photo ID requirement is suspect because it is more restrictive than the requirements of the Help America Vote Act (HAVA), which the Brennan Center says “represents Congress’s reasoned view of what is

²⁰ The photo ID ballot measure passed with 73 percent of the vote. See Erik Siemers, *ACLU Sues Clerk Over City’s New Voter ID Rule*, Albuquerque Tribune, Oct. 28, 2005, at A2, and pre-election polls showed photo ID with overwhelming support “among Republicans and Democrats, Anglos and Hispanics and across income levels” in Albuquerque, Dan McKay, *Voter Picture ID Has Wide Support*, Albuquerque Journal, Aug. 24, 2005, at A1. Albuquerque City Clerk Judy Chavez and other election officials “said the rule change didn’t cause any problems.” *New ID Rule Passes Test*, Albuquerque Journal, Nov. 16, 2005, at B1.

²¹ Press Release, American Ctr. for Voting Rights, *ACVR Legislative Fund Applauds NBC/WSJ Po11 Finding 80% Support for Photo ID Requirement* (April 30, 2006), available at <http://www.ae4vr.com/app/content.asp?ContentId=808>; see also Hart/McInturff, *Study #6062, NBC News/Wall Street Journal Survey* at 13 (April 2006), available at <http://online.wsj.com/public/resources/documents/po1120060426.pdf>.

²² Press Release, American Ctr. for Voting Rights, *Missourians Strongly Favor ID Plan* (March 23, 2006), available at http://www.ac4vr.com/states/MO/Polling_Release_032206.pdf.

sufficient to combat impersonation fraud.” *Id.* at 21.²⁵ But Congress stated expressly in HAVA that the identification requirements are merely a floor, not a ceiling that would preclude states from adopting serious measures to combat fraud. *See* 42 U.S.C. § 15484.

The House of Representatives and a growing number of states are adopting voter identification requirements – including photo ID requirements – to curb election fraud and promote greater confidence in the electoral system. As the Brennan Center acknowledges, 24 states now require that all voters present some form of documentary identification prior to voting. Seven of them – including states with Democratic legislatures such as Hawaii and Louisiana; swing states such as Florida and Missouri; and Republican states such as Georgia, Indiana, and South Dakota – specifically require that voters present photo ID. *See* Fla. Stat. § 101.043; Ga. Code Ann. § 21-2-417(a); Hawaii Rev. Stat. § 11-136; La. Rev. Stat. Ann. § 18:562(A)(2); Mo. Rev. Stat. § 115.427;²⁶ S.D. Codified Laws § 12-18-6.1. Legislation is pending in seven other states that, if enacted, would require photo ID to be displayed at the polls.²⁷

²³Press Release, American Ctr. for Voting Rights, *Pennsylvanians Support ID Requirement at the Polls* (Jan. 30, 2006), available at http://www.ac4vr.com/News/FINAL_PA_Poll_Release_1_30_06.pdf.

²⁴<http://www.ewfa.org/files/pdf/Poll%20results-public.pdf>

²⁵ Obviously (now), the U.S. House of Representatives’ “reasonable view” is that photo identification is required. *See* HR 4844.

²⁶ Available at <http://www.senate.mo.gov/06info/pdf-bill/tat/SBI014.pdf>. For further background regarding Missouri’s new law, see Mark F. (Thor) Hearne II, *The Missouri Voter’s Protection Act Real Election Reform for All Missouri Voters*, St. Louis Lawyer 12 (June 2006), available at <http://www.bamsl.org/members/stlawyer/archivehome.html>.

²⁷ The seven States are Illinois (HB 4224), Iowa (HF 2597), Maryland (HB 1194 and HB 1582), Minnesota (HF 1443), New Jersey (A114), Tennessee (SB 2827), and Washington (HB 2158 and SB 6333). The legislatures of Minnesota, New Hampshire, Pennsylvania, and Wisconsin also passed such legislation, but the legislation was vetoed.

Available polling also confirms the nonpartisan support for photo ID plans: 66% of Democrats and 92% of Republicans in Albuquerque support voter ID,²⁸ 87% of Democrats and 94% of Republicans in Missouri, by 79% of Democrats and 86% of Republicans in Pennsylvania.²⁹ A Rasmussen Research poll found that 82% of Americans, including 75% of Democrats, favor photo ID at the polls.³⁰

Moreover, the bipartisan Carter-Baker Commission on Federal Election Reform, which was formed to propose ways to increase confidence in the electoral system, recommended, by a 14-3 vote, a photo ID system for voting (“ . . . to ensure that persons presenting themselves at the polling place are the ones on the registration list . . .”). As the report explained:

Building confidence in U.S. elections is central to our nation’s democracy. At a time when there is growing skepticism with our electoral system, the Commission believes that a bold new approach is essential We should have an electoral system where registering to vote is convenient, voting is efficient and pleasant, voting machines work properly, *fraud is deterred*, and disputes are handled fairly and expeditiously.

This report represents a comprehensive proposal for modernizing our electoral system. We propose to construct the new edifice for elections on five pillars:

.....

Second, to make sure that a person arriving at a polling site is the same one who is named on the list, we propose a uniform system of voter identification based on the “REAL ID card” or an equivalent for people without a drivers license.

Commission on Federal Election Reform, *supra* n.2, at iv (emphasis added).

This recommendation by the Carter-Baker Commission, and particularly its incorporation of the federal REAL ID standard, puts Albuquerque’s photo ID requirement

²⁸ See *infra* at n.20.

²⁹ See *supra* at n.21.

³⁰ See Fund, *supra* n.5.

in proper perspective. When the REAL ID Act³¹ takes effects in 2008, for all practical purposes, everyone in the United States will be required to possess photo ID. Federal agencies will be prohibited from accepting state-issued identification unless the identification contains, among other things, a digital photograph of the person. Act § 202(a)(1), (d)(1). Furthermore, to obtain an identification card compliant with the REAL ID Act, an individual will have to present rigorous proof of the person's (1) identity, (2) social security number (or verification that the person is not eligible for such a number), and (3) lawful status in the United States. *See id.* § 202(c)-(d). Thus, any person needing to prove his identity to obtain federal benefits, and any person wanting to access federal facilities or board commercial aircraft will need to present some form of photo ID. *See id.* § 201(3). And in order to obtain that ID, that person will have to go through procedures more "burdensome" than the Albuquerque procedures (assuming walking or traveling to a city location to obtain a free identification is burdensome). Especially in light of the Carter-Baker Commission and the REAL ID Act, it is hard to understand how Albuquerque's photo ID requirement can be viewed as so burdensome as to be unconstitutional. Albuquerque's photo ID requirement represents at most a minimal burden on the right to vote.

Finally, the Brennan Center's assertions that a photo ID requirement will decrease voter turnout are nothing more than more unsubstantiated speculation. Brennan Br. 25. Equally plausible is the possibility that voter identification laws such as Albuquerque's photo ID law can only will strengthen voter confidence and increase turnout.³²

³¹ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005). The REAL ID Act passed the U.S. Senate with a vote of 100-0 and the U.S. House with a vote of 368-58.

³² *See* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925611
http://www.ac4vr.com/states/Missouri/Affidavit_of_Jeffrey_Milyo.pdf
http://www.ac4vr.com/states/Missouri/Affidavit_of_marvin_Overby.pdf

Of course, assuming someone can be located in the future who does not have acceptable identification, who is personally offended by absentee voting, and further assuming that walking or traveling to City Hall to obtain free identification is “burdensome” and resulted in someone not voting, photo ID laws would still be constitutional. “[S]triking the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.” *Griffin*, 385 F.3d at 1131.

C. Photo ID Rules Are Nondiscriminatory.

Photo ID requirements are nondiscriminatory. “Discriminatory” in this context does not simply refer to any difference in treatment as, obviously, virtually every regulation treats some people differently from others. As the Court explained in *Griffin*, “any such restriction [on voting] is going to exclude, either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” 385 F.3d at 1130, 1131-33.

Thus, in this context, discriminatory means differentiating between individuals on some improper basis, such as race. *See McDonald*, 394 U.S. at 806-07. Although some have asserted that photo ID laws disenfranchise minority voters, Plaintiffs promised, but have presented no evidence to support that assertion. In fact, polling shows that minority communities - like the public at large - overwhelmingly favor photo ID requirements.³³ In a poll of Pennsylvania voters, 70% of African-Americans and 90% of Hispanics said they

³³ *See supra* at nn. 21-23.

support a photo ID requirement for voting.³⁴ Similarly, in a 2005 survey of Missouri voters, 83% of African-American voters supported a photo ID requirement.³⁵ No one was “disenfranchised” after the federal district court in *Indiana* upheld the more “burdensome” Indiana statute.³⁶

CONCLUSION

For the reasons stated above and the reasons advanced by Defendant, the Court should deny Plaintiffs’ Motion for Summary Judgment and grant Defendant’s motion for Summary Judgment.

Respectfully submitted,

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³⁴ See *supra* n.31.

³⁵ See *supra* n.30.

³⁶ See Affidavit of Indiana SOS Todd Rokita in Missouri case available at http://www.ac4vr.com/states/Missouri/Affidavit_of_Todd_Rokita_Weinschenk.pdf

WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed this 11th day of October, 2006 to the following:

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