

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

HILL
FILED OCT 11 2006
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,

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CLERK-ALBUQUERQUE

Plaintiffs.

v.

No CV 05-1136 MCA/WDS

MILLIE U. SANTILLANES, ALBUQUERQUE
CITY CLERK,

Defendant.

DEFENDANT'S MEMORANDUM IN RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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DEFENDANT'S MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

Defendant Millie Santillanes, by and through her undersigned attorneys, submits this memorandum in response to plaintiffs' memorandum in support of their motion for summary judgment, Dkt. no. 66, filed September 14, 2006 (hereinafter plaintiffs' memorandum). The city has filed its cross motion for summary judgment, Dkt. no. 64, (hereinafter city's memorandum), which has addressed many of the same arguments asserted by plaintiffs in their motion. The city requests that it be granted summary judgment dismissing plaintiffs' claims in their entirety because there are no genuine issues of material fact remaining for decision.

- I. THE CITY'S RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS. Response to plaintiffs' memorandum, p. 2.¹

¹ To the extent possible, the city has designated the sections of plaintiffs' memorandum to which their arguments are responsive.

A. Response to plaintiffs' Voter I.D. Amendment facts

1. The city does not dispute plaintiffs' fact no. 1 but states that the voter ID law² is attached as Exhibit A to plaintiffs' memorandum.

B. Response to "The Plaintiffs" facts.

2. Not disputed.

3. Not disputed that Diane Goldfarb stated that the League objects to the voter ID Law. In response to this assertion, however, the League has failed to identify any individual member of the League who lacks photo identification sufficient for purposes of the voter ID law.³

4. The city does not dispute that the League contends that the voter ID law will impact the League and its members. The League, however, has failed to identify any individual member who lacks photo identification sufficient for purposes of the voter ID law. To the extent plaintiffs assert their personal opinions and preferences as operative facts for purposes of summary judgment, such facts are disputed.

5. Not disputed. In response to this assertion, however, SAGE Council has failed to identify any of its dues paying or other members who lack photo identification sufficient for purposes of the voter ID law.

² The ordinance at issue will be referred to as the voter ID law.

³ The city has filed a separate motion for summary judgment specifically arguing that none of the named plaintiffs have demonstrated standing to assert the issues raised. Dkt. No. 64. The standing issue is fully addressed in that motion and will not be restated here because plaintiffs have not argued standing in their motion to any significant extent. Further, the separate exhibits which establish the undisputed facts relevant to the city's summary judgment motion are attached to that brief and will not be attached separately here.

6. Not disputed. It is also established in the record that Plaintiff Kass has a valid identification sufficient for purposes of the voter ID law.

7. Not disputed. It is also established in the record that Plaintiff Grothus has a valid identification sufficient for purposes of the voter ID law.

8. Not disputed. It is also established in the record that Plaintiff Kazaras has a valid identification sufficient for purposes of the voter ID law.

9. Disputed. While Ms. Santillanes is the City Clerk, she does not administer the actual operation of the municipal polling places on election day. That administration is accomplished by the election clerks and judges appointed pursuant to Section 3-8-19 NMSA 1978.⁴ Ms. Santillanes was appointed as city clerk on December 1, 2005 and has never trained any precinct board members concerning the Voter ID amendment or administered any election involving the Voter ID amendment. Exhibit M, additional portions of Deposition of Millie Santillanes, attached hereto and incorporated herein by reference, at pp. 3, 6, 8.

C. Response to Voting in Albuquerque Municipal Elections.
Response to plaintiffs' memorandum, p. 5.

10. Disputed to the extent that plaintiffs imply that there are 369 separate polling places. The precincts within the Municipality of Albuquerque are consolidated pursuant to § 3-8-10. There are 171 consolidated precincts.

⁴ All New Mexico statutory references will be to NMSA 1978 unless otherwise indicated. References will be only to the statute number, without the "NMSA 1978" designation.

11. Not disputed.
12. Disputed. Section 2-12-10 does not apply to municipal elections. Identification of voter requirements for Municipal Elections is governed by Section 3-8-41. See discussion below.
13. Disputed. The Voter ID amendment controls over the provisions of § 3-8-41 and § 1-12-10 is not applicable. Section 3-8-1 allows the election laws of home rule municipalities to govern their municipal elections.
14. Not disputed
15. Not disputed. To the extent that this paragraph implies that a voter who voted on a provisional ballot cannot obtain a photo ID after election day and present such photo ID within the ten-day period after election day, the city disputes such implication or characterization of the Voter ID law.
16. Not disputed except that plaintiffs have omitted that portion of the Voter ID law which provides that the city clerk confirms with the county clerk that the person is actually the person who is registered to vote before any photo ID is issued.
17. Disputed as to plaintiffs' assertion that §§ 1-6-10 and 1-6-5 F. govern municipal elections. Sections 3-9-7 and 8 govern absentee ballots in municipal elections.
18. Disputed as to plaintiffs' assertion that § 1-6-3 governs municipal elections. Section 3-9-3 governs, allowing any qualified elector entitled to vote in the municipal election to vote by absentee ballot.

C.[sic]⁵ Response to Defendant's Official Interpretation of the Voter I.D. Amendment. Response to plaintiffs' memorandum, p. 8.

18.[sic] Disputed. The city disputes plaintiffs' characterization of the testimony of Ms. Santillanes as an "official Interpretation" of the voter ID law. Such characterization is unsupported and is misleading.

a. Ms. Santillanes, the City Clerk, has available to her legal counsel to respond to questions that may arise.

b. Disputed as to the representation that on page 50 of Ms. Santillanes' deposition, Exhibit G to plaintiffs' memorandum, there is any mention of 369 election judges. Disputed to the extent that plaintiffs imply that each election judge can make a unilateral decision as to what qualifies as a "valid" photo Identification. Ms. Santillanes states that she did not conduct the training for the November 2005 City Council District 9 runoff election in which the voter ID law was implemented. Training is provided to precinct election judges on administering elections, which includes the voter ID requirement. Plaintiffs have made no claim and have presented no evidence that any precinct election judge can or will interpret or apply the provisions of the law incorrectly, let alone in an unconstitutional manner. Plaintiffs incorrectly assume that there are 369 precinct election judges. See the city's response to plaintiffs' fact 10, above.

c. Denied to the extent that it implies that Ms. Santillanes admitted that each election judge could make a unilateral determination

⁵ Plaintiffs' lettering contains two subsection Cs. Plaintiffs' memorandum, pp. 5, 8 and two paragraph 18s. Plaintiffs' memorandum, pp. 7, 8. In an attempt to avoid confusion, defendant will continue with plaintiffs' paragraph references.

as to what qualifies as current valid photo identification. A unanimous decision by the election judges is required under § 3-8-43 B. Each precinct board is to have no fewer than three election judges pursuant to § 3-8-19 C. Ms. Santillanes' testimony is not disputed and it is not legally incorrect.

d. Denied that Millie Santillanes admitted that "each precinct election judge has discretion to deny individuals the ability to enter the polling booth and vote, based upon the individual's physical appearance and that such discretion may be exercised entirely subjectively." Ms. Santillanes' testimony is not disputed and is not legally incorrect. The voter ID law does not allow the election judges to deny voters the "ability to enter the polling booth and vote". The voter ID Law provides for voting by a provisional ballot (which would be in a "polling booth") in the event an individual does not have photo identification. A successful challenge to the voter's photo identification must be by unanimous decision by the election judges under Section 3-8-43 B.

c. Disputed. The quote is neither accurate nor complete. Ms. Santillanes' testimony is not disputed and is not legally incorrect.

D. Response to Evidence of Impersonation of Voters at Polls.
Response to plaintiffs' memorandum, p. 10.

19. To the extent plaintiffs imply that the city has the burden of showing voter fraud by voter impersonation, the city disputes plaintiffs' characterizations in this paragraph.

20. There is no paragraph 20.

21. Not disputed.

22. Disputed. The city does not dispute that Denise Lamb provided this sworn statement. The affidavit is conclusory and therefore legally irrelevant. Ms. Lamb was been withdrawn by plaintiffs as an expert witness and cannot offer this type of opinion. Dkt. no.51. Her conclusions as a lay witness concerning fraud are inadmissible hearsay because Ms. Lamb has no competent, admissible information concerning complaints about in-person voter identification theft.⁶ Exhibit N, additional portions of Lamb Deposition, pp. 69-71, attached hereto and incorporated herein by reference. Ms. Lamb also testified that she had no information concerning Albuquerque city elections. Exhibit N, (Lamb depo) pp. 8, 9, 37, 69.

23. Not disputed. She has failed, however, to identify the nature of complaints concerning absentee voting. She also did not keep records and there was no formal complaint process as to municipal elections. Exhibit N (Lamb deposition) pp. 66-68.

24. Denied to the extent that what Ms. Santillanes stated was “anything is possible” and that “I don’t have enough knowledge to answer that question.” Ms. Santillanes made no admission. Plaintiffs’ statement of material facts number 24 amounts only to plaintiffs’ characterization

⁶ The self-serving, conclusory affidavits submitted by plaintiffs, and objected to by defendants, are inadmissible and ineffective to establish “permanency.” Rule 56 (e), F.R. Civ. P. See Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1200 (10th Cir. 2006) (an affidavit is inadmissible if the witness could not have actually perceived or observed the testimony in the affidavit); Tavery v. United States, 32 F.3d 1423, 1427, n. 4 (10th Cir. 1994) (statements of mere belief at the summary judgment stage contained in affidavit should be disregarded); Hom v. Squire, 81 F.3d 969, 974 (10th Cir. 1996) (plaintiff’s own belief or feeling is insufficient as a matter of law to preclude summary judgment); and Gossett v. Oklahoma ex rel. Bd. Of Regents for Langston Univ., 245 F.3d 1172, 1179 – 80 (10th Cir. 2001).

and opinion of Ms. Santillanes' testimony. The testimony of Ms. Santillanes is not materially disputed. Plaintiffs have provided no contradictory evidence.

E. Response to Plaintiffs' interests and injuries.
Response to plaintiffs' memorandum, p. 11.

25. The city does not dispute Plaintiffs Kass, Grothus and Kazaras have stated their personal preferences. Those preferences, however, do not demonstrate injury in fact and election laws do not prevent them from voting absentee on election day. Section 3-9-3. To the extent plaintiffs imply that such personal preferences establish the truth of the underlying alleged fact, such is denied. Plaintiffs Kass, Grothus and Kazaras are not qualified to provide expert opinions about how casting a vote in person on election day makes the voter more informed than when a voter delivers or causes an absentee ballot to be delivered just before the polls close at 7:00 p.m. on election day. These plaintiffs provide their opinions without citation to any study, thesis or recognized authority.

26. The city does not dispute that the media publish information throughout the election season. That is irrelevant to resolution of the legal issues. Individuals who vote early are also required to provide a valid voter ID and may not have all of the relevant information. If an individual chooses to vote at noon on election day, that voter may not have all of the relevant information that develops after noon.

27 - 30. See response to paragraph 26.

31. Not disputed. But the logical response to this assertion that is not legally relevant, is that no voter will have all of the information potentially available until the polls close on voting day.⁷

32, 35. Not disputed but irrelevant. Plaintiffs Kass and Grothus have failed to demonstrate that they have been injured by the voter ID law. They have not demonstrated that the voter ID law interferes with their right to appear at the polls and cast their votes. They can continue to express their commitment to democracy and to engage in the “act and ritual” of voting. While these plaintiffs have the first amendment right to vote in a specific manner, it does not follow that plaintiffs have any standing or constitutional right to make other voters join them on election day. Plaintiffs’ opinion about voting on election day makes an unfounded assumption that voters cannot cast an informed decision on how to vote prior to election day. Plaintiffs’ concern about other voters, her “friends and neighbors,” possibly voting without being “sufficiently informed” does not rise to a claim that absentee and early voting is an unconstitutional alternative to voting on election day.⁸

33 - 34. There is no evidence that Plaintiffs Kass or Grothus could be denied the right to vote or could not be identified from their New

⁷ Plaintiffs’ personal preference to vote in-person at all times is not a constitutionally recognized right. In addition, the New Mexico Legislature has provided not only for absentee voting but also all mail-in ballot elections under Section 1-24-1 which eliminates all in-person voting on election day.

⁸ The affidavit of Ms. Kass may be an attempt to argue that there is a first amendment right to congregate at the polling place with friends and neighbors. The contention appears to be that this alleged right is denied when voters other than plaintiffs choose to vote by absentee ballot. The first amendment is extended only to protect individuals against actions taken by the government. Magallanes v. Cracker Barrel Old Country Store Inc., 2002 U.S. Dist. LEXIS 1111 (D. Kan. 2002). The timing of voting is clearly a choice for the voter to make.

Mexico drivers' license by a poll worker. There is no evidence that Plaintiffs Kass' or Grothus' drivers' licenses are inadequate for purposes of operating a motor vehicle in New Mexico and the same identification cards would be valid for purposes of voting. The statements in plaintiffs' facts 33 and 34 are speculative and irrelevant.

36. While Plaintiff Kazaras does not possess a New Mexico driver's license, she was able to produce a Costco card bearing her image, which satisfies the requirements of the city's voter ID requirements. She also produced her Washington State Drivers' License and admitted that she has a University of New Mexico photo identification card, both of which are adequate forms of identification under the city's voter ID law.

37. Plaintiffs allege that SAGE has members who use their pueblo or reservations as addresses for purposes of their drivers' licenses, although they live in Albuquerque. SAGE has failed to identify any such individual. The voter ID law does not require that the photo identification establish the voter's address in his or her voting precinct.

II. THE VOTER ID AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT OR THE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENTS. Response to plaintiffs' memorandum, p. 15.

A. Response to plaintiffs' introduction. The Voter ID Law is a rationally based approach by the city and the voters of Albuquerque to combat in-person voter identity theft. Response to plaintiffs' memorandum, p. 16.

In its memorandum in support of motion for summary judgment, Dkt. No. 64, the city addressed at length that the voter ID law does not violate the First or Fourteenth Amendments. See Dkt. No. 64. Section V. In summary, the city argued that the voter ID law does not regulate the manner of electing

public officials and it does not impose substantive voting criteria on voters. The city has the right to regulate its elections and its interests as a government outweigh the minimal burden imposed on the right to vote.

Plaintiffs cite Bush v. Gore, 531 U.S. 91 (2002) as “parallel” to the alleged constitutional infirmities of the voter ID law. In Bush the question was not whether local entities, in the exercise of their expertise and discretion, may develop different systems for implementing elections. Instead, the Court faced the situation where a state court with the power to assure uniformity had ordered a statewide recount with minimal procedural safeguards.

In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

531 U.S. at 105.

Presenting photo identification to election officials is a method of implementing elections that is uniform and in no way implicates the same type of concerns discussed in Bush v. Gore. The plaintiff’s claim that there is a lack of uniformity is based on the unsupported theory that the words “valid” and “current,” as modifying “photo Identification,” cannot be understood by election officials. These words are not vague. The presentation of photo identification cannot be compared to the lack of rules concerning which ballots may be counted. Bush is not applicable to this case.

B. The Voter ID law is not void for vagueness.
Response to plaintiffs’ memorandum, p. 18.

Plaintiffs claim that the requirement of having a current valid photo identification cannot be understood by poll workers and is therefore void for

vagueness. Pl. response memo, pp. 17-18. The words “current” and “valid” that precede “photo identification card” are not defined and do not need to be. The common meaning of these words is all that is needed.

When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. Words not defined in statute should be given ordinary or common meaning. In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. We have observed that the rule of lenity cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term. [Internal citations omitted].

Smith v. United States, 508 U.S. 223, 228, 239 (1993).

Statutory construction requires that the common meaning of words used in laws should be adopted by the court. J.C. Hawkins v. the Upjohn Company, 890 F. Supp. 601 (E.D. TX. 1994)(citing Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947)). Neither “valid” nor “current” are technical words requiring a statutory definition. “Valid” is defined as “having legal efficacy or force, executed with the proper legal authority and formalities”, Webster’s Ninth New Collegiate Dictionary, Black’s Law Dictionary, 5th Edition. “Current” is defined as “occurring in or existing at the present” and “generally accepted, used, practices or prevalent at the moment”, Webster’s Ninth New Collegiate Dictionary. The meanings of these words can be easily understood.

Current and valid identification is a generally used and commonly understood phrase. See, e.g., City of Chicago v. Haworth, 303 Ill. App. 3d 451, 708 N.E.2d 425 (Ct. App. Ill. 1999); Carroll v. Temple University, 1995 U.S. Dist. LEXIS 7410 (E.D.Pa. 1995); Salazar v. Barnhart, 344 F. Supp. 2d 723, 729 (N.M. 2004); Lucas County Democratic Party v. Blackwell, 341 F. Supp. 2d 861 (N.D. Ohio 2004). Without providing a statutory definition, the

phrase “current valid” is even used in federal election requirements to describe driver’s licenses. *See, e.g.*, 42 U.S.C.A. Section 15483.⁹

The city’s voter ID law does not require an expiration date on the identification. Should a photo identification card contain an expiration date, it must be a date after the date the voter presents the identification card and there would be no question that the ID is valid and current. Exhibit B (Fulgenzi affidavit). The requirement of a current valid photo allows poll workers to compare the individual’s face to the identification tendered to ensure the individual is who he/she professes to be, which is clearly the most expeditious means of correct identification widely available to the elections officials. The expiration date, if any is shown on the identification card, is only one element to establish the reliability of the identification presented.¹⁰

Plaintiffs seem also to contend that only photo identification cards issued by the State of New Mexico and the Federal government may be accepted by election officials even though the voter ID law specifically allows identification far broader, including photo identification cards issued by a government agency (not just New Mexico or federal) and from any a commercial transaction cards,

⁹ 42 U.S.C.A. Section 15483 (a) (5) Verification of voter registration information.

(A) Requiring provision of certain information by applicants.

(i) In general. Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes—

(I) in the case of an applicant who has been issued a **current and valid driver’s license**, the applicant’s driver’s license number; or [emphasis added].

¹⁰ Plaintiffs spend a great deal of effort pointing out what they believe to be discrepancies in Ms. Santillanes’ description of what is to be considered current and valid. Pl. resp. memorandum pp. 20 – 22. Ms. Santillanes is the city clerk, She has available to her attorneys to provide legal advice when such issues arise. Because there has been only one city runoff election conducted applying the voter ID law that resulted in no provisional ballots having to be issued due to lack of photo identification, it is not clear if there will be any issues. In any event, if a voter is not permitted to cast a ballot because of a lack of a valid ID, a provisional ballot is available.

union cards or professional association cards.

Plaintiffs have not articulated which theory of law is offended by these alleged deficiencies but they have made a vague claim that the law is void because it does not define the common terms. Their argument is that the election judge could make a wrong decision or could act arbitrarily. Each of the requirements imposed by the ordinance is directly related to the material requirement of establishing an individual voter's identity. The potential for a wrong identification is insufficient to invalidate the voter ID law:

We expressly reject the suggestion Kolender v. Lawson, 461 US 352, 75 L.Ed.2d 903, 103 S. Ct. 1855 (1983) implicitly removed the "as applied" analysis from a court's examination of a vagueness challenge. The Supreme Court continues to examine vagueness challenges in light of a defendant's conduct, recognizing that the theoretical possibility of improper enforcement "is of no due process significance unless the possibility ripens into a prosecution." Posters ' N' Things, Ltd., v. United States, 511 U.S. 513, 128 L.Ed. 2d 539, 114 S.Ct. 1747 (1994).

Fox v. State of Florida, 700 So. 2d 172 (Ct. App. Fla. 1997).¹¹ Speculative danger of arbitrary enforcement does not render ordinances void for vagueness, National Paint & Coatings Assoc. v. City of Chicago, 803 F. Supp. 1335, 149 (N.D. Ill. E.D., 1992).

Plaintiffs' claim that the voter ID law is void because it is vague should be rejected. Plaintiffs' further argument that the voter ID law might be improperly applied, should also be rejected. These claims have been raised and rejected as bases for a constitutional challenge.

¹¹ Plaintiffs state in their memorandum that defendant may argue that plaintiffs lack standing. Defendant has, in fact, advanced that argument and has addressed it in detail in its original memorandum. Plaintiffs have failed to identify any basis for standing.

- C. The Voter ID law does not permit arbitrary or capricious acts by election officials. Response to plaintiffs' memorandum, pp. 22, 38.

Plaintiffs complain that poll workers are impermissibly allowed under the city's voter ID law to determine whether the photo identification is of the person presenting himself or herself to vote. Under the State Municipal Election Code, poll workers are given even broader discretion to challenge voters:

- A. A challenge may be interposed by a member of the precinct board or by a challenger for the following reasons, which shall be stated in an audible tone by the person making the challenge:
- (1) the person offering to vote is not registered;
 - (2) the person offering to vote is listed among those persons in the precinct to whom an absentee ballot was issued;
 - (3) the person offering to vote is not a qualified elector;
 - (4) the person offering to vote is not listed on the signature roster or voter registration list;
 - (5) in the case of an absentee ballot, if the official mailing envelope containing an absentee ballot has been opened prior to delivery of absentee ballots to the absent voter precinct board; or
 - (6) the person offering to vote is a qualified elector of the municipality but does not reside in the district where he is offering to vote.

Section 3-8-43A.

The determination by election officials that the person offering to vote is not a qualified elector, or is not a resident in the district where he is offering to vote, is far less objective than requiring an election official to look at a photo identification card and compare it to the person presenting the card. Section 3-8-43 B. (1) requires a unanimous decision by the election judges to challenge a voter. All of the election judges would have to agree that the photo identification presented does not match the person wishing to vote. The remedy when the election judges do not accept a photo identification card presented by a voter is to issue a provisional ballot. Should the election judges not allow a

prospective voter to vote because he or she is not listed on the signature roster or voter registration list, § 3-8-43 A. (4), the remedy is that such voter must go to the County Clerk's office and obtain a certificate from the county clerk pursuant to § 3-8-40 or § 3-8-40.1, stating that he or she has not been purged from the voter rolls and that he or shall be permitted to vote in the precinct and election specified. If the voter is successfully challenged for any other reason under § 3-8-43, he or she may not vote. The voter in that instance is not entitled to a provisional ballot as would be allowed pursuant to the Election Code, because, as discussed earlier, the revisions to the Election Code allowing for provisional ballots were not enacted by the New Mexico Legislature in the Municipal Election Code.

In effect, plaintiffs assert that election judges cannot be allowed to exercise any discretion in the administration of the election, but they object only to Albuquerque's voter ID Law while ignoring the more detrimental requirements included in state law.

Regulation of elections, such as is at issue here, has been upheld:

States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote... Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

Among the important interests that justify such regulations is the interest in preserving the "integrity and reliability of the electoral process itself." 460 U.S. at 788, n.9. And while "nothing in the language of [Article I, Section 4] gives support to a construction that would immunize" state laws that destroy

a citizen's right to vote the ability of the States to determine the procedures and mechanisms of elections held within their borders is unquestioned. Smiley v. Holm, 285 U.S. 355, 366 (1932) (internal citations omitted).

The Court rejected the "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny" in Burdick v. Takushi, 504 U.S. 428, 432 (1992). Otherwise, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." 504 U.S. at 433; *see also* Indiana Democratic Party v. Rokita, 2006 WL 1005037, 2006 U.S. Dist. LEXIS 20321 (S.D. Ind. 2006)*114-118. Because "the States are given the initial task of determining the qualifications of voters who will elect members of Congress," not every substantial restriction on the right to vote is presumptively invalid. Storer v. Brown, 415 U.S. 724, 729-30 (1974) ("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 process).

Plaintiffs' arguments that strict scrutiny should be applied or, in the alternative, intermediate scrutiny and that the voter ID law is invalid when such scrutiny is applied, should be rejected. Regardless which level of scrutiny is to be applied, the voter ID law is valid and analogous authorities have upheld similar regulations.

- D. The Voter ID law does not violate substantive first amendment rights: it does not regulate the manner of electing public officials. Response to plaintiffs' memorandum, p. 26.

The voter ID law does not place any substantive burdens on the exercise of the right to vote. Plaintiffs first argue that the right to vote is fundamental and the city does not dispute this assertion. Plaintiffs' argument is that the voter ID requirement somehow deprives them of the right to fully consider all available information. Their argument makes no sense. The argument assumes that if a voter does not have a valid ID, the voter can only cast his or her vote by absentee ballot, thus depriving the voter of information that may become available after the absentee ballot is cast. First, this assumes that the voter has no valid ID although plaintiffs have been unable to identify any individual without a qualifying identification card. Second, it ignores the availability of a provisional ballot in the event a voter cannot produce a valid ID. Third, if the issue is whether a voter is fully and completely informed, the voter would have to wait until just before the polls close, at 7:00 p.m. on election night, to cast a vote because that is the only time when all information would be available. Their additional argument is that voters are somehow making a "statement" by their presence at the polls but there is no authority which supports this assertion and they have identified none. While individuals may have a fundamental right to vote, they have no fundamental right to vote in a particular manner.¹² Plaintiffs' substantive First Amendment claims should be rejected.

There is no constitutional right to vote in any specific manner and there is no right to First Amendment associational right to vote without restriction, for political or other purposes. Burdick v. Takuski, 504 U.S. 428, 432 (1992). Plaintiffs have presented no contrary authority and their assertion should be

¹² Elections conducted solely by mail have been held to be valid. See, e.g., O.R.S. Section 254.465 which reflects that all ballots are absentee in Oregon.

rejected.

- E. There is no infringement of expressive political speech. Voting absentee would not be a burden or hardship for any voter; plaintiffs lack standing to assert these claims.
Response to plaintiffs' memorandum, p. 30.

Plaintiffs assert that a violation of First Amendment free speech exists because voters who do not have photo identification have to vote by absentee ballot. Plaintiffs then speculate that voting by absentee ballot means that voters cannot be fully informed because they have to vote before election day.

Plaintiff Kass admits that she has voted by absentee ballot, Plaintiffs' memorandum, exhibit D, paragraph 3; Plaintiff Grothus stated that even with the photo identification requirement she still intended to vote in person, Defendant's memorandum, Exhibit I (Grothus deposition), p.22; and Plaintiff Kazaras states that she does not choose to vote by absentee ballot, Plaintiff's memorandum, Exhibit F, paragraph 4, but that she would choose to vote absentee if she did not have a valid ID. Defendant's memorandum, Exhibit G, (Deposition of Kazaras) page 15.

Although these three plaintiffs apparently do not wish to vote absentee, this abrogation of their personal preferences is not a cognizable injury or hardship. *Rokita* at *123, n. 71. Plaintiffs' free speech claim is no different than the claim rejected in Rokita:

Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to SEA 483¹³ because of his or her inability to obtain the necessary photo identification. Similarly, Plaintiffs have failed to produce any evidence of any individual, registered or unregistered, who would have to obtain photo identification in order to vote, let alone anyone who would undergo any appreciable hardship to obtain photo identification in order to be qualified to vote.

¹³ The Indiana Voter ID Law.

Rokita, at * 122-123.

III. THERE IS NO VIOLATION OF EQUAL PROTECTION REQUIREMENTS.
Response to plaintiffs' memorandum, p. 32.

Plaintiffs' argument is that the voter ID law impermissibly treats voters differently. The differential treatment argued by plaintiffs is first, voters voting in the same election and voting on the same day are treated differently and second, in-person and absentee voters are treated differently. There is no merit to these claims.

- A. There is no evidence that voters voting in-person have been or could be treated differently in violation of the equal protection clause.
Response to plaintiffs' memorandum, p. 33.

Absolutely no evidence has been adduced that voters voting in the same election on election day at the same polling place could be treated differently. See plaintiffs' memorandum, p. 32, fn. 5. The argument is that an election judge may reject one voter's identification while accepting a different voter's identification. How this could violate equal protection is not described. If there is a question concerning a voter's identification and it is rejected by the election judge, the voter can cast a provisional ballot and resolve the dispute within a sufficient period of time to have the vote counted. No plaintiff and no identified individual has ever been denied the right to vote and the requirement of the voter identification is not invalid on its face.

Similarly, plaintiffs argue that if a voter lacks a voter ID and chooses to vote absentee, that voter will be deprived of all of the information necessary to make an informed vote and will not be able to demonstrate his or her full participation in the electoral process because he or she does not appear at the polls. The only support for this proposition is that the individual plaintiffs wish

to appear at the polls. Plaintiffs have failed to demonstrate that these individuals lack a valid voter ID thus each of the plaintiffs is free to appear to vote in person. The speculative injury to a voter who has to vote absentee because he or she lacks a voter ID has not been shown.

The city has demonstrated the existence of a rational basis for the requirement of a photo ID and the burden is on plaintiffs to show that the law is not justified. Plaintiffs have presented no evidence to invalidate the rational basis which underlies enactment of the voter ID law and it withstands equal protection scrutiny.

- B. Distinguishing between absentee and in-person voting does not violate the equal protection clause.
Response to plaintiffs' memorandum, p. 33.

The city addressed in detail in its memorandum, Dkt. No. 64, that any distinction between identification required by an absentee voter and the voter ID requirement does not violate the equal protection clause. This is the result whether strict or rational basis scrutiny is applied.

The logical result of plaintiffs' arguments are that the allegedly discriminatory voter ID law should be expanded to apply to absentee voting. Plaintiffs' arguments are internally inconsistent. If, as argued by plaintiffs, the voter ID law violates their First Amendment rights by imposing a burden, then expanding its application to absentee voting would presumably burden more voters. Plaintiffs subsequently assert that the failure to provide the same measures against fraud for in-person voting and absentee voting results in vote dilution. This claim is based on the unfounded assumption that the type of voter fraud is the same for in-person voting and absentee voting and that the preventative measures would be the same.

Absentee voting is an inherently different procedure from voting in person, allowing the City, which permits both in-person and absentee voting, to apply different "standards, practices, or procedures" to these two groups of voters.

Absentee ballot fraud typically occurs in a different way and is not readily detectable by checking photo identification. As Denise Lamb testified, the primary absentee ballot fraud is coercion of legitimate voters, not simply voting in the name of another, Defendant's memorandum, Fact No. 39; *see also Pabey v. Pastrick*, 816 N.E.2d 1138, 1145-46 (Ind. 2004);¹⁴ *Schoffstal v. Kaperek*, 457 N.E. 2d 550, 552-54 (Ind. 1984).¹⁵ Requiring voters to enclose some form of photo identification obviously would not detect the sort of fraud found in absentee ballots.

Even if absentee ballot fraud occurs through voter impersonation, a photo identification requirement would be of little use. The only means for applying an absentee voter identification requirement would be to have absentee voters include some form of picture identification with their absentee ballot or ballot application. While requiring absentee voters to enclose a copy of photo identification with their ballots would provide election officials with a trustworthy source to establish a link with the name of the registered voter, the absence of a person standing before those same election officials precludes

¹⁴ The commission of criminal acts by Pastrick supporters that included such activity as their unauthorized possession of completed ballots, a type of vote fraud defined by Ind. Code 3-14-2-16(4) and (5), the unauthorized possession of unmarked ballots, a type of vote fraud, Ind. Code 3-14-2-16(6), their presence while voters marked and completed their absentee ballots, a type of vote fraud, Ind. Code 3-14-2-16(3) and a violation of Ind. Code 3-11-10-1.5, and the direct solicitation of a vote for cash all yielded absentee votes which respondent Pastrick concedes are invalid, 816 N.E. at 1146.

¹⁵ Errors related to absentee balloting included failure to seal and initial absentee ballot envelopes.

linking the enclosed identification with the person actually casting the ballot. A critical link in the chain of identity verification is thereby lost, meaning that the photo identification is of little practical significance in detecting absentee ballot fraud.

Applying plaintiffs' argument, the alleged violation of the equal protection clause results in requiring that all procedures applicable to a particular method of voting must be abolished. For example, all voters voting in-person are required to vote at the poll in the precinct where they reside, § 3-8-43 A (6), announce their name and address in an audible tone and sign their name on the signature roster, § 3-8-41 A. None of these procedures is required of absentee voters. On the other hand, to have their votes counted, absentee voters are required to apply for an absentee ballot, § 3-9-4, sign the official mailing envelope and affirm that they will not vote in this election other than by the enclosed ballot and will not receive or offer any compensation or reward for giving or withholding any vote, § 3-9-6.D, and properly seal their ballot, § 3-9-4 K. None of these requirements applies to in-person voters.

The only difference to which plaintiffs seemingly object is the photo identification requirement, but in doing so they proceed without distinguishing this requirement from the other standards, practices, and procedures applicable to either absentee or in-person voters. Plaintiffs' contention as to the equal protection clause would compel the invalidation of vast portions of the Municipal Election Code. Plaintiffs' claim is based on little more than their own personal and political preferences.

IV. STATE LAW IS NOT APPLICABLE TO CITY ELECTIONS.
Response to plaintiffs' memorandum, p. 46.

Much of plaintiffs' argument in their motion relies on the erroneous application of state election laws. Because those laws are not applicable, they were not discussed in detail by the city in its summary judgment memorandum. State law has only limited applicability and plaintiffs have misconstrued how it is applicable.

A. City Charter provisions concerning elections are controlling and provide for application of the city's voter ID law.

Plaintiffs' argument is premised in part upon the erroneous assumption that the state Election Code, Chapter 1 NMSA 1978 (hereinafter the Election Code), provisions concerning voter identification apply to municipal elections. Plaintiffs' memorandum, p. 12 ("NMSA Section 1-12-10 identification requirements apply to Albuquerque elections . . ."). Plaintiffs conclude that if the voter ID law is stricken, the procedure for ascertaining voter identification will be the process defined in the state election laws. Plaintiffs' memorandum, p. 46. This conclusion is erroneous.

Plaintiffs have also argued in their motion that the city's voter ID law violates the First Amendment and the Equal Protection Clause. The city has addressed these claims in its memorandum in support of motion for summary judgment and will not repeat them in the same detail here. The city is addressing the additional claims asserted by plaintiffs including that the State Election and Municipal Election Codes are not applicable and the practical impact if Albuquerque's voter ID law is invalidated for any reason.

1. The "Controlling Law" Provision of the Municipal Election Code.

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

The Municipal Election Code shall govern the conduct of all aspects of all municipal elections except when the Municipal

Election Code is silent or is in conflict with the state Election Code [Chapter 1 NMSA 1978] with respect to any procedures or protections required of the state by federal law, then the state Election Code shall govern, as appropriate. The provisions of the Municipal Election Code shall not apply to home rule municipalities or municipalities incorporated under special act unless the Municipal Election Code is adopted by reference by such municipality.

This provision establishes the hierarchy for applicability of election laws:

- First: Election Codes of home rule municipalities apply first.
- Second: The State Election Code applies if its provisions are required by federal law.
- Third: The Municipal Election Code unless it is silent.

2. The State Election Code Voter Identification Provision.

Section 1-12-10 of the State Election Code regulates the identification of voters who vote in person in an election governed by the Election Code:

A. When a voter presents himself at the polls to vote, he shall announce his name and address in an audible tone of voice. When an election judge finds the voter's name in the signature roster, he shall in like manner repeat the name of the voter. The election judge shall then ask the voter to provide the required voter identification.

B. If a voter fails to provide the required voter identification, the voter shall be allowed to vote on a provisional ballot.

The types of identification allowed under the Election Code are defined in

Section 1-1-24 NMSA 1978:

As used in the Election Code [1-1-1 NMSA 1978], "required voter identification" means any of the following forms of identification as chosen by the voter:

A. a physical form of identification, which may be:

(1) an original or copy of a current and valid photo identification with or without an address, which address is not required to match the voter's certificate of registration or a voter identification card; or

(2) an original or copy of a utility bill, bank statement, government check, paycheck, student identification card or other government document, including identification issued by an Indian nation, tribe or pueblo, that shows the name and address of the person, the address of which is not required to match the voter's certificate of registration; or

B. a verbal or written statement by the voter of the voter's name, year of birth and unique identifier; provided, however, that the statement of the voter's name need not contain the voter's middle initial or suffix. The voter shall then sign his name or make his mark on the signature line in the copy of the signature roster to be returned to the county clerk. Upon the voter's name or mark being written in the signature roster, a challenge may be interposed as provided in the Election Code...

3. The State Municipal Election Code Voter Identification Provision.

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

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

Plaintiffs' conclusion that the Election Code voter identification provision applies to municipal elections pursuant to Section 3-8-1 E. of the Municipal Election Code requires that the Municipal Election Code be silent on the subject of voter identification when voting in person or that the Municipal Election Code conflict with the Election Code. The only difference between the Election Code and the Municipal Election Code is that the Election Code adds the "required voter identification" provision that is not required in the Municipal Election

Code. Because the general subject of voter identification is covered in both the Election and Municipal Election Codes, this difference is not the type of omission described in Section 3-8-1 E. of the Municipal Election Code which requires conflict as a prerequisite to application of the Election Code. The mere fact that the two Codes treat identification requirements differently does not place them in conflict.

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

There is no conflict between the Election Code and the Municipal Election Code and the legislature has expressed no intention to repeal any provisions of the Municipal Election Code. The legislature has chosen to treat non-partisan municipal elections¹⁶ differently from partisan elections that are subject to the Election Code.

4. The City Charter Provisions.

The City of Albuquerque is a political subdivision of the state and is a home rule municipality under Article X, Section 6 of the Constitution of New Mexico. City of Albuquerque v. Chavez, 91 N.M. 559, 556 P.2d 457 (Ct. App.) *cert. denied*, 91 N.M. 610, 577 P.2d 1256 (1978).

¹⁶ Section 3-8-29 C: "Municipal elections shall be nonpartisan."

The Municipal Election Code specifically exempts home rule municipalities from coverage of that Code unless the Municipal Election Code is adopted by reference by the municipality. Section 3-8-1E. Although the City of Albuquerque has adopted the Municipal Election Code in its Charter, it has done so with limitations. Article II, Section 2 of the Albuquerque City Charter¹⁷ provides:

Section 2. REFERENCE TO STATE LAW.

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

[Emphasis added]. Even if the Municipal Election Code is viewed as having an omission as to voter identification requirements for purposes of in-person voting, under Section 3-8-1 E., it is the city's voter ID law, contained in a provision of the City Charter, which provides for the method of voter identification, not the State Election Code.

B. The Voter ID Law is not inconsistent with and does not supersede state law.

Referring to the Election Code provisions concerning voter identification for in-person voting, plaintiffs argue that the Albuquerque voter ID law is inconsistent with and thus supersedes state law. Plaintiffs' memorandum, p. 5. Section 3-8-1 E. provides that the city charter may control over the Municipal Election Code and Article XIII, Section 14 of the Albuquerque City Charter, the voter ID law, states "Pursuant to Article II, Section 2 (b) of the City Charter, this Section shall take precedence over the State Municipal Election Code." The City

¹⁷ The applicable provisions of the City Charter are attached to Plaintiff's memorandum, exhibit H.

Council has unequivocally expressed its intent that the Albuquerque voter ID law apply rather than the State Municipal Election Code.

Although the city's position is that the Election Code, Municipal Election Code and City Charter provisions are not inconsistent, state law clearly allows for a city charter voter ID law to control over the Election Code and the Municipal Election Code. Albuquerque's voter ID law does not conflict with any state law provision because it merely adds an identification requirement for in-person voting that is not present in the Municipal Election Code and is not prohibited by the Municipal Election Code. It is not inconsistent with the Election Code because the in-person voting identification requirements of the Election Code do not apply to Albuquerque municipal elections.

V. IF THE ALBUQUERQUE VOTER ID LAW IS INVALIDATED FOR ANY REASON, THE VOTER IDENTIFICATION PROCEDURE WILL NOT BE GOVERNED BY THE STATE ELECTION CODE.

Response to plaintiffs' memorandum at pp. 26, 44.

Plaintiffs' memorandum asserts that if the voter ID law is stricken by the court the procedure for ascertaining voter identification will default to the state election laws. Plaintiffs' reference is to the in-person voter identification requirements of the Election Code, which, as discussed previously, govern Albuquerque municipal elections only in limited circumstances and do not govern as to voter identification. If the voter ID law is invalidated by the Court, the Municipal Election Code provisions will be the applicable in-person voter identification provisions and will require only a verbal identification by the voter pursuant to § 3-8-41, leaving the city with no measure to protect against voter identity theft.

The Election Code in-person voter identification requirements were passed by the New Mexico Legislature, in part, in response to the requirements

of the Help America Vote Act ("HAVA"), 42 U.S.C.A. Section 15301 *et seq.* HAVA requires the states to implement the provisions of HAVA, however, the requirements of HAVA apply only to elections where the ballot includes election of a federal office. Sandusky County Democratic Party v. Blackwell, 387 F. 3d 565 (6th Cir. 2004). As a result, there was no reason for the New Mexico Legislature to make the additional identification requirements of the Election Code, as cited by plaintiffs, applicable to municipal elections that do not include federal offices on their ballots. In addition, the voter ID law specifically states that it only applies to Albuquerque municipal elections. Defendant's memorandum, Exhibit B, paragraph 21, Affidavit of Kelly Fulgenzi ("the Voter ID law applies only to City elections and does not apply to elections where the ballot contains a federal question").

Plaintiffs argue, plaintiffs' memorandum, p. 29, that the city cannot show voter fraud and is thus prohibited from enacting the voter ID legislation. They assert that the New Mexico State procedure applicable to absentee voters -- disclosure of name, date of birth and unique identifier -- is inadequate to provide an equal level of integrity to in-person voting. Plaintiffs' claim that the city was required to follow the Election Code rather than adopt the voter ID law fails because the Election Code provisions to which plaintiffs refer do not govern Albuquerque elections.

It is the legislative function of the city to determine what constitutes adequate protection against fraud. In examining an election regulation aimed at combating fraud, courts are to give deference to the legislative judgment because "the striking of 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 v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004). The city has made the decision as to how to best address potential fraud in voting. This court should not disturb the legislative determination.

VI. THE VOTER IDENTIFICATION REQUIREMENT OF INDIANA IS SUBSTANTIALLY THE SAME AS THE VOTER ID LAW AND THE ANALYSIS IN ROKITA PROVIDES GUIDANCE; GEORGIA’S LAW IS NOT THE SAME AND THE INTERPRETATION OF THAT LAW IS NOT RELEVANT HERE.

Response to plaintiffs’ memorandum, p. 41.

Plaintiffs argue state that the state laws in Georgia and Indiana is substantially different than the Albuquerque Photo ID Law and as a result the judicial decision interpreting Indiana’s law is not applicable. The city disputes that the laws at issue in those jurisdictions are substantially different. The city does agree that some provisions of the laws differ, but those decisions provide guidance in addressing the issues raised and Indiana Democratic Party v. Rokita, 2006 WL 1005037, 2006 U.S.Dist.LEXIS 20321 (S.D.Ind. 2006) directly addresses and rejects most of the claims asserted by plaintiffs in this case.

A. The Indiana Voter identification law is substantially similar.

The Indiana Voter ID law is not materially different from the law to be interpreted in this case. The Indiana statute¹⁸ is more stringent than

¹⁸ Burns Ind. Code Ann. § 3-5-2-40.5 (2006) Proof of identification.
“Proof of identification” refers to a document that satisfies all the following:
(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual’s voter registration record.
(2) The document shows a photograph of the individual to whom the document was issued.
(3) The document includes an expiration date, and the document:
(A) is not expired; or
(B) expired after the date of the most recent general election.
(4) The document was issued by the United States or the state of Indiana.

Albuquerque's voter ID law: (1) Indiana limits photographic identification to that issued by the United States Government or the State of Indiana while the voter ID law permits use of any government issued photo identification (not just that issued by New Mexico), commercial transaction, union and professional association cards; (2) the Indiana photo identification must contain an expiration date and no expiration is required by the Voter ID Law; (3) the name on the identification must conform to the name in the individual's voter registration record, while Albuquerque does not impose that requirement; and (4) Indiana does not have "at will" or universal absentee voting as New Mexico does.¹⁹ Rokita, at *12. The idea that the Indiana statute, with these additional "burdens", can pass constitutional muster and the Albuquerque Voter ID Law cannot is not a plausible position no matter how sincere the concerns and beliefs of the Plaintiffs.

Rokita addressed and rejected each of the arguments advanced by plaintiffs in this case. Rokita found no first or fourteenth amendment violations and determined that heightened scrutiny of the law was not warranted. If anything, Albuquerque's law is more voter-friendly than was the law at issue in Indiana, allowing for more types of voter identification. Rokita provides guidance and the analysis in that case is applicable here.

B. The Georgia Voter identification case is inapposite.

A recent district court decision in Common Cause/Georgia v. Billups, 406 F. Supp.2d 1326 (N.D. Ga. 2005)(*remanded sub nom.*) Common

¹⁹ All voters may vote absentee in New Mexico municipal elections, Section 3-9-3 NMSA 1978. Burns Ind. Code Ann. § 3-11-4-1 limits those who may vote by absentee ballot.

Cause/Georgia v. Cox, No. 05-15784 (11th Cir. Feb. 9, 2006) (*followed in* Common Cause/Georgia, v. Billups, 2006 U.S. Dist. LEXIS 56100 (ND Ga. 2006) does not support plaintiffs' claims and the result and analysis of the Georgia court is inapposite.

First, Common Cause was a ruling on an application for injunction, which presents different evidentiary standards than those on summary judgment. Second, Common Cause expressly based its ruling on several factual findings and assumptions for which there is no evidentiary basis in this case, including, for example, one of the concerns expressed in Common Cause was that immediately prior to the scheduled election, Georgia had changed its absentee voter requirements but had not publicized the change. There are no similar circumstances in this case.

Third, the second injunction in Common Cause was issued on July 14, 2006 because there was insufficient time prior to the July 18, 2006 primary election in Georgia to inform the public about changes to the election law, including changes in absentee voting. Public service announcements about the changes in the election laws had begun only two weeks before the primary, Common Cause, 2006 U.S. Dist. LEXIS 56100, at *149. In contrast, the next municipal election for the city of Albuquerque is October 2, 2007, as provided in City Charter Article II, Section 1, Exhibit H to Plaintiffs' memorandum.

Fourth, unlike Georgia, the voters in Albuquerque voted to adopt the Voter ID Law and therefore are generally aware of the Voter ID Law. Unlike in Georgia, voters in Albuquerque have more than two years from enactment of the law to obtain their free voter identification from the city. Defendant' memorandum, Exhibit B, Affidavit of Kelly Fulgenzi, paragraphs 3, 4, 6.

Fifth, Plaintiffs state that the state laws in Georgia are substantially different than the Albuquerque Photo ID Law which would defeat their assertion that the judicial decision addressing the Georgia law are somehow applicable.

Sixth, unlike the geographically large state of Georgia, with 159 counties, by comparison, the City of Albuquerque is geographically small, has a central location for procuring a valid ID, has several groups (some of which include plaintiff organizations) whose avowed purpose is to assist voters in obtaining the necessary ID, and moreover, the city has a readily available municipal transportation system making travel far more convenient than in a rural state such as Georgia.

Seventh, a final distinction between Albuquerque's voter ID law and the law at issue in Common Cause is that plaintiffs in Common Cause did not have the burden of proof that applicable to plaintiffs in this case. 42 U.S.C.A. § 1973(a), the Voting Rights Act, specifies jurisdictions in which minority voters have been historically disenfranchised. Unlike the State of Georgia, neither Albuquerque nor the State of New Mexico is designated under § 1973, Appendix to 28 C.F.R, Part 51, as one of these jurisdictions. While Georgia is subject to the federal provisions, the requirements of § 1973b that pre-clearance be obtained from the Department of Justice for any changes to voting procedures are not required for the City of Albuquerque.

The burden is on plaintiffs to establish any denial or abridgement of the right of any individual to vote. Although plaintiffs have pled and promise expert testimony, plaintiffs can offer no direct or indirect admissible evidence of discrimination or any statistical information demonstrating discrimination as a result of the Voter ID Law and reliance on Section 1973 is unfounded. Plaintiffs

have withdrawn their identified expert witnesses who were previously identified as a possible source for showing any claimed disparate impact on minority voters. Dkt. no. 51.

VII. PHOTO IDENTIFICATION IS A REASONABLE MEANS FOR COMBATTING VOTER FRAUD.

Response to plaintiffs' memorandum, p. 33.

To the extent plaintiffs are claiming that there exist effective alternatives to requiring photo identification that the city could and should have adopted and that there are additional potential avenues of voter fraud that the City failed to address in the Voter ID Law, these arguments are not relevant. The City Council has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them. The Supreme Court could not be clearer than it was in Williamson v. Lee Optical of Oklahoma:

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. (internal citations omitted).

348 U.S. 483, 489 (1955).

VIII. CONCLUSION

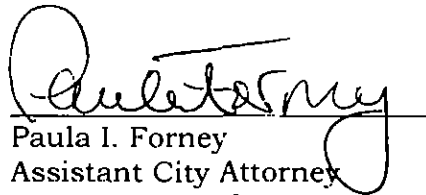
It is a testament to the Voter ID Law's minimal burden and narrow crafting that plaintiffs have been unable to identify any individual who can attest to the fact that he or she will be prevented from voting despite the concerted efforts of the organizational plaintiffs and their members who purport to represent the voter populations most severely affected by the Voter ID Law.

Lacking any such individuals who claim they will be prevented from voting, the Voter ID Law does not impose a severe or any burden on the right to vote. To the contrary, plaintiffs' lack of evidence confirms that the Voter ID Law is narrowly tailored because every hypothetical individual who plaintiffs assert would be adversely affected by the law actually benefits from the absentee voting requirements. See Rokita at *125.

For the reasons discussed in this memorandum, defendant respectfully requests that this court deny plaintiffs' motion for summary judgment.

Respectfully submitted,

CITY OF ALBUQUERQUE
Robert M. White
City Attorney



Paula I. Forney
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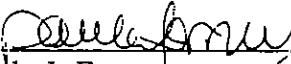
I hereby certify that true copy
of the foregoing was mailed to the following:

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Attorney for Amicus American Center for Voting Rights

On this 11th day of October 2006



Paula I. Forney
Assistant City Attorney

**NUMBERED INDEX LISTING OF EXHIBITS TO DEFENDANT'S
MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

EXHIBIT M: Deposition of Millic Santillanes

EXHIBIT N: Deposition of Denise Lamb

**Exhibit
“M”**

**Deposition of
Millie Santillanes**

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

THE AMERICAN CIVIL LIBERTIES
UNION OF NEW MEXICO, LLC,
PLAINTIFF, V. NEW MEXICO STATE POLICE OFFICER
BERNARDO GONZALEZ, INC. AND CIVIL SERVICE
NEW MEXICO COALITION FOR ETHNIC DIVERSITY,
ANNE KASS, ALEXANDRA KAZARIAN,
and HARRIET GORDON,
Defendants.

Case No. CV-05-1136-CAVMS

MILLIE SANTILLANES, ALBUQUERQUE
CITY CLERK,
Defendant

EXAMINATION OF MILLIE SANTILLANES
Mar. 4, 2005
9:00 a.m.
One Civic Plaza, Fourth Floor
Albuquerque, New Mexico 87103

PURSUANT TO THE FEDERAL RULES OF CIVIL
PROCEDURE, this deposition was:

TAKEN BY: JAMES R. SCARANTINO, ESQ.,
ATTORNEY FOR PLAINTIFFS

REPORTED BY: Deborah Williams, RPR, NACCV 192
WILSONS COURT, 9, DORNING
900 Central SW, Suite 1500 E
Albuquerque, New Mexico 87102

1 Q. Close enough.
2 A. Twelve years ago, I think it was.
3 Q. Have you ever been deposed before?
4 A. Yes.
5 Q. Okay. Let's just go over some basic rules so
6 this goes smoothly. You are under oath, and it's the
7 same oath just as if you were testifying live in front
8 of a judge or a jury; do you understand that?
9 A. Yes, I do.
10 Q. And the court reporter here, Deb Williams, will
11 be taking down my questions and your answers and
12 preparing them in stenographic form, which you may read
13 later on; do you understand that?
14 A. Yes.
15 Q. And you will have the opportunity to make any
16 corrections to the record for, I believe it's 30 days
17 from the date you receive the transcript.
18 A. All right.
19 Q. The court reporter can only take down oral,
20 verbal responses, she can't take down nods of heads or
21 other physical gestures. So please respond verbally to
22 my questions, okay?
23 A. Fine.
24 Q. And also, if you want to indicate a positive or
25 a negative, please don't say "Uh-huh" or "Huh-uh,"

Page 1

Page 1

APPENDICES

For the Plaintiff:

JAMES R. SCARANTINO, ESQ.
Attorney at Law
1400 Central SW, Suite 1100
Albuquerque, New Mexico 87104

For the Defendant:

CITY OF ALBUQUERQUE LEGAL DEPARTMENT
One Civic Plaza, NW, Fourth Floor
Albuquerque, New Mexico 87103
BY: PAUL L. FORNEY
MARK SCHOENMUTH

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PAGE

(No exhibits were marked to the deposition)

1 because as Deb just took them down, they're going to
2 look exactly the same on the piece of paper. So you
3 need to say "Yes" or "No," okay?
4 A. Fine.
5 Q. This isn't going to be a very complicated or
6 lengthy deposition, but if you wish to consult with your
7 attorneys, please feel free to take a break, or take a
8 break for any other reason, okay?
9 A. Very good.
10 Q. And while you are entitled to respond
11 truthfully to my questions, I think you're also entitled
12 to understandable questions from me. So if you feel you
13 don't understand what I'm asking, don't hesitate to ask
14 me to clarify the question, okay?
15 A. Fine.
16 Q. All right. Do you have any other questions
17 before we proceed?
18 A. None.
19 Q. All right. What are your duties and
20 responsibilities as city clerk of the city of
21 Albuquerque?
22 A. I consider my primary task as the historian,
23 the recordkeeper. We maintain the history of our city
24 in the city clerk's office.
25 Q. Do you have any duties or responsibilities with

Page 2

Page 2

MILLIE SANTILLANES

Having been first duly sworn under oath,
was questioned and testified as follows.

EXAMINATION

BY MR. SCARANTINO:

Q. Good morning. Would you please state your full
name for the record?

A. Millie Santillanes.

Q. And just for the record, so it does not appear
as a discourtesy, you've requested that I call you
"Millie," rather than "Ms. Santillanes" --

A. Yes.

Q. -- so I will accede to your wishes. How are
you employed, Millie?

A. I'm the city clerk for the city of Albuquerque.

Q. When were you appointed to that position?

A. December 1, '05.

Q. And had you previously served as city clerk of
the city of Albuquerque?

A. Yes, I had.

Q. Okay. And what was that period?

A. I was afraid you'd ask me. It was Marty's
first term.

Q. For the full term?

A. For the full term.

1 respect to municipal elections?
2 A. I am in charge of municipal elections.
3 Q. And by saying "in charge," what do you mean?
4 A. Well, that I conduct them with the help of the
5 legal department, with the help of staff.
6 Q. Are you responsible for the actual operation of
7 the polling places in municipal elections --
8 A. Yes, I am.
9 Q. -- as well as staffing of election judges and
10 clerks?
11 A. That's right.
12 Q. Basically, you have overall responsibility for
13 all municipal elections?
14 A. That's right.
15 Q. Okay. Does the city clerk also register
16 voters?
17 A. No.
18 Q. That's done through the county clerk?
19 A. The county clerk.
20 Q. Okay. One other rule, and I break this all the
21 time, but it will make the court reporter's job easier,
22 is if you'll wait until I finish my question before
23 answering, and also if I wait until you finish your
24 answer before I start my next question, okay?
25 A. That's fine.

1 Q. All right. In your prior term as city clerk
2 and in your current term as city clerk, have you become
3 aware of any instances of complaints, charges or
4 prosecutions of individuals for violating election laws
5 through absentee balloting procedures?
6 A. None.
7 Q. In your prior term as city clerk, and since
8 you've been city clerk since December of last year, have
9 you become aware of any instances of allegations,
10 charges, complaints or prosecutions of individuals for
11 impersonating another person when voting at an election
12 place?
13 A. Do you want to repeat the question?
14 Q. Okay. The question pertains to somebody going
15 into a polling place, for instance, and saying "I'm
16 Millie Santillanes" and voting in the name of another
17 person, okay? That's what I mean by "impersonating."
18 In your prior term as city clerk, and since you've been
19 appointed city clerk in this second administration, have
20 you become aware of any instances of complaints,
21 charges, or prosecutions of individuals who have
22 impersonated someone else when voting at the polls?
23 A. In the examples of the legislation, they allude
24 to someone who went to vote, and someone had already
25 voted in her name. And that's the only knowledge that I

1 have
2 Q. So during the time that you were city clerk in
3 the first Chavez administration, you did not gain
4 knowledge of one instance of somebody complaining that
5 their vote had been stolen by anyone else and
6 impersonating them at the polls; is that correct?
7 A. Not that I can remember.
8 Q. Well, there's been no city elections since
9 you've been in office?
10 A. Right.
11 Q. But since you've been in office since December
12 of 2005, has any information come to your attention,
13 Millie Santillanes' attention directly as city clerk, of
14 any charges, allegations, any complaint that somebody
15 has impersonated someone else in voting at the polls?
16 A. Not directly.
17 Q. So the only information you would have would be
18 the instance referred to in the city ordinance that
19 we're calling the Voter I.D. Ordinance?
20 A. That's right.
21 Q. Do you even know the name of that person or the
22 circumstances of that incident?
23 A. I read about it. I cannot -- it's there, but I
24 do not necessarily remember.
25 Q. Okay. So the only information you would have

1 would be secondhand, by reading the ordinance?
2 A. That's right.
3 Q. What procedures are in place in municipal
4 elections, since that's your field, to ensure that
5 someone voting by absentee ballot is not voting using
6 someone else's name or identity?
7 A. Well, they can call on the phone, they can
8 write in and request -- there are different ways of
9 requesting an absentee ballot. But we mail it to their
10 home. And they're registered voters, so that is the
11 procedure we use.
12 Q. If we could take it step by step through how
13 one requests an absentee -- well, first, you have to get
14 an application for an absentee ballot, right?
15 A. Right. You can call in and request the
16 application, and we mail it.
17 Q. And how do you know where to mail it to?
18 A. They tell us.
19 Q. Okay. So they give you an address?
20 A. That's right.
21 Q. Over the phone, correct?
22 A. That's right.
23 Q. And the absentee ballot application is then
24 mailed to the address that was given over the phone,
25 right?

1 A. That's correct.
2 Q. Okay. Once the application is received on the
3 other end, what is the next step in that person casting
4 a vote by absentee ballot, what else do they have to do?
5 A. Send it back.
6 Q. Okay. When they send it back, what are they
7 sending back? An application?
8 A. They're sending in an application for a ballot.
9 Q. Okay. So they send in the application, and
10 it's received at the county clerk's office or the city
11 clerk's office?
12 A. City clerk.
13 Q. Okay. Then what happens once the application
14 is received?
15 A. Then once we receive it, we verify them, that
16 they're on the voter rolls provided to us by the state,
17 and send them their ballot.
18 Q. To what address?
19 A. To the one they gave us.
20 Q. Okay. To the one they gave in the initial
21 telephone call, or the one that's on the application?
22 A. Well, the one that is on the application.
23 Q. And then it's sent from the city clerk's office
24 to the voter?
25 A. That's right.

1 Q. Okay. And then the voter does what to cast a
2 vote by absentee ballot?
3 A. Fill it in and return it.
4 Q. Okay. Do they have to give any identifying
5 information on the absentee ballot that will, to some
6 extent, ensure that they are, in fact, the person they
7 purport to be on the ballot?
8 A. I'm going to be perfectly honest with you. I
9 have not done an election in eight years, and I'd rather
10 not answer that, because I really don't remember.
11 Q. Just a little rusty?
12 A. I am.
13 Q. Okay.
14 A. Eight years later, you forget a lot.
15 Q. Okay. In your prior term, okay, then, to the
16 best of your knowledge, what procedures ensure that the
17 person sending in that absentee ballot is, in fact, the
18 person whose name is on the ballot and not someone else?
19 A. Well, you know, I think primarily, it's that
20 you check to see if they're registered. And if the
21 addresses match, you send it out.
22 Q. Well, is there anything in this procedure that
23 would prevent a husband from casting an absentee ballot
24 for his wife? He knows her name, correct; and chances
25 are he knows her Social Security number. What would

1 prevent a husband from casting an absentee ballot in the
2 name of his wife?
3 A. I'd prefer not to answer that, because you're
4 building a scenario. I don't know what's going on in
5 people's households.
6 Q. Well, assume a husband wants to vote in his
7 wife's name. He could call up the city clerk and
8 request an application for her, right?
9 A. That's right.
10 Q. It would be mailed to the address where --
11 let's assume they live together.
12 A. Uh-huh.
13 Q. Correct?
14 A. That's right.
15 Q. Then he would mail the application back to the
16 city clerk and get the ballot for his wife at the house,
17 correct?
18 A. That's right.
19 Q. And he could fill out that absentee ballot in
20 her name and send it in to cast the vote for her, could
21 he not?
22 A. Anything is possible.
23 Q. Okay. Is there any procedure in place that
24 would prevent that scenario from occurring?
25 A. I don't have enough knowledge to answer that

Exhibit

“N”

**Deposition of
Denise Lamb**

IN THE 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
CIVIL 05-1136 MCA & WDS
MILLIE E. SANHILLANES, ALBUQUERQUE
CITY CLERK

Defendant

DEPOSITION OF DENISE LAMB

August 10, 2006
10:01 AM
One Civic Plaza, Fourth Floor
Albuquerque, New Mexico 87102

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE
this deposition was

TAKEN BY PAULA L. FORNEY
ATTORNEY FOR DEFENDANT

REPORTED BY: Rachel M. Lopez, NM #P-44
RUSSEN REPORTING
1608 5th Street, NW
Albuquerque, New Mexico 87102

1 Q. Is it current?
2 A. Yes.
3 Q. Did you prepare that for anything in particular?
4 A. I think I prepared that for Mr. Scarantino. I
5 think he asked for it.
6 Q. And what is Exhibit 2, while we're looking at it?
7 A. That's my Expert Witness Report.
8 Q. Is that a document you prepared for this case?
9 A. Yes.
10 Q. And was that at Mr. Scarantino's request?
11 A. Yes.
12 Q. You said you're an assistant deputy county clerk?
13 A. No. I'm the chief deputy county clerk.
14 Q. How many deputy county clerks are there?
15 A. It depends.
16 Q. On what?
17 A. On what they're doing at any given time.
18 Q. What's the range?
19 A. The range?
20 Q. Yes.
21 A. Of deputy county clerks?
22 Q. Of number of deputy county clerks?
23 A. I don't know.
24 Q. What does it depend on?
25 A. It depends on what activities the employees in

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17 Albuquerque, New Mexico 87102
18 BY PATRICK J. ROGERS

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23	4	1 Narrative Resume
24	4	2 Expert Witness Report by Denise Lamb

1 the office are engaged in.
2 Q. Does it vary when you're getting closer to an
3 election or when an election is being administered?
4 A. Yes.
5 Q. Well, are you now in an election cycle?
6 A. Yes.
7 Q. Which election are you preparing for?
8 A. The general election in November.
9 Q. And how many deputies do you have?
10 A. Right now, no one is acting as a deputy. People
11 are deputized when they're delivering ballot boxes and
12 things of that nature. We're not close enough to the
13 actual election to have people acting in that deputy
14 capacity.
15 Q. So you're the chief deputy with nobody below you
16 at this point?
17 A. No, I have a number of employees that are under
18 my constant supervision in the election office.
19 Q. And are they deputies?
20 A. They are deputies as we get closer to an
21 election.
22 Q. What are they now?
23 A. Right now they have their personnel assignments.
24 We have a voting system's supervisor. We have voter
25 registration specialists. We have election

1 DENISE LAMB
2 after having been first duly sworn under oath
3 was questioned and testified as follows:
4 EXAMINATION
5 BY MS. FORNEY:
6 [Exhibits 1 and 2 marked for identification.]
7 Q. Will you state your name for the record, please?
8 A. Denise Lamb.
9 Q. Ms. Lamb, are you currently employed?
10 A. Yes.
11 Q. And how are you employed?
12 A. I am the chief deputy county clerk for Santa Fe
13 County Bureau of Elections.
14 Q. And I have given you two documents that we'll get
15 to. One is marked Exhibit 1. Can you tell me what that
16 is?
17 A. One is marked what?
18 Q. Oh, I'm sorry. Let me write that on there. I
19 didn't give you the marked ones. Exhibit 1. I marked
20 them 1 and 2 down in the corner.
21 A. All right.
22 Q. What is Exhibit 1?
23 A. It's a Narrative Resume.
24 Q. Is that your resume?
25 A. Yes.

1 administration specialists on range three and four,
2 depending on their experience.
3 Q. How many are there that you supervise?
4 A. Eight.
5 Q. Who is your supervisor?
6 A. My supervisor is the county clerk.
7 Q. And who is the county clerk?
8 A. Valerie Espinoza.
9 Q. You've been employed there since January 2005?
10 A. Correct.
11 Q. What are your specific job duties?
12 A. My specific job duties are to generally supervise
13 the conduct of elections in Santa Fe County.
14 Q. And what does that consist of you doing?
15 A. That consists of me making sure that the election
16 code of the State of New Mexico is carried out pursuant
17 to the instructions of the Secretary of State, and the
18 attorney general's office, following all rules,
19 regulations and the election code and federal laws.
20 Q. What laws, specifically, are you following?
21 A. Specifically?
22 Q. Yes.
23 A. The election code.
24 Q. Is that the state election code?
25 A. Yes.

Page 7

1 Q Is there a municipal election code?
 2 A There is, but at the county level, in my present
 3 capacity, we don't administer the municipal election
 4 code.
 5 Q Which takes precedent, the municipal or state
 6 election code with regard to a municipal election?
 7 A What the election code says -- what the municipal
 8 election code says is that if a specific procedure is
 9 not spelled out, then you go back to the state election
 10 code for guidance.
 11 Q Is there a state municipal election code?
 12 A Yes, there is
 13 Q Okay Where does that one fit in the scope of
 14 things?
 15 A That is in the election code of the State of
 16 New Mexico, and it's called the municipal election code
 17 Q Do you know what the section numbers are for the
 18 election code and the municipal election code?
 19 A The state election code starts at 1-1-1 And the
 20 municipal election code is in, I believe, 3-something,
 21 and I'm not sure what the exact designation is
 22 Q What is the hierarchy of which code prevails or
 23 controls?
 24 A I think that would probably require a legal
 25 interpretation, and I'm not an attorney.

Page 8

1 Q Have you ever been in a position where you have
 2 applied a municipal election code?
 3 A Where I have what?
 4 Q Applied a municipal election code
 5 A You mean applied the municipal election code?
 6 Q Well, we're talking two types of municipal
 7 election codes, aren't we?
 8 A Well, not that I'm aware of. There's the one
 9 that's in the state law
 10 Q Right
 11 A And that's the one that I'm aware of.
 12 Q Right. Have you ever applied that?
 13 A I have followed the direction of the municipal
 14 code in the administration of election of the Secretary
 15 of State's office
 16 Q Have you ever administered an election conducted
 17 pursuant to the state municipal election code?
 18 A Not administered it, no
 19 Q Is there a separate Santa Fe municipal election
 20 code?
 21 A The City of Santa Fe -- I believe the City of
 22 Santa Fe's charter has adopted the state municipal
 23 election code.
 24 Q Do you know whether the City of Albuquerque's
 25 charter has adopted the state municipal election code?

Page 9

1 A No
 2 Q Do you know whether the City of Albuquerque has
 3 its own election code?
 4 A No
 5 Q Have you read any of the election codes
 6 applicable to the City of Albuquerque other than the
 7 state and the municipal?
 8 A No
 9 Q You said that while you worked at the Secretary
 10 of State's office, you administered a municipal election
 11 pursuant to the state municipal election code?
 12 A No I said I administered the municipal election
 13 code under state law. In other words, the municipal
 14 code directs the Secretary of State to investigate
 15 complaints regarding municipal elections and forward
 16 those to the applicable law enforcement authorities
 17 Q Have you ever been in a position where you have
 18 personally administered a municipal election?
 19 A No
 20 Q Have you ever worked for any municipality?
 21 A I have worked on contract for the City of Santa
 22 Fe, but not in the field of elections.
 23 Q What duties did you do for the City of Santa Fe
 24 as a contractor?
 25 A Well, for the City of Santa Fe, as a

Page 10

1 contractor -- well, it says right here on my Narrative
 2 Resume, as you can see, from 1979 to 1993
 3 Q You were a court reporter?
 4 A Correct.
 5 Q Were you like the only court reporter for these
 6 boards and commissions?
 7 A For a time I was, but then they expanded the
 8 number of committees, and there were -- by the time I
 9 stopped doing this, there were other people that did it
 10 as well.
 11 Q And between '79 and '93, you didn't engage in any
 12 employment that was related to conduct of elections?
 13 A No
 14 Q Now, then the next thing you did was '91 through
 15 '93, a legislative analyst?
 16 A Correct
 17 Q What specific topics did you work on during that
 18 period of time?
 19 A Elections.
 20 Q Who did you work for?
 21 A I worked for the Secretary of State's office
 22 Q Who was the Secretary of State at that time?
 23 A Stephanie Gonzales.
 24 Q And what specific analysis did you conduct
 25 related to elections?

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1 A The office would receive bills from the DFA and
 2 the LFC, and we would have a 24-hour turnaround. And
 3 what you had to do is you had to analyze each bill for
 4 its administrative impact, for its fiscal impact on the
 5 agency, and for any other information that you felt it
 6 was important for the legislature to know.
 7 Q What specific legislation was presented to you
 8 for analysis that was related to elections?
 9 A I couldn't even begin. I mean, it was too long
 10 ago to remember, and there are too many bills. There
 11 are 60 -- 70 election bills in a session a 60-day
 12 session
 13 Q Was the position year-around or just during the
 14 legislature.
 15 A Just during the session
 16 Q So a month? Two months?
 17 A Well, it depended. In the 60-day session, it was
 18 two months, and in the 30-day session, it was 30 days
 19 Q I understand. My question was -- and it probably
 20 wasn't clear -- did you start before and stay after, or
 21 was it coexistent with the time of the legislature?
 22 A I had some duties after I was charged with
 23 presenting a final report to the Secretary of State on
 24 the legislation that passed, failed, vetoed. And so for
 25 a couple of weeks after the session, I would be

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1 preparing that report and waiting for all the bills to
 2 come in.
 3 Q So you did three sessions?
 4 A No pre-session.
 5 Q No I said, you did three sessions? I'm sorry
 6 A Oh. Three, yes.
 7 Q And do you have any recollection of any major
 8 election bill changes being enacted during that period,
 9 those three sessions?
 10 A No
 11 Q You don't have any recollection, or there weren't
 12 any?
 13 A I don't recall
 14 Q Did you perform any other duties for the
 15 Secretary of State other than the bill analysis during
 16 these three years?
 17 A No
 18 Q Then it says from April of '93 to November of
 19 '94, you became an administrative assistant to the
 20 Secretary of State?
 21 A Correct.
 22 Q Was that a full-time position?
 23 A Yes
 24 Q And what were your duties?
 25 A Anything the Secretary of State asked me to do

1 municipal election code. Some municipalities who have
2 charters -- who have adopted a charter that are home-run
3 municipalities, such as Albuquerque and Santa Fe, have
4 adopted portions of the municipal -- state municipal
5 election code. And it just depends on the municipality
6 and the extent to which they have done that
7 Q If they have not adopted the portions of the
8 state municipal election code and have done their own --
9 A Yes
10 Q -- which law governs? The state municipal
11 election code or the local municipal election code?
12 A. Well, I would assume, in a case like that -- and
13 I don't know, because I am not an attorney -- that the
14 first would be their code, and then depending on what
15 their code said, the other laws.
16 Q Do you know whether there's a provision
17 addressing provisional ballots in the Albuquerque -- the
18 local Albuquerque municipal election code?
19 A. No
20 Q Is it your understanding that the state
21 requirements concerning provisional balloting are
22 applicable to the City of Albuquerque?
23 A. I don't know the answer to that
24 Q When can provisional ballots be used in a state
25 election?

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1 A. Provisional ballots are used in a state election
2 whenever a voter -- a voter's name does not appear on
3 the roster at their polling place.
4 Q And what could that be due to?
5 A. It could be due to them being at the wrong
6 polling place. It could be due to them -- to an
7 administrative error on the part of the county clerk.
8 There's a variety of things that could happen.
9 Q And who is responsible for resolving whether a
10 provisional ballot would get counted?
11 A. The county clerk's office, and the canvassing
12 board of the county.
13 Q Does the Secretary of State's office or the state
14 election bureau have any involvement in that process?
15 A. No.
16 Q. Any other duties that you have or had as state
17 election director?
18 A. Any other duties?
19 Q Right. We've talked about administering HAVA --
20 or implementing HAVA. Excuse me
21 A. Well, I've administered the election code.
22 Q. What did that consist of doing?
23 A. I think I answered that question already
24 Q. I'm not sure you did. I think you did it with
25 regard to the Secretary of State's office when you were

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1 there. Is anything different?
2 A. The general duties of the election administrator
3 of the State of New Mexico is to ensure that the
4 election code is administered in a uniform manner
5 throughout the 33 counties by the county clerks
6 Q. In that position, did you ever take any action
7 against any county clerks or officials for some
8 impropriety?
9 A. What do you mean by "action"?
10 Q. Did you do anything? Did you discipline? Did
11 you warn? Did you give written notice? Did you
12 prosecute or send for prosecution?
13 A. Well, the Secretary of State's office does not
14 have subpoena power, nor are we prosecutors
15 Q. Right
16 A. There was one notable instance where there was a
17 county clerk in one of the counties that was charged
18 with felonies, and I was called to testify at that
19 trial.
20 Q. Did the Bureau of Elections state election
21 director, other than your testimony, have anything to do
22 with bringing that case to prosecution?
23 A. You mean, did we refer it to the district
24 attorney?
25 Q. Correct

1 A. No
2 Q. How did it come up then?
3 A. There was a dispute between the county clerk and
4 one of the political parties, and the evidence from the
5 political party basically indicated that the county
6 clerk was not carrying out the duties required under the
7 election code. Our office sent a letter to the county
8 clerk basically listing the deficiencies that we saw in
9 terms of following the state election law, and we C.C'd
10 the district attorney at the same time.
11 Later the district attorney decided to file
12 charges, and there was a trial, and the offending county
13 clerk was removed from office.
14 Q. Does the state elections' director or office
15 certify local elections' officials?
16 A. Certify in what respect?
17 Q. Any respect. To say you can act as a state
18 elections' official, you can do whatever with regard to
19 elections?
20 A. You mean to county clerks?
21 Q. Yes
22 A. No. County clerks are elected officials that are
23 elected and they take an oath to uphold the constitution
24 and laws of the state
25 Q. Are there officials below them, like yourself in

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1 Santa Fe. I guess, who get some sort of certification to
2 administrator elections?
3 A. No
4 Q. Are there any provisions in the state municipal
5 election code that govern a situation where a voter is
6 not on the voter roles in the precinct that the voter
7 tries to vote at?
8 A. Are you talking about provisional ballots again?
9 Q. Anything that would lead to that situation
10 A. Would you ask your question again? I'm sorry
11 Q. Sure. Are there any provisions in the state
12 municipal election code --
13 A. The state municipal election code?
14 Q. Right
15 A. Okay.
16 Q. -- that govern the situation where the voter is
17 not on the voter roles at the precinct that the voter
18 tries to vote at?
19 A. Yes
20 Q. Okay. What are those provisions?
21 A. There is a section of the law that provides that
22 a certificate of eligibility can be issued. So, in
23 other words, if the voter is not on the roles, what
24 happens is the voter can go to the county clerk's
25 office, and the county clerk will look up the voter in

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1 the roles, sometimes physically in the card file
2 If it turns out that the voter is, in fact, a
3 registered voter, and their name has been omitted for
4 any reason, then the county clerk issues what is known
5 as a certificate of eligibility. The voter then takes
6 that back to the polling place and can cast a ballot.
7 Q. And is this taking place during the day of the
8 election?
9 A. Yes
10 Q. And what do they look at to determine whether a
11 voter is eligible?
12 A. I think I already answered that. I just said a
13 certificate of registration
14 Q. So they search other records for the
15 registration, other than those at the polling place?
16 A. I'll answer once more.
17 Q. Okay.
18 A. The voter goes to the county clerk's office. The
19 county clerk's office searches their file, including the
20 file of original certificates of registration. If, in
21 fact, the voter is registered, then they are issued a
22 certificate of eligibility. They take that back to
23 their polling place, and they are permitted to vote.
24 Q. And this takes place on the day of voting?
25 A. Yes

1 elections would go to the city clerk as well?
 2 A. Yes, they can go to the city clerk as well. And
 3 those cases, typically, the city clerk would call us.
 4 Q. Would you then resolve the issue with regard to a
 5 municipal election?
 6 A. We would usually direct the city clerk to tell
 7 the complaining party to send us a letter in writing.
 8 Q. Were there any records kept of -- well, could the
 9 city clerk attempt to resolve it first without your
 10 intervention?
 11 A. Yes, absolutely.
 12 Q. And do you have any records of how many of those
 13 complaints were resolved by the city clerks before they
 14 got to your level?
 15 A. No. A lot of times they would just be resolved
 16 at the city level, and they would never even come to our
 17 attention.
 18 Q. So you didn't know what those complaints were?
 19 A. There would be no way for us to know.
 20 Q. Are city clerks required to make any kind of a
 21 report to you about complaints during an election?
 22 A. No.
 23 Q. Do county clerks also field complaints like a
 24 city clerk would?
 25 A. Sure.

1 has to do with the voting machines, provisional ballots,
 2 voter registration, all the things that could -- that
 3 are designed to prevent a voter being disenfranchised.
 4 Title 3 of HAVA. And there is an administrative rule
 5 that is drafted that addresses Title 3 complaints.
 6 Q. What does it require, generally? I don't expect
 7 you to quote it.
 8 A. It requires a written complaint being submitted
 9 within a certain period of time, the Secretary of State
 10 has to engage a hearing officer; there's a hearing
 11 provided.
 12 Q. Was one of those procedures ever followed while
 13 you were at the Secretary of State's office?
 14 A. No.
 15 Q. How about at the Santa Fe County?
 16 A. No.
 17 Q. Are you aware of any procedure like that being
 18 conducted in the state?
 19 A. Not yet.
 20 Q. Did the Secretary of State's office require
 21 county and municipal clerks to keep records of voter
 22 fraud complaints that came up?
 23 A. Secretary of State's office does not -- the state
 24 election code does not provide that the Secretary of
 25 State's office do that.

1 Q. And do they attempt to resolve them on the first
 2 level before they escalate them to you?
 3 A. Some do.
 4 Q. Are they required to report all of those
 5 complaints to the Secretary of State's office?
 6 A. No.
 7 Q. Once a complaint comes into the Secretary of
 8 State's office, is there any formalized way of resolving
 9 it or handling it?
 10 A. Formalized?
 11 Q. "Well, we've got five complaints on this. We
 12 have to log them in on a certain place. We have to send
 13 them to this particular person." Any kind of an
 14 established protocol for dealing with them?
 15 A. No.
 16 Q. Do you know whether there's any kind of an
 17 established protocol for dealing with complaints at the
 18 county clerk's offices?
 19 A. Well, I don't know what other county clerks do.
 20 I can only speak for the Santa Fe County Clerk's office.
 21 Q. Correct. Is there a protocol?
 22 A. Yes. If we got a complaint -- I think a
 23 complaint that involves disenfranchising a voter is much
 24 more serious than a complaint about a campaign sign and
 25 highway department easement. So you prioritize

1 Q. Was there any separate requirement imposed by the
 2 Secretary of State's office, or request even, that
 3 county and city clerks provide information or
 4 compilations on fraud complaints?
 5 A. There was no requirement that they do so, but
 6 most of them would.
 7 Q. Do you know for certainty that all such
 8 complaints were reported to the Secretary of State's
 9 office?
 10 A. No, because as I just said, a lot of times the
 11 complaint may not be valid, or it may be handled at the
 12 local level. County clerks can also make direct
 13 referrals to the district attorney without going through
 14 the Secretary of State's office.
 15 Q. Are you aware of any complaints being made
 16 without the Secretary of State's offices involvement?
 17 A. Yes, I am. I can give you an example. This is
 18 the only known instance of a non-citizen voting in an
 19 election in New Mexico. It took place in Los Alamos.
 20 There was a Russian scientist up there who had applied
 21 for citizenship and was within days, I believe, of
 22 taking his oath. He registered to vote, thinking that
 23 it was okay to do so, and he voted in a school election.
 24 The county clerk in Los Alamos at the time made a
 25 referral to the district attorney, and the district

1 complaints based on your assessment of the level of
 2 damage and how serious the complaint is.
 3 Q. What do you define as a disenfranchisement-type
 4 complaint?
 5 A. Well, anything that affects the rights of the
 6 voter to cast their ballot, that's disenfranchising.
 7 Q. What have been some of the complaints that have
 8 come in that are disenfranchising that you've dealt with
 9 at the Santa Fe County?
 10 A. Actually, we haven't had any complaints like that
 11 in the last year and a half.
 12 Q. Do you know whether there's a complaint procedure
 13 through the Albuquerque city clerk?
 14 A. No, I don't know.
 15 Q. Are there any complaint procedures established
 16 under HAVA?
 17 A. Yes.
 18 Q. What are those?
 19 A. There's an administrative complaint procedure.
 20 The Secretary of State's office has an administrative
 21 rule that basically deals with the requirements of --
 22 well, there's a section of -- I think it's Section 3 of
 23 HAVA without having it right in front of me.
 24 Q. Sure.
 25 A. I'm not sure. But there's a section of HAVA that

1 attorney investigated and came to the conclusion that
 2 there was no intent on the part of the Russian scientist
 3 to commit fraud or even commit a crime, and nothing
 4 happened.
 5 Q. Any others you're aware of?
 6 A. Not that I can recall right off the top of my
 7 head, but that one stuck in my mind.
 8 Q. Do you have any personal knowledge of anybody who
 9 was ever accused of impersonating someone else at the
 10 polls?
 11 A. No.
 12 Q. What law enforcement agencies have the authority
 13 to prosecute voter fraud, DA, AG, anybody else?
 14 A. Well, let's see. The district attorney could. I
 15 imagine that a municipal attorney could do so. The
 16 attorney generals can do so. The FBI, the US Department
 17 of Justice.
 18 Q. Did you do any kind of interviewing or talking to
 19 anybody or investigation to write this report?
 20 A. No.
 21 Q. Have you ever interviewed anybody to determine if
 22 there have been instances of impersonation or even
 23 allegations of impersonation for purposes of voter
 24 fraud?
 25 A. For this report?