

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

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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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,

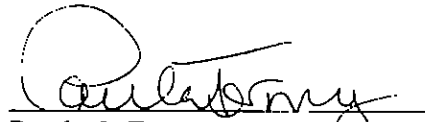
Defendant.

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

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MILLIE U. SANTILLANES, ALBUQUERQUE
CITY CLERK,

Defendant.

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

Defendant Millie Santillanes, by and through her undersigned attorneys, submits this memorandum in reply to plaintiffs' Memorandum In Response to Defendant's Motion for Summary Judgment, Dkt. No. 74, filed October 10, 2006 (hereinafter "plaintiffs' response 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 summary judgment 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. Dkt. No. 74 (Plaintiffs' response memorandum). p. 2.¹

A. Response to Defendant City's Statement of Facts.

Plaintiffs dispute only the following facts in the city's memorandum. For

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

an issue of fact to be contested for purposes of Rule 56, the matter being contested must be material. Fed.R.Civ.Pro. 56(c) (a party is entitled to summary judgment as a matter of law where there is no genuine issue as to any material fact). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 247-8 (1986)(*emphasis in original*). In other words, "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Schwartz v. Bhd. of Maint. of Way Empl., 264 F.3d 1181, 1183 (10th Cir. 2001) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U. S. at 248). Although plaintiffs purport to dispute fifteen of the city's material facts, these disputes are without merit or are immaterial.

Defendant City's Fact No. 6: The city's statement concerning the requirements of the Voter ID Law is correct as a matter of law and plaintiffs' dispute ignores the language of the law. The Voter ID Law provides: "The Municipal Election Clerk shall . . . ask the individual seeking to vote for one current valid identification card containing the voter's name and photograph. Such photo identification card may include. . . ." The Voter ID Law provides a listing of the types of photo identification cards that may be presented to the election clerk. Dkt. No. 64 (City's Memorandum) Exhibit A. The law requires nothing more than a "valid identification card containing the voter's name and address."

Defendant City's Fact No. 7: Plaintiffs assert that the Voter ID Law does not state that a voter ID may be obtained from the city clerk on or after

Election Day. The Voter ID Law provides that the city clerk shall issue photo identification cards and provides a procedure for the issuance of such identification. The procedure specified in the law itself does not limit the time period in which a photo identification card may be issued by the city clerk. Dkt. No. 64 (City's memorandum) Exhibit A. There is no factual dispute: what the law provides is a matter of law for the court's interpretation.

Defendant City's Fact No. 12. Again, plaintiffs attempt to characterize the provisions of the Voter ID law, which is for the court's interpretation. According to the law, voters who cast provisional ballots are required to present photo identification to the city clerk within the ten-day canvassing period immediately after the election. There is no misstatement of the requirements of the Voter ID Law in fact No. 12. Dkt. No. 64 (City's memorandum) Exhibit A.

Defendant City's Fact No. 14: Plaintiffs state that the Voter ID law does not use the term "in person voting." The threshold requirement of the Voter ID Law is in the first sentence of the law: "when a voter approaches the election polling place seeking to vote. . . ." The remainder of the Voter ID law describes the procedures to follow. The only type voting to which the Voter ID Law can apply is when the voter presents himself at a polling place, which constitutes voting in person. Section 3-9-7 NMSA 1978² provides for in-person absentee voting, which plaintiffs refer to as early voting. Section 1-6-5.7A. does not apply to municipal elections, a point discussed a length in the City's Memorandum in Response to Plaintiffs' Motion for Summary judgment, Dkt. 75, filed 10-11-06, pp. 23-28, (hereinafter "city's response memorandum") The Municipal Election Code, Chapter 3, Articles 8 and 9, does not use the

² All New Mexico statutory references will be to the statute number only, without the "NMSA 1978" designation and to the applicable provision, unless otherwise indicated.

terminology "early voting" but allows absentee voting at a polling place where the voter appears in person and is given a ballot on which to vote. Section 3-9-1 defines "absentee voting" as casting a vote by a qualified elector for any candidate or question prior to Election Day, by mail on an absentee ballot, in person on an absentee ballot or in person on a voting machine. Voting in person on a voting machine is a separate process from voting on a ballot sent to the voter by the clerk through the mail and returned by mail or to the clerk's office by hand delivery. Returning the absentee ballot to the clerk's office by hand delivery is not "in-person" voting because the voter has already voted on the mailed ballot and placed the ballot in the return ballot envelope.

Sections 1-6-16A, 1-6-5 F. and 1-6-10.1 cited by plaintiffs do not apply to municipal elections. The location where the voter votes absentee in person before election day on a voting machine is an election polling place, Section 3-9-7D.; when a voter votes on an absentee ballot received in the mail and chooses to vote on that ballot at the city clerk's office, that process is not defined as in-person voting at a polling place. Section 3-9-4L. There is no material factual dispute. This issue requires interpretation of the applicable voting laws.

Defendant City's Facts Nos. 17 and 19: Plaintiffs argue the existence of a factual dispute based on testimony of the city clerk. While Ms. Santillanes is the city clerk, she does not administer the actual operation of the municipal polling places on Election Day. Administration is by the election clerks and judges appointed pursuant to Section 3-8-19. Ms. Santillanes was appointed as city clerk on December 1, 2005 and has not trained any precinct board members concerning the Voter ID law or administered any election involving the Voter ID law. Dkt. No. 75 (city's response memorandum) Exhibit M, pp. 3, 6,

8. In addition “current valid” as used to modify “identification” are non-technical words given their ordinary meaning. Dkt. No. 75 (city’s response memorandum) pp. 11-13. There is no material factual dispute.

Defendant City’s Fact No. 21: Plaintiff denies the city’s statement of fact that “the organizational plaintiffs have made no expenditures related to the photo identification requirement” arguing that Mr. Hughes’ organization anticipates spending money related to the voter ID requirements. This statement confirms the city’s assertion that there have been no such expenditures to date; the mere possibility of some future expenditure at some unknown time is insufficient to confer standing. Courts have generally rejected this type of speculative injury as a basis for standing. Even under the more relaxed standing requirements applied in the fair housing context which are not applied to voting cases, plaintiffs must show that they have actually expended resources. Spann v. Colonial Village, Inc., 899 F. 2d 24, 27 (D.C. Cir. 1990).

Defendant City’s Facts Nos. 22, 30: There is no material factual dispute. Ms. Goldfarb testified in response to the question: “Have you (the League of Women Voters) taken any kind -- or conducted any kind of a study or a poll of your members to determine if you have any members who not have an appropriate ID to vote.” Her response was “We have asked in our newsletter and not received a response there.” Dkt. No. 66 (city’s memorandum) Exhibit D, p. 12. Plaintiffs do not dispute these facts and they should be deemed established.

Defendant City’s Fact No. 24: See city’s response to plaintiffs’ denial of Facts Nos. 17 and 19, above.

Defendant City’s Fact No. 29: Plaintiff Kazaras did not state that her

photo ID issued by the University had been revoked. The photo identification Kazaras described contained her photo and name as required by the Voter ID Law. There is no material factual dispute.

Defendant City's Fact No. 31: Plaintiff Kass testified that she does not know if her mother is registered in Albuquerque to vote, if she votes absentee or whether she has photo identification other than a state issued driver's license. Dkt. No. 64 (city's memorandum) Exhibit H, pp. 4, 5. There is no material factual dispute.

Defendant City's Fact No. 32: While plaintiffs state that they deny the fact there is no material factual dispute and the testimony of Kazares speaks for itself. Plaintiffs admit Plaintiff Kazaras stated that she would "probably go vote absentee" if she lacked an ID to vote and this fact shows that Plaintiff Kazaras has suffered no harm as a result of the Voter ID Law; she has no standing as a plaintiff in this litigation.

Defendant City's Fact No. 37: The testimony of Ozawa Bincshi Albert speaks for itself. She was asked, "Do you know about a survey being done by SAGE Council?" Albert answered, "We've done several in the last ten years. You'd have to be a little more specific." When asked, "Okay. Any on voting?" Plaintiff Albert identified a study from spring, 2006, which did not address the Voter ID Law. (City's memorandum) Exhibit E, pp. 9 and 12.

Laurie Weahkee was asked, "Has anything been done to your knowledge that you relied on in terms of statistics from phone banks or otherwise as to whether urban Native American possessed valid photo IDs." The response cited no study or survey. Ms. Weahkee could produce no reports concerning Voter ID. (City's memorandum) Exhibit L, pp. 116-117. There is no factual

dispute in the testimony, which speaks for itself.

Defendant City's Fact No. 39. There is no material factual dispute: plaintiffs have stipulated to the city's fact. The city, however, disputes plaintiffs' assertion that "Denise Lamb, [] supervised all elections in New Mexico for more than a decade" No basis is provided for this statement and it is belied by Ms. Lamb's own sworn testimony that she had no information concerning Albuquerque city elections because she had never administered a municipal election. (City's memorandum) Exhibit N, pp. 8, 9, 37, 69.

B. The city's response to plaintiffs' Additional Statement of Facts.
Dkt. No. 74 (Plaintiffs' response memorandum), p. 7.

Plaintiffs' additional fact is immaterial except to demonstrate that a runoff election was held and the Voter ID Law was implemented resulting in an election canvass, which shows that all votes cast were counted.

II. ARGUMENTS UNRELATED TO THE REMAINING CLAIMS AND PARTIES.
Dkt. No. 74 (Plaintiffs' response memorandum), p. 7.

Defendant agrees that plaintiffs should now limit themselves to First Amendment and Equal Protection Arguments.

III. ROKITA IS VALID PRECEDENT IN THE CASE AT BAR. INDIANA'S PHOTO IDENTIFICATION LAW IS IN ALL MATERIAL WAYS THE SAME AS THE VOTER ID LAW. Dkt. No. 74 (Plaintiffs' response memorandum), p. 8.

Plaintiffs ask this court to ignore Indiana Democratic Party v. Rokita, 2006 WL 1005037, 2006 U.S. Dist. LEXIS 20321 (S.D. Ind. 2006) arguing that it is not binding precedent. Dkt. No. 74 (plaintiffs' response memorandum) p. 8. An opinion from another district court is not binding authority. Courts routinely consider such authority to be persuasive particularly where there is an identity of issues. See De Pue v. Sears, 812 F. Supp 750 (W.D. Mich. 1992)

(noting that although a Pennsylvania district court's decision was not binding, it was instructive based on the similarity of issues). As set forth in the city's Motion for summary judgment, the voter identification considerations raised before the Indiana court and this court are factually and legally similar. The extensive opinion also details the Indiana court's reasoning for upholding the identification requirement. That detailed and reasoned analysis can be considered by this court as instructive and persuasive. Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 639 (11th Cir. 1991) ("Florida Supreme Court decisions are not binding precedent on this court. Nonetheless, we find the Florida Supreme Court's reasoning instructive and persuasive").

The Indiana Voter ID law is not materially different from the law to be interpreted in this case. The Indiana statute³ is more stringent than 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

³ 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.

(4) Indiana does not have “at will” or universal absentee voting as New Mexico does.⁴ Indiana Democratic Party v. 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.

Sections 1-12-10 and 1-1-24 B, 1-12-8.2 and 1-16-5.F do not apply to municipal elections, as discussed previously, because they are not part of the Municipal Election Code. The delivery of absentee ballots is limited in municipal elections to the office of the city clerk, Section 3-9-8. B. Plaintiff’s entire argument is base on the Election Code, Chapter 1, NMSA, which does not apply to municipal elections. Plaintiffs state that the Indiana law requires a photo i.d. of absentee voters who deliver their ballot to the clerk’s office, citing Ind. Code Section 3-11-8-25.1. That section does not state that the delivery of absentee ballots requires proof of identification. The provision concerning absentee voting is found in Ind. Code Section 3-11-10-26, which allows early “absentee” balloting in the same manner as found in Section 3-9-7, a procedure commonly

⁴ 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.

know as early voting. As discussed previously, early voting is in-person voting and as such requires photo identification. Early voting is not the same as the delivery of an absentee ballot received in the mail by the voter from the City Clerk. In Indiana, when a voter applies for an absentee ballot that he/she can mail back to the County Clerk, he does not have to provide photo identification, Ind. Code, Section 3-11-4-2. Indiana's photo identification law is in all material ways the same as the Voter ID Law.

The Georgia Photo, however differs from the Voter ID law. In Common Cause v. Billups, 439 F. Supp. 2d 1294, 1334 (N.D. Ga. 2006), the court notes that

many voters may not even attempt to vote a provisional ballot in person because they do not have a Photo ID, and they believe that they cannot make the necessary arrangements to obtain a Photo ID within forty-eight hours after casting their votes.

The Court also found that

Additionally, evidence submitted by Plaintiffs in connection with the 2006 Photo ID Act indicates that many Georgia voters have literacy skills that are below the level required to navigate the absentee voting process successfully without assistance.

Billups at 1334.

Unlike the 48 hour limitation at issue in Georgia, the voter ID law allows ten days to obtain and present photo identification. Plaintiffs have not and cannot present any evidence as to any speculative lack of literacy skills as was presented in Georgia, because plaintiffs have withdrawn all of their expert witnesses. Dkt. No. 51. A more detailed analysis of the Billups case is found in Dkt. No. 74 (city's response memorandum), pp. 33-35.

Gonzalez v. State of Arizona, 435 F. Supp. 2d 997 (D. Ariz. 2006) cited by plaintiffs, was a challenge under the National Voter Registration Act, 42 U.S.C.

§ 1973gg, to Proposition 200 approved by the voters of Arizona in 2004 that requires proof of citizenship identification for voter registration and voter identification when voting [now codified under A.R. S. Section 16-579]. Under the Arizona statute the identification allowed may include non-photo identification. The district court denied plaintiffs' motions for a preliminary injunction and that decision was appealed. On September 11, 2006 the Ninth Circuit granted an interlocutory injunction prohibiting Arizona from enforcing Proposition 200. Ninth Circuit, Cause Nos. 06-16702 and 06-16706 (9-11-06). The United States Supreme Court granted Arizona's application for stay and vacated the interlocutory injunction. Purcell v. Maricopa County Recorder, 549 U.S. ___ (2006); 2006 U.S. LEXIS 8000; 2006 WL 2988365 (U.S.) (October 20, 2006). Although Purcell does not address the Voter ID Law, the Court did make it clear that voter identification requirements such as the Voter ID Law do not necessarily result in turning away qualified registered voters by election officials for lack of proper identification, Purcell at *2. To the extent that Purcell involves voter registration however, the Albuquerque City Clerk has no involvement in the voter registration process; the Bernalillo County Clerk administers voter registration. The provisions of 42 USC § 1973gg do not apply to the Albuquerque City Clerk.

Another case decided during the briefing in this proceeding, which plaintiffs may cite, is not applicable. Weinschenk v. State of Missouri, 2006 Mo. LEXIS 122 at **5-10 (S.Ct. Mo. October 16, 2006) 2006 WL 2959284, (Mo. 2006) (*not final until expiration of the rehearing period*). The Missouri Supreme Court struck a photo voter identification law with significant differences from the voter ID law at issue: (1) Missouri allowed only photo

identification issued by the State of Missouri and the federal government, (2) the Missouri photo identification must contain the person's name as listed in the voter registration records and must have an expiration date showing the identification has not expired, (3) use of the provisional ballot in Missouri is limited to those who sign an affidavit that they cannot get a photo identification because of a disability, handicap, religious beliefs, or those born before 1941, and (4) in Missouri, the signature on such affidavit must match the signature on file with the election authority. None of these limitations apply to the voter ID law. Further, there was no provision requiring Missouri to provide free voter identification to indigent voters, let alone all voters, as is required in the Voter ID Law. Weinscheck, at *30.

Finally, the comment by the Missouri Court that the Federal Real ID Act of 2005, Pub. L. 109-13 Title II, (119 Stat. 301, 2005) would not permit Missouri to issue free driver's licenses to its citizens would not apply to Albuquerque's free voter photo identification because the Federal Real ID Act only applies to driver's licenses. The Voter ID law allows many alternative forms of photo identification as well as allowing the voter to obtain photo identification from the city clerk with non-photo identification documents, all without cost to the voter.

While this court can look to Rokita for guidance in addressing this issue because it is factually and legally analogous, the laws being questioned in Billups, Gonzales and Weinscheck are not. Those cases do not provide assistance to this court to review Albuquerque's voter ID provisions.

IV. PLAINTIFFS DO NOT HAVE STANDING TO ASSERT THEIR CLAIMS.
Dkt. No. 74 (Plaintiffs' response memorandum), p. 12.

A. Plaintiffs have no First Amendment standing.

The cases cited by plaintiffs do not support their contention that they have some sort of standing beyond that required by Article III, permitting them to assert a void for vagueness claim when they would not otherwise have the Article III standing to do so. Plaintiffs' claim should be rejected. First, the quotation from City of Chicago v. Morales, 527 U.S. 41, 55, n. 22 (1999) on which they rely specifically requires an "adverse[] impact[] by the statute in question," whether it arises under Article III or some other species of standing. Second, their reliance on Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) is misplaced. The Court required:

The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact," an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of, the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Specifically the Court found no standing by the organizational plaintiffs in that case. The organizations could not validly assert standing based on their members' affidavits that did not support a finding of actual or imminent injury. The Court also rejected other theories of standing such as an "animal nexus" approach, whereby any person with an interest in studying or seeing endangered animals anywhere on the globe would have standing to challenge a federal decision that threatens such animals and a "vocational nexus" theory similar to the animal nexus theory. Plaintiffs' theories in this case are of no greater validity than those in Lujan.

Plaintiffs have not satisfied the standing requirement of Lujan and have shown no harm to any of the individual or organizational plaintiffs. They rely on Friends of the Earth, Inc. v. Laidlaw Environmental Services, (TOC), Inc., 528 U.S. 167, 181 (2000) and recite certain of the inquiries set forth in that case, but they fail to address the remaining requirements: plaintiffs must show that they have suffered concrete and particularized and actual or imminent, not conjectural or hypothetical injury. Having identified no voter who lacks a photo identification and having no experts to establish any other basis that the Voter ID law has any constitutional impact, plaintiffs have not established any basis for First Amendment standing.

- B. Plaintiffs' have no equal protection standing.
Dkt. No. 74 (Plaintiffs' response memorandum), p. 15.

“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group,” a plaintiff establishes injury by showing “the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”

Cache Valley Elec. Co. v. State of Utah Dept. of Transp. 149 F.3d 1119, 1122 (10th Cir. 1998)(*citation omitted*). While the city agrees that the injury results from the denial of equal treatment rather than denial of the ability to obtain the benefit, there is no evidence in this case that any individual plaintiff has been denied equal treatment. Further, the injury alleged must be concrete and imminent. Essence, Inc. v. City of Federal Heights, 285 F.3d 1272, 1281 (10th Cir. 2002). Hypothetical or conjectural harm is not sufficient. When a law does not apply to a party, that party has no invasion of a legally protected interest. Essence, Inc. The Voter ID law is applicable to the individual plaintiffs in this case but it does not prohibit them from voting because it is

undisputed that plaintiffs have identification that qualifies them to vote. Thus they have no standing to assert equal protection claims.

V. DEFENDANT DISPUTES PLAINTIFFS' FIRST AMENDMENT CLAIMS. Dkt. No.74 (Plaintiffs' response memorandum), p. 17.

Contrary to plaintiffs' assertion, the city does dispute the First Amendment claims set forth in Count VI of their second amended complaint. See Dkt. No. 64 (city's memorandum) Section V; Dkt. No. 75 (city's response memorandum), Section II. The city argued in its prior memoranda that the voter ID law is the city's rational response to the legitimate concern of voter fraud. Further, the voter ID law is not arbitrary or capricious and its requirements are not vague. Discussed above and in the city's prior memoranda, plaintiffs lack standing to assert these claims because they have not suffered and are not in danger of suffering any injury as a result of the voter ID law. While plaintiffs have identified individuals who may not have voter identification, none of those individuals listed in plaintiffs' initial disclosures, attached as an exhibit to their response memorandum, have provided testimony as to their lack of a valid identification. Plaintiffs have presented no evidence that these individuals lack valid voter ID or that they would in fact vote. Thus those individuals lack standing to assert a First Amendment claim.

Contrary to plaintiffs' assertion, the city has asserted on every occasion possible, its challenge to plaintiffs' First Amendment claim both substantively and because they lack standing to assert the claims. The city requests that plaintiffs' First Amendment claims be rejected as a matter of law on both bases.

VI. SUMMARY JUDGMENT SHOULD BE GRANTED AS TO ALL OF PLAINTIFFS' CLAIMS, INCLUDING THE EQUAL PROTECTION CLAIMS. Dkt. No. 74 (Plaintiff's response memorandum), p. 17.

- A. Strict Scrutiny does not apply. Dkt. No. 74 (Plaintiffs' response memorandum), p. 17.

Defendant's memorandum discusses the inapplicability of strict scrutiny in detail at Dkt. No. 64, pp. 13, 24 and 29.

- B. The city has provided the rationale for requiring photo identification for in person voting while not requiring such identification for absentee (mail in) voting. Dkt. No. 74 (Plaintiffs' response memorandum), p. 18.

The city has briefed this issue at length in its original memorandum, Dkt. No. 64, pp. 36-40, and in its response memorandum to plaintiffs' motion for summary judgment, Dkt. No. 64, p. 20. Plaintiffs' statements challenging the city's asserted rational basis for imposing the voter ID requirement are incorrect, as argued above. See Dkt. No. 74 (plaintiffs' response memorandum) at p. 18. Absentee ballots cannot be cast at the voter's regular polling place on Election Day and absentee in-person early voting is entirely different than casting an absentee ballot received in the mail. Plaintiffs' statement that getting a name from the posted voter list will not permit voter impersonation ignores the lack of any vote impersonation under the Municipal Election Code. A voter arriving early has a very good chance of picking a name of the list of a voter who has not yet voted. As long as the impersonator has a name from the voter list, there may be nothing that would alert the election clerks that the impersonator is not the person he claims to be. Under the Municipal Election Code, the impersonator does not have to provide the last four digits of the social security number or birth date. The Voter ID Law contains findings of voter registration and voter-identify theft. It is not the City's obligation to justify the voter identification requirements but plaintiffs' obligation to provide evidence that the law is invalid. There is no requirement of "elaborate, empirical

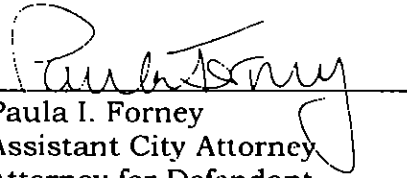
verification of the weightiness of the State's asserted justifications." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997).

VII. CONCLUSION

For the reasons discussed in this reply and in the city's prior memoranda the city requests that the court grant this motion and dismiss plaintiffs' complaint in its entirety. Specifically, plaintiffs lack standing to assert the claims in the complaint and if the court addresses the claims on their merits, the city is entitled to judgment as a matter of law.

Respectfully submitted,

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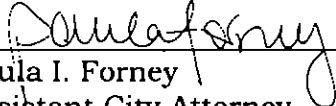
I hereby certify that true copy
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On this 25th day of October, 2006



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