

IN THE UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

FOR THE DISTRICT OF NEW MEXICO

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CLERK-ALBUQUERQUE

THE AMERICAN CIVIL LIBERTIES
UNION OF NEW MEXICO; THE
LEAGUE OF WOMEN VOTERS OF ALBUQUERQUE/
BERNALILLO COUNTY, INC.; SAGE COUNCIL;
NEW MEXICO COALITION TO END HOMELESSNESS;
ANNE KASS, ALEXANDRA KAZARAS
and BARBARA GROTIUS,

Plaintiffs,

v.

No. CV 05-1136 MCA/WDS

MILLIE U. SANTILLANES, ALBUQUERQUE
CITY CLERK,

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment on Counts I and VI of their Second Amended Complaint for Declaratory and Injunctive Relief. For the reasons stated below, the photographic identification requirement adopted by the City of Albuquerque for persons who vote in person on election day, but not for absentee voters, violates the Fourteenth Amendment Equal Protection Clause and the First Amendment of the United States Constitution, and must be declared invalid and its enforcement enjoined.

Plaintiffs request that the Court set this matter and Defendant's expected cross-motion for summary judgment for oral argument. The constitutional issues raised herein concern the most profound political right enjoyed by Americans, the right to vote. The arguments raised in the cross-motions for summary judgment in many respects are complex and of first impression in this District and the Tenth Circuit, and Plaintiffs believe the Court's deliberations will benefit from oral argument.

66

I. Statement of Material Facts

Pursuant of D.N.M.L.R. 56.1(b), Plaintiffs submit their statement of facts:

A. The Albuquerque Voter I.D. Amendment

1. On October 4, 2005, the voters of the City of Albuquerque approved an amendment to the Election Code of the City of Albuquerque that requires all voters who vote in person in any municipal election, but not those who vote by absentee ballot, to present at the polling place one of several specified forms of “current valid” photographic identification. A copy of the amendment is attached as Exhibit A.

B. The Plaintiffs

2. Plaintiff The League of Women Voters of Albuquerque/Bernalillo County (“the League”) is a non-partisan, non-profit membership organization incorporated in New Mexico and founded in 1947. The League has approximately 300 members who are registered voters in the City of Albuquerque. The mission of the League is to encourage the informed and active participation by citizens in government and to influence public policy through education and advocacy. The League’s principles include the protection of all citizens’ equal right to vote and the education of voters about voting rights and procedures. One of the League’s most important functions is to provide educational information to voters, including publishing and distributing a voter’s guide, moderating candidate forums and debates and assisting in the presentation of televised debates. (Affidavit of Diane Goldfarb, Ex. B).

3. The League has dozens of members who vote only in person. The League objects to the Albuquerque voter i.d. amendment because it requires a photo i.d. of those

citizens who vote in person, but not those who vote by absentee ballot. (Goldfarb affidavit, Ex. B).

4. The League contends that the Albuquerque voter i.d. amendment will directly and negatively impact the League and its members for two reasons. One, it subjects its members to different standards and qualifications in voting in Albuquerque municipal elections because it does not require a photo i.d. of absentee voters. Two, it will harm the League's efforts to encourage voters to become as informed as they can be when voting. The exercise of this right to be informed in making a voting decision is subject to higher standards and burdens for voters, who because they may wait until election day to gather and consider by imposing higher standards and burdens upon those voters who wait until election day to receive and consider all available information, developments and news before voting, information they could not consider if they voted earlier. (Goldfarb affidavit, Ex. B).

5. Plaintiff SAGE Council is a non-profit membership organization whose mission includes protecting and advancing the voting rights of Native Americans in the City of Albuquerque. SAGE Council works to register and encourage voting by Native Americans in elections, including Albuquerque municipal elections. SAGE Council has approximately 40 dues paying members who reside and are registered to vote in Albuquerque, and approximately 300 members who reside and are registered to vote in Albuquerque. (Affidavit of Bineshi Albert, Ex. C)

6. Plaintiff Anne Kass is a registered voter in Albuquerque, who chooses to vote in person and not by absentee ballot. She makes that choice so that her decision on how to cast her vote may be fully informed by the full course of a campaign, including the

benefit of newspaper endorsements, news reports, campaign finance reports and campaign literature and events. Further, she chooses to vote in person and not by absentee because she views appearing physically at the polls to vote as an expression of commitment to democracy and her community and an important aspect of the ritual of voting. (Affidavit of Anne Kass, Ex. D)

7. Plaintiff Barbara Grothus is a registered voter in Albuquerque, who chooses to vote in person and not by absentee ballot. She has never voted by absentee ballot. She chooses to vote in person and not by absentee ballot for the same reasons as Plaintiff Kass, as explained in fact #6. (Affidavit of Barbara Grothus, Ex. E)

8. Plaintiff Alexandra Kazaras is a registered voter in Albuquerque who chooses to vote in person and not by absentee ballot. She has never voted by absentee ballot. (Affidavit of Alexandra Kazaras, Ex. F)

9. Defendant Millie U. Santillanes is the City Clerk of Albuquerque. Pursuant to the New Mexico Municipal Election Code, NMSA § 3-8-7 (1978), Defendant Santillanes is charged with the responsibility and authority for administering municipal elections for the City of Albuquerque. Further, Defendant Santillanes is responsible for the actual operation of the municipal polling places and their staffing with election judges and clerks. (Depo. M. Santillanes, p. 6, Ex. G) She is also the person in charge of training election day personnel, and does so personally—"hands on." (Id., pp. 14, 16, Ex. G).

C. Voting In Albuquerque Municipal Elections¹

10. The City of Albuquerque is divided into nine council districts. According to pages 25-26 of the City Charter, attached hereto as Ex. H, there are 369 separate voting precincts within the City of Albuquerque.

11. Under Albuquerque's City Charter, Art. II, Section 2, the New Mexico Municipal Election Code, Chapter 3, Articles 8 and 9, NMSA 1978, governs the conduct of all aspects of municipal elections, except where inconsistent with the terms of the Charter, when the Charter controls. (Ex. II, Albuquerque City Charter, Art. II. § 2).

12. Prior to the Albuquerque i.d. amendment, voter identification requirements were controlled by state law. Under NMSA § 1-12-10, voters at a polling place are required to announce their name, and then to present the required voter identification. State law provides various forms of acceptable identification, but the basic form of identification, which any in-person voter may use, requires them to provide a "verbal or written statement by the voter of the voter's name, year of birth and unique identifier" (NMSA § 1-1-24.B.). "Unique identifier" means the last four digits of a voter's social security number. Persons choosing to vote by absentee ballot must similarly provide their name and year of birth and their "unique identifier." (NMSA § 1-6-4.C.)

13. The Albuquerque voter i.d. amendment (Ex. A) is inconsistent with and thus supercedes state law. It requires, in pertinent part,

"When a voter approaches the election polling place seeking to vote, the Voter must identify himself or herself audibly by name. The Municipal Election Clerk shall locate in the election rolls the name spoken and ask the individual seeking to vote for one current valid identification card containing the voter's name and photograph.

¹ As the underlying municipal and state election laws and procedures provide the context for this dispute, they are set forth here in the statement of facts.

“Such photo identification card may include any card issued by a government agency, driver’s license, student identification card, commercial transaction card such as a credit or debit card, insurance card, union card, a professional association card or the voter identification card issued by the City Clerk.”

(Ex. A, Albuquerque voter i.d. amendment)

14. The “voter identification card issued by the City Clerk” can be obtained without charge if the voter presents him or herself to the City Clerk and produces “two of the following identification documents that show the name and address of the voter: a state issued identification card, social security card, student identification card, library card, insurance card, selective service card, union card, professional association card, utility bill, bank statement, government check or a paycheck.” If the voter is unable to present the required documentation, then the voter may swear or affirm under penalty of perjury that he or she is registered to vote and the City Clerk is required to issue a “voter photo identification card upon confirmation with the County Clerk that such person is presently registered to vote.” (Ex. A, Albuquerque voter i.d. amendment)

15. In the event an individual appears at the election polling place without the required photo identification, they shall be allowed to vote on a provisional ballot,

“but only if he or she swears or affirms under penalty of perjury in an affidavit provided by the City Clerk that he or she is a registered voter listed on the voter registration rolls at the precinct at which he or she presented himself or herself to vote and provides his or her date of birth and the last four digits of his or her social security number.”

The provisional ballot shall only be counted if, within the ten day canvassing period following the election the voter presents to the City Clerk one of the “photo identification cards” listed in the Voter I.D. Amendment, specifically one of those

“current valid” forms of photo identification listed above in paragraph 13, *supra*. (Ex. A, Albuquerque voter i.d. amendment).

16. A person may obtain a photo i.d. from the City Clerk by stating they have none of the forms of identification listed in the voter i.d. amendment, and swearing they are the registered voter they purport to be. Thereupon, a photo i.d. “shall be issued” to them. They need show no form of identification of any nature whatsoever in order to obtain a photo i.d. from the City Clerk. (Ex. A, lines 26-30).

17. To vote by absentee ballot, a voter requests an application for an absentee ballot. (Santillanes depo., pp. 9-10, Ex. G) It can be mailed to an address given over the telephone. (Id.) The application is then completed and mailed back to the City Clerk, who then verifies that the voter applying for an absentee ballot is a registered voter. Once that is done, an absentee ballot is mailed to the address given on the application. (Id.) If a properly completed absentee ballot is received before the polls close on election day, it will be counted. The absentee ballot may be delivered to the Clerk’s office personally by the voter, or through a third-party such as the Post Office or an immediate family member or caregiver. NMSA § 1-6-10.1. An absentee voter may also personally deliver an application and complete an absentee ballot in a voting booth in the Clerk’s office and cast his ballot at that time. NMSA § 1-6-5.F.

18. Any qualified voter may vote by absentee ballot for all candidates and questions appearing on the ballot as if he were to cast his ballot in person at his regular polling place on election day. NMSA § 1-6-3.

C. Defendant's Official Interpretation of the Voter I.D. Amendment

18. Defendant, the City Clerk of Albuquerque, the official charged with administering municipal elections, training and supervising election personnel, and enforcing the Albuquerque voter i.d. amendment was asked to provide her understanding of operation and meaning of the voter i.d. amendment, specifically the meaning of the terms "current" and "valid" on line 22, page 2 of the i.d. amendment. (See Fact #13).

a. The City Clerk admitted that she could not provide any definition of the requirement that the photo identification be "valid." (Santillanes depo., p. 37-38, Ex. G)

b. The City Clerk admitted that she would leave up to each of the 369 precinct election judges the decision as to what qualifies as "valid" photo identification. Each election judge would be the "ultimate authority for making the calls on what constitutes a valid i.d." (Santillanes depo., p. 50, lines 12-15, Ex. G).

c. The City Clerk's admission that she would leave it up to the election judge to determine what qualifies as a "current valid" photo identification, is shown in the following exchange (Santillanes depo., pp. 22-23, Ex. G):

Q: But there will be some forms of photo identification that would not be acceptable because they would not be current and valid, correct, such as a driver's license that expired 20 years before?

A: Right, something ridiculous.

Q: What about a driver's license that expired the week before and is no longer current?

A: Well, I think that nobody is there to keep anyone from voting.

Q: But that form of identification could be rejected since it isn't current and valid, correct?

A: It could, but I don't think it would be.

.....

Q: Would you instruct the election judge to overlook the fact that a driver's license is expired and still allow the person to vote if that's the only photo Identification they have?

A: I would never bring it up.

Q: So you're simply going to leave it up to the election judge to make the call?

A: That's right.

d. The City Clerk 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, as shown in the following exchange (Santillanes depo., pp. 26-27, Ex. G):

Q: Okay. If their physical appearance was different than their photograph, would the election judge have the discretion to reject that photo I.D. because he believes it to be a fake?

A: I would say if it was so dramatically different from the person bringing in the card, yes.

Q: Okay.

A: That could be done. That is the whole idea.

Q: So, once again, it would be left up to the discretion of the election judge to determine whether the person standing in front of him or her sufficiently matches the image of the photograph to allow that person to vote; is that a correct statement?

A: That's a correct statement.

Q: What happens if that person is turned down because they did lose a lot of weight, all right, or their hair is different, they color it or something, or it's just a bad photo, or for any reason that the photo isn't good enough to satisfy that judge that that is, in fact, the person, okay, but that person insists that's who they are, what right of appeal would they have under those circumstances so they could proceed to vote?

A: If I were an election judge and I just knew that was not—in my heart, I just knew that wasn't the right person, I would put them on a provisional ballot.

e. The City Clerk stated that “There’s no way of knowing if it’s [a driver’s license] is “valid.” (Santillanes depo., p. 36).

D. No Evidence of Impersonation of Voters at Polls

19. The City Clerk can produce no evidence of voter impersonation occurring at the polls under the New Mexico “unique identifier” system of voter security. Defendant has served as City Clerk during the previous term of Mayor Martin Chavez (1994-98) and since December 1, 2005. (Santillanes depo, pp. 3-4, Ex. G) Defendant knows of no instance of anyone impersonating someone else at the polls. (Santillanes depo., pp. 7-8, Ex. G) Nor has Defendant produced any documentation recording information about complaints or investigations of impersonation at the polls. (Ex. I, Defendant’s Responses to Plaintiffs’ First Request for Production, #6). Defendant has learned, second-hand, of an allegation of impersonation as it is set forth in the preamble to Albuquerque’s voter i.d. amendment. Defendant, however, does not have any direct knowledge of that single allegation, and does not even know the name of the person who was allegedly impersonated. (Santillanes depo., pp. 8-9, Ex. G).

21. The single allegation of voter impersonation in the preamble to the voter i.d. amendment supposedly occurred in November 2004, before New Mexico’s current system of voter identification was enacted. (Ex. 1 & NMSA §1-12-10)

22. Denise Lamb was the State Election Director from November 1994 to September 1997, and again from January 1999 to January 2005. (Affidavit of Denise Lamb, Ex. J). In that capacity, she was responsible for administering the State Election Code in all thirty-three New Mexico counties, enforcing the Election Code and

investigating violations of the Election Code. She is currently Deputy County Clerk for Santa Fe County, in charge of that county's Bureau of Elections. (Id.) She is unaware of any case of any person impersonating another at the polls, has never received one complaint of a voter being impersonated at the polls and knows of no case where any individual has been prosecuted for impersonating another person at the polls. (Id.)

23. Ms. Lamb, as State Election Director, received complaints or reports of irregularities in absentee voting every election, without fail. (Ex. J, affidavit D. Lamb)

24. Defendant admits that voter impersonation can occur by mail-in absentee ballot, as in the case of a husband voting for a wife. (Santillanes depo., pp. 11-12, Ex. G) She sees no greater potential for voter fraud in-person or absentee voting. (Id., p. 14)

E. Plaintiffs' Interests and Injuries

25. Plaintiffs Kass, Grothus and Kazaras prefer to vote in-person on election day, not early by absentee mail, so that they can receive as much information from the campaign as possible, and thereby cast as informed a vote as they can. (Exs. D, E, & F)

26. Albuquerque newspapers, *The Albuquerque Journal*, *The Albuquerque Tribune* and *The Weekly Alibi*, frequently do not publish their endorsements until as little as two days before election day. Newspaper election guides and profiles frequently are not published until a few days before election day. (Goldfarb affidavit, Ex. B)

27. Candidate forums and debates are held as close to election day as the immediately preceding weekend, meaning as little as two to four days before election day. (Goldfarb Affidavit, Ex. B)

28. The election guide published by the League, containing candidate issue statements and information on ballot measures, is distributed up until and throughout

election day. It is not received by some voters until a day or so before election day, or on election day itself, as it is available near some polling places and other public facilities such as libraries. (Goldfarb affidavit, Ex. B)

29. Major campaign events continue until the night before election day. Some campaigning occurs on election day itself, and there are always news stories in the morning about campaign events. (Goldfarb Affidavit, Ex. B)

30. Campaign finance reports are not released and disseminated by the media until the day before election day. Under the Election Code of the Albuquerque City Charter, § 4.(c).D.2. (pertinent sections of the City Charter and Election Code are attached as Ex. H), six periodic campaign finance statements are required to be filed with the City Clerk. The third statement is filed on the Friday before the election. The fourth statement is filed on the Monday immediately preceding the election (elections are held on the Tuesdays). Under § 4.(i).3., not until sometime between noon of the Friday immediately preceding the election and the day of the election do the treasurers of each candidate first produce for audit and inspection any campaign financial records. (Goldfarb Affidavit, Ex. B)

31. Information not available until the night before election day or the morning of election day has caused Plaintiffs Kass and Grothus to change their minds about candidates and issues, or led them to make a decision on how to vote that had not previously been reached. (Exs. D & E, Kass and Grothus Affidavits)

32. Plaintiff Kass expresses her commitment to participatory democracy and her community by appearing in person at the polling place. (Ex. D, Kass affidavit). She

believes her presence, along with the presence of other voters, constitutes a statement about “the necessity for hands-on community involvement in our self-governance”:

“I belief (sic) that by being physically present, rather than voting remotely by mail, I send a statement about the vibrancy of democracy and the necessity of citizens to personally support that democracy. For me, going to the polls to vote is a treasured ritual of democracy, something that has been done by citizens of this nation since the time of George Washington. By being present I express myself as an active and engaged member of my community who cares enough to personally take time out of my day to show up and vote with other members of my neighborhood. Absentee voting, on the other hand, does not in my mind express the same commitment to democracy because it is done solely out of convenience, from the comfort of a home, and away from other members of our community. It is, to me, an isolating, alienating experience, unlike the experience of associating with other persons physically gathering at a polling place on election day. My presence at the polls expresses the importance I attach to the act and ritual of voting. I have voted in the same precinct for three decades, and I believe it is important for my friends and neighbors and I to see each other appear at the polling place to personally cast our vote as a way of maintaining the bonds and fabric of our community.”

33. Plaintiff Kass holds a New Mexico driver’s license issued for a period of eight years. This is the form of identification she carries with her and would have with her at the polls during the next Albuquerque municipal election. Since her photograph was taken in 2001, her appearance has changed “dramatically.” She has lost thirty pounds, begun wearing eyeglasses, and changed the style and color of her hair. Due to the passage of time, her face and eyes have also changed, and she does not resemble the person depicted in her driver’s license photograph. (Ex. D, Kass affidavit)

34. Plaintiff Barbara Grothus has a New Mexico driver’s license that is the only form of identification she has which contains her photograph. Her current physical appearance does not resemble the person in her driver’s license photograph, taken about 2 ½ years ago. Her appearance has changed “dramatically.” (Ex. E, Grothus affidavit)

35. Plaintiff Grothus, like Plaintiff Kass, expresses her commitment to participatory democracy, and encourages others not to take their right to vote for granted,

by physically going to the polls to cast her vote in the presence of others. In Grothus' own words, from her affidavit attached as Exhibit E:

¶6. I believe that voting in person is a statement by me that I believe enough in democracy and our right to vote that I will bodily exercise that right by walking into a polling place and casting my vote in the presence of fellow citizens. I believe that absentee voting numbs us to the sacred importance of what we are doing when we vote, and should be discouraged except in situations where it is not physically possible for someone to vote in person.

¶7. I am a ward leader in my political party. I vote in person so that other members of my neighborhood can see that I am committed to the voting process, and similarly encourage them to stand up for and assert their right to vote by also voting in person. Gathering at the polling place, where we vote in the presence of others, is, to me, an American tradition, and one that we need to maintain so that we do not take our right to vote for granted. The symbolism of voting in person is profound. It is an act of courage and sends a strong signal that one believes enough in one's right to vote that we use our bodies to express that commitment. I need only point to the inspiring example of people going to the polls in Baghdad, in person, in full day light and at risk to themselves, to demonstrate how powerful is the act and symbolism of voting in person. I believe that by voting in person I and others state very clearly we are not taking our democracy for granted. Voting is not an inconvenience to be mitigated by voting in the comfort of one's home, on one's own schedule. It is a sacred duty we should do in the presence of our friends and neighbors so that we never forget the staggering importance of what we are doing when we elect our own leaders. Americans died and suffered for the right to vote; we should never cheapen their sacrifice by treating voting as a chore, like mailing off payments for monthly bills.

36. Plaintiff Kazaras does not possess a New Mexico driver's license. She has lived in New Mexico for nine years. She was unable to obtain a driver's license initially because she could not dedicate two days to the DWI course she was told she had to take in order to get a New Mexico driver's license (she was informed this was necessary for a person moving to New Mexico, even though she has no DWI arrests or convictions). Last year, she attempted again to obtain a New Mexico driver's license, but was refused when she could not produce her Social Security card, which she does not possess. As a result, she holds a driver's license issued from the State of Washington, where she is

from, where she owns a car and which she continues to visit frequently. She possesses no other form of identification that is “current” or “valid” and which contains a photograph of her, and that fits the categories of “current valid” photo i.d. in the Albuquerque voter i.d. amendment. (Ex. F, Kazaras affidavit).

37. Plaintiff SAGE Council has many Native America members who continue to use their pueblo or reservation as their address for the driver’s license, though they live and vote in Albuquerque. (Ex. C, Albeert Affidavit). SAGE Council is unable to advise such members whether their license will allow them to vote as there is no definition of what constitutes a “current valid” photo i.d. in the voter i.d. amendment. (Id.)

II. The Voter I.D. Amendment Violates The First And Fourteenth Amendments Of The United States Constitution.

The Albuquerque voter i.d. amendment violates the First Amendment to the United States Constitution because it establishes such vague and undefined conditions for an acceptable photo identification that election precinct judges are given unrestrained discretion in deciding whether to accept or reject an identification. Further, the *Albuquerque voter i.d. amendment unjustifiably burdens the expressive political speech of those voters who wish to make the most informed vote possible by not making their decision before election day and who express their commitment to democracy through voting in person on election day in the presence of others.*

The Albuquerque voter i.d. amendment violates the Equal Protection Clause of Fourteenth Amendment to the United States Constitution because it unjustifiably discriminates against voters who choose to vote in person, and subjects them to greater burdens and obstacles to voting than imposed on those persons who vote by absentee ballot. This disparate treatment is irrational and does not serve a legitimate state interest,

for it actually permits the very thing it purports to prevent, that is, impersonation of voters at the polls. The disparate treatment of the Albuquerque voter i.d. amendment fails both strict and intermediate scrutiny.

A. Introduction: Bush v. Gore

The constitutional infirmities in Albuquerque's voter i.d. amendment parallel the constitutional infirmities the United States Supreme Court found in Florida's Presidential vote recount measures in *Bush v. Gore*, 531 U.S. 98 (2000). The Supreme Court held that standardless manual recounts of the votes in some, but not all, Florida counties violated the Equal Protection Clause. The Florida Supreme Court had ordered a recount of Presidential votes in some counties to discern "the intent of the voter" where the ballot punch card had not been completely perforated. Election officials were instructed to discern a voter's intent from "hanging" and "dimpled" chads. No standards were given for discerning "the intent of the voter." The Supreme Court faced a situation where different tests and standards would apply in each county conducting a recount. This parallels the situation where Albuquerque applies undefined standards to in-person voters, but not to absentee voters.

The Supreme Court began by discussing how the Equal Protection Clause applies to voting. There is no federal constitutional "right to vote." But, when a state or local legislature vests a right in its people, the Equal Protection Clause governs restrictions and burdens on that right. Once the right to vote is extended, that right "is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote *and the equal dignity owed to each voter.*" 531 U.S. at 104 (emphasis added):

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once

granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *See, e.g., Harper v. Virginia Bd. of Education*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”) It must be remembered that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The Supreme Court enjoined the recount measures because they did “not satisfy the minimum requirement of non-arbitrary treatment of voters necessary to secure the fundamental right [of voting].” *Id.* at 105. By giving election officials no more instruction than to discern “the intent of the voter,” the Florida Supreme Court’s order lacked “specific standards to ensure its equal application”, *Id.* at 106, leading to a “process with[out] sufficient guarantees of equal treatment.” *Id.* at 107.

The Court reiterated that equal protection underlies the principle of “one person, one vote.” Arbitrary and disparate treatment among voters treats some more favorably and dilutes the power of the disfavored groups. “The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.” *Id.* at 107 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)). Because the Florida recount procedures could not ensure equal treatment and fundamental fairness with some degree of uniformity throughout the state, they were invalidated as a violation of each voter’s fundamental right to vote.

The Albuquerque i.d. amendment guarantees arbitrary and capricious enforcement because it requires election clerks and judges to determine whether a voter has produced a “current valid” photo identification without providing any standards as to what is

“current” and “valid.” This defect supports a First Amendment “void for vagueness” challenge as well as the equal protection challenge demonstrated in *Bush v. Gore*.

Plaintiffs assert that the i.d. amendment violates the First Amendment on two additional grounds. One, it unjustifiably imposes greater burdens and risks upon voters who choose not to express their decision about who shall govern them until they have had the opportunity to become fully informed by experiencing and learning from the full election campaign. Two, it unjustifiably burdens voters who express their commitment to democracy through their presence and voting at the polling place on election day.

B. The Voter I.D. Amendment Is Void for Vagueness.

The Albuquerque voter i.d. amendment requires that when a voter “approaches the election polling place seeking to vote” they shall identify themselves by name. After being located by the election clerk in the election rolls, the individual shall be asked to produce a “current valid” identification card, such as a driver’s license, a union card, professional association card or other forms of documentation in the categories set forth in the amendment and which contain the voter’s name and photograph. The amendment never defines “current” or “valid,” nor even suggests any standards by which the precinct election clerk or judge can be guided in determining whether the identification produced is “current” and “valid.”

Two types of First Amendment challenges may be made against the i.d. amendment, facial and as applied. “A facial challenge considers the restriction as a whole, while an as-applied challenge tests the application of that restriction to the facts of a plaintiff’s concrete case.” *Faustin v. City and County of Denver, CO*, 423 F.3d 1192, 1196 (10th Cir. 2005). Since Plaintiffs have not been subjected to application of the voter

i.d. amendment (the first city-wide use of the voter i.d. amendment will be in the 2007 municipal elections), they bring a facial challenge against the vagueness of the law.

The voter i.d. amendment is “aimed directly at activity protected by the Constitution.” Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971), that is, the act of voting. “Facial challenges seek to vindicate not only individual plaintiffs’ rights, but also those of all others who wish to engage in the speech being prohibited.” Id. Plaintiffs have standing for a void-for-vagueness challenge because the voter i.d. amendment will be applied against them when they seek to vote in-person at the next municipal election.

In Jordan v. Pugh, 425 F.3d 820, 824-25 (10th Cir. 2005), the Tenth Circuit explained the standards governing a void-for-vagueness claim:

“A statute can be impermissibly vague for either of two independent reasons. First, it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” Hill v. Colorado, 530 U.S. 703, 732, (2000)(citing City of Chicago v. Morales, 527 U.S. 41, 56-56 (1999)). [A] court deciding whether a challenged statute provides fair notice often considers factors such as the enactment’s purpose, the harm it attempts to prevent, whether there is a scienter requirement, and the interpretations of individuals charged with enforcement.

Here, Defendant Santillanes, the City Clerk, the very official charged with the i.d. amendment’s enforcement, admits repeatedly that she cannot offer a definition of the key terms “current” and “valid.” (Plaintiffs’ Fact #18) She admits she will simply let each precinct judge (all 369 of them) decide for themselves, on a case-by-case basis, what constitutes a “current valid” photo identification sufficient to allow a citizen to vote. (Plaintiffs’ Fact # 18)

The problem is profound and intractable. Even in the example of a driver’s license, Defendant cannot offer a definition as to what constitutes a “current” driver’s

license. When asked if a license twenty years old would be considered “current,” she dismisses that as being so “ridiculous” it would be rejected. But in the case of a license that is only recently expired, she states it could be accepted as “current.” (Ex. G, Santillanes depo., pp. 22-23) Thus, the meaning of the term “current” is rooted in some nebulous reference point, other than the New Mexico Motor Vehicle Code, known only to Defendant. She also discloses that the election judge would have no means of determining whether the second half of the “current valid” equation has been met in the case of a driver’s license. “There’s no way of knowing if it’s valid” (Id. p. 36), she states, even though the law requires the election clerk and election judge to make that very determination (Ex. A, p. 2, line 22).

When questioned whether a driver’s license that shows an address different from the voter roles or where the voter is living would be “current” and “valid,” Defendant states that a difference in addresses would be immaterial to the determination of whether the i.d. was “current” and “valid.” Once again Defendant demonstrates these words have no meaning rooted in any objective source of definition. Her definition of what constitutes a “valid” license conflicts with the New Mexico Motor Vehicle Code, which requires that a driver’s license show the “current” New Mexico physical or mailing address of the driver. NMSA § 66-5-15.

The conflict between Defendant’s interpretation of what a “valid” New Mexico driver’s license requires and what state law requires forcefully highlights the problem with the undefined term “valid” as a condition for an acceptable photo i.d. that will allow a voter to enter the polling booth. Does “valid” mean valid under the terms of the authority issuing the photo i.d., so that the precinct judge must know and rule upon the

regulations of a union, professional association, credit card company, university, government agency, etc. to determine whether the proffered i.d. complies? Or does “valid” mean something entirely different, as the City Clerk demonstrated when, contrary to New Mexico law, she declared that a driver’s license need not show the current address or may be unexpired yet still be considered “valid”?

In fairness to Defendant, she has no choice but to make up definitions on the fly. The voter i.d. amendment, after all, no more incorporates the New Mexico Motor Vehicle Code to provide meaning to the terms “current” and “valid” than it incorporates the by-laws of a union or a professional association or credit card agency to determine whether the i.d.s issued by those entities are “current” and “valid.”

The facial invalidity of the i.d. amendment is conclusively demonstrated by consideration of how any reviewing authority—a court, a canvassing board or the City Clerk herself—could determine whether a precinct judge had made the right call in accepting or rejecting a photo i.d. There are simply no standards against which to measure the precinct judge’s decision. As a result, “men of common intelligence must necessarily guess at its meaning.” *Coates, supra*, 402 U.S. at 614, thus rendering the i.d. amendment void for vagueness.

The voter i.d. amendment is also unconstitutional because it authorizes arbitrary enforcement. The City Clerk makes it clear that the requirement of a voter producing a “current valid” photo i.d. means the election judge has absolute discretionary authority to reject that i.d. as not “current” or “valid” because he is dissatisfied with the photograph on the identification card. Thus, “current” is being interpreted as meaning the photo, in the subjective judgment of the election judge looks enough like the voter as she appears

on election day, and “valid” means the photo must be satisfactory to the election judge for him to allow the voter to enter the polling booth. Neither interpretation amounts to anything but restating that the election judge has absolute discretion to accept or reject a photo i.d.²

We are left with the vague, wholly subjective, and entirely unreviewable standards expressed by the City Clerk in her deposition. She reveals how wholly subjective and idiosyncratic is the process for determining whether an i.d. is a “current valid” photo i.d. when she says the decision comes down to this: “If I were an election judge and I just knew that that was not—*in my heart*, I just knew that that wasn’t the right person, I would put them on a provisional ballot.” (Depo. M. Santillanes, p. 27. Ex. G) (emphasis added).³ No court has ever accepted such a personalized, subjective standard as a sufficient limitation on a law’s imprecise language to save it from a void-for-vagueness challenge.

The Albuquerque voter i.d. amendment is void and in violation of the First Amendment for the same reason as the law struck down in *Kolender v. Lawson*, 461 U.S. 352 (1983). A California statute required persons who loiter or wander on the streets upon request by a peace officer to provide a “credible and reliable” identification. The U.S. Supreme Court held the statute to be unconstitutionally vague.

² Once again, the City Clerk demonstrates that a “current” and “valid” driver’s license under the i.d. amendment is different than a “current” and “valid” license under the New Mexico Motor Vehicle Code. The state issues eight-year licenses, that are current and valid for the entire eight years. NMSA § 66-5-21.B. A license does not become invalid if over that period of time the driver’s appearance, as can be expected, may change. New Mexico does not require a driver to get a new license because they age, lose or gain weight, or their appearance diverges from their driver’s license photo.

³ The remedy of a provisional ballot is illusory. It is subject to the same vague, subjective requirements as a regular ballot. See *infra* pp. 24-25.

“Our Constitution is designed to maximize individual freedom within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as the definiteness of certainty of expression,” Justice O’Connor wrote for the Court. She explained that the void-for-vagueness *doctrine requires a statute to define the conduct expected of citizens with sufficient definiteness that ordinary people can understand what conduct is required and in a manner that does not encourage arbitrary and discriminatory enforcement. “Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine ‘is not actual notice, but the other principal of the doctrine—the requirement that legislature establish minimal guidelines to govern law enforcement.’” Kolender, 461 U.S. at 358.*

The Court held that the California statute was unconstitutionally vague because it contained no standard for determining what is a “credible and reliable” form of identification. It gave police “virtually complete discretion” in determining whether someone has satisfied the statute’s requirement that they produce a “credible and reliable” identification. “Our concern here is based upon the *potential* for arbitrarily suppressing First Amendment liberties....” *Id.* (emphasis added)

Just as Defendant admitted that each precinct judge will have absolute discretion to determine what constitutes a “current valid” photo identification, so, too, the state in Kolender confirmed that a person would violate California’s i.d. requirement unless the police officer was “satisfied” that the identification was reliable. *Id.* at 360. “It is clear that the full discretion accorded to the police to determine whether the suspect has

provided a 'credible and reliable' identification necessarily entrust[s] lawmaking to the moment-to-moment judgment of the policeman on his beat.'" *Id.*

The Albuquerque voter i.d. amendment is constitutionally defective under both prongs of *Kolender*. First, because even the City Clerk cannot say what qualifies as "current valid" photo identification, an ordinary citizen cannot be expected to have any greater comprehension of the law's requirements. Citizens are left to guess what identification will satisfy each precinct judge, and will not know until each precinct judge, as the voter stands before them on election day, indicates whether or not "in his heart," to use the City Clerk's standard, he is satisfied with the identification documents.

Secondly, and more importantly, as *Kolender* holds, the voter i.d. amendment grants each of the 369 precinct election judges complete, unreviewable, moment-to-moment discretion to affect the right of each voter to vote solely upon his subjective determination of whether he is satisfied with the documents presented. As the City Clerk explains, it is up to each judge to decide whether to ignore or honor the requirements of the Motor Vehicle Code in determining that a license is "valid" for purposes of voting, or to reject an i.d. because he does not think the person standing before him looks enough like the photograph for his satisfaction. Making each precinct judge a legislature defining "current" and "valid" on a case-by-case basis violates the vagueness doctrine. *See also Chicago v. Morales*, 527 U.S. 41 (1999)(invalidating law giving police officers absolute discretion to determine what conduct is required under anti-loitering ordinance).

The fact that a voter whose identification is rejected will be permitted to vote provisionally is illusory. Their vote will still not be counted unless they promptly get themselves physically to the City Clerk's office and there convince yet another official

operating under the same undefined terminology that their i.d. is “current” and “valid.” (Ex. A, p. 3, lines 2-4). A provisional ballot offers no more meaningful relief than another run at appealing to the unlimited discretion of yet another official, with the same absolute discretion to determine what qualifies as a “current valid” photo i.d.

Defendant may argue that Plaintiffs lack standing to challenge the facial validity of the voter i.d. amendment because they may have documentation which may not be rejected when they to seek to vote in person. The argument’s flaw is to presume an operable definition of the terms “current” and “valid.” No one—not even the City Clerk—knows what constitutes a “current valid” identification under the voter i.d. amendment. Even a New Mexico driver’s license with an expiration date after the election is not necessarily “current” or “valid,” because an election judge retains absolute discretion to reject it, including because he dislikes the quality of the photograph.

When a law is void for vagueness, it fails not because an official misapplied his discretion in some circumstances. As Justice Breyer explained in *Chicago v. Morales*, 527 U.S. at 71 (concurring): “The ordinance is unconstitutional, not because a policeman applied his discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents unlimited discretion, then the ordinance is invalid in all its applications.”

Defendants may insist that the photo identification amendment, even with its hopelessly sloppy draftsmanship, is needed to prevent impersonation of voters at the polls. As will be shown later, the voter i.d. amendment actually allows for such fraud to occur by undermining the state’s voter security measures. But the excuse of preventing

fraud is no excuse for unconstitutionally sloppy draftsmanship. As Justice O'Connor explained in rejecting a similar argument in Kolender, "As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." 461 U.S. at 361.

C. The Voter I.D. Amendment Substantively Violates Plaintiffs' First Amendment Rights.

Voting involves expressive conduct and speech protected by the First as well as the Fourteenth Amendment. Engaging in political campaigns and debates is core political speech accorded the "broadest protection" under the First Amendment. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346-47 (1995)(anonymous leafletting is core political speech); Meyer v. Grant, 486 U.S. 414 (1988)(circulation of initiative petition is core political speech). The act of voting—declaring how one wishes to be governed—similarly is core political speech deserving the broadest protection.

"When a citizen steps into the voting booth to cast a vote on a matter properly on the ballot, he or she intends to send a message in support of or in opposition to the candidate or ballot measure at issue." Turner v. D.C. Bd. of Elections and Ethics, 77 F.Supp.2d 25, 31 (D.D.C. 1999). "If discussion about social and political change is core political speech, it follows that the instrumentality used to bring about political and social change, that is, a lawful vote and its results, should be given the same level of protection." Id. at 32. See also Burdick v. Takushi, 504 U.S. 428, 433-34 (1992)(discussing First Amendment rights in voting).

The voter i.d. amendment infringes Plaintiffs' First Amendment rights. First, it subjects them to higher burdens and the subjective, unfettered determination of an election official, solely because they choose to consider all the information available

from a campaign and thus vote in person on election day. Second, Plaintiffs Kass and Grothus vote in person as expressive political conduct, making a statement by their physical presence that the right to vote is sacred, must be honored and not be taken for granted. The voter i.d. amendment, by subjecting them to higher burdens and risks in voting, infringes unconstitutionally on the expression of that viewpoint.

1. The Right Be an Informed Voter

“It is now well-established that the Constitution protects the right to receive information and ideas. ‘This freedom [of speech]...necessarily protects the right to receive....’” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *See also Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 307-08 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

This right to receive information is especially important in the context of voting. No right is more precious in a free country than that of having a voice in the election of those who make the laws by which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964). In *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964), the Court observed, “Especially since the right to exercise the franchise is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”

The importance of the right to vote would be illusory, and the core political speech of pre-election debates would be rendered meaningless, if voters were pressured to vote before they had received the information they needed to make decisions they believe best for the nation, their communities and their families. Accordingly, it cannot be denied that “the First Amendment was ‘fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”

McIntyre v. Ohio Elections Comm., 514 U.S. 334, 346 (1995)(quoting **Roth v. United States**, 354 U.S. 476, 484 (1957)). “[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions...is vast....” **Monitor Patriot Co. v. Roy**, 401 U.S. 265, 270 n. 3 (1971)(citation omitted).

In **Mills v. Alabama**, 384 U.S. 214 (1966), the Supreme Court struck down an Alabama law prohibiting the publication of newspaper editorials on election day. The statute was defended as being necessary to protect the public from “confusive” last-minute information. The Court discussed the necessity to our constitutional system of a press free to criticize and editorialize at any time. To acknowledge the importance of editorials on election day, but to make it harder for citizens to vote if they wait to read those editorials, would be inconsistent with everything the Supreme Court has said about the need for the electorate to be informed and involved in choosing its government.

In Albuquerque municipal elections, much critical information is not available until shortly before election day, or on election day itself. Newspaper endorsements, news stories and campaign finance reports are not available until the weekend before, the night before or even the very day on which the election occurs. Debates take place on the weekend before election day. All individual plaintiffs state they deliberately seek to vote on election day so that they can receive all this information. Based on information available only right before the election, Plaintiffs Kass and Grothus state they have reached previously unformulated decisions or changed their minds about how to vote.

“[B]ecause absentee voters vote before election day, often weeks before, they are deprived of any information pertinent to their vote that surfaces in the late stages of the

campaign.” *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004)(Posner, J.). The voter i.d. amendment imposes greater burdens upon Kass, Karzaras and Grothus than it does upon voters who waive their right to receive campaign information and vote more than a month and a half before election day, long before they could possibly receive the sort of information which Plaintiffs need for their decisions.⁴

A state may impose reasonable time, place and manner restrictions upon the exercise of First Amendment rights. But “[a] valid time, place and manner regulation must also ‘serve a significant governmental interest.’” *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981)(quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

There can be no conceivable significant governmental interest in subjecting the exercise of the right to vote by informed voters to greater burdens than those imposed upon less informed voters. No evidence exists in this case that those voters who wait until election day to vote, after receiving the benefit of the full course of a campaign, pose any greater threat to the integrity of an election than do voters who cast their ballot a month before election day, with the benefit of far less information. Nor can Defendant show that New Mexico’s security procedure applicable to absentee voters—disclosure of name, date of birth and “unique identifier”—is inadequate to provide an equal level of integrity to the election day balloting. There is absolutely no evidence in this case that the state system applicable to absentee voters has any shortcomings when applied to election day voters. Indeed, as will be shown in the discussion of the Equal Protection Clause, the Albuquerque voter i.d. amendment actually makes possible impersonation at

⁴ Absentee ballots are available at least forty-nine days before a general election. NMSA § 1-6-7.

the polls that was not possible when the state voter i.d. requirements governed in-person voting in municipal elections.

The voter i.d. amendment also violates the First Amendment, and cannot be justified as a reasonable time, place or manner regulation, because it is impermissibly based upon “the content or subject matter of speech.” Consolidated Edison Co. v. Public Service Comm’n, 447 U.S. 530, 536 (1980). The higher burdens of the voter i.d. amendment apply only to those voters who choose to cast the most informed vote possible. The “content” that is being impermissibly singled out is the informed vote itself. Accordingly, because the voter i.d. amendment cannot be justified as a reasonable time, place or manner regulation of Plaintiffs’ First Amendment rights, it must be declared unconstitutional.

2. Infringement of Expressive Political Speech

The “expression of an idea through activity,” Spence v. Washington, 418 U.S. 405, 411 (1974), may rise to the level of speech that is protected by the First Amendment. The key question is whether “an intent to convey a particularized message was present, and...the likelihood was great that the message would be understood.” Texas v. Johnson, 491 U.S. 397, 404 (1989)(quoting Spence, 418 U.S. at 410-11). This principle has protected flag burning, Texas v. Johnson, supra, flying an inverted flag, Spence, supra, and wearing black armbands, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

Plaintiffs Kass and Grothus express their belief that American democracy not “be taken for granted” by bodily going to the polls, in the presence of others, to cast their votes. Their reasons are more eloquently and completely articulated in their own words,

quoted above in Fact ## 31 and 34. Their decision to personally congregate at the polls with others, and be seen as they go through the process of voting, also implicates their rights of assembly protected by the First Amendment. Their act of employing their own bodies to demonstrate their commitment to and celebration of participatory democracy is dramatic political speech. The rapt attention the world paid to the individual acts of courage when Iraqis voted in their first free election underscore the great symbolic act of voting in a public place, unafraid and proud to be electing one's own government. Many of us may no longer appreciate the significance of seeing a female Black, Native American or Hispanic voter freely enter a polling booth without fear or harassment. Even if many Americans have sadly become cavalier towards democracy by viewing going to the polls as an inconvenience to be avoided, the symbolic political statements of Plaintiffs Kass and Grothus do not lose entitlement to full First Amendment protection.

The voter i.d. amendment takes direct aim at core political speech of Plaintiffs Kass and Grothus. Solely because they wish to express their commitment to free and open elections by personally voting on election day, they are subjected to the vagaries of a system requiring them to produce "current valid" identification satisfactory to each precinct judge. There is no conceivable reasonable time, place or manner justification for so burdening the symbolic act of voting in person. No evidence has been presented in this case that voters choosing to vote in person pose some particular threat to democracy. No reason can be offered why the act of voting in person, in itself, merits stricter regulation than voting remotely via an absentee mail ballot.

Furthermore, the voter i.d. amendment impermissibly discriminates against the content of speech. In this case, that content is "not taking for granted" our country's

democracy by appearing in person at a polling place to openly vote in the presence of others. Content-based restrictions on political speech are absolutely impermissible. Even speech distasteful to many Americans, such as flag burning, is protected from content regulation. Certainly something so noble as the tangible, personal expression of support for democracy deserves greater protection.

Because the voter i.d. amendment impermissibly burdens and discriminates against the symbolic political speech of Plaintiffs Kass and Grothus, it must be declared unconstitutional.

D. The Voter I.D. Amendment Violates The Equal Protection Clause

The voter i.d. amendment applies substantially different treatment to voters voting in the same election, voting for the same candidates and ballot measures, even voting on the same day.⁵ While Plaintiff Kass, for instance, may be marking her paper ballot at her polling place, an absentee voter can be dropping off their paper ballot at the City Clerks' office. Kass is subjected to the absolute discretion of an election judge as to whether he is satisfied with her photo i.d. The person simultaneously dropping off her absentee ballot at the Clerk's office is not even questioned about her identity, let alone required to produce any documentation for the satisfaction of a government official.

The disparate treatment between in-person and absentee voters is irrational and serves no legitimate significant state purpose. The voter i.d. amendment actually permits the very type of fraud it purports to prevent, conclusively demonstrating its irrationality.

⁵ Or even at the same location. A person who claims not to have received an absentee ballot may go to their normal polling place and complete an absentee ballot at that time and location. NMSA § 1-6-16.1.

The voter i.d. amendment fails both strict and intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

1. There Are No Distinctions of Constitutional Magnitude Justifying Discrimination Against In-Person Voters and Favoring Absentee Voters.

In New Mexico, absentee and in-person voting are materially similar:

- a. The qualifications for absentee and in-person voters are the same under the New Mexico Constitution and the state Election Code. There are no limitations upon whom may vote by absentee ballot.⁶
- b. Both absentee and in-person voting are now conducted by paper ballot. NMSA § 1-6-7; NMSA § 1-9-7.1.
- c. With the exception of the Albuquerque voter i.d. law, the security measures are the same. At a minimum, both absentee and in-person voters provide their name, date of birth, and unique identifier. NMSA § 1-6-4.C.; NMSA § 1-1-24.B.
- d. Absentee ballots, like in-person votes, must be received by 7 p.m. on election day. NMSA § 1-6-10.B; NMSA § 1-12-1.
- e. False voting in absentee voting is punishable to the same extent as fraud in in-person voting. NMSA § 1-26-8.B.

The differences between in-person and absentee voting are not great. The most significant, of course, is that an absentee voter may vote well before election day, and can mail his ballot to the Clerk. NMSA §§ 1-6-5.F., 1-6-10.B., 1-6-10.1 (1978). But an absentee voter can also complete and cast his ballot in-person in a voting booth in the City Clerk's office at the same time while in-person early voting, requiring production of a "current valid" i.d., is occurring elsewhere. NMSA § 1-6-5.F. (Ex. G., dep. M.

⁶ "Any voter may vote by absentee ballot for all candidates and on all questions appearing on the ballot as if he were able to cast his ballot in person at his regular polling place on election day." NMSA § 1-6-3.A.

Santillanes, p. 20)⁷ An absentee voter can also cast his vote on election day by personal delivery to the Clerk. NMSA § 1-6-10.1.

No reason can be offered by Defendant as to why, if a photo i.d. is necessary to avoid voter impersonation, it is not required of all voters regardless of when and how they vote. There is absolutely no justification for requiring a voter at the regular polling place to undergo the subjective testing of their documentation required by the voter i.d. amendment, when, at the same time, perhaps only blocks away at the City Clerk's office, a voter can cast a vote without undergoing any inquiry whatsoever.

There are no significant obstacles against requiring absentee voters to produce the same identification as in-person voters. The Clerk could easily require production of a photo i.d. from anyone picking up or dropping off an application or absentee ballot. There is no constitutional right to vote by mail. *Griffin v. Roupas, supra*. A prospective absentee voter could be required, at some point in the process, to personally present a "current valid" photo i.d. to an election official. The absentee ballot law is not restricted to infirm persons or those who are serving overseas. It is open to everyone, and procedures could be implemented to require production of a photo i.d. of those persons able to physically present themselves before an election official. Requiring all voters equally to demonstrate that they are the person entitled to cast that vote would eliminate the violation of Equal Protection caused by Albuquerque's disparate, irrational system.

Whether strict or intermediate scrutiny is applied, discussed *infra* pp. 38-41, the i.d. requirement must serve a legitimate purpose. Presumably the Albuquerque i.d.

⁷ The Albuquerque voter i.d. amendment applies only to voters approaching a "polling place" with the intention of voting. A clerk's office is, by law, not a "polling place." NMSA § 1-6-5.F.

amendment is motivated by a desire to prevent voter impersonation. But, for two reasons, it does not serve that purpose.

First, a gaping hole in the i.d. amendment points anyone wishing to commit voter fraud to the absentee ballot avenue. Defendant admits that absentee voting is subject to the same potential for voter impersonation as in-person voting. (Plaintiffs' Fact #23). Common sense indicates that absentee voting may actually be more prone to impersonation than in-person voting. Voting fraud is "facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d at 1131. "[A]bsentee voting is to voting in person what a take home exam is to a proctored one." *Id.* To steal someone else's vote in-person, the culprit must actually go to the polling place, stand in line, announce the assumed name, hope that person has not already voted or is not in line or ear shot when he gives the assumed name, or that anyone else in ear shot knows that person, and then enter and escape from the polling booth before the real voter appears or the culprit is otherwise discovered.

In the case of impersonation by absentee ballot, a husband or wife, for example, can easily impersonate their spouse. They would know their spouse's name, date of birth and social security number. Just by a telephone call they could obtain and vote and then cast an absentee ballot in their spouse's name. The same could be done by a parent for a child away at college, an infirm grandparent, etc.

Second, the utter irrationality of the Albuquerque voter i.d. amendment is shown by the fact that it enables the very sort of fraud it purports to prevent. Under state law, a person appearing at a polling place to vote must at least provide their name, date of birth and the last four digits of their social security number, their "unique identifier." NMSA §

1-12-10. No evidence can be presented by Defendant that the state system for preventing voter impersonation does not operate effectively. Indeed, Defendant cannot point to one instance where impersonation of a voter has occurred or even been alleged to have occurred since New Mexico implemented its “unique identifier” procedure for voter security.

But the Albuquerque voter i.d. law permits someone to easily circumvent the state security measures, and easily steal someone else’s vote. Under the Albuquerque voter i.d. procedures, a person appearing at the polls to vote in municipal election is released from having to provide their date of birth and their “unique identifier.” They need only produce one of the forms of identification listed in the amendment. That includes a photo identification issued by the City Clerk. There are, however, no security measures in the ordinance to prevent someone from obtaining a City Clerk-issued photo i.d. under a false name. They need only go to the City Clerk’s office, request a photo i.d., and say they have none of the documents listed in the amendment (social security card, library card, selective service card, etc.). Then, upon merely swearing they are the voter they purport to be, the impersonator “shall be” issued a voter photo identification. The City Clerk is not granted any authority or discretion to deny them a photo i.d. See Ex. A, lines 26-30.

The penalty for falsely swearing to be someone else is the same penalty the impersonator would risk anyway by falsely voting in someone else’s name. Cf. NMSA § 30-25-1 (1978) & NMSA § 1-20-8 (1978). What carries no legal penalty of any kind is falsely telling the City Clerk that one possesses none of the documents listed in the voter i.d. amendment, the very statement that triggers the Clerk’s nondiscretionary obligation to issue a photo i.d.

Anyone who would impersonate someone else in order to steal a single vote must do some advance planning. Voter impersonation is not a crime of sudden impulse. Now, because of the easy availability of a City Clerk photo i.d., discovering a target's date of birth and social security number are no longer necessary ingredients of the scheme. A person intent on false voting need only visit the City Clerk's office, give the name of their target, say they have no other documents, and after signing a false statement just as they will do when they falsely sign the voter's roll, they are guaranteed of walking away with an official photo identification issued by the Albuquerque City Clerk in someone else's name. Nothing then stands between them and the vote they intend to steal.

1. Plaintiffs Have Standing to Assert an Equal Protection Claim.

Plaintiffs need not have been denied their vote or face an absolute, certain loss of their right to vote to assert an equal protection claim.⁸ “[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Bush v. Gore*, 531 U.S. at 104 (citation omitted). The injury-in-fact in an equal protection case is the denial of equal treatment resulting from imposition of the disparate treatment, not the ultimate inability to obtain the benefit sought. *See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 593 (10th Cir. 1996). Each of the individual plaintiffs and the members of the organizational plaintiffs who choose to vote

⁸ Because the City Clerk cannot define what qualifies as “current valid” i.d., Defendant cannot establish that Plaintiffs will not be denied their vote. No one knows either way what will occur at the polls because no one knows what will satisfy an election judge operating solely at his discretion is deciding what qualifies as a “current valid” photo i.d.

in-person are denied equal treatment because the burden of a “current valid” photo i.d. is imposed upon them, but not absentee voters.

2. Strict Scrutiny Should Be Applied.

The Supreme Court has never applied any level of scrutiny except strict scrutiny to state laws that would abridge or deny the fundamental right of a citizen to vote on equal terms with other citizens. See Hill v. Stone, 421 U.S. 289, 297 (1975)(any direct restriction on the right to vote other than residence, age and citizenship must promote a compelling state interest); Dunn v. Blumstein, 405 U.S. 330, 335 (1972)(applying strict scrutiny to durational requirements on right to vote); Kramer v. Union Free School Dist. No. 15, 395 U.S. at 626-27 (applying strict scrutiny to law that would deny some qualified citizens the right to vote).

Strict scrutiny, though, does not apply to every law regulating elections. In Burdick v. Takushi, 504 U.S. 428 (1992), the Supreme Court applied what has become known as a balancing test or an “intermediate” level of scrutiny to a state law prohibiting write-in candidacies. The law did not concern a regulation allowing some, but not other citizens to vote. Whether strict or intermediate scrutiny is appropriate “depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” Burdick, 504 U.S. at 434. Thus, the first question to be asked is, what is at stake?

In the Tenth Circuit “[s]trict scrutiny is applied where the government restricts the quantum of speech available to the election or voting process.” Campbell v. Buckley, 203 F.3d 738, 745 (10th Cir. 2000), cert. denied, 531 U.S. 823 (2000). Accord Chandler v. City of Arvada, 292 F.3d 1236 (10th Cir. 2002). Cf. Chandler, 292 F.3d at 1242 n. 2 (balancing test appropriate for “content neutral time, place and manner regulations”).

The Tenth Circuit has also made clear strict scrutiny and not a balancing test should be applied where an election regulation is facially discriminatory. *American Const. Law Found v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), *aff'd sub nom., Buckley v. Const. Law Found., Inc.*, 525 U.S. 182 (1999)(“*ALCF*”). *Cf. Campbell v. Davidson*, 273 F.3d 1229 (10th Cir. 2000)(failure to allege that election regulation was discriminatory triggers balancing test).

Strict scrutiny is called for here. The Albuquerque voter i.d amendment, on its face, is discriminatory. In itself, that requires application of strict scrutiny. *ALCF*, 120 F.3d at 1100. The voter i.d. amendment discriminates against voters wishing to receive information from a full election campaign and those who vote in-person as a form of political expression. The i.d. requirement, as explained Section II.A., *supra*, requires in-person voters to roll the dice that their documentation will be found satisfactory an election official with absolute discretion to reject their papers. Furthermore, it imposes higher qualifications upon in-person voters not imposed upon absentee voters. For each of the categories of documents set forth in the i.d. amendment, in-person voters must meet the qualifications of the entity issuing those forms of photo i.d., as well as incur additional expenses to acquire those identification documents.

For instance, an in-person voter must produce a professional association, commercial transaction or union card with their photo i.d. In order to acquire such documentation, obviously, the voter must meet the qualifications and demands of those organizations. Even a document such as a driver’s license imposes added qualifications. One must have demonstrated sufficient mastery of the Motor Vehicle Code and the operation of an automobile, and pay the required fee, in order to qualify for a license.

None of the qualifications and demands for each of the listed required documents is imposed upon absentee voters, who need not produce any documentation in order to vote.

Strict scrutiny must also be applied under Tenth Circuit law, because, on its face, the voter i.d. amendment can limit the “quantum of expression.” It prevents the voting decisions of otherwise qualified voters from being expressed simply because they do not produce a photo i.d. that satisfies precinct election officials. It thus eliminates the contribution of their expression from the total expression of opinion in the election. Further, the voter i.d. amendment encourages early, and thus less-informed voting. Voters who forego receiving information from campaigns, debates, news stories, endorsements, etc. are held to a lower standard in securing their vote than voters who take in more information from the free flow of information for the entire course of a campaign. Lastly, the voter i.d. amendment also deters the expression of those voters who, like Plaintiffs Kass and Grothus, express their commitment to and celebrate participatory democracy by their bodily presence at the polls where they vote among others assembled at that location. For them to express that viewpoint, they must run the risk of having their vote prohibited by an election official, who, exercising his absolute discretion, may reject the documents they produce. The price of avoiding this risk is to vote absentee, thus not expressing one’s beliefs about the preciousness of democracy by one’s physical presence at the polls.

Furthermore, strict scrutiny is required because the voter i.d. amendment is not content neutral. It disfavors the vigorous exchange of information by voters seeking to be as informed as possible before exercising their franchise. It burdens the expression of a fully informed voting decision. It serves as a direct, discriminatory barrier to the

exercise of the panoply of First Amendment rights inherent in the act and process of voting discussed in this brief.

Lastly, under its own terms, Burdick intermediate scrutiny can only be employed when “a state election law imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters.” 504 U.S. at 433-34 (citation omitted; emphasis added). The Albuquerque voter i.d. amendment is neither “reasonable” on its face nor “nondiscriminatory. As shown in section II.B., *supra*, the voter i.d. amendment is unconstitutionally vague. An unconstitutionally vague law, logically, cannot be considered “reasonable.” Accordingly, strict scrutiny must be applied.⁹

3. The Voter I.D. Amendment Fails Strict Scrutiny

Voting is a fundamental right under the Fourteenth Amendment. Bush v. Gore, *supra*; Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 629 (1969). The restriction on Plaintiffs’ ability to vote on equal terms with absentee voters cannot survive strict scrutiny. As the Supreme Court explained, “Statutes affecting constitutional rights must be drawn with ‘precision.’ And must be ‘tailored to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’” Dunn, 405 U.S. at 343. Or, as the Court said in Kramer, 395 U.S. at 627, “[I]f a challenged state

⁹ Two District Courts have considered this question in the context of photo i.d. laws. *Cf. Common Cause v. Billups*, 406 F.Supp. 1326 (D.Ga. 2005)(applying strict scrutiny); Indiana Democratic Party v. Rokita, 2006 WL 1005037, 2006 U.S. Dist. LEXIS 20321 (S.D. Ind. 2006)(intermediate scrutiny). The state laws in those cases are substantially different than the Albuquerque photo i.d requirements. Those cases will be discussed in Plaintiffs’ response and reply briefs on the cross-motions for summary judgment.

statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.”

In Chandler, supra, the Tenth Circuit struck down a local law prohibiting nonresidents from collecting ballot initiative petition signatures. Even though nonresidents could participate and support a ballot initiative by other activities than collecting signatures, the court found that this restriction limited the “quantum of expression” and thus subjected the law to strict scrutiny. Finding the law was not “vital to ensuring the integrity of Arvada’s petition process,” and that less restrictive measures could be employed, it held the law unconstitutional.

Similar considerations operate here. The voter i.d. law on its face excludes otherwise qualified voters from expressing their opinions in the voting booth. The nonresident signature gatherers in Chandler could not even vote for the ballot measures for which they would collect signatures. But the Tenth Circuit recognized that their contribution to the “quantum of expression” was being limited and thus strict scrutiny served to invalidate the law. It could be argued that in-person voters, assuming they can master the intricacies of state and municipal election laws, can find other ways to express themselves, as well. Because the voter i.d. amendment excludes anyone who, on the day of voting, cannot produce a “current valid” photo i.d. and thus also has the effect of limiting the “quantum of expression,” without being necessary to the preserving the integrity of Albuquerque’s elections.

The voter i.d. amendment fails strict scrutiny Defendant can produce no evidence that requiring only in-person voters to produce a “current valid” photo i.d. is “necessary

to promote a compelling state interest.” *Kramer, supra*. Defendant cannot show that the overarching state i.d. procedures, which, at a minimum require a voter to state their name, date of birth and “unique identifier,” do not prevent voter impersonation. Indeed, if allowing absentee voters to provide their date of birth and “unique identifier” suffices to prevent fraud in absentee voting, Defendant can present no evidence that the same safeguards are inadequate for in-person voters.

Nor can Defendant prove that Albuquerque’s i.d. amendment is narrowly tailored and that no less drastic and discriminatory means are available. Defendant cannot prove that holding in-person voters to the unascertainable, vague “current valid” photo i.d. standard, as opposed to the more certain and definite forms of identification applicable to absentee voters, is necessary to prevent voter impersonation. Contrary to *Dunn*’s proscription, the voter i.d. amendment is far from being drawn “with precision.”

4. The Voter I.D. Amendment Fails Intermediate Scrutiny

Albuquerque’s voter i.d. amendment fails even intermediate scrutiny.

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

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

The injuries to Plaintiffs have been explained. The character and magnitude of those injuries is the infringement of fundamental constitutional rights. Defendant can be expected to argue that the interest served by requiring photo i.d. is to prevent false voting. But Defendant cannot meet the last prong of *Burdick*. The goal of preventing false voting does not make it necessary to burden Plaintiffs’ First and Fourteenth Rights.

The Albuquerque voter i.d. amendment fails this test for three reasons. One, the photo i.d. requirements do not apply to all voters who can cast their vote on election day, or during the early voting period. If a photo i.d. is necessary to prevent voter fraud, Defendant must explain why that requirement is not applied to all voters, especially since she admits the potential for false voting by absentee ballot is no less than the potential for false in-person voting.

Two, Defendant can produce no evidence that the state voter i.d. system, applying equally to in-person or absentee voters, does not prevent voter impersonation. Thus, Defendant can show no need for imposing greater burdens on in-person voters only.

Three, the i.d. amendment, while burdening Plaintiffs' First and Fourteenth Amendment, actually provides a means for committing voter impersonation that otherwise would not exist. Individuals wishing to commit false voting can do so by easily obtaining a false voter i.d. from the City Clerk. The additional burdens on Plaintiffs' constitutional rights are not offset by increased protection against fraud. The integrity of the vote is actually more secure in the absence of Albuquerque's law. "[I]t is difficult to take very seriously" a state's asserted interest in prohibiting certain conduct "when it permits other, equally, if not more, effective means of [the conduct] without...fear of punishment." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 110 (1979).

5. Bush v. Gore Vote Dilution

No evidence exists that the state "unique identifier" system has permitted voter impersonation. The most that can be said for the Albuquerque i.d. law is that it addresses the *potential* of false voting. But it only addresses the potential of false voting at the polls. It does nothing about the potential of false voting by absentee ballot.

Consequently, absentee voters as a group are granted increased security that their votes will not be diluted by false in-person voting. But in-person voters are not granted the same assurance against dilution by false absentee voting.

This situation is not unlike the situation the Supreme Court condemned in *Bush v. Gore*. The Florida Supreme Court ordered recounts of votes in only some counties. Voters in the recounted counties would potentially have a greater assurance that their votes had been correctly tabulated than would voters in other counties. The votes in the recount counties were theoretically given greater value than votes elsewhere.

“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over another.” 531 U.S. at 104. “It must be remembered that ‘the right of suffrage can be denied by debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting free exercise of the franchise.’” *Id.* (citation omitted).

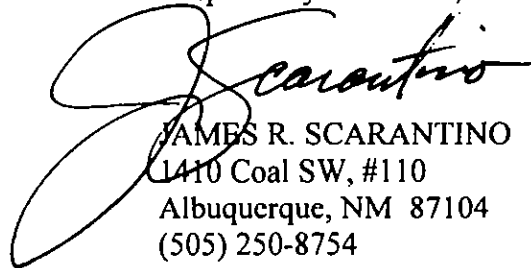
Albuquerque’s voter i.d. amendment violates this principal of equal protection. It values the votes of absentee voters more highly than those of in-person voters, because it protects only against the potential of false in-person voting while turning a blind eye to that potential among absentee voters. In-person voters thus do not enjoy the same level of protection against dilution of their vote by false voting that is enjoyed by absentee voters. One source of the fundamental nature of the right to vote “lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Id.* By creating arbitrary qualifications that do not grant equal dignity and value to the votes of in-person voters as granted to absentee voters, Albuquerque’s voter i.d. amendment violates the Equal Protection Clause under the *Bush v. Gore* analysis.

Albuquerque can cure this constitutional defect by valuing the security of absentee and in-person votes equally. That could involve requiring absentee voters, at some point in the absentee application and ballot process, to show the same i.d. as required of in-person voters. Or Albuquerque can return to the previous state system, which required the same identification of all voters, regardless of whether they vote absentee or in-person. In the event the court strikes down Albuquerque's voter i.d. amendment, under the Municipal Election Code and Albuquerque's City Charter, the procedure for ascertaining voter identification will default to those state election laws. (Ex. H, Albuquerque City Charter, Art. II, § 2).

III. CONCLUSION

For the foregoing reasons, Albuquerque's voter i.d. amendment should be declared unconstitutional and Defendant enjoined from its enforcement and administration. Plaintiffs request that summary judgment be entered in their favor on Counts I and VI of their Second Amended Complaint.

Respectfully submitted,



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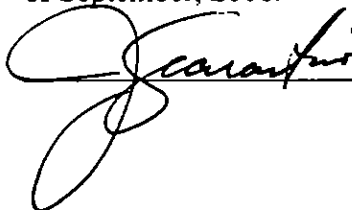
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I certify that I served a true and correct copy of
the foregoing by U.S. mail upon counsel for
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87102, by hand delivery this 14th day
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