

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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CLERK-ALBUQUERQUE

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

Plaintiffs,

v.

No. CV 05-1136 MCA/WDS

MILLIE U. SANTILLANES, ALBUQUERQUE
CITY CLERK,

Defendant.

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

Plaintiffs, by and through their undersigned counsel, hereby submit this
memorandum in response to Defendant's Motion for Summary Judgment.

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I. Defendant's Statement of Material Facts

A. Response to Defendant's Statement of Facts

Plaintiffs do not dispute any of Defendant's stated material facts except for the following:

Defendant's Fact #6: Defendant incorrectly restates the requirements of the Voter ID Law. Defendant states: "The Voter ID Law provides that any identification showing the voter's photograph and name is sufficient to meet the requirements of the Voter ID law, including but not limited to any card issued by a government agency, driver's license, student identification card, commercial transaction card such as a credit or debit card, an insurance card, union card, a professional association card, or the voter identification card issued by the Albuquerque City Clerk."

This is not what the Voter ID law says. The law says: "When a voter approaches the election polling place seeking to vote, the voter must identify himself or herself 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. 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."

Defendant's Fact #7: The Voter ID Law does not state that a voter ID may be obtained on or after Election Day. It is silent as to when a photo ID may be obtained from the City Clerk. See Defendant's Exhibit 1.

Defendant's Fact #12: Defendant misstates the requirements of the Voter ID Law as to when a provisional ballot will be counted. In its own terms, the Voter ID Law states: "Provisional ballots shall be counted only by the Municipal Canvassing Board and only upon the voter's presentation to the City Clerk within the ten day canvassing period one of the photo identification cards described in this section." See Defendant's Exhibit 1.

Defendant's Fact #14: The Voter ID Law does not use the term "in person voting." By its own terms, it requires a current valid photo identification be produced when "a voter approaches the election polling place seeking to vote...." See Defendant's Exhibit 1. Plaintiffs agree this would apply to voters seeking to vote by physically going to the early polling locations established under NMSA § 1-6-5.7.A. Plaintiffs disagree with this statement of fact by Defendant if it implies that persons who have applied for an absentee ballot are considered to vote "in person" under any circumstances. New Mexico law prohibits anyone who applied for an absentee ballot from voting "in person." NMSA § 1-6-16.A. Furthermore, a person voting by absentee ballot may do so by going to the clerk's office, and requesting, completing and delivering his ballot there, at that time. However, under New Mexico law, the Clerk's office is not considered an "election polling place," NMSA § 1-6-5.F., and thus Albuquerque's Voter ID Law would not apply to that voter. Further, New Mexico law permits an absentee voter to have his ballot delivered on his behalf by a caregiver or immediate family member, NMSA § 1-6-10.1.

Defendant's Fact # 17: Denied. Defendant herself stated that, as for a driver's license which is presented after the expiration date, "It could [be rejected], but I don't think it would be." See Exhibit G to Memorandum in Support of Plaintiffs' Motion for

Summary Judgment With Tables of Contents and Authorities, pp. 22-23. Defendant stated that as City Clerk she will leave it up to each election judge to determine whether an expired driver's license is "current valid" photo identification entitling a person to voter. See *Id.* Defendant stated repeatedly in her deposition that she could not define what a "current valid" photo i.d. is, and will leave the decision as to what constitutes a "current valid" photo i.d. to the discretion of each election judge. *Id.* Santillanes depo. pp. 26-27, 37-38, 50, 26-27.

Defendant's Fact #19. Denied. The Voter ID Law does not anywhere define what constitutes a "current valid" photo i.d., and, particularly, does not define a "current valid photo identification" as "a government issued identification card...issued by any governmental agency." See Defendant's Exhibit 1. Further, the cited excerpt from the deposition of Millie Santillanes does not support the statement of fact made in Defendant's Fact #19. As stated previously in response to Defendant's Fact # 17, Defendant Santillanes cannot define what constitutes a "valid" photo i.d.

Defendant's Fact #21: Denied. The deposition transcripts cited do not support Defendant's asserted statement of fact. In none of the passages cited in support of the statement, "The organization plaintiffs have made no expenditures related to the photo identification requirement," were the representatives of The League of Women Voters of Albuquerque/Bernalillo County ("The League") or SAGE Council asked about expenditures related to the photo identification requirement. And, contrary to Defendant's asserted factual statement, in the very passages cited by Defendant, Mr. Hughes states his organization anticipates spending money related to the voter i.d. requirements. See Defendant's Exhibit F, deposition of Henry Hughes, p. 43, lines 8-11.

Defendant's Fact #22. Admitted, but Plaintiffs wish the Court to note that the question presented to League members was *any* photo identification, not a "current valid" photo identification that would allow them to vote in Albuquerque elections. See Defendant's Exhibit D, Goldfarb depo., p. 13. The question posed to League members was unspecific.

Defendant's Fact #24: Denied. See Plaintiffs' Initial Disclosures, Ex. K, hereto (Plaintiffs continues the lettering sequence from their memorandum in support of their motion for summary judgment). Further, neither Plaintiffs nor Defendant can say who will or will not have "acceptable" photo i.d. as the definition of what constitutes a "current valid" photo i.d. cannot be provided by even the City Clerk herself. Ex. G to Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Santillanes depo., pp. 26-27, 37-38, 50.

Defendant's Fact #29: Denied. Defendant Kazaras explained in her affidavit attached as Exhibit F to Memorandum in Support of Plaintiffs' Motion for Summary Judgment that the card issued her once by UNM is no longer current or valid, as the terms under which it was issued to her no longer exist. Plaintiffs' also deny Defendant's legal conclusion that the forms of identification listed in Defendant's Fact #29 "can be used to vote." As the terms "current" and "valid" are not defined in the Voter ID Law, and the decision as to the meaning of those terms is left to the discretion of each election judge, Defendant's cannot know what is and what is not a "current valid" photo i.d. that will enable anyone to vote. As stated above, Defendant has admitted that even she, the City Clerk, cannot provide a definition of what constitutes a "valid" photo i.d.

Defendant's Fact # 30: See Plaintiff's response to Defendant's Fact #22.

Defendant's Fact #31: Denied. Defendant falsely states Plaintiff Kass' testimony. Contrary to Defendant's representation, Defendant Kass stated she did not know if her mother votes absentee. Defendant's Exhibit H, p. 4, line 25, p. 5, line 1.

Defendant's Fact #32: Denied. Defendant falsely reports Plaintiff Kazaras' testimony. She did not say she "will probably vote absentee," as Defendant reports. Instead, she was asked if her ID was invalid, or she didn't have any ID, would she make an effort to go and obtain ID to permit her to vote. She answered: "I would probably go vote absentee, then." Defendant's Exhibit H, Kazaras depo., p. 15. Kazaras has stated that she knows nothing about the absentee voting process and has never voted absentee. Id., Defendant's Exhibit H, Kazaras depo., p. 14. Kazaras does not wish to vote absentee and give up her ability to learn the information she needs to make an informed voting decision. Plaintiffs' Exhibit F, Kazaras affidavit.

Defendant's Fact #37: Denied. The cited deposition excerpts do not support Defendant's statement of fact. The excerpt from the Albert deposition asks only whether a particular survey in Spring 2006 contained any questions related to voter ID. The excerpt from the Weahkee deposition actually concerns work done by SAGE Council concluding that, "many of our people are not going to have valid IDs." Defendant's Exhibit L, Weahkee depo., pp. 116-17.

Defendant's Fact # 39: Plaintiffs stipulate to Defendant's statement of fact to the extent that one form of absentee ballot fraud is coercion, along with voting in the name of another. The excerpts cited by Defendant from the deposition of Denise Lamb, though, do not state that this is the "primary" form of fraud. What Denise Lamb, who supervised all elections in New Mexico for more than a decade, stated was:

Q: And so for the ones [abuses] that are still occurring, would the requirement of a voter photo ID short-circuit those abuses or stop them in any way?

A: My opinion is that most of the abuses right now are in absentee, so I don't believe that a photo ID, unless it was required with the absentee ballot, would stop the abuses.

Q: I still want you to answer my question, so I'll try it again. You read about some of these abuses in your books, and you told me, I think, that some of them are still continuing?

A: Yes.

Q: Do you believe the requirement of a voter photo ID would stop those abuses that you still believe are continuing?

A: No.

Q: Why not?

A: Because I believe that most of the abuses that take place now are done with absentee ballots, not at the polling place.

B. Plaintiffs' Additional Statement of Facts

Plaintiffs make the following additional statement of fact, which they believe is undisputed:

1. In the November 2005 special run-off election for the District Nine City Council seat, only 3,687 out of 28,925 eligible voters participated, resulting in only a 12.75% turnout. Of the votes cast, nearly 20% were cast by absentee ballot. (Ex. L, Albuquerque City Clerk Certificate of Canvass and Bernalillo County Clerk election results).

II. Defendant Raises Arguments Unrelated To The Remaining Claims and Parties.

Defendant raises many arguments unrelated to parties and claims remaining in this case. Plaintiffs's remaining claims are the First Amendment and Equal Protection

arguments in Counts I and VI of their Second Amended Complaint, as briefed in the Memorandum in Support of Plaintiffs' Motion for Summary Judgment. The remaining parties are The League, SAGE Council, Anne Kass, Barbara Grothus, and Alexandra Kazaras.

Accordingly, Plaintiff sees no need to respond to Defendant's arguments that are unrelated to Plaintiff's remaining claims or the parties remaining in this case. Hopefully, this will serve, as Plaintiffs intended by voluntary dismissal of other claims and parties, to simplify the issues before the Court. To further avoid unnecessary duplication of briefing, Plaintiff will, where appropriate, occasionally refer to relevant portions of their Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

III. Rokita Does Not Control This Court's Decision.

Defendant seems to rely almost exclusively on the decision in Indiana Democratic Party v. Rokita, 2006 U.S. Dist. LEXIS, 2006 WL 1005037 (S.D. Ind. 2006). Defendant borrows her standing and Equal Protection arguments directly from Rokita, without citing any Tenth Circuit precedent¹ or notifying this Court that Rokita is not a final judgment. An appeal from the District Court's decision is pending before the Seventh Circuit.

Rokita, obviously, does not control this Court's decision. Moreover, the facts of that case are so materially distinguishable that Rokita bears little relevance to the particular factual and legal issues presented here.

¹ The Tenth Circuit's "quantum of expression" test for determining whether strict or intermediate scrutiny should apply is discussed in Section II.D.2. of the Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

First, Indiana's approach to absentee and in-person voting differs greatly from New Mexico². In New Mexico any person can vote by absentee ballot. NMSA § 1-6-3.A. In Indiana, only limited categories of individuals may vote absentee. Generally, Indiana absentee voters must qualify for an absentee ballot by actual absence on election day, illness, physical disability, advanced age, or religious conflicts. *Rokita*, n.10. In New Mexico, in-person as well as absentee voting is done with a paper ballot. NMSA §§ 1-6-7, 1-9-7.1. This does not appear to be the case in Indiana. In New Mexico, except for Albuquerque's voter i.d. law, the same basic identification—name, date of birth, and “unique identifier”—is required for all voters, regardless of how they vote. NMSA §§ 1-12-10, 1-1-24.B. Indiana has no such provision. In Indiana, absentee ballots are not counted until after a comparison between the signature on the envelope and the registration signature. *Rokita*, n. 10. A signature comparison is not conducted on absentee ballots in New Mexico. See NMSA § 1-6-16.1.D. & E.

New Mexico allows a voter to drive to his regular precinct on election day, even fill his ballot out in his car or at the door of the polling place, and hand it to the election judge. NMSA § 1-12-8.2. Indiana has no similar provision. New Mexico also permits an absentee voter to apply in person at the clerk's office for a ballot, and in a voting booth set up in the clerk's office mark his ballot and deliver it at that time. NMSA § 1-6-5.F. It does not appear Indiana has a similar provision.

Second, the Indiana voter i.d. law itself is substantially different from Albuquerque's law. Most tellingly, Indiana requires a photo i.d. of absentee voters who

² As discussed in the Memorandum in Support of Plaintiffs' Motion for Summary Judgment, p. 5, the New Mexico Municipal Election Code controls all aspects of voting in Albuquerque except with respect to Albuquerque's adoption of a voter photo i.d. requirement.

deliver their ballot to the clerk's office. Ind. Code § 3-11-8-25.1. Albuquerque's law applies only to voters seeking to vote at their "election polling place," which, by law, excludes the clerk's office. NMSA § 1-6-5.F. Thus, Indiana extended its voter i.d. requirement to everyone delivering their vote "in person," either by dropping it off at the clerk's office or by casting it in a polling place voting booth. Albuquerque's voter i.d. law applies to only those in-person voters seeking to vote at their election polling place, but not to voters voting absentee at the clerk's office, dropping off their absentee ballot at the clerk's office, or even dropping their absentee ballot off at their regular polling place.³

Third, Indiana's law does not suffer from the same vague draftsmanship as Albuquerque's. Albuquerque requires presentation of a "current valid" photo i.d., without providing any definition of those terms. Albuquerque's law, as demonstrated in Section II.B. of the Memorandum in Support of Plaintiffs' Motion for Summary Judgment, leaves the decision as to what constitutes a "current valid" photo i.d. completely to the discretion of each precinct election judge. Indiana, on the other hand, was very specific in describing what documentation would be required. Sec Ind. Code § 3-5-2-40.5. Indiana's law does not grant the precinct election judge with authority to reject an i.d. because he decides it is not both "current" and "valid," according to his own interpretation of what those terms mean as applied to each document presented him.

In sum, in the state of Indiana absentee and in-person voting may be substantially different. That consideration factored into the District Court's analysis in Rokita. But

³ Under NMSA § 1-12-8.2, a voter may simply deliver his absentee ballot envelope to their precinct. They are not required to undergo the identification procedures applicable to other voters under NMSA § 1-12-10, who seek to enter the polling booth. All that an absentee voter need do to cast their vote under NMSA § 1-12-8.2 is present the official mailing envelope to the election judge before polls close and it will be counted.

such is not the case in New Mexico. The distinctions here between in-person and absentee voting in New Mexico are so small that they do not amount to anything of constitutional importance. Please also refer to the lengthier discussion on this point at pages 33-37 of the Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

While Defendant points this Court repeatedly to the non-final ruling in *Rokita*, she fails to mention a Georgia case where the United States District Court struck down that state's voter i.d. law under both strict and intermediate scrutiny. *Common Cause v. Billups*, 406 F.Supp.2d 1326 (D.Ga. 2005), enjoined enforcement of Georgia's voter i.d. law as a violation of the Equal Protection Clause. The court found that requiring photo identification of in-person, but not absentee voters "left the field wide open for voter fraud by absentee voting. Under these circumstances, the Photo ID requirement is not narrowly tailored to serve its stated purpose" of preventing voter impersonation. 406 F.Supp. 2d at 1362. The ruling was appealed to the Eleventh Circuit, which refused to disturb the injunction. See *Common Cause v. Billups*, 2006 U.S. Dist. LEXIS 56100 p. 6 (N.D.Ga. July 14, 2006)(striking down subsequent modification of voter i.d. requirement under intermediate scrutiny).

Lastly, the Plaintiffs wish to inform this Court that the United States District Court for Arizona has denied a request for preliminary injunction against that state's voter i.d. law. As of the time of writing this brief, an opinion has not yet been issued in *Gonzales v. State of Arizona*, CV06-1268-PHX-ROS (U.S.D.C. AZ), and only a one-page order has been released.

IV. Plaintiffs Have Standing To Assert Their Claims.

Plaintiffs have standing to raise their First Amendment and their Equal Protection Claims. Plaintiffs discussed the basis of their standing to raise their claims in their brief in support of their motion for summary judgment. That discussion is expanded here.

A. Plaintiffs' First Amendment Standing

All plaintiffs, organizational and individual, have raised a void for vagueness challenge to Albuquerque's voter i.d. law. A somewhat unique standing doctrine has evolved for such claims. A void for vagueness challenge is a facial challenge to the constitutional validity of a law. "When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which [the Supreme Court has] recognized as a prudential doctrine and not one mandated by Article III of the Constitution." *City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999). *Accord Faustin v. City and County of Denver, CO*, 423 F.3d 1192, 1196 (10th Cir. 2005); *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1286, 1290 (10th Cir. 1999).

Here, Albuquerque's voter i.d. law will not permit any person to vote unless they can produce a "current valid" photo i.d. As explained in plaintiffs' brief in support of their motion for summary judgment, those terms—especially the term "valid"—not only are completely undefined, but even the City Clerk herself cannot provide a definition. She admits that the definition of what constitutes a "current valid" photo i.d. will be left completely to the discretion of each election judge. Please see pages 19-21 of the

Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and Plaintiffs' statements of fact #18.

As in *City of Chicago v. Morales*, the essential question of what the law requires is facially and hopelessly vague. Where, as here, "vagueness permeates the text of such a law, it is subject to facial attack." 527 U.S. at 55. In these circumstances, plaintiffs may raise void for vagueness claims which are not necessarily limited to their own personal circumstances.

Plaintiffs also satisfy Article III standing requirements. In the case of the individual plaintiffs, they will each be subjected to the vague voter i.d. requirement and the unlimited discretion of election judges. No one can tell them with any certainty what constitutes a "current valid" photo i.d. which will enable them to vote. Their right to vote is in the hands of the unguided discretion of unnamed election judges.

That injury is not conjectural, as they will be voting in-person. That injury is also connected directly to defendant's enforcement of the voter i.d. requirement. And, lastly, that injury can be remedied by an order from this Court declaring the voter i.d. law to be void for vagueness. The individual plaintiffs thus satisfy the standing requirements discussed in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The organizational plaintiffs, The League of Women Voters and SAGE Council, satisfy the requirements of organizational standing. Their members who vote in-person will be subjected to the void voter i.d. law when they attempt to vote. Each of the members of the organizations would have the same standing to raise a void for vagueness claim as those persons who have joined this case as individual plaintiffs. This gives the organizations representational standing to assert the void for vagueness claims on behalf

of their members. The claims in this case are germane to the organizations' purposes, and the case can proceed without the participation of the individual members who would be affected by enforcement of the void voter i.d. requirements. The League of Women Voters and SAGE Council thus meet the requirements for associational standing. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

The representational standing of these organizations is particularly appropriate and needed here. Each of their members who vote in public will be subjected, at different polling places, to the particular definitions of "current" and "valid" chosen by each election judge. The void for vagueness doctrine is designed to address this exact situation. Rather than require every affected citizen to undergo subjection to the unlimited discretion of a government official in determining whether a constitutional right may or may not be exercised—and bring a multitude of as-applied legal challenges—the doctrine allows a facial challenge to the law itself. As discussed in plaintiffs' summary judgment brief, the question is not whether various officials might wisely exercise their discretion in particular circumstances. The sin of a vague law is that it allows unrestrained and unguided discretion in *every* circumstance. That is why a void for vagueness claim is a facial challenge, and not an as-applied challenge. The expanded standing allowed for void for vagueness claims, as explained in *City of Chicago v. Morales*, is a prudential doctrine. It serves the interests of judicial economy, as well as efficiently and effectively vindicating the rights of all persons who will be affected by a law permeated with unconstitutional vagueness.

B. Plaintiffs' Equal Protection Standing

Plaintiffs have standing to assert an Equal Protection claim under *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. V. City of Jacksonville*, 508 U.S. 656, 666 (1993)(“*Northeastern*”). When 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 member of the disadvantaged group need not allege that he would have obtained the benefit but for the barrier in order to establish his standing. The “injury in fact” is the denial of equal treatment itself, not the ultimate inability to obtain the benefit. *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 593 (10th Cir. 1996).

The City of Albuquerque has created the benefit of voting in municipal elections. But it requires one group, those persons who vote in-person, for reasons which include the exercise of First Amendment rights, to overcome the barrier of presenting to election officials a “current valid” photo i.d., which determination rests in the sole, unfettered discretion of one of hundreds of election judges. The “injury in fact” is that in-person voters are being disadvantaged in access to the benefit of voting, and treated less favorably than those persons who choose to vote by absentee ballot.

Put another way, in-person voters are denied access to the benefit of voting unless they satisfy an election official enforcing a vague, undefined photo i.d. standard. Voters who vote by absentee ballot, on the other hand, can have their vote counted after meeting limited, unambiguous requirements, to wit, that they simply provide their name, date of birth and the last four digits of their social security number.

It is not necessary for plaintiffs to prove that they individually or any of their members will be denied their vote. The injury arises by disparate treatment alone. In

Northeastern an association claimed that some of its members had not applied for government contracts because they would be unable to compete for those contracts on the same footing as others. The Court did not require proof that they would have received the contracts had they applied. Nor did it matter that they had not even applied. The Court found standing to assert an Equal Protection claim simply because “some discriminatory classification prevented the plaintiff from competing on an equal footing in its quest for a benefit.” 508 U.S. at .

The United States District Court for the Northern District of Georgia in *Billups* applied these principles and found that individual and organizational plaintiffs had standing to challenge that state’s voter i.d. law. 406 F.3d at 1355-56.

Plaintiffs also have standing under the principles articulated in *Bush v. Gore*, 531 U.S. 98 (2000). “[T]he right of suffrage can be denied by a debasement or dilution of a citizen’s vote just as effectively as by wholly prohibiting free exercise of the franchise.” 531 U.S. at 104. Here, in-person voters face a potential debasement or dilution of their vote, just as plaintiff did in *Bush v. Gore*. Absentee voters are permitted to have their ballots counted without having to verify their identity by the same means as required of in-person voters. If a photo i.d. is necessary to prevent voter impersonation, then in-person voters should be protected against having their vote diluted by that offense, just as absentee voters are protected against in-person voter impersonation. In-person voters should enjoy the same level of security against their vote being diluted as absentee voters enjoy. This argument is further explained in section II.D.6. of the Memorandum in Support of Plaintiffs’ Motion for Summary Judgment.

The injury in fact faced by plaintiffs is the same as in *Bush v. Gore*, which condemned practices giving greater weight and dignity to some votes over others. That case enjoined those practices before they could potentially dilute any votes, the same remedy plaintiffs seek here.

V. Defendant Has Not Disputed Plaintiffs' First Amendment Claims

Defendant has not contested Plaintiffs' First Amendment Claims, set forth in Count VI of their Second Amended Complaint. Plaintiffs have moved for summary judgment on their First Amendment claims, alleging the voter i.d. law is void for vagueness and violates the substantive First Amendment rights of Plaintiffs Kass and Grothus. Those arguments are found in sections II.B. & C. of the Memorandum in Support of Plaintiffs Motion for Summary Judgment.

VI. Plaintiffs Should Prevail On Their Equal Protection Claims.

Plaintiffs have moved for summary judgment on their Equal Protection Claims. Defendant's cross-motion on these claims should be denied. Defendant has failed to address Tenth Circuit law requiring application of strict scrutiny, and has misstated the factual basis which she claims provides a justification for requiring photo i.d. of in-person, but not absentee voters. In fact, defendant has failed to show any credible and rational reason whatsoever for upholding a requirement subjecting in-person, but not absentee voters to the photo i.d. requirement.

A. Strict Scrutiny Should Be Applied.

Defendant failed to even mention the line of Tenth Circuit decisions which leads to application of strict scrutiny in this case. Those decisions, establishing a "quantum of speech" test, are discussed in section II.D.3. of Plaintiffs' brief in support of their motion

for summary judgment. Under strict scrutiny, the voter i.d. law must be declared unconstitutional.

B. Defendant Cannot Present Any Minimal Rational Basis For Requiring In-Person, But Not Absentee Voters To Produce Photo I.D.

Defendant relies heavily on the statement from Rokita, that absentee and in-person voting are inherently different. That may be a valid observation of the situation in Indiana, but it is incorrect when applied to New Mexico. As shown in Plaintiffs' brief in support of their memorandum for summary judgment, pages 33-37, except for the symbolic political speech associated with in-person voting, there is no constitutionally meaningful difference between absentee and in-person voting in this State. Any one can vote absentee. Absentee and in-person voting are both done on paper ballots. Absentee voting can be done on election day. Absentee votes can be cast in a voting booth set up in the Clerk's office. Absentee ballots can even be cast at the voter's regular polling place on election day, at the same time while "in-person" voters are undergoing examination of their "current valid" photo i.d before they are permitted to do what the absentee voter has just done in the very same room without undergoing equal scrutiny.

The only arguments offered by Defendant for requiring in-person but not absentee voters to produce "current valid" photo i.d are set forth at pages 37 and 38 of her brief. First, Defendant argues that a photo i.d. is necessary to prevent someone from getting a name off the list of voters posted outside polling places and falsely voting in that person's name. But Defendant, who supervises all City elections, knows that simply getting a name from the posted voter list will not permit voter impersonation. She knows that under New Mexico law anyone wishing to vote must at least be able to give their date of birth and their "unique identifier"—the last four digits of their social security number—in

order to be permitted to vote. NMSA § 1-12-10. It is more than misleading for Defendant to suggest voter impersonation can occur under her false scenario. Defendant knows full well that the posted voter list does not contain any Social Security number information required for a person to vote. In fact, state law prohibits publishing such information on the posted voter list. NMSA § 1-12-7.1.A.

Next Defendant argues it is not possible to require absentee voters to produce a photo i.d. She argues that absentee voting procedures do not present opportunities for election officials to examine a photo i.d. to see if it matches the person wishing to vote. She argues that “the only means for applying an absentee voter [photo] identification requirement would be to have absentee voters include some form of picture identification with their absentee ballot or ballot application.” Defendant’s brief at p. 38.

But Defendant is fully aware that absentee ballots can be dropped off by the voter at the Clerk’s office. NMSA § 1-6-10.1. An application for absentee ballot can be picked up at the Clerk’s office, and an absentee ballot marked and cast at that time. NMWS § 1-6-5.F. What’s more, an absentee ballot can be completed literally outside the voter’s polling place and dropped off at that location on election day. The voter need only present the envelope to their precinct election judge and it will be accepted and counted. NMSA § 1-12-8.2.A.

Defendant has offered no rational reason why voters lined up to cast their votes in the voting booth should be required to produce “current valid” photo i.d. when someone with an absentee ballot can at the same time, in the same room, drop off their envelope

and have it counted without having to similarly prove their identity.⁴ Nor can Defendant offer any rational reason why someone casting their vote in the Clerk's office should be permitted to escape the photo i.d. requirement applicable to voters wishing to vote down the street in a regular polling place. And, furthermore, Defendant can offer no rational reason why someone picking up or dropping off an absentee ballot at the Clerk's office cannot be required to produce the same form of "current valid" photo i.d. that would be required if they sought to vote in a voting booth on election day.

Lastly, since absentee voting is not solely by mail, Defendant can offer no rational reason why, at some stage in the application and delivery process, absentee voters could not be required to undergo the same scrutiny of their photo i.d. as in person voters. Absentee voters could be required to pick up their application in person, and present photo i.d. at that time, and still enjoy the convenience of not being physically present on election day.

It should also be noted that the preamble to the voter i.d. law does not provide any rational basis for the disparate treatment of in-person and absentee voters. The only allegation of voter impersonation set forth in the preamble occurred before New Mexico implemented its "unique identifier" system for voter identification. The alleged incident could not be repeated under the current system. Defendant has yet to produce any evidence of alleged in-person voter impersonation since the New Mexico "unique identifier" requirement became law.

The other items in the voter i.d. preamble concern voter registration concerns, which are irrelevant to the issue of voter impersonation. Indeed, the allegation that two

⁴ As noted *supra*, p. 9, Indiana requires absentee voters who drop off their ballot to show photo i.d.

underage boys managed to register actually proves the irrationality of not applying photo i.d. requirements to absentee voters. A thirteen year-old boy who managed to register to vote can continue the charade through absentee voting. He is not likely to get into a voting booth if he dares to try to vote in person. Likewise, the account of a voter registration card arriving for a dead relative confirms this irrationality. As explained in plaintiffs' brief in support of their motion for summary judgment, the easiest avenue for someone to improperly vote in the name of a relative is through absentee voting. The account of finding voter registration forms during a search warrant is meaningless, because it is not illegal in New Mexico to hire voter registrars. Both major parties do it. Lastly, the account of incomplete voter registration cards being turned into the Bernalillo County Clerk only shows the system works. As the account states, incorrect registrations were treated by the Clerk as invalid. Further, the fact that some people turned in incomplete registration cards, which were deemed invalid, is totally irrelevant to anything that may be achieved by requiring in-person voters, but not absentee voters, to produce "current valid" photo i.d.

Defendant is unable to present any credible basis for the disparate treatment of in-person and absentee voters. This proves there exists no rational reason for this disparate treatment and renders Albuquerque's voter i.d. invalid under intermediate as well as strict scrutiny.⁵

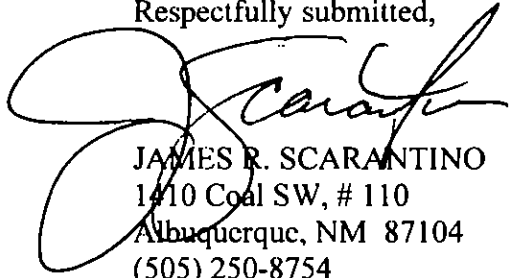
⁵ Defendant's argument at the bottom of page 38 is nonsensical. Defendant insinuates that a photo i.d. is necessary at the polling place because election officials are not trained to match the signature of the person presenting themselves to vote against the voter registration signature on file. But the same would be true of election officials opening absentee ballots. They also would be untrained in the signature analysis necessary to match the absentee ballot signature against the registration signature. In fact, New Mexico absentee ballots, just like the signature of a voter signing the vote roster before

VII. Conclusion

For the reasons state in Plaintiffs' memorandum in support of their motion for summary judgment, the Court should rule that Albuquerque's voter i.d. law violates the First Amendment and Equal Protection Clause of the United States Constitution.

Defendant's motion for summary judgment should be denied.

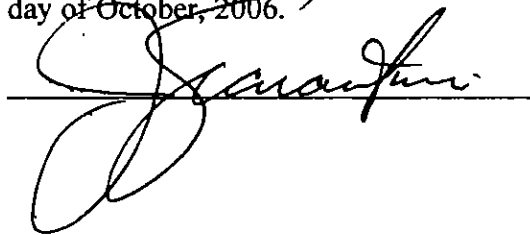
Respectfully submitted,



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COUNSEL FOR PLAINTIFFS

I hereby certify that I served a true and correct copy of the foregoing by U.S. mail upon Assistant City Attorneys Paula Forney and Mark Shoesmith this 10th day of October, 2006.



entering a voting booth, do not undergo verification by comparison to the voter registration signature. NMSA § 1-6-16.1.D. & E. Having the advantage of knowing the voter's registration address adds nothing above what polling place officials have. They also have the name and address of the voter in the precinct voting list and other records the election judge has to ensure that voter is registered. That is how voters and officials know the person is registered to vote in the right precinct. NMSA § 1-12-7.1.B.

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

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

Plaintiffs,

v.

No. CV 05-1136 MCA/WDS

MILLIE U. SANTILLANES, ALBUQUERQUE
CITY CLERK,

Defendant.

PLAINTIFFS' INITIAL DISCLOSURES

COME NOW Plaintiffs, pursuant to F.R.Civ.P. 26(a)(1) and hereby make the following initial disclosures:

A. The name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged in the pleadings:

1. Peter Simonson, Executive Director
American Civil Liberties Union of New Mexico
1410 Coal SW, Albuquerque, NM 87104
505-243-0046

Mr. Simonson has information regarding the impact of the voter I.D. requirement upon members of the ACLU of NM.

2. Diane C. Goldfarb
League of Women Voters, Albuquerque/Bernalillo County
7909 Charger Trail NE
Albuquerque, NM 87109
505-821-4229

Ms. Goldfarb has information regarding the impact of the voter I.D. requirement on members of the League of Women Voters of Albuquerque/Bernalillo County.

3. Josephine T. Porter
League of Women Voters, Albuquerque/Bernalillo County
31 Juniper Hill Loop NE
Albuquerque, NM 87122
505-858-3160

Ms. Porter has information regarding the impact of the voter I.D. requirement on members of the League of Women Voters of Albuquerque/Bernalillo County.

4. Laurie Weahkee, Executive Director
SAGE Council
510 3rd SW, Albuquerque, NM 87102
(505) 260-4696

Ms. Weahkee has information regarding the allegations in the complaint pertaining to the impact of the voter I.D. requirements on Native Americans and members of SAGE Council.

5. Hank Hughes
Executive Director
New Mexico Coalition to End Homelessness
P.O. Box 865
Santa Fe, NM 87504
505-982-9000

Mr. Hughes has information regarding the impact of the voter I.D. requirement upon homeless voters and members of the NM Coalition To End Homelessness.

6. Anne Kass, c/o of Plaintiffs' counsel.

Mrs. Kass has information regarding the disparate impact of the voter I.D. Requirements on her right to vote.

7. Alexandra Kazaras, c/o Plaintiffs' counsel.

Ms. Kazaras lacks the current valid forms of identification required by the Voter I.D. amendment and has information related that fact.

8. Barbara Grothus, c/o Plaintiffs' counsel.

Ms. Grothus has information regarding the disparate impact of the voter I.D. requirements on her right to vote.

9. Tom Shinnick
1616 Zena Lona NE, Albuquerque, NM 87112
505-715-9650

Mr. Shinnick has information regarding how the I.D. requirement was applied in the District 9 special election.

10. John L. Sandoval

Current address undetermined; no telephone

Mr. Sandoval is a homeless person qualified to vote in Albuquerque but lacks the current valid identification required by the Albuquerque voter I.D. amendment.

11. Joseph Cailteux

Current address undetermined; no telephone

Mr. Cailteux is a homeless person qualified to vote in Albuquerque but lacks the current valid identification required by the Albuquerque voter I.D. amendment.

12. Kenneth P. Carter

Current address undetermined; no telephone

Mr. Carter is a homeless person qualified to vote in Albuquerque but lacks the current valid identification required by the Albuquerque voter I.D. amendment.

13. Adrienne Korris

Current address undetermined; no telephone

Ms. Korris is a homeless person qualified to vote in Albuquerque but lacks the current valid identification required by the Albuquerque voter I.D. amendment.

14. Andres N. Lucero

Current address undetermined; no telephone

Mr. Lucero is a homeless person qualified to vote in Albuquerque but lacks the current valid identification required by the Albuquerque voter I.D. amendment.

15. Denise Lamb
Bureau of Elections Chief Officer
Santa Fe County Clerk's Office
102 Grant Avenue
Santa Fe, NM 87504
505-986-6239

Ms. Lamb has information regarding complaints about irregularities in absentee balloting procedures and the absence of proof of allegations of voters being impersonated at the polls from her tenure as Chief of the Bureau of Elections for the N.M. Secretary of State.

16. Jamie Chavez
Bureau of Elections
Office of the Bernalillo County Clerk
One Civic Plaza NW
Albuquerque, NM 878102
505-768-4090

Mr. Chavez has information regarding complaints about irregularities in absentee balloting procedures in Albuquerque and Bernalillo County.

17. Witnesses identified by Defendant.

B. Description by category and location of all documents, data compilations and tangible things in the possession, custody or control of Plaintiffs relevant to the disputed facts alleged in the pleadings:

1. Video Recordings of the two City Council debates concerning the voter I.D. Amendment.
2. June 16, 2005 memorandum by Mark Shoesmith, Assistant City Attorney, to Laura Mason, Director Council Services.
3. The Albuquerque Voter I.D. Amendment.

4. Documents identified by Defendant.

C. Plaintiffs' Expert witnesses and their reports will be disclosed in accordance with the schedule set by the Court.

Respectfully submitted,

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s/James R. Scarantino

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Judy N. Chavez, City Clerk

Office of the City Clerk
P.O. Box 1293
Albuquerque, NM 87103
Phone (505) 768-3030 Fax (505) 768-2845
www.cabq.gov/clerk

**CITY OF ALBUQUERQUE
DISTRICT 9 MUNICIPAL RUN-OFF ELECTION
CERTIFICATE OF CANVASS
November 21, 2005**

We, the Municipal Canvass Board, made up of Judy N. Chavez, the duly appointed and qualified City Clerk of the City of Albuquerque, New Mexico, and Daniel E. Ramczyk, Metropolitan Court Judge, hereby certify that on the 15th day of November 2005, the Office of the City Clerk conducted the District 9 Municipal Run-Off Election. The purpose of the election was to vote for electing, one (1) City Councillor in District 9. The election returns from said election were canvassed by the Municipal Canvassing Board Pursuant to Section 3-8-53, N.M.S.A. 1978 (1999 Supp.), on November 21, 2005. The results are as follows:

**CANDIDATES
Terms Expiring November 30, 2009**

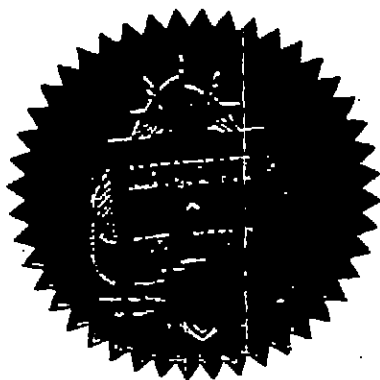
For Councillor – District 9	Votes Cast	Percentages
Tina L. Cummins	1,236	33.52%
Don F. Harris	2,451	66.48%

I further certify that from said canvass, we ascertained the candidate elected as follows:


COUNCIL DISTRICT No. 9: DON F. HARRIS

The total number of registered voters eligible to vote in the Municipal Run-Off Election District 9, on November 15, 2005, was 28,925; the total number of voters 3,687, resulting in a 12.75% turnout.

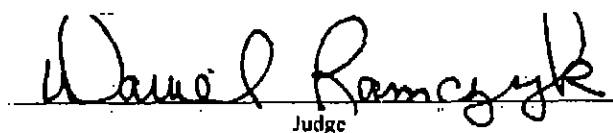
IN WITNESS THERETO, we have hereunto set our hand and seal on this 21st day of November 2005.




Judy N. Chavez, City Clerk
Presiding Officer, Municipal Canvassing Board


Daniel E. Ramczyk, Metropolitan Court Judge
Member, Municipal Canvassing Board


City Clerk


Judge

header (23K)

Unofficial Election Results for the City of Albuquerque
Municipal Run-Off Election - November 15, 2005

Absentee Vote with Hand Tally

17 of 17 Precincts as of Tuesday, November 15, 2005 9:01 PM

COUNCIL DISTRICT 9

Candidate	Precinct	Absentee	Early	Total	Percentage
TINA L. CUMMINS	1,032	179	25	1,236	33.53%
DON F. HARRIS	1,828	552	70	2,450	66.47%
3,686 Total Votes					

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