

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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/Appellees,

v.

MILLIE U. SANTILLANES,

Defendant/Appellant.

USCA No. 07-2067

APPELLANT'S BRIEF IN CHIEF

Appeal from the United States District Court
for the District of New Mexico
The Honorable M. Christina Armijo, United States District Judge
District Court No. CIV 05-1136 MCA/WDS

Respectfully submitted:

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STATEMENT OF JURISDICTION

This action was brought pursuant to 42 U.S.C. §§ 1971(d), 1973(f) and 1983 and 28 U.S.C. §§ 1331, 1343(3) and (4) and 1367 (a); Applt.App.p. 106. Plaintiffs asserted that the case arose under the Constitution and laws of the United States, as protected by 42 U.S.C. §§ 1971, 1973 and 1983. Applt.App.pp. 109-117. The parties filed cross motions for summary judgment, Applt.App.pp. 172-174 and Applt.App.pp. 294-296, and the district court granted plaintiffs' motion for summary judgment as to Count I of the second amended complaint on February 12, 2007, Applt.App.pp. 605-687, and permanently enjoined defendant from enforcing the voter photo identification requirements of City Charter Article XIII, Section 14 (hereinafter the "voter ID law"). Notice of appeal was timely filed by defendant in accordance with Rule 4(a)(1), F.R.A.P. on March 7, 2007. Applt.App.p. 713. Appellate jurisdiction is pursuant to 28 U.S.C. Section 1291.

STATEMENT OF THE ISSUES

- A. Did the district court err in determining that the voter ID law violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?
- B. Did the district court err in finding the voter ID law substantially burdens the right to vote and in applying a strict scrutiny standard of review of the voter ID law?
- C. Did the district court err in finding that the plaintiffs had standing to challenge the voter ID law.

STATEMENT OF THE CASE

Effective October 4, 2005, the voters of the City of Albuquerque approved an amendment to the Albuquerque City Charter requiring in-person voters to present photo

identification prior to voting in municipal elections. Plaintiffs, various individuals and organizations with an interest in voting, filed this action against the Albuquerque City Clerk alleging that the amendment to the Charter violated the First and Fourteenth Amendments to the Constitution of the United States and other federal provisions.

The complaint, as amended, contained six counts. Plaintiff ACLU was dismissed by stipulation of the parties and Counts II through V of the Second Amended Complaint were voluntarily dismissed by the remaining plaintiffs, leaving only Counts I and VI. Applt.App.p. 293. Plaintiffs originally identified but subsequently withdrew all of their proposed experts in response to the city's motion to exclude such proposed testimony. Applt.App.p. 624. After discovery, the parties filed cross motions for summary judgment on the remaining claims. Applt.App.pp. 172, 294. The American Center for Voting Rights Legislative Fund and the Brennan Center for Justice were granted leave to participate as *amicus curiae* and filed briefs. Applt.App.pp. 609-610. The district court filed its Memorandum Opinion and Order, Applt.App.p. 605, on February 12, 2007 granting plaintiffs' motion for summary judgment on the Equal Protection claim and granting the city's motion for summary judgment on the First Amendment claim; plaintiffs had previously dismissed all remaining claims. The district court also requested additional position statements from the parties on the impact of the court's Memorandum Opinion on subsequent elections. After considering the additional statements, the court declined to modify the original ruling and issued its Final Order on March 6, 2007. Applt.App.p. 711. Defendant filed its notice of appeal on March 7, 2007. Applt.App.p.

713. Plaintiffs filed a cross appeal. On April 13, 2007 the appellate court issued an order granting plaintiffs’ motion for “Unopposed Dismissal of Cross Appeal.”

The district court held that the voter ID law violated plaintiffs’ rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The district court found that all plaintiffs had standing to pursue the claims and without specifically resolving the issue, the court applied a strict scrutiny or a “strict scrutiny light” standard to invalidate the voter ID law. The district court permanently enjoined and restrained the city from enforcing or implementing the requirements of the voter ID law in any future municipal election.

STATEMENT OF FACTS

The voters of Albuquerque amended the City Charter in the October 2005 municipal election to require voters who vote in person to present a photo identification card to precinct election officials. The voter ID law is an election regulation to deter in-person voter identity impersonation and does not regulate other types of voting fraud that might occur during absentee voting. The voter ID law requires that voters in municipal elections present proper identification prior to casting a ballot. Applt.App.pp. 121 – 24.

The identification provided must contain the voter’s photograph and name. Applt.App.pp. 121 – 24. The card allowed is any card meeting the requirements specified in the ordinance and is not limited to only government-issued cards. Applt.App.p. 230. An expiration date is not required. Applt.App.p. 230. If the card does contain an expiration date, such date must be after the day on which the voter cast

the ballot. Applt.App.p. 230. The identification need not reflect that the voter resides in the district in which the vote is being cast. Applt.App.pp. 121 - 24.

Voters who do not have a photo identification card may vote by provisional ballot. Applt.App.pp. 121 – 24, 229. If a vote is cast on a provisional ballot, the voter may at any time during the ten days after the election present photo identification to the city clerk and upon such presentation the provisional ballot will be counted by the city canvassing board. Applt.App.p. 123. Voter photo identification cards may be obtained from the city clerk free of charge at any time, including on Election Day and during the ten days after the election. Applt.App.pp. 121 - 24. Voters who desire to vote absentee for any reason including the voter identification requirement may vote absentee without providing photo identification. Applt.App.pp. 121 – 24, 230.

All of the individual plaintiffs possessed photo identification sufficient to satisfy the requirements of the voter ID law. None of the plaintiffs could identify a registered voter in Albuquerque who did not have photo identification. No plaintiff claimed that he or she would not vote in an Albuquerque municipal election because of the implementation of the voter ID law.

The voter ID law, which only applies to Albuquerque municipal elections, was implemented in a city council runoff election in November 2005. Applt.App.pp. 124, 228, 229. Under City Charter Article II, the next city election to which the requirement would apply is to be held October 2, 2007.

SUMMARY OF ARGUMENT

The voter ID law does not substantially burden plaintiffs. The district court found that the voter ID law substantially burdens the fundamental right to vote and appears to have applied a strict judicial scrutiny standard. The court held that the law gives election officials such unbridled discretion that arbitrary or disparate treatment of similarly situated voters is “almost certain to result.” *Applt.App.pp.* 607-608. The district court relied on perceived problems with the voting system that could burden voters, all of which are either unsupported by the record, speculative or pertain to election code requirements unrelated to the voter ID law.

Plaintiffs failed to identify or produce a single registered voter in Albuquerque who did not have a valid photo identification card. There is no evidence that any plaintiff has given up the intent or ability to vote because of the requirements of the voter ID law. The minimal impact of Albuquerque’s voter identification requirement does not justify strict scrutiny review by the courts. *E.g.*, Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff’d. sub nom.*, Crawford v. Marion County Election Board, 472 F.3d 949, C.A.7 (Ind.), 2007 and Gonzalez v. Arizona, 485 F.3d 1041, C.A.9 (Ariz.), 2007 (affidavits of four people who claimed that they did not have the required identification was insufficient to demonstrate a severe burden). Plaintiffs here could not locate any person who was prohibited from voting because of the lack of a voter ID. The district court’s decision in this case is contrary to the decisions by the Seventh and Ninth Circuit Courts of Appeals and, most recently, the Michigan Supreme Court. Crawford, Gonzalez, In re Request for Advisory Opinion, No. 130589 (Mi.Sup.Ct. 07-18-07).

The district court found that plaintiffs had standing based on speculation that they might not be allowed to vote at some future time. The “fears,” Applt.App.pp. 636- 638, expressed by the district court are unsupported by the record, are speculative and unrelated to the voter ID law at issue. These “fears” do not create standing.

Plaintiffs have also not shown that the voter ID law is anything other than even-handed and politically neutral. The voter ID law is not (1) a direct or severe impingement on the right to vote, (2) a poll tax, (3) a voter qualification, or (4) unequally applied to voters in Albuquerque municipal elections. There is simply no evidence that obtaining and presenting photo identification is an unrealistic demand on citizens who wish to vote in person at the polls. The voter ID law is an important, rational, common sense approach by the city to protect the integrity of municipal elections. The law merely requires voters to produce one of a large array of common forms of photo identification so that poll workers have some opportunity to detect identity fraud at the polls.

The Elections Clause of the United States Constitution expressly authorizes political subdivisions to regulate the manner of holding federal and state elections. The City of Albuquerque is a political subdivision of the state and as a home rule municipality under the Constitution of New Mexico, Article X, Section 6, is empowered to regulate its elections. The city has a compelling interest in preserving the integrity of its elections and in preserving the confidence of the public in the integrity of elections. The voter ID law is a reasonable, narrowly tailored means to encourage fair elections, protect the value of legitimate votes, and safeguard public confidence in the legitimacy of elections. There is no requirement for any jurisdiction conducting elections to suffer a fraudulent election

result, to await the disintegration of the election process or to ignore the further alienation and disillusionment of the voters prior to imposing minimal safeguards on the election process.

ARGUMENT

I. STANDARD OF REVIEW

On appeal, the court “review[s] the district court’s grant of summary judgment *de novo* applying the same legal standards as employed by the district court.” Orr v. City of Albuquerque, 417 F.3d 1142, 1148 (10th Cir. 2005) (*quoting* Simms v. Okla. ex rel. Dept. Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999)). The legal standard applied by the district court is the standard applicable on summary judgment: “Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Applt.App.pp.* 640 - 41. “Summary judgment necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.” Pub. Serv. Co. of Colo. v. Cont’l Cas. Co., 26 F.3d 1508, 1517, C.A.10 (Colo.), 1994 (*quotation omitted*). “[F]ailure of proof of an essential element renders all other facts immaterial.” Koch v. Koch Indus., Inc., 203 F.3d 1202, 1212 (10th Cir. 2000). Further,

“Where the non moving party will bear the burden of proof at trial, on a dispositive issue” that party must “go beyond the pleadings” and “designate specific facts” so as to “make a showing sufficient to establish the existence of an element essential to that party’s case” in order to survive summary judgment.

English v. Colorado Department of Corrections, 248 F.3d 1002, 1007, C.A.10 (Colo.), 2001 (*quoting* McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998));

Roche v. John Hancock Mutual Life Ins. Co., 81 F.3d 249, 253 (1st Cir. 1996)

(“[S]peculation and surmise, even when coupled with effervescent optimism that something definite will materialize further down the line, are impuissant in the face of a properly documented summary judgment motion”).

The district court addressed at length the appropriate standard for summary judgment, recognizing that summary judgment procedure must take into account the burdens on the parties for proving their claims. The issue in this case is whether defendant or plaintiffs has the burden of proving the elements of the equal protection claim. Because the court improperly subjected the voter ID law to heightened scrutiny, the burden was improperly placed on defendant to justify the voter ID law. Defendant requests that the court reverse this conclusion: the voter ID law should be subject to rational basis scrutiny and the burden placed on plaintiffs to demonstrate that that provision is unconstitutional. *See, e.g.*, Applt.App.p. 644.

II. THE VOTER ID LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT. Applt.App.p. 608.

Plaintiffs argued and the district court determined that the voter ID law violated the Equal Protection Clause. The court first addressed what standard of scrutiny should apply, ultimately determining that some intermediate level of scrutiny was appropriate. Applt.App.pp. 644 – 53. There is no legal or factual authority to support application of any but rational basis analysis to plaintiffs’ claim.

A. The voter ID law properly distinguishes between in-person and absentee voters.

The complaint alleges that the voter ID law violates equal protection because it does not apply equally to absentee voters. The law provides that a voter appearing at the polling place produce a valid photo identification; the same requirement is not imposed on absentee voters. Applt.App.pp. 106-107.

The district court improperly links absentee voting issues to in-person voting issues.¹ Applt.App.pp. 667, 669 – 70. The appropriate equal protection analysis is whether the city had a rational basis for applying the voter ID law to in-person, but not absentee voting: the issue is not whether the city was justified in failing to impose the requirement on absentee voting. The voter ID law has a rational basis for its application only to in-person voting because it helps protect against identity fraud as to in-person voting at the polls. Application of the voter ID law to mail-in or absentee ballots would not prevent this type of fraud. The type of fraud addressed by the voter ID law occurs when an individual who is not entitled to vote arrives at a polling place and claims the identity of someone whose name is on the voter registration list for that precinct.

Because state law requires that a list of voters be posted at the entrance of each polling place, Section 1-12-7.1 NMSA 1978,² identity theft becomes fairly simple: rather

¹ If the argument is that the voter ID law is unequally applied, the logical conclusion of that argument is that the voter ID law should be expanded to apply to absentee voting. Plaintiffs' two arguments are inconsistent. If the voter ID law violates plaintiffs' First Amendment rights by imposing a burden, then expanding its application to absentee voting would presumably burden more voters.

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

than the fraudulent voter being required to view the registration list at the city or county clerk's office, that voter can simply review the list posted at the poll and fraudulently assume an identity. Requiring voters to present photo identification provides election officials with the opportunity to check the name on the identification against the information in the poll book and simultaneously check the photograph on the identification card against the name of the person who will cast the ballot. The photo identification thus becomes a link between the persons presenting themselves at the polls and the previously established record in the registration database.

Absentee ballot fraud typically occurs in a different way, is not readily detectable and cannot be corrected by checking photo identification. As the evidence demonstrated, absentee ballot fraud generally occurs as a result of coercion of legitimate voters, not simply voting in the name of another. *Applt.App.pp. 279-283*; *see also Pabey v. Pastrick*, 816 N.E.2d 1138, 1145-46 (Ind. 2004); *Schoffstal v. Kaperek*, 457 N.E. 2d 550, 552-54 (Ind. 1984). Thus the city's goal of prohibiting in-person voting fraud is achieved through the requirement of a voter ID while applying that requirement to absentee voting would not achieve the same purpose.

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

name of the registered voter, the absence of a person standing before election officials precludes linking the enclosed identification with the person actually casting the ballot. A critical link in the chain of identity verification is thereby lost and the photo identification is of little practical significance in detecting absentee ballot fraud.

In addition, the voter roster signature requirement imposed by the state, Section 3-8-41 A., is of little benefit to detect voter identity theft at the polling place because election officials are both untrained in signature analysis and under pressure to keep voter lines moving. Only the more expedient comparison of the actual voter to the photo ID provides the verification to eliminate the most basic in-person voter fraud.

Absentee voting does not present concerns of the same type of fraud which can be corrected with a photo ID. With absentee voting, the election officials can check the name and address of the voter against the voter registration rolls on the county clerk's computer database of registered voters, without time pressure. Election officials at the polling places on election day do not have the benefit of a computer link to this database and cannot perform the same check of in-person voters. *Applt.App.p. 229.*

The district court opinion references practices which the court deemed to be inappropriate but which are not prohibited. For example, the district court incorrectly concludes that a family member filling out an absentee ballot is fraud,³ that a fraudulent

³ There is no statutory prohibition of a voter obtaining assistance in filling out and casting an absentee ballot. The only limitations are found in Section 8-8-22 of the state statute as to who can receive assistance when voting in person. Plaintiffs' witness, Denise Lamb, agrees that assisting voters in filling out an absentee ballot is not improper. *Applt.App.pp. 280-281.*

application could prevent a voter from voting⁴ and that there is an equal protection problem because absentee voting does not require the voter to appear in person. Applt.App.pp. 669-670. None of these practices constitutes fraud and the voter ID requirement is not intended to and cannot correct these practices. The district court's reference to those practices as constituting fraud which is not corrected by the voter ID law is inappropriate.

The Seventh Circuit addressed and rejected imposition of a photo ID requirement on absentee voters:

The plaintiffs complain that the new Indiana law is underinclusive because it fails to require absentee voters to present photo IDs. But how would that work? The voter could make a photocopy of his driver's license or passport or other government-issued identification and include it with his absentee ballot, but there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo. Cf. Griffin v. Roupas, supra, 385 F.3d at 1130-31.

Crawford, 472 F.3d at 954. While the district court found the Seventh Circuit's analysis in Crawford to be inapposite, holding that the Indiana law at issue in that case imposed greater restrictions on who was eligible to vote by absentee ballot, Applt.App.p. 670, the same analysis applies here: it would make no sense to impose a similar photo ID requirement on absentee voters because that burden would not correct the possible fraud toward which the photo ID requirement is addressed.

⁴ If a fraudulent application is submitted to the city clerk, the voter would not receive the absentee ballot. The voter then has two choices: (1) apply for an absentee ballot again by signing an affidavit that the voter did not receive an absentee ballot and obtain an absentee ballot, Section 3-9-13.B., or (2) vote on election day by signing an affidavit of non-receipt. Section 3-9-13.1 A.

Crawford rejected imposing a photo ID requirement on absentee voters as a means of satisfying equal protection concerns. The voter ID law was intended to and did address fraud in in-person voting. It did not address absentee voting. The distinction drawn by the law in applying to only in-person voting does not offend the equal protection clause.

- B. The district court incorrectly applied strict scrutiny analysis to the voter ID law; rational basis analysis is the appropriate level of scrutiny. Applt.App.pp. 607-608.

Determining the appropriate level of scrutiny defines which party has the burden of proof. If strict scrutiny is required, the burden is on the city to show that the voter ID law is narrowly tailored to advance a compelling governmental interest. Applt.App.p. 42. If rational basis analysis is applied, the presumption is that the legislation is constitutional and the burden is on plaintiffs to overcome this presumption. Applt.App.p. 40. While the city's position is that the voter ID law should be subjected to rational basis scrutiny only, the voter ID law satisfies both levels of scrutiny.

1. The city's ordinance satisfies rational basis scrutiny. Cases which have addressed voter ID requirements have generally found rational basis scrutiny more appropriate. The Supreme Court has rejected the "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." Burdick v. Takushi, 405 U.S. 428, 432 (1992).⁵ Otherwise, "to subject

⁵ The district court erred in characterizing the voter ID law as an eligibility requirement for voting. Applt.App.p. 612. The city has the right to regulate elections and protect the integrity and the public's perception of the integrity of the election process. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); Smiley v. Holm, 285 U.S.

every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” Burdick, 405 U.S. at 433; *see also* Rokita, 458 F.Supp.2d at 821. Because “the States are given the initial task of determining the qualifications of voters who will elect members of Congress,” not even substantial restrictions on the right to vote are presumptively invalid. Storer v. Brown, 415 U.S. 724, 729-30 (1974) (“as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process”). The voter ID law does not severely burden the voters. There must be more than a minimal infringement on the right to vote before strict judicial review is warranted. Clingman v. Beaver, 544 U.S. 581, 592, 125 S.Ct. 2029, U.S., 2005 (reversing the Tenth Circuit’s finding that strict scrutiny applied to primary election participation laws).

The district court addressed the different levels of scrutiny to be applied to determine the constitutional validity of the voter ID law. The court did not apply either strict scrutiny or the rational basis test but opted for application of some level of intermediate scrutiny, *Applt.App.pp.* 646 – 49, and the balancing test in Burdick v. Takushi, 405 U.S. at 432.

Under rational basis scrutiny, the government is required only to provide “empirical verification of the weightiness of the State’s asserted justifications.”

355, 366 (1932); *Applt.App.pp.* 202-205. The power at issue is to regulate the election and is not related to voter eligibility.

Timmons v. Twin Cities Area New Party, 620 U.S. 351, 364 (1997). The city council, in its findings supporting the voter ID law, has articulated those justifications. As the district court recognized, “a governmental defendant is given more leeway to legislate as a preventive measure. . .” when the constitutionality of legislation is presumed under the rational basis test. Applt.App.p. 644. Rather than applying this principle, the district court ignores the "precise interests" identified by the city council and the evidence and interests identified by the city in the lower court.

The district court substituted its judgment for the judgment of the city council and the voters of Albuquerque. The court gives no credence to the view supported by the decisions in Crawford, Gonzalez and Purcell. The court extracts portions of testimony to justify shifting the burden to the city to prove that the voter ID law will prevent fraudulent voting which the court does not believe could occur.

After the court ignores the existing precedent and the deference to be accorded to government enactments with regard to the policy decisions about election details, the court selects specific provisions of the voter ID law to justify the conclusion that more than rational basis scrutiny is warranted. The district relied on its findings that election officials have been given unbridled discretion that would almost certainly result in arbitrary or disparate treatment of similarly situated voters, Applt.App.pp. 607-608; a threatened injury to plaintiffs exists, Applt.App.pp. 644-646; the city failed to prove that in-person voter fraud had occurred, Applt.App.pp. 622-625; the voter ID law was not tailored to prevent future instances of voter fraud, Applt.App.pp. 665-666; and the voter

ID law lacks a sufficiently close relationship to the actual prevention of voter impersonation fraud. Applt.App.p. 674.

In making these findings, the court ignored other undisputed evidence in the record: plaintiffs could not locate a single person who had been denied the right to vote or who would be denied the right to vote because of the ordinance. The evidence in the record demonstrates that the city had a rational basis for its legislation. If that standard of review is applied, the city's ordinance should be upheld.

2. Strict scrutiny is not appropriate.

Voting regulations may be subjected to strict judicial scrutiny only if they impose “severe” burdens on the right to vote. Burdick, 504 U.S. at 434. If strict scrutiny is required, the burden is on the city to demonstrate that its ordinance is narrowly tailored to advance a legitimate state interest. Ashcroft v. ACLU, 542 U.S. 656, 666, (2004). The voter ID Law does not impose severe burdens on the right to vote as evidenced by plaintiffs' inability to identify any voter or potential voter who has been burdened at all.⁶ The voter ID law does not severely burden the voters. In rejecting the same analysis regarding the Indiana photo identification requirement, the Seventh Circuit stated: “A strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger.” Crawford, 472 F.3d at 952 (*citations omitted*).

⁶ The district court, evidently recognizing this established authority, stated that strict scrutiny was not being applied. Applt.App.p. 649. The court recognized that the appropriate level of scrutiny depends on the severity of the burden. Burdick v. Takushi 504 U.S. at 433 – 34.

There is no evidence in the record to reflect that any burden has been imposed on the fundamental right to vote. Plaintiffs have failed to submit: (1) evidence of any individuals who will be unable to vote or who will be burdened to vote; or (2) any statistical or aggregate data identifying particular groups which will be disenfranchised or burdened in voting. All that plaintiffs have presented is the vague assertion that the homeless will be burdened if they are required to obtain and retain photo identification. *E.g.*, Applt.App.pp. 105, 253; cost of a driver's license or identification card from the state of New Mexico and cost of travel; Applt.App.p. 237. One witness opined that requiring a homeless individual to obtain a voter ID would be so intimidating that the individual would choose not to vote rather than to obtain the voter ID. This opinion, however, was based on the erroneous assertion that the only means for obtaining the requisite identification to permit an individual to vote would be to obtain the ID from the city clerk. Applt.App.p. 272.

Plaintiffs have, at most, attempted to demonstrate that there will be some burden resulting from the voter ID requirement on some unidentified homeless person who does not currently possess a photo ID. They have failed to adduce evidence as to what will cause the burden, the extent of the burden or to identify any specific individual who has been so burdened. In the absence of such evidence, strict scrutiny analysis is not appropriate.⁷

⁷ The city also pointed out that plaintiffs failed to produce any evidence of an identifiable registered voter in Albuquerque who would be prevented from voting pursuant to the voter ID law because of his or her inability to obtain the necessary photo identification. Similarly, plaintiffs have failed to identify any individual, registered or

The district court stated that it was rejecting application of strict scrutiny analysis, evidently because plaintiffs had failed to produce any evidence demonstrating that the right to vote was burdened by the voter ID law. This court should affirm that result but find that the city's voter ID law withstands any constitutional scrutiny.

3. The district court applied inappropriate intermediate scrutiny to the voter ID law.

While the level of scrutiny actually employed by the district court is difficult to determine it resembles most closely the "strict scrutiny light" suggested by Judge Evans in his dissent in Crawford, 472 F.3d at 954. The test actually employed by the court, however, is in practical application, indistinguishable from strict scrutiny. The requirements imposed by the district court are indistinguishable from the analysis imposed by strict scrutiny. Neither strict scrutiny nor intermediate scrutiny as applied by the district court is supportable.

unregistered, who would have to obtain photo identification to vote, let alone any individual who would undergo any appreciable hardship to obtain such identification to be qualified to vote. At most, some of the plaintiffs assert that they know of people, or know of people who know of people, who claim those people will not be able to vote as a result of the voter ID law. None of these allegedly affected individuals has been identified by name, submitted an affidavit or become a party to this litigation. Applt.App.pp. 184 - 87. There was no testimony that any member of plaintiff organizations or any individual who the plaintiff organizations sought to represent lacked photo identification. There is no evidence that any plaintiff organization would be burdened by imposition of the voter ID requirement. While other plaintiffs or organization representatives knew of some people, although not specifying a single name, who might not have a voter ID, there was no evidence that these individuals were unable to vote or could not obtain acceptable photo identification if needed, that the individual was registered to vote in Albuquerque or even wanted to vote in a municipal election. The district court ignored this lack of evidence.

The district court appropriately recognized that local governments had the right to impose some burden on the election process which is what led to the conclusion that strict scrutiny was not warranted. Burdick. To avoid application of strict scrutiny which is not applicable based on established precedent and lack of evidence of a burden, the court mandated a balancing of the “character and magnitude of the asserted injury to the rights protected,” against the burden imposed on the plaintiffs’ rights. Applt.App.pp. 549 – 50 (*quoting Burdick*). In formulating the intermediate test, the court also placed some undefined burden on the city to come forward with “some admissible evidence to show that the photo ID law is tailored to advance the precise governmental interest for which it was enacted.” Applt.App.pp. 650 – 51. How the city can produce admissible evidence that fraud did not occur is unclear. What the city did argue was that plaintiffs had failed to adduce any evidence that they suffered injury.⁸

In applying its intermediate test, the district court initially recognized that the voter ID law at issue gives Albuquerque voters exactly what they wanted,

[n]o one doubts that preventing voter fraud and giving voters confidence in the accuracy and integrity of municipal election results is an important and compelling governmental interest.

Applt.App.p. 666, and that

[t]he precise interest put forth by the City as its justification for imposing a photo-ID requirement at its municipal polling places is to prevent voter

⁸ Interestingly, while the district court placed a burden on the city to produce evidence that its ordinance was narrowly tailored, applying its intermediate standard, the court did not similarly impose any burden on plaintiffs. The court considered plaintiffs’ arguments, but did not require them to produce admissible evidence of injury; the court admitted to focusing on the *threat* of arbitrary enforcement, not the actuality. *See, e.g.*, Applt.App.p. 654 (*emphasis in original*).

impersonation fraud among voters who vote in person at their polling place on election.

Applt.App.p. 667.

The district court then rejected the proposition that voters and the city council could possibly discern a causal relationship between registration fraud and election day voter impersonation fraud. Applt.App.pp. 666 – 68. It seems evident, however, that voter registration fraud may be a prelude to election day fraud. In rejecting the articulated reasons for enactment of the voter ID law, the court determined, without legal or evidentiary support, that “Plaintiffs’ claims necessarily depend on an analysis that is prospective in nature, taking into account what is likely to happen at the next municipal election, . . .” Applt.App.p. 650. Such consideration is purely speculative in nature. Plaintiffs have been unable to identify any injury they have suffered or could have suffered in the election which has already occurred under the provisions of the voter ID law. The court was not justified in looking to what could, possibly, occur in the future to invalidate the current voter ID law.

The district court seems to suggest that the voter ID law failed the Burdick test because no precise interest was identified. Although plaintiffs and the court may not be concerned that the evidence of voter registration fraud is sufficient to justify the voter ID law, registration fraud prior to an election could cause a reasonable voter to be concerned about the integrity of the results of the upcoming elections. The plaintiffs’ and the court’s disagreement with the city council and the voters of Albuquerque and their

perceived imperfections in the voter ID law do not justify the creation of a new requirement of precise interest.

Gonzalez v. Arizona, 485 F.3d 1041, (9th Cir. 2007), supports the Albuquerque ordinance, whether it is subjected to a strict or intermediate scrutiny test. Appellants argued that Proposition 200 which requires proof of citizenship when registering to vote and requires voters to present identification when voting in person imposed an undue burden on the right to vote in Arizona and the state was required to satisfy strict scrutiny of the legislation. The Ninth Circuit rejected application of that standard, relying on the same finding of Burdick cited by the district court in this case. Gonzalez, 485 F.3d at 1049-50. In Gonzalez, appellants did not demonstrate that the voter ID requirement imposes any severe burden. Appellants did submit evidence in an effort to demonstrate an impermissible burden which consisted of four declarations from individuals and appellants' objection that obtaining required documentation would be a burden to them. The circuit court found this evidence insufficient as a matter of law to establish the burden necessary to invoke strict scrutiny evaluation. The court also found no showing as to how many Arizona citizens lack all of the documents which could be used for registration and found that in all likelihood, the vast majority of Arizona citizens already possess at least one of the allowed documents.

Here, plaintiffs have presented even less "evidence" that the city's voter ID law imposes an improper burden. No declaration was made by any individual who had been prevented from voting or could be prevented from voting by imposition of the voter ID requirement. No evidence was presented that the voter ID law is anything more than an

even-handed and politically neutral law. The vast array of concerns voiced by plaintiffs and the district court were the same concerns rejected by the Ninth Circuit in Gonzalez.

There is no legal basis or factual showing that strict scrutiny or the district court's intermediate scrutiny should be applied. Gonzales held:

In this Circuit, courts “uphold as ‘not severe’ restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process.” Proposition 200 applies to all Arizonans. At this stage of the proceedings, appellants have not shown that it is anything other than an even-handed and politically neutral law.

Gonzalez, 485 F.3d at 1050 (*citation omitted*).

The court should reach the same conclusion in this case. The district court's use of strict scrutiny was inappropriate; the district court's application of some version of intermediate scrutiny is also not warranted as defined or applied by the district court. The Seventh and Ninth Circuits are not in error and no circuit has reached a contrary conclusion. Whether an intermediate, “heightened” or “strict scrutiny light” test is applied, the voter ID law meets all constitutional tests.

4. The district court's application of intermediate scrutiny ignores and misconstrues the evidence in the record.

The district court considered the evidence in the record and plaintiffs' assertions which lack evidentiary support. Based on this information, the court applied intermediate or heightened scrutiny to the voter ID law. The information relied on by the district court is not contained in the record, does not support the conclusion drawn from it or is simply incompetent speculation which should be rejected.

- a. The district court erred in rejecting the city council's and voters' findings of fraud to justify imposition of the voter ID law. Applt.App.p. 667.

The city council found the occurrence of both voter registration fraud and voter identification fraud which the voter ID law was intended to remedy. Applt.App.pp. 121-122. Registration fraud creates fictitious voter names later used by people voting under that name who cannot produce photo identification that would allow them to vote. The district court erred in creating a new test of the "precise interests" necessary for a legislative enactment to clear the hurdle of judicial review. The city council has identified its precise interest in passing the voter ID law. The district court concedes that preventing voter fraud and giving voters confidence in the accuracy and integrity is an important and compelling governmental interest. Applt.App.p. 666. That plaintiffs or the district court do not agree with the decision of the city council and the voters of Albuquerque does not allow a conclusion that the precise interests have not been identified.

- b. Differential treatment of in-person and absentee voters is warranted.

Implicit in plaintiffs' argument is that voters have a right to choose their method of voting and the voter ID law may limit this choice by dictating absentee rather than in-person voting for individuals who lack a valid voter ID. Applt.App.p. 105. There is no constitutional right to vote in any specific manner and there is no First Amendment associational right to vote without restriction, for political or other purposes. Burdick v. Takushi, 504 U.S. at 432.

The equal protection argument fails to address the fact that absentee voting is an inherently different procedure from in-person voting: Rokita, which was affirmed by the Seventh Circuit in Crawford addressed these concerns:

Indeed, it is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters. Not surprisingly, [plaintiffs] cannot cite to a single case in support of their contention that a state may not impose different requirements on absentee and in-person voters, . . . Accordingly, the mere fact that [the] photo identification requirements apply only to in-person voters and not to absentee voters does not offend the Equal Protection Clause.

Rokita, 458 F.Supp.2d at 831.

Rokita addressed and rejected the contention that treatment of absentee voters differently from in-person voters in imposing the voter ID requirement violated equal protection. The result should be no different here.

C. The “current valid” photo identification requirement is not unconstitutionally vague.

The district court’s conclusion that “current, valid” is unconstitutionally vague, Applt.App.p. 673, rests upon its finding that the election judges are likely to implement and enforce the photo identification requirement in an arbitrary or inconsistent manner. The municipal election procedures have multiple safeguards to prevent the improper denial of the right to vote based upon the lack of photo identification. Plaintiffs have produced no evidence that any voter was or will be denied the right to vote because of an improper determination concerning the validity of the identification presented.

The words “current” and “valid” that precede “photo identification card” are not defined and do not need to be.⁹ The common meaning of these words is all that is needed. Smith v. United States, 508 U.S. 223, 228, 239 (1993).¹⁰

The district court’s determination that the voter ID law is invalid because it could be arbitrarily enforced should be rejected:

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

Fox v. State of Florida, 700 So. 2d 172, Fla.App. 4 Dist., 1997. Speculative danger of arbitrary enforcement does not render ordinances void for vagueness National Paint & Coatings Assoc. v. City of Chicago, 45 F.3d 1124, (7th Cir. 1995).

⁹ Current and valid identification is a generally used and commonly understood phrase. *See, e.g.*, City of Chicago v. Haworth, 303 Ill. App. 3d 451, 708 N.E.2d 425 (Ct. App. Ill. 1999); Carroll v. Temple University, 1995 U.S. Dist. LEXIS 7410 (E.D.Pa. 1995); Salazar v. Barnhart, 344 F. Supp. 2d 723, 729 (N.M. 2004); Lucas County Democratic Party v. Blackwell, 341 F. Supp. 2d 861 (N.D. Ohio 2004). Without providing a statutory definition, the phrase “current valid” is even used in federal election requirements to describe driver’s licenses. *See, e.g.*, 42 U.S.C.A. Section 15483.

¹⁰ Statutory construction requires that the common meaning of words used in laws should be adopted by the court. J.C. Hawkins v. the Upjohn Company, 890 F. Supp. 601 (E.D. TX. 1994)(*citing* Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947)). Neither “valid” nor “current” are technical words requiring a statutory definition. “Valid” is defined as “having legal efficacy or force, executed with the proper legal authority and formalities,” Webster’s Ninth New Collegiate Dictionary, Black’s Law Dictionary, 5th Edition. “Current” is defined as “occurring in or existing at the present” and “generally accepted, used, practices or prevalent at the moment,” Webster’s Ninth New Collegiate Dictionary. The meanings of these words can be easily understood.

The record contains no evidence of arbitrary enforcement of the voter ID law. The district court considered whether application of the voter ID requirement was appropriate. The grounds relied on by the court are speculative and without foundation and should be discounted.

1. State ID requirements are not relevant or better suited to preventing voter impersonation fraud. Applt.App.pp. 674-675.

The district court assumed the provisional ballot process applied to all situations where the voter's registration is in question including those not related to voter identity theft, such as going to the wrong precinct, running out of ballots and not having the voter's name on the voter roster at the polling place. The Legislature has not included the state election code provisions concerning the use of provisional ballots in the state municipal election code. The current provisions of the state election and municipal election codes do not address identity theft and the only law that has created a provisional ballot for municipal elections is the voter ID law. The district court opined that the city's selected process for preventing voter identity theft is not foolproof,¹¹ but at the same time suggests imposing the state provisions which contain virtually no method of identifying the voter somehow provides more protection against voter fraud than does the city's voter ID law. Applying the district court's analysis to the state election code would allow an identity thief to more easily obtain the types of identification allowed

¹¹ The district court erroneously concludes that the state election code leaves fewer loopholes available for stealing another person's vote. Applt.App.p. 674. Why this system should be any more successful at preventing voter fraud is not clear and is only speculation by the district court.

under Section 1-1-24 A (2)¹² by simply going through a voter's trash. The decision by the voters of Albuquerque and the city council to impose the voter ID law is not constitutionally suspect because the state legislature has not yet adopted or imposed the same restriction as the city.

2. The effort to obtain a city-issued identification card is not burdensome and the State laws currently offer no meaningful alternative. *Applt.App.p. 675.*

Obtaining a city-issued identification card is no more burdensome than going to the polling place. The state identification required under Section 1-11-12.1 that was issued by the secretary of state may or may not be acceptable identification under Section 1-1-24. The issue of the state identification card is not in the record and was not raised or addressed by the parties before the district court. Had the state card been considered, the record would have shown that the card has no photograph and that the current secretary of state has rescinded the cards. The state identification cards are not relevant to this case. Even if, as the district court suggests, there may be a better system of achieving the city's articulated goals, a better system does not demonstrate a constitutional violation.

Crawford, 472 F.3d at 953.

3. Bush v. Gore, is inapplicable.

The district court referenced Bush v. Gore, 531 U.S. 98 (2000) for the equal protection analysis applied to the alleged constitutional infirmities of the voter ID law. In

¹² Voter identification required in the election code includes: a physical form of identification, which may include a copy of a utility bill, bank statement, government check, paycheck, student identification card or other government document, Section 1-1-24, or the voter's verbal identification of himself.

Bush the question was not whether local entities, in the exercise of their expertise and discretion, could develop different systems for implementing elections. Instead, the Court addressed the state court's power to assure uniformity by ordering a statewide recount with minimal procedural safeguards.

In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person.

531 U.S. at 105.

Presenting photo identification to election officials is a method of implementing elections that is uniform and in no way implicates the same type of concerns discussed in Bush v. Gore. The voter ID law provides an efficient means to help election judges at the precincts determine that the person presenting to vote is who he/she claims to be and is not relevant to whether such person is validly registered. The determination of valid registration is governed in Section 3-8-43 and enforcing registration requirements will continue with or without photo identification. The claim that there is a lack of uniformity is based on the unsupported theory that the words "valid" and "current," as modifying "photo identification," cannot be understood by election officials. These words are not vague. The presentation of photo identification cannot be compared to the lack of rules concerning which ballots are to be counted. Bush is not applicable.

4. Buckley v. Am. Const. Law Found, Inc., is not relevant to voter ID.

The district court attempts to equate the voter ID law requirements with the petition circulator registration requirements at issue in Am. Const. Law Found., Inc. v.

Meyer, 120 F.3d 1092, C.A.10 (Colo.) 1997, *aff'd. sub nom.*, Buckley v. Am. Const. Law Found. Inc., 525 U.S. 182 (1999). Buckley focused on the intimidation factor of requiring a petition circulator to wear an identification badge when confronting citizens to obtain nominating or referendum petition signatures. The district court rejected plaintiffs' First Amendment free speech claim, Applt.App.pp. 608, 676-680, but equated the requirement of presenting a photo identification card to that of having to wear a government issued identification card when obtaining petition signatures. The issues in Buckley are not analogous. There is nothing in the record here to establish that plaintiffs can reasonably claim to be intimidated by presenting photo identification cards to election officials. The intimidation claim has no more validity in the election setting than does presenting a photo identification to complete a financial transaction, rent a video, board an airplane, or enter a courthouse. The bureaucratic hurdles referenced by the district court, Applt.App.p. 659, appear to be to the requirement that the voter must fill out the forms, Applt.App.p. 042-049, to obtain a city-issued voter identification card. Plaintiffs have not identified an individual who lacks a photo identification card and it is pure speculation as to whether this requirement imposes any burden on such voter.

5. Billups and Weinschenk are inapplicable. Applt.App.p. 661-662.

The district court unsuccessfully attempts to equate the voter ID law to the facts in Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, N.D.Ga., 2006. Billups was decided on an application for injunction which presents a different evidentiary standard than on summary judgment. The ruling in Billups relied on the close imposition of the voter ID requirement to the timing of the election which did not occur here, thus raising

no concern about voter education as to the requirements of the voter ID law. *See* Applt.App.pp. 506-508. More importantly, the district court completely ignored that provisional ballots are allowed under Albuquerque's law which would prevent any possible disenfranchisement of the voters.

Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) is similarly inapposite. *See* Applt.App.pp. 593-594. Missouri's voter ID law is significantly different from the provisions at issue. The identification allowed by Missouri is significantly more limited, as is the use of provisional ballots. Weinschenk's reference to the Federal REAL ID Act of 2005, which applies only to driver's licenses, and is also cited by the district court, Applt.App.p. 662, is similarly inapposite: identification cards allowed under the city's ID law are not limited to New Mexico or Federal government-issued identification cards.

6. The provisional ballot process is available to insure that votes are counted.

The district court misconstrues the nature of a provisional ballot, opining that voters who vote on a provisional ballot must obtain a state identification card within the 10-day time limit after election day for their votes to be counted. Applt.App.p. 662. Voters have other options, including obtaining a voter identification card from the city clerk or presenting a photo identification card other than one issued by the State of New Mexico or the federal government. The district court omits the option of obtaining a voter identification card from the city clerk, Applt.App.pp. 662-663, stating that there is little in the record as to efforts by the city to educate voters about this option. The court's speculation as to any failure to provide sufficient education is not accompanied by any

legal authority as to the appropriate constitutional minimum of the quantity or quality of the educational effort required. Also, the district court erroneously concludes that there has been no education of the voters, claiming that the city has not enacted rules or created instructions for the voter ID law. Applt.App.p. 663. The forms, instructions to election judges and rules related to the issuance of voter identification cards were provided to plaintiffs, Applt.App.pp. 028-049, along with the Precinct Official's Election Guide revised as of November 2005. Applt.App.pp. 050-100. The district court is correct that these documents were not presented as part of the briefing on summary judgment because plaintiff did not argue that these instructions and rules were inadequate.

7. Lack of expenditure for voter education does not support the district court's conclusion.

The district court also references the lack of evidence that the city funded any voter-education efforts, Applt.App.pp. 625-626, 663-665, but the decision by the district court was issued long before the October 2, 2007 election and before the city's budget cycle was completed on May 30, 2007. It was only during the budget cycle for fiscal year July 1, 2007 through June 30, 2008 that election costs, including those for voter ID and education, for the 2007 municipal election are budgeted. When the district court enjoined the city from enforcing the voter ID law, the city clerk no longer had a basis for expending funds on voter education for the photo identification requirement.

8. Application of the voter ID law does not create confusion.

Finally, the district court states that the voter ID law only applies in certain municipal elections raising the specter of voter confusion. Applt.App.p. 664. The voter

ID law applies to all Albuquerque municipal elections. There is little likelihood of Albuquerque voters being confused about the requirements of Albuquerque municipal elections to any degree that is greater than voter confusion about any other aspect of an election. For example, precinct voting locations vary as to almost all elections and district boundaries are different for almost all offices on the ballot other than countywide and statewide offices. There is no evidence in the record to support the contention that the voter ID law will confuse voters any more than changing boundaries or precincts. In the only election held pursuant to the voter ID law, there was no evidence that voters were confused as to the voter identification requirement. No voter had to use a provisional ballot during the November, 2005 election because he or she forgot or did not have photo identification. *Applt.App.p. 229.*

The defects in the voter ID law perceived by the court do not compel or even support the conclusion that the voter ID law is unconstitutional. As stated in Crawford,

[p]erhaps the Indiana law can be improved-what can't be?-but the details for regulating elections must be left to the states . . . “To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny... and compel federal courts to rewrite state electoral codes.

Crawford, 792 F.3d at 953 (*citation omitted*). The same is true of this case and the same conclusion should be reached.

D. HAVA and the 2005 amendments to the State Election Code requiring voter identification do not conflict with the voter ID law. *Applt.App.pp. 614, 617, 664.*

The district court erroneously found a conflict between the voter ID law and the Help America Vote Act, 42 U.S.C.A. Section 15301 *et seq.* (hereinafter HAVA).

Applt.App.p. 664. The state election code in-person voter identification requirements, Section 1-1-24, were passed by the New Mexico Legislature, in part, in response to the HAVA requirement that states implement its provisions. HAVA applies only to elections where the ballot includes election to a federal office, a fact recognized by the district court. *See, e.g., Sandusky County Democratic Party v. Blackwell*, 387 F. 3d 565 (6th Cir. 2004). Because HAVA was not applicable to any but federal elections, there was no reason for the New Mexico Legislature to apply the HAVA identification requirements in the election code to municipal elections. In addition, the voter ID law applies only to Albuquerque municipal elections. Applt.App.p. 619.

Section 3-8-41 requires voters voting in person in a municipal election to announce his or her name and address in an audible tone of voice and to locate his or her name and number on the voter list. The law allows different forms of identification but photo identification is not mandatory and the voter has the option to verbally identify himself and provide no other identification. Simple verbal identification is sufficient under both the election code, Section 1-1-24, and the municipal election code.

Section 3-8-1E. of the municipal election code governs the conduct of all municipal elections except when it is silent or in conflict with the state election code. Section 3-8-1E. If federal law requires a procedure or protection the state election code governs. Section 3-8-1E.

There is no conflict between the state election code and the state municipal election code regarding voter identification. The legislature has chosen to treat non-

partisan municipal elections¹³ differently under the municipal election code from partisan elections subject to the election code. There is no authority to support the conclusion that the state election scheme prohibits the Albuquerque City Council and the voters of Albuquerque from imposing more stringent requirements on Albuquerque municipal elections by requiring voter identification.

A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. “[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.”

Purcell v. Gonzalez, ___ U.S. ___, 127 S.Ct. 5, 7 (2006) [*Internal citations omitted.*]

The court’s observation that HAVA and the 2005 amendments to the state election code strengthen the requirements for maintaining current and accurate voter registration rolls on a statewide basis, still does not prevent all forms of identity theft. Applt.App.p. 668. For example, there is no requirement that people registering in person have to present any photo identification, only those who register by mail must do so. Section 1-4-5.1.I.4 (a). Thus even if HAVA is applicable to a municipality, the city’s voter ID law has not been preempted by either state or federal law.

E. The city was not required to show that the state failed to comply with HAVA prior to imposing its voter ID law.

¹³ Section 3-8-29 C: “Municipal elections shall be nonpartisan.”

The district court faulted the city for failing to produce evidence to demonstrate that the State of New Mexico is behind in its compliance with HAVA or any other election law. The district court invalidated the photo ID law because the city failed to show that its ID requirement was “needed to combat the problem of deceased or non-existent voters appearing in voter-registration records, . . .” *Applt.App.p.* 668. HAVA and other state election laws, however, do not and are not intended to address and correct inflated voter registration rolls which result in part from inadequate voter purge procedures.

The same argument was raised and rejected in Crawford which addressed purge provisions similar to those in New Mexico. *Compare, e.g., Crawford*, 472 F.3d at 954 *with* Section 1-4-28 (both provisions require a four year waiting period before purging a voter). In Crawford, the government offered support for its voter ID provisions by presenting evidence of a discrepancy between eligible voters and the substantially higher number of names listed on voter rolls.

The Crawford plaintiffs responded, claiming that the National Voter Registration Act of 1993, 42 U.S.C. Section 1973gg-6(a)(4) and HAVA, 42 U.S.C. § 15301, obligates states to purge their registration rolls of ineligible voters. Crawford, 472 F.3d at 954. The court recognized that the National Voter Registration Act did not provide the solution because the purge requirements “provide only a short-term solution, since as soon as the purge is complete the inflation of the registration rolls will recommence.” 472 F.3d at 953. Thus the fact that the city in this case did not present the same type of evidence of

fraud is irrelevant: the evidence was not deemed necessary by the court in Crawford which validated the ID requirements.

The district court determined that the city failed to present evidence of fraud which led the court to its conclusion that the voter ID law was invalid under HAVA. The same argument was addressed and rejected in Crawford, which recognized the problem of proving the type of fraud which the voter ID law was intended to eliminate:

the form of voting fraud in which a person shows up at the polls claiming to be someone else—someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day. Without requiring a photo ID, there is little if any chance of preventing this kind of fraud because busy poll workers are unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature. The plaintiffs point out that voting fraud is a crime, see, e.g., Ind.Code § 3-14-2-12, and they argue that the penalty (six months to three years in prison plus a fine of up to \$10,000, Ind.Code § 35-50-2-7) should suffice to deter the crime. They further note that as far as anyone knows, no one in Indiana, and not many people elsewhere, are known to have been prosecuted for impersonating a registered voter.

Crawford v. Marion County Election Bd., 472 F.3d at 953.

Because of the inherent difficulty of proof of such fraud,¹⁴ the court in Crawford held that the lack of such evidence was not fatal to upholding the voter ID law. Crawford, 742 F.3d at 954.

The court should reach the same result here. That the city council cited evidence of voter registration fraud rather than evidence of specific instances of fraudulent voting by impersonation should not invalidate the voter ID requirements.

¹⁴ See Brief of Amicus Curiae American Center for Voting rights, Applt.App.pp. 532-539.

- F. The district court's remaining objections to the city's voter ID law should be rejected.

The district court lists numerous objections to the city's voter ID law and articulates various bases on which the court finds that the law is unconstitutional. None of the reasons advanced justifies invalidation of the law.

1. Any conflict in the testimony of Fulgenzi and Santillanes is not relevant. Applt.App.pp. 626-628, 664-665.

The district court referenced what it believed to be conflicting testimony from City Clerk Santillanes and an office deputy. The discrepancies in the testimony are irrelevant. While the city clerk is the official ultimately responsible for administering city elections, the municipal election process provides for safeguards during the process which insure that elections are fairly and equitably administered.

Under the municipal election code, the precinct election judges, and not the city clerk, are the people on election day who make the determination of who can vote, applying the procedures of Section 3-8-43.

A challenge to the voter must be unanimously affirmed by the election judges. Section 3-8-43 B. Each polling place must have at least three election judges. Section 3-8-19 C. At least three election judges must determine that the identification card is either not valid or not current. Any voter who is prevented from voting by the unanimous decision of the election judges may vote by provisional ballot. Voters without proper identification on election day, including those who have intentionally chosen not to vote early or by absentee ballot, have ten days after election day to present identification or obtain identification and their vote will be counted. Assuming the existence of three

biased election judges intent on disallowing valid current identifications, additional safeguards exist. After election day the election judges who required the voter to cast a provisional ballot are no longer involved in the process and acceptance of the provisional ballot is by the municipal canvassing board. Applt.App.p. 619.

Any dispute in the testimony from the city clerk or her deputy is irrelevant: the system for conducting elections is in place and has operated without challenge in New Mexico and elsewhere. Training is provided to poll workers in anticipation of upcoming elections as required by Section 3-8-21. There was no documented evidence of any impropriety in the enforcement of the voter ID law during the one election in which it was applied. In the absence of evidence of such impropriety, the court's reliance on speculative issues which might arise from a hypothetical dispute between the clerk and her deputy does not constitute evidence of improper application of the law.

2. The district court erred in according any weight to the testimony of Denise Lamb. Applt.App.pp. 624-625.

Hearsay testimony does not satisfy the requirements of Rule 56 for responding to a summary judgment motion; unsworn and anecdotal information generally cannot be considered. Applt.App.p. 642 (*citing New England Mut. Life Ins., Co. v. Anderson*, 888 F.2d 646, 650 – 51, C.A.10 (Kan.), 1989). Denise Lamb, a witness tendered by plaintiffs, did not establish any authority, practice or procedure of the secretary of state to investigate voter identify theft. The district court concluded that if the secretary of state did not receive complaints that no voter fraud existed. Ms. Lamb's testimony that she had received no complaint thus there was no voter fraud to be corrected was without

foundation. Ms. Lamb was not an expert witness, Applt.App.p. 624, and could not offer this type of opinion, Applt.App.p. 161. Her conclusions as a lay witness concerning fraud are inadmissible hearsay because Ms. Lamb possessed no competent, admissible information concerning complaints about in-person voter identification theft.¹⁵

Applt.App.p. 520. Ms. Lamb also testified that she had no information concerning Albuquerque city elections, had no experience administering a municipal election, and that county and city clerks did not have to report complaints during an election to the secretary of state's office. Applt.App.pp. 518, 519, 520. Ms. Lamb was not authorized to investigate voter fraud complaints thus her failure to recall such complaints was not remarkable. Her testimony was incompetent for purposes of summary judgment and the district court inappropriately relied on the statements of Ms. Lamb.

¹⁵ The self-serving, conclusory affidavits submitted by plaintiffs, and objected to by defendants, are inadmissible and ineffective to establish "permanency." Rule 56 (e), F.R. Civ. P. See Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1200 (10th Cir. 2006) (an affidavit is inadmissible if the witness could not have actually perceived or observed the testimony in the affidavit); Tavery v. United States, 32 F.3d 1423, 1427, n. 4 (10th Cir. 1994) (statements of mere belief at the summary judgment stage contained in affidavit should be disregarded); Tavery v. United States, 32 F.3d 1423, 1427, n. 4 (10th Cir. 1994) Hom v. Squire, 81 F.3d 969, 974 (10th Cir. 1996) (plaintiff's own belief or feeling is insufficient as a matter of law to preclude summary judgment); and Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ., 245 F.3d 1172, 1179 – 80 (10th Cir. 2001).

3. Allowing the use of photo identification cards that do not have an expiration date does not make enforcement of the photo identification requirement arbitrary or inconsistent. Applt.App.p. 673.

The district court found that allowing cards from unions, professional associations, private businesses and other than the city “make it less likely that municipal election officials will be able to discern . . .” a fake or outdated card. Applt.App.p. 673. The court’s concern seems to be that only very current and specific identification should be permitted. If only this type of card is permitted, the burden on the voter to produce an acceptable card is far more likely to be unconstitutional. By permitting the use of numerous different types of cards as long as the card has a photo of the voter, the city has lessened the constitutional burden.

The district court concluded that allowing election judges to distinguish between false and real identification cards raises the specter of arbitrariness and inconsistency. Applt.App.p. 673. Again, however, no evidence of any such arbitrary or inconsistent application or result has been produced.

What the district court is in essence holding is that if the city does not enact a provision which guarantees the elimination of all voter identification theft, no constitutionally appropriate limitations are possible. Applt.App.p. 676. Even if election judges can only detect the obvious forged identification cards and not sophisticated forgeries, they should be allowed to disallow those identification cards which can be determined to be invalid. It is well within the province of the voters and the legislative body to enact voter identification requirements on the basis that the mere existence of

such requirements might discourage persons who are contemplating fraud. *See also Crawford*, 472 F.3d at 953.

4. Voters might change their names. Applt.pp. 655-656.

The court found that the voters will likely be denied the right to vote because an identification card lists a different name due to a recent marriage or divorce. This theory has no relevance unless the voter has changed his or her name on all identification cards except the name on the voter registration. Even if this were to occur, such voter could obtain an affidavit from the county clerk under Sections 3-8-40 and 41 to have the new name added to the precinct voter list on election day.

There are no facts in the record to establish that this problem has occurred. It is unlikely that a voter who has changed his or her name would immediately destroy all identification cards with the prior name and be left with no identification for voting. This concern is pure speculation and could not constitute any impact, let alone a severe one, on voting in a municipal election.

H. The voter ID law is not unconstitutional.

The city's voter ID law was enacted to address the concerns of the city council that fraud was or could be committed by individuals impersonating registered voters. The law was not intended to address voting by dead people or voter rolls which were inflated because they had not been purged. The voter ID law was not enacted to comply with HAVA or with the state election code and the city's law is applicable only to municipal elections. The law does not violate equal protection. Any distinction between absentee and in-person voters is justified whether a rational basis or strict scrutiny

analysis is applied. Plaintiffs have presented no evidence that they have been burdened by imposition of this law and the city requests that the law be upheld and the district court reversed.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE INDIVIDUAL PLAINTIFF AND THE ORGANIZATIONAL PLAINTIFFS' MEMBERS HAVE STANDING TO SUE. Applt.App.p. 639.

The facts are established in the record: Plaintiffs have been unable to identify any individual who has been adversely impacted by the imposition of the voter ID law. No organizational plaintiff has identified a member or individual who it represents who lacks a voter ID or has been unable to vote because of the voter ID requirement. Each individual plaintiff had at least one valid form of voter ID and none of the identification cards were past their expiration dates. No individual plaintiff was even acquainted with an individual who was prohibited from voting because of the voter ID law.

Applt.App.pp. 190 – 92. The burden is on plaintiffs to demonstrate that they have standing but they have failed to produce evidence that they have an interest in this litigation sufficient to support standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)(*citations omitted*); Applt.App.p. 639.

A. The district court improperly found standing. Applt.App.pp. 628-629.

Plaintiffs have no personal interest in the litigation as shown by their failure to produce any registered voter in Albuquerque who did not have photo identification and because no plaintiff claimed that the passage of the voter ID law would prevent the individual from voting in person. The district court recognized this lack of evidence, “it is true that Plaintiffs have not identified a single voter who has been denied the right to

vote,” Applt.App.p. 638, but concluded that there is a “realistic danger or threat of injury to their legally protected interest in voting in-person at polling places, . . . Applt.App.p. 639. The district court’s analysis and conclusion are incorrect.

The district court relies on Initiative and Referendum Institute v. Walker, 450 F.3d 1082, 1088, 1089 (10th Cir. 2006); Applt.App.pp. 628, 630, 632, 635, which concerned a state constitutional provision requiring a supermajority of voters for a citizen ballot initiative to become law. In that case, plaintiffs claimed that such a requirement created a chilling effect on speech. Walker held that part of the test for standing included a plausible claim that voters presently have no intention to vote because of a credible threat that the statute will be enforced to prohibit them from voting. 450 F.3d at 1088 – 89; *see also* Crawford, 472 F.3d at 952. Enforcement of the voter ID law is not an issue in this case; if the voter ID law is held to be constitutional, it will be enforced. But no plaintiff has been identified who, if the law is enforced, will be prohibited from voting under its provisions.

None of the organizational plaintiffs in this case claimed or presented evidence that any of their members would not vote because of the voter ID law. While the individual plaintiffs stated that they have voted before and that they would vote again, none of them stated that they would not vote in the future due to the voter ID law; under Walker they lack standing. The district court cites no evidence in support of the proposition that any plaintiff or any individual who could be identified would not vote in person because of the voter identification requirement. The assertion that some unnamed

person might not vote in person because of the voter ID law is merely speculation and does not support plaintiffs' standing.

B. Rokita and, on appeal, Crawford addressed and rejected the claims asserted by plaintiffs to support their standing.

Each of the issues raised in this case by plaintiffs and ruled on by the district court have been resolved against finding standing. The cases are indistinguishable and, while a case from a different circuit is not controlling, the case does provide an appropriate analysis and rejects the same arguments raised here.

The district court held that the city's objection to plaintiffs' standing violates applicable Supreme Court and Tenth Circuit precedents. Applt.App.p. 632. The district court did not address the ruling in Crawford v. Marion County Election Board, 472 F.3d 949, (7th Cir. 2007), which was issued after the decision at issue in this appeal and is directly on point:

There is not a single plaintiff who intends not to vote because of the new law-that is, who would vote were it not for the law. There are plaintiffs who have photo IDs and so are not affected by the law at all and plaintiffs who have no photo IDs but have not said they would vote if they did and so who also are, as far as we can tell, unaffected by the law. There thus are no plaintiffs whom the law will deter from voting.

Crawford, 473 F.3d at 951-952. Based on this failure to identify any affected voter, Crawford held that plaintiffs lacked standing.

As in Crawford, there is not a single plaintiff identified in this case who intends not to vote because of the new law. The only difference in Crawford is that there are no plaintiffs here who lack photo identification cards, which is even stronger evidence than in Crawford that standing is lacking.

The cases relied on by the district court are in accord with the test provided in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) and relied on by this court recently in Sumnum v. Duchesne, 482 F.3d 1263, 1267-68 (10th Cir. 2007)(reaffirming that injury-in-fact must be shown by “an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical”).

Standing is not conferred because plaintiffs are personally offended at being required to provide identification to vote. Standing is also not conferred because the plaintiff organizations take the position that requiring voter ID might adversely impact people in their organizations. Offense alone in response to government policies or requirements does not suffice to create standing. "Otherwise there would be universal standing: anyone could contest any public policy or action he disliked. There must be a concrete injury." In determining Article III standing, "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury in fact' for constitutional purposes." Brooks v. Elkhart County, Ind., 401 F.3d 857, 870 (7th Cir. 2005); Rokita, 458 F.Supp.2d at 814. Plaintiffs here have articulated and proven only that they do not like the city's voter ID requirement. This is insufficient to confer Article III standing.

C. Speculative injury does not create standing.

The only injury identified by the district court to find standing, the “injury-in-fact” which is required, is the threatened loss of the statutory option to vote in person at the polling place on election day and the extent to which they are being treated on less

favorable terms than other similarly situated voters. Applt.App.p. 633. Assuming plaintiffs had located a voter who objected to voting other than in person and who was injured by some less favorable treatment, these concerns do not support standing. The district court identified various potential bases on which to support standing. Those bases, however, do not withstand analysis and should be rejected as supporting standing:

1. Plaintiffs do not want to vote early because additional information about the election may be obtained in the days immediately before the election. Plaintiffs and the district court ignore the election procedures which prevent voters having to make this choice. Voters may deliver their absentee ballot to the city clerk on election day without presenting photo identification, thereby voting on election day with all available information.¹⁶

2. Plaintiffs claim that the Constitution is offended if they are not permitted to “display their exercise of their right to vote to other members of their communities. . . .” Applt.App.p. 636. No citation to a statute or existing precedent is provided for this alleged right. The district court properly disregarded this claim under its First Amendment analysis, Applt.App.p. 678, but inexplicably cited this as one of the reasons plaintiffs had been injured and thus had standing to bring this suit. Applt.App.p. 636. Plaintiffs are provided with many opportunities to display their exercise of their right to

¹⁶ Section 3-9-8 B. Provides that the voter or the voter’s spouse, children, parents, brothers and sisters may deliver an absentee ballot to the municipal clerk’s office until 7:00 p.m. on election day.

vote to other members of their communities, including campaigning at the polling place on election day.¹⁷

3. Plaintiffs claim to be concerned that their absentee ballots may not be received or counted. No statistical analysis was provided to justify the concern and no plaintiff could articulate a basis for this fear. If plaintiffs believe that the postal service will not deliver the absentee ballot by the 7:00 p.m. deadline on election day, they or their immediate family can deliver the ballot to the city clerk. As to the fear that a ballot will not be counted, no explanation has been provided as to the basis for this fear or how the omission could occur or be related to voter ID. If the fear is that paper absentee ballots somehow are more likely not to be counted than votes cast on voting machines, such fear bears no relationship to New Mexico municipal elections. All ballots, including absentee, early voting-in person and election day in-person, are paper ballots. Section 1-9-7.1. All the paper ballots, including absentee ballots, are tabulated by the same type of machine.

4. The concern that a voter's address on the voter identification card may not match the address on the voter registration card does not constitute an injury and does not support standing. There is no requirement in the voter ID law that the photo identification include any address, let alone an address that matches the voter's registration records. The voter ID law specifically provides that the identification card need only contain the voter's name and photograph. Applt.App.pp. 619-620. The intent

¹⁷ Section 1-20-16.

of the voter ID law is to match the person who is presenting him/herself to vote with a photo identification, not to verify residency in the precinct by matching the address on the identification with that of the address on the voter registration rolls.

5. Plaintiff New Mexico Coalition to End Homelessness asserts that its members lack a permanent physical address on their identification cards which in some unidentified manner causes injury. Applt.App.p. 637. There is no requirement in the voter ID law that the identification card contain an address. Any concern about the lack of a permanent address is a concern arising under the state election code which does require an address.¹⁸ This issue exists whether the city's voter ID law is enforced or not.

6. The argument that a voter may not be able to obtain a voter ID card is, again, premised on the concern that the homeless do not have a secure place to store their ID cards. Applt.App.p. 637. This argument is circular: plaintiffs speculate that the homeless do not have identification, but if they do, they might lose the ID card and be prevented from voting. No evidence is offered to support this paternalistic argument which ignores the reality that the voter can vote on a provisional ballot or vote absentee even if the ID is lost.

The homeless may not have a secure place to store their identification cards and other belongings. Applt.App.p. 637. Plaintiffs, however, have made no showing that the

¹⁸ Section 1-5-19 C. requires a residence address when registering to vote and Section 1-4-5.3 provides that if a qualified elector resides in an area lacking a specific physical address, the qualified elector shall be allowed to substitute a map or give a description and, if available, a mailing address, indicating where the qualified elector resides for a physical address and register to vote.

homeless have any greater problem with losing their identification cards than any other particular segment of the population.

7. There is no requirement in the photo ID law that the photo identification contains an expiration date. There is no basis for claiming that a photo identification would be rejected because it does not have an expiration date.

8. The concern that a photo ID card with an expiration date might expire before the election creates no injury and is not unique to plaintiffs. There is no evidence in the record that plaintiffs are a special class of voters who cannot remember to renew their drivers' licenses, credit cards and passports. This concern also discounts the probability that voters have photo identification cards that do not have expiration dates. As to such identification cards as driver's licenses that do contain expiration dates, the plaintiff will have to obtain a new driver's license under motor vehicle laws in any event and cannot claim harm because other laws require current driver's licenses.

9. While the district court apparently found standing on the assertion that plaintiffs Kass' and Grothus' photographs on their drivers' licenses no longer match their physical appearance, this concern was not expressed by either plaintiff at deposition and was raised only after discovery was concluded, through affidavit. Applt.App pp. 404, 414, 407. No issue was raised that any of the photo identifications were so different from the plaintiffs' appearances that a reasonable person would have cause to doubt that the identification was of that plaintiff. If there is such a discrepancy, the same differences would appear on every ID card and would not be unique to the voter ID. No plaintiff claimed that these forms of identification had previously been challenged when

the ID was used. This post-deposition concern does not rise to the level of the subjective chill referenced in Walker, 450 F.3d at 1089.

Plaintiffs and the district court recognize that some injury must be demonstrated to support their challenge imposition of the voter ID requirement. None of the injuries identified creates a constitutional concern. No evidence has been presented that any plaintiff has suffered injury sufficient to confer standing.

D. Plaintiff organizations lack standing.

The district court found that the organizational plaintiffs' members have standing to sue in their own right. Applt.App p. 639. The district court did not disclose whether the ruling was because the organizational plaintiffs have standing (1) in their own right, (2) based on the rights of their members, or (3) based on the rights of the individuals they serve. Organizational standing is not proper under any theory. Applt.App.pp. 196-200, 594-597.

In Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999 (6th Cir 2006) plaintiff organizations alleged absentee voter identification violated equal protection because the identification laws would not be applied uniformly and that by not voting absentee, voters did not have the same requirement to provide a current address. Blackwell, 467 F.3d at 1004. The dearth of information about the plaintiff organizations in the complaint led the court to conclude that substantial questions about whether the interests at stake in Blackwell were germane to the organization's purpose were raised. Blackwell, 467 F.3d at 1010. Here, the organizational plaintiffs have shown no harm to their members due to the voter ID law and have failed to show that the organizations have

a primary purpose related to voter's rights. Similarly in Harkless v. Blackwell, 467 F.Supp.2d 754 (N.D. Ohio, 2006), the court found that organizational plaintiffs had no standing in a case challenging voter registration procedures. The allegations amounted to only a perceived setback to the organization's theoretical interests and no facts were alleged to demonstrate that any of plaintiffs' members had suffered or would suffer a concrete, actual injury traceable to defendant's alleged violations of the NVRA.

Harkless, 467 F.Supp.2d at 761.

IV. CASES FROM OTHER JURISDICTIONS ARE DISTINGUISHABLE OR SUPPORT DEFENDANT'S POSITION

The issue of whether voter ID may be required has been addressed in several circuits. Each of those cases either supports the city's position here or is readily distinguishable:

In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mi.Sup.Ct. 07-18-07):

This case was a referral to the Michigan Supreme Court from the legislature for an advisory opinion as to whether the state's voter ID requirements were valid. Applying the Burdick balancing test to voter ID requirements similar to those in this case, the court held that the voter ID requirement is a reasonable, non-discriminatory restriction designed to insure the purity of elections.

Rokita and Crawford:

The Indiana Voter ID law is not materially different from the law to be interpreted in this case. The Indiana statute is more stringent than Albuquerque's voter ID law,

limiting what types of identification satisfy the requirement of the law. The courts held that the Indiana law, with these additional burdens, satisfies all constitutional concerns.

Rokita addressed and rejected each of the arguments advanced by plaintiffs and the court in this case. Rokita found no First or Fourteenth Amendment violations and determined that heightened scrutiny of the law was not warranted. That conclusion is warranted here.

Common Cause/Georgia v. Billups, 439 F.Supp.2d 1294, N.D. Ga., 2005 (*remanded sub nom.*), Common Cause/Georgia v. Cox, No. 05-15784 (11th Cir. Feb. 9, 2006) (*followed in*) Common Cause/Georgia, v. Billups, 2006 U.S. Dist. LEXIS 56100 (ND Ga. 2006):

This case does not support plaintiffs' claims and the result and analysis of the Georgia court are inapposite.

First, the case was an application for injunction, which presents different evidentiary standards. Second, the court expressly based its ruling on factual findings not relevant here. Third, the act was enjoined four days before the primary election and there was insufficient notice to the public. 2006 U.S. Dist. LEXIS 56100, at *149. Fourth, unlike Georgia, the voters in Albuquerque voted to adopt the Voter ID Law, providing sufficient notice. Fifth, the law in Georgia is substantially different. Sixth, plaintiffs in Common Cause did not have the burden of proof that applicable to plaintiffs in this case. 42 U.S.C.A. § 1973(a). Unlike in Georgia, neither Albuquerque nor the State of New Mexico is designated under § 1973, Appendix to 28 C.F.R, Part 51, as a jurisdiction with historic disenfranchisement of minority voters.

Purcell v. Gonzalez, --- U.S.---, 127 S.C. 5, 7 (2006); Gonzalez v. Arizona, 485 F.3d 1041, 2007, (9th Cir. 2007):

The Supreme Court reversed a stay of an injunction prohibiting the operation of Arizona's voter identification law and the Ninth Circuit denied the appeal from the district court allowing the same Arizona voter identification law to be implemented. Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d.999 (6th Cir 2006):

The court rejected plaintiffs' appeal that the voter identification requirements violated equal protection.

STATEMENT REGARDING ORAL ARGUMENT

Defendant requests oral argument to assist the court in resolving the issues in this case and clarify the record, if needed. The law in this area is changing frequently as other circuit and district courts weigh in on whether voter ID requirements violate the constitution. Oral argument will assist the court in reconciling these decisions.

CONCLUSION AND RELIEF SOUGHT

Defendant requests that the opinion of the district court be reversed, that defendant be granted summary judgment, that plaintiffs' complaint be dismissed in its entirety and that the city be allowed to impose its voter ID law.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionately spaced and contains approximately 13,800 words.

I relied on my word processor to obtain the count and the software is Microsoft Word 2003 Standard.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

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REGARDING ELECTRONIC SUBMISSION

Pursuant to Emergency General Order filed October 4, 2004, as amended May 23, 2005, I hereby certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submission has been scanned for viruses with the most recent version of Trend Micro Office Scan 7.3 and, according to the program, is free of viruses.

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/s/ Electronically signed
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 2007, I served the required number of true and accurate copies of Appellees Brief in Chief on the Clerk of the United States Court of Appeals for the Tenth Circuit and opposing counsel at the following addresses, by depositing them at 1135 Broadway, NE, Albuquerque, New Mexico, first class postage prepaid.

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