

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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

Plaintiffs/Appellees,

vs.

**MILLIE U. SANTILLANES,  
ALBUQUERQUE CITY CLERK,**

Defendant/Appellant.

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On Appeal from the United States District Court for the District of New Mexico  
No. 05-cv-1136 MCA/WDS

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**BRIEF OF BRENNAN CENTER FOR JUSTICE  
AT NYU SCHOOL OF LAW AS AMICUS CURIAE  
IN SUPPORT OF PLAINTIFFS/APPELLEES AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

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With the consent of all parties, the Brennan Center for Justice at NYU School of Law (“Brennan Center”) respectfully submits this brief amicus curiae in support of appellees and affirmance.

### **INTEREST OF THE AMICUS**

The Brennan Center is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. Through its Voting Rights and Elections project, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The project has extensively addressed issues relating to alleged voter fraud and methods for preventing it, tracking the national experience with legislation relating to election fraud, co-authoring two major reports on the subject, and participating as counsel or amicus in a number of federal and state cases involving voting and election issues. The Brennan Center has participated as amicus in constitutional challenges to statutes requiring photo identification (“photo ID”) as a condition for in-person voting in Georgia and Indiana, and in the district court here.

### **SUMMARY OF THE ARGUMENT**

The district court found that, under the balancing test required by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992), the photo ID requirement in Albuquerque’s City Charter Amendment (the “Amendment”) “imposes a significant burden on the fundamental right to vote . . . [and] is not

adequately tailored to meet the City’s interest in preventing voter impersonation fraud.” (Appl. Br., Att. A at 72.)

This brief reviews the nationwide experience with voter fraud issues to show that the “precise interest” advanced to support the photo ID requirement—the need to prevent voter impersonation fraud—does not justify imposing the burdens that a photo ID requirement entails. *See Burdick*, 504 U.S. at 434. Nationwide experience confirms that impersonation fraud rarely if ever occurs, and is already adequately addressed by less burdensome identification requirements under federal law and the laws of 48 states (including New Mexico) and the District of Columbia, and employed by Albuquerque prior to the Amendment. Simply put, Albuquerque’s photo ID requirement addresses a problem that does not exist.

Hence, the Amendment advances no interest sufficient to justify the increased burden of a photo ID requirement as a condition for in-person voting.

### **ARGUMENT**

#### **ALBUQUERQUE’S PHOTO ID REQUIREMENT IS AN UNNECESSARY RESPONSE TO THE EXTREMELY UNLIKELY AND UNSUBSTANTIATED THREAT OF IMPERSONATION FRAUD**

*Burdick* requires that, in assessing the constitutionality of election regulations, courts must balance the “the character and magnitude” of the burdens on plaintiffs’ voting rights “against the *precise interests* put forward by the State” and “the extent to which those interests make it *necessary* to burden the plaintiffs’ rights.” 504 U.S. at 434 (quotation marks and citation omitted) (emphasis added).

Careful application of each element of *Burdick*'s balancing test is especially warranted here. For the vast majority of Albuquerque's residents who voted for the Amendment, the photo ID requirement poses no burden at all, because they are likely to already have a driver's license or other acceptable photo ID. Those citizens who must bear the burdens of the photo ID requirement—citizens lacking a current driver's license or other acceptable photo ID—are most likely to be Albuquerque's most vulnerable residents: low income persons (largely people of color) and elderly and disabled persons.<sup>1</sup> For these people, even obtaining a free photo ID imposes burdens of time and effort that most other citizens do not suffer and cannot appreciate. Under such circumstances, special care must be taken to assure that an unaffected majority does not impose burdens that discourage voting only by a vulnerable minority.<sup>2</sup>

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<sup>1</sup> See, e.g., Barreto, *et al.*, Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters, presented at 2007 American Political Science Ass'n Annual Conference, Sept. 1, 2007, at 1 (concluding, based on research in California, New Mexico, and Washington State, that "immigrant and minority voters were consistently less likely to have each form of identification" required under voter ID laws); Hood & Bullock, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute 19 (April 2007)*, available at [http://electionlawblog.org/archives/GA%20Voter%20ID%20\(Bullock%20&%20Hood\).pdf](http://electionlawblog.org/archives/GA%20Voter%20ID%20(Bullock%20&%20Hood).pdf) ("Registered voters are significantly less likely to possess a driver's license if they are from minority groups, especially blacks and Hispanics, and if they are older.").

<sup>2</sup> See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (heightened scrutiny is appropriate when laws distinctly burden "discrete and insular" minority groups that lack sufficient numbers or power to seek redress through the political process).

The district court found that the Amendment imposed a “significant” burden on the right to vote. (Applt. Br., Att. A at 61.) Whether this burden is considered “severe” or less than severe, *Burdick* requires balancing to determine whether any burden imposed is sufficiently justified by the interests claimed by the government. Even when a burden is less than severe, *Burdick* does not contemplate application of the deferential “rational basis” test applicable to social and economic legislation; in such circumstances, *Burdick* requires the state to demonstrate an “important regulatory interest” and that regulations addressing this interest be “reasonable” and “nondiscriminatory.” 504 U.S. at 434.<sup>3</sup>

Nationwide and New Mexico evidence shows that claims of impersonation fraud advanced to support photo ID requirements are unsubstantiated and that less burdensome federal and state voter ID laws, as well as those employed by Albuquerque before the Amendment, already adequately prevent impersonation fraud. Hence, Albuquerque does not have any “important regulatory interest”—let alone a compelling one—sufficient to justify imposing a photo ID requirement that

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<sup>3</sup> See, e.g., *Reform Party of Allegheny County v. Allegheny County Dep’t of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (en banc) (election laws imposing less than severe burdens are analyzed under an “intermediate level of scrutiny”); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) (“a regulation which imposes only moderate burdens could well fail the [*Burdick*] balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational”); *New Alliance Party v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991) (“Although . . . the burden imposed . . . is not insurmountable, . . . plaintiffs are due to be granted the relief requested

almost exclusively burdens the voting rights of vulnerable minorities. The Amendment thus fails the *Burdick* balancing test, even in its less rigorous formulation.

**A. Impersonation Fraud Is Highly Unlikely And Exceedingly Rare**

Supporters of photo ID requirements like Albuquerque’s repeatedly invoke the specter of “voter fraud,” but the Amendment addresses only a single type of alleged voter fraud: impersonation of a registered voter at the polls. A photo ID requirement provides no remedy for other types of election fraud, such as absentee ballot fraud, vote buying, and ballot box stuffing. The district court found no evidence in the record of impersonation fraud in Albuquerque. (Applt. Br., Att. A at 63.) The absence of such evidence mirrors the national experience: reliable studies of election fraud reveal that there have been virtually no confirmed instances of impersonation fraud.

In one of the most comprehensive surveys of election fraud to date, Professor Lorraine Minnite of Barnard College and David Callahan of Demos reviewed news and legal databases and interviewed attorneys general and secretaries of state in 12 states, representing about half of the national electorate, about incidences of election fraud from 1992 to 2002. *See* Minnite & Callahan, *Securing the Vote: An Analysis of Election Fraud* 15 (2003), *available at*

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because the interests put forth by the defendant do not adequately justify the restriction imposed.”).

[http://www.demos.org/pubs/EDR\\_Securing\\_the\\_Vote.pdf](http://www.demos.org/pubs/EDR_Securing_the_Vote.pdf). The study found that voter fraud of any kind is “very rare,” is not more than a “minor problem” and “rarely affects election outcomes.” *Id.* at 4, 17. Notably absent from the study are any confirmed cases of in-person impersonation fraud. According to the study, even where cases of alleged election fraud have received significant attention in the news media, the allegations have proved baseless. *Id.* at 17.

To the limited extent fraud has been detected, the study concludes, it generally takes the form of organized fraud such as vote buying, use of fraudulent absentee or mail-in ballots, ballot box stuffing, or wrongful purging of registration rolls to exclude eligible voters. *Id.* at 14. Instances of these types of fraud far outweigh incidents of individual fraud. *Id.* Most importantly, the study concludes that the wrongful *disenfranchisement of voters* is a “far bigger problem” than voter fraud. *Id.* at 15.

Similarly, a Department of Justice (“DOJ”) report describing DOJ’s investigation of election fraud since 2002 confirms that impersonation fraud is not a threat to the integrity of elections. *See* Press Release, DOJ, Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative (July 26, 2006), *available at* [http://www.usdoj.gov/opa/pr/2006/July/06\\_crt\\_468.html](http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html) (“DOJ Report”). The DOJ Report details 86 convictions for election-related misconduct over a nearly 5-year period, but not a single one of these convictions involved

impersonation fraud. *See id.*; *see also* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. Times, Apr. 12, 2007. The report describes incidents of vote buying, improper use of personal information by local officials, various campaign finance convictions, and harassment to keep voters from the polls. *None* of these crimes could be prevented by requiring voters to show a photo ID.<sup>4</sup>

Press reports have repeatedly recycled allegations of voter fraud in Washington State, Milwaukee, Ohio, and Detroit. Thorough investigations of each of these allegations, in fact, confirm that impersonation fraud at the polls was not a problem.

A substantial investigation into alleged voter fraud in Washington State, following a bitterly contested gubernatorial election, cast serious doubts on whether there were any incidents of in-person impersonation fraud at all. *See Borders v. King County*, No. 05-2-00027-3 (Wash. Super. June 6, 2005), *reprinted in* 4 Election L.J. 418 (2005). Out of 2,812,675 ballots cast, the investigation

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<sup>4</sup> Similarly, in New Mexico, a bipartisan task force created by then-U.S. Attorney David Iglesias to root out election fraud identified only a single case of potential election fraud, which did not involve impersonation fraud. That case related to potentially fraudulent registration, and was dropped because of the lack of evidence. *See* Amy Goldstein, *Justice Dep't Recognized Prosecutor's Work on Election Fraud Before His Firing*, Wash. Post, Mar. 1, 2007 (noting that Iglesias "had been heralded for his expertise in [voter fraud] by the Justice Department, which twice selected him to train other federal prosecutors to pursue election crimes").

uncovered only 19 incidents that could conceivably have involved impersonation fraud, involving alleged voting in the name of the deceased. Subsequent investigations indicated that most of these so-called “ghost voting” incidents involved absentee ballots—not in-person impersonation fraud—and therefore would not have been prevented by a photo ID requirement. *See* Phuong Cat Le & Michelle Nicolosi, *Dead Voted in Governor’s Race*, *Seattle Post-Intelligencer*, Jan. 7, 2005 (noting that only one of eight investigated cases of ghost voting may have involved in-person fraud).<sup>5</sup> Moreover, even if some small number of ghost voting incidents involved impersonation fraud, these could have been prevented had the state removed the names of deceased persons from its voter rolls, as required by federal law.<sup>6</sup> Indeed, Appellants concede that Albuquerque’s photo ID law “was

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<sup>5</sup> Other evidence suggests that publicized cases of ghost voting involving in-person, rather than absentee, voting are often the result of clerical errors, as when election clerks mistakenly record a vote under the wrong name in post-election recordkeeping, or have a voter sign the poll book entry of a voter with a similar name. *See* Lisa Collins, *In Michigan, Even Dead Vote*, *Detroit News*, Feb. 26, 2006 (“It’s impossible to say whether [purported cases of ghost voting] are names used by someone else to cast fraudulent votes or whether they simply represent clerical errors. . . . Among the most common mistakes occur when election workers record a vote under a similar name, or confuse voters with their parents or other relatives.”); *see also* Van Smith, *Elections Nights of the Living Dead*, *Baltimore City Paper*, June 22, 2005 (discussing likely mistakes involving, *e.g.*, voters with different middle initials and a son confused with his deceased father of the same name).

<sup>6</sup> Under the Help America Vote Act (“HAVA”), states are required to implement centralized registration lists, update them regularly, and remove ineligible registrants. *See* 42 U.S.C. § 15483(a)(4).

not intended to address voting by dead people or voter rolls which were inflated because they had not been purged.” (Applt. Br. at 41.)

A year-long joint federal and state investigation into an alleged scheme to alter the result of the 2004 election in Wisconsin disclosed no evidence of impersonation fraud. *See Preliminary Findings of Joint Task Force Investigating Possible Election Fraud* (May 10, 2005), available at <http://www.wispolitics.com/1006/electionfraud.pdf>. Indeed, the investigation showed very little evidence of any other type of voter fraud, although it did turn up severe administrative and recordkeeping problems with the Milwaukee elections board. *See id.* at 1; *see also* Greg Borowski, *A New Push To Repair Elections*, Milwaukee Journal-Sentinel, May 15, 2005 (administrative problems and “jumbled records made confirmation [of voter fraud allegations] a near impossibility”). The few incidents that were substantiated involved registration fraud, double voting and voting by ineligible persons with felony convictions, not impersonation fraud. *See* Steve Schultze, *No Vote Fraud Plot Found*, Milwaukee Journal-Sentinel, Dec. 5, 2005.

Allegations of widespread fraud in Ohio were also shown to be baseless in a study by the Coalition of Homelessness and Housing in Ohio (“COHHIO”) and The League of Women Voters. *See* COHHIO & League of Women Voters Coalition, *Let the People Vote 1* (2005), available at <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>. Researchers interviewed the Director

or Deputy Director of each of the state's 88 county Boards of Elections during the first week of June 2005, and concluded that in-person voter fraud as a whole was an "exceedingly rare" occurrence, as evidenced by the fact that, out of a total of 9,078,728 votes cast, there were only four reported instances of ineligible persons voting or attempting to vote in 2002 and 2004, confined to three of the state's 88 counties. *Id.* at 2.

Tales of voter fraud in Detroit have, likewise, produced no verified examples of impersonation fraud. Detroit's elections have involved widespread problems with the city's registration rolls, including duplicate records for voters who have moved, as well as alleged "documented instances of violations of election law . . . relating to absentee ballots." Lisa Collins, *In Michigan, Even Dead Vote*, Detroit News, Feb. 26, 2006. Even these reports—which do not involve impersonation fraud—are often inflated: follow-up research on the Detroit News study, for example, revealed that most of the alleged ghost absentee voters in fact represented absentee ballots mailed to voters who died *after* casting their votes, or never cast the ballot at all. See Kelly Chesney, Special Letter, *Claims That the "Dead" Voted Were Wrong*, Detroit News, Mar. 5, 2006.<sup>7</sup>

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<sup>7</sup> Election irregularities that would not be addressed by a photo ID requirement also feature prominently in two books that are often cited by supporters of photo ID laws; both books include almost no allegations of impersonation fraud. See Sabato & Simpson, *Dirty Little Secrets* (1996), and Fund, *Stealing Elections* (2004). Sabato describes thousands of incidents of possible absentee ballot fraud and numerous problems with registration rolls, but includes only a

Supporters of photo ID requirements frequently cite the final report of the Carter-Baker Commission on Federal Election Reform<sup>8</sup> for the proposition that impersonation fraud occurs, and that photo ID requirements are necessary to prevent it. *See* Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005) (“Carter-Baker Report”). While the Carter-Baker Report did opine that “there is no doubt that [fraud] occurs,” *id.* at 18, it also concluded that “there is no evidence of extensive fraud in U.S. elections,” *id.*, and noted that the Commission was divided as to the magnitude of the problem. Most significantly, the Commission cites no credible evidence of impersonation fraud, instead simply referring to the since-discredited reports of such fraud in Milwaukee and Washington State. Compare *id.* at 2-4, 18 with *supra* at 7-9. Moreover, as one of the dissenters notes, the Commission “did not call as witnesses many of the most established experts on the issue [of voter ID requirements]. A commission’s reliance on anecdotes and political sound bites—rather than empirical data, testimony by top experts, and rigorous analysis—undermines its credibility.”

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single hearsay allegation of attempted impersonation fraud (that was foiled without a photo ID requirement). *See* Sabato at 291-92. Fund retails numerous reports of voting by felons and double voting—for which a photo ID requirement is no solution—and though Fund describes 14 allegations of ghost voting in Missouri, there is no indication that any of these involved in-person, rather than absentee, voting, or whether they were simply the product of clerical mistakes. *See* Fund at 64.

<sup>8</sup> The Carter-Baker Commission was not a commission of the federal government; it was an independent project organized by American University.

Spencer Overton, *Establishing Procedures for Credible Advisory Commissions* (2005), available at <http://www.carterbakerdissent.com/procedure.php>.

Although the majority of Commissioners supported the use of the REAL ID,<sup>9</sup> which includes a photo, for in-person voter identification, they recognized that 12% of voters lack the most common form of photo ID, and that the difficulty of obtaining such identification could disenfranchise low income voters. *See Carter-Baker Report* at 73 n.22. In addition, the majority recommended that REAL IDs be used for voter identification only if: (1) there is a uniform national identification standard, eliminating the risk of discrimination from state or local requirements; (2) states make the ID free and widely available; and (3) states actively seek out and register unregistered citizens, effectively shifting the burden of voter registration from citizens to the states. *See id.* at 19-20.<sup>10</sup> Albuquerque's photo ID requirement does not meet the first and third requirements. Far from eliminating the risk of discrimination, the Amendment's terms leave it particularly vulnerable

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<sup>9</sup> *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). Three Commissioners dissented from the majority's proposal to use the REAL ID for voting purposes.

<sup>10</sup> Tellingly, even President Carter and Secretary Baker rejected Georgia's photo ID law as "discriminatory" because "it was costly or difficult for poor Georgians." Jimmy Carter and James Baker III, *Voting Reform is in the Cards*, N.Y. Times, Sept. 23, 2005. *See also* Brennan Center & Spencer Overton, Response to the Report of the 2005 Commission on Federal Election Reform (Sept. 19, 2005), available at [www.brennancenter.org/resources/downloads/Response%20to%20Federal%20Election%20Reform%20Commission%20Report.pdf](http://www.brennancenter.org/resources/downloads/Response%20to%20Federal%20Election%20Reform%20Commission%20Report.pdf).

to discriminatory and arbitrary enforcement. (Applt. Br., Att. A at 70.) Moreover, although the Amendment authorizes free IDs for those who lack one, the requirement that such voters incur the time, effort, and inconvenience of obtaining photo IDs from the City Clerk, and the City’s complete failure to establish procedures to issue such IDs, are burdens that will likely discourage voting by many of the most disadvantaged voters. (Applt. Br., Att. A at 22.)

Nor finally can proponents of strict photo ID requirements find support for claims of impersonation fraud in a recent report of the Federal Election Assistance Commission (“EAC”).<sup>11</sup> The EAC commissioned a study of allegations of voter fraud by a pair of bipartisan experts: Tova Wang and Job Serebrov. Assisted by a bipartisan working group, Wang and Serebrov reviewed existing research on election fraud, interviewed a bipartisan group of 25 advisors with expertise in election fraud issues, including academics, advocates, elections officials, lawyers and judges, and issued a preliminary report concluding that there was “widespread but not unanimous agreement [among voting experts] that there is little polling place fraud . . . .”<sup>12</sup> The final report, however, was altered by the Commission to

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<sup>11</sup> The Election Assistance Commission was established by Congress in 2002 to research and report on matters related to the administration of federal elections, and to serve as a clearinghouse of election administration information. The EAC’s four Commissioners are appointed by the President.

<sup>12</sup> Job Serebrov & Tova Wang, *Voting Fraud and Voter Intimidation: Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations* 3, 7 (July 2006) (“*EAC Report*”), available at

claim that “there is a great deal of debate on the pervasiveness of fraud.”<sup>13</sup> This change is contradicted by the underlying survey data on which the report relied. That data shows that only one of the 25 persons interviewed by the researchers maintained that polling place fraud of any kind—much less impersonation fraud—is “widespread.”<sup>14</sup> As one of the two authors of the original report recently stated, the changes to the report were made without the author’s permission—even though it continues to purport to be based on the authors’ work—and “stood [the authors’] . . . work on its head.”<sup>15</sup>

In sum, the national experience confirms that the “problem” of voter impersonation is not a real problem at all. It is unsurprising, therefore, that in

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[http://graphics8.nytimes.com/packages/pdf/national/20070411voters\\_draft\\_report.pdf](http://graphics8.nytimes.com/packages/pdf/national/20070411voters_draft_report.pdf).

<sup>13</sup> *Election Crimes: An Initial Review and Recommendations for Future Study 1* (Dec. 2006), available at <http://www.eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20-POSTED.pdf>.

<sup>14</sup> See *EAC Report* at 7. That person, Jason Torchinsky, was affiliated with the American Center for Voting Rights (“ACVR”), an organization that was dedicated to supporting strict voter ID laws, but no longer exists. See Richard Hasen, *The Fraudulent Fraud Squad*, Slate, May 18, 2007, available at <http://slate.com/id/2166589/>.

<sup>15</sup> Tova Wang, *A Rigged Report on U.S. Voting?*, Wash. Post, Aug. 30, 2007; see also Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. Times, Apr. 11, 2007.

every case in which a photo ID requirement has been challenged in court, the state has been unable to offer any evidence of impersonation fraud.<sup>16</sup>

Defenders of voter ID laws like Albuquerque’s nevertheless dismiss the lack of any evidence of impersonation fraud by arguing that such fraud may exist, yet goes undetected. In his majority opinion for a split panel of the Seventh Circuit, upholding Indiana’s photo ID law, Judge Posner speculated that the absence of evidence of impersonation fraud might be explained by the “endemic underenforcement of minor criminal laws” and the “difficulty of apprehending a voter impersonator.” *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007).<sup>17</sup> One could as easily speculate that there is no evidence of impersonation fraud because it is extremely risky, exposes the perpetrator to severe

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<sup>16</sup> In defending a challenge to its photo ID law, Indiana conceded that there was no confirmed case of impersonation fraud in Indiana. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 792-93 (S.D. Ind. 2006). Similarly, Georgia’s Secretary of State testified that in her nine-year tenure, she had not heard of a single instance of impersonation fraud. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1332 (N.D. Ga. 2005). Finally, in striking down Missouri’s photo ID law, the Missouri Supreme Court noted that the only documented example of polling-place fraud detected in that state involved a voter who had already submitted an absentee ballot trying to vote in-person—conduct which the court noted would not have been stopped by a photo ID requirement. *See Weinshenk v. Missouri*, No. 06AC-CC-00656, at 3 (Mo. Oct. 16, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Opinion.pdf>

<sup>17</sup> *Rehearing and Rehearing en Banc Denied*, 484 F.3d 436 (7th Cir. 2007), *Petitions for Certiorari Filed* (U.S. July 02, 2007) (No. 07-21) (No. 07-25).

penalties,<sup>18</sup> has very little payoff, and therefore rarely occurs. But guesswork is misplaced where fundamental rights are at stake: as Justice Stevens recently emphasized, courts must decide voting-rights cases on the basis of “facts rather than speculation.” *Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring).<sup>19</sup>

Supporters of the Amendment also rely on the referendum in which a majority of Albuquerque’s voters supported it. But because a majority of voters already have driver’s licenses or other acceptable photo IDs, they cannot be expected to understand or empathize with those vulnerable citizens who lack photo IDs and are put to the additional trouble of scaling yet another hurdle to voting. Most importantly, under our Constitution, the fundamental rights of the most vulnerable members of our society may not be stripped away by majority vote.

*See, e.g., Lucas v. Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713,

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<sup>18</sup> Conviction for voter impersonation in a federal election can result in five years maximum imprisonment and \$10,000 maximum fines. *See* 42 U.S.C. § 1973i(c). New Mexico law provides eighteen months’ maximum imprisonment and a \$5,000 maximum fine for impersonation fraud. *See* NMSA 1978 §§ 31-18-15 (2005); 1-12-9 (1969); 3-8-40 (1985).

<sup>19</sup> As Judge Wood recognized in her dissent from the denial of en banc rehearing in *Crawford*, in that case, “the ‘facts’ asserted by the state in support of its voter fraud justification were taken as true without examination to see if they reflected reality.” *Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (en banc) (Wood, J., dissenting from denial of en banc reconsideration). This case stands in stark contrast. Here, the district court gave “careful consideration to the plaintiff’s challenges,” as mandated by *Purcell*, 127 S.Ct. at 7 (per curiam), and developed and scrutinized a full factual record. (*See* Applt. Br., Att. A at 64.)

736-37 (1964) (“[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections. A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”) (quotation marks omitted); *id.* at 737 n.30 (“It is too clear for argument that constitutional law is not a matter of majority vote.”) (quotation marks and citation omitted).

There is, in sum, no evidence that impersonation fraud is a problem. And, as shown below, there is certainly no justification for imposing the additional burdens of a photo ID requirement to prevent it.

**B. A Photo ID Requirement Is Not Needed To Prevent Possible Impersonation Fraud**

*Burdick* requires a sliding scale: a city or state may take prophylactic measures to prevent even rare or unlikely types of fraud, provided those measures are not disproportionate to the nature of the problem. The adoption by Congress and other states—including New Mexico—of various less onerous alternatives to a photo ID demonstrates that given its additional burden, the Amendment is neither a necessary nor reasonable means to address Albuquerque’s interest in preventing the unsubstantiated threat of impersonation fraud. (*See* Applt. Br., Att. A at 72.) These less burdensome approaches are offered not because they are preferable as a policy matter, but because the absence of impersonation fraud shows that these approaches are adequate to prevent such fraud. Hence, the government does not have either a compelling or an important interest, as required by *Burdick*, to justify

the added burden that acquiring the requisite photo ID imposes on the vulnerable minority voters most likely to lack one.

New Mexico provides a prime example of adequate alternatives to photo ID. In New Mexico, an in-person voter must provide some form of “required voter identification,” NMSA 1978, § 1-12-7.1, but this identification is not limited to photo ID. Upon approaching the polls, a voter is requested to furnish either a photo ID or “an original or copy of a utility bill, bank statement, government check, paycheck, student identification card or other government document, including identification issued by an Indian nation, tribe or pueblo, that shows the name and address of the person, the address of which is not required to match the voter’s certificate of registration.” NMSA 1978, § 1-1-24. If, however, a voter lacks all of these forms of documentary identification for any reason, she may still vote a regular ballot by providing “a verbal or written statement by the voter of the voter’s name, year of birth and unique identifier.” *Id.*

New Mexico is well within the mainstream. In evaluating Albuquerque’s claim that the photo ID requirement is necessary to prevent impersonation fraud, it is pertinent that the Amendment is so at odds with the approaches not only of New Mexico, but of the federal government and New Mexico’s sister states.

**1. Federal Provisions Addressing Election Fraud Provide Adequate Less Onerous Alternatives**

Congress enacted the Help America Vote Act (“HAVA”) in response to the deeply flawed 2000 election, and to improve the administration of elections. *See generally* 42 U.S.C. § 15301. Three of HAVA’s requirements are especially relevant here.

*First*, HAVA requires states to maintain complete and accurate registration lists by implementing a uniform, centralized, and computerized statewide voter registration list that is regularly updated. The statute requires states to establish a “system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.” *Id.* § 5483(a)(4)(A). This requirement, over time, is intended to eliminate most of the potential for voting by ineligible voters, including ghost voting.

*Second*, HAVA requires all voter registration applicants to provide their driver’s license number or the last four digits of their social security number (if they have such numbers) with their applications. *See id.* § 15483(a)(5)(A). The state must then try to match the numbers and other information provided by applicants against state motor vehicle authority or Social Security Administration databases. *Id.* § 15483(a)(5)(B). HAVA exempts applicants whose information is successfully matched from the ID requirements for first-time voters who register by mail. *See id.* § 15483(b)(3)(B).

*Third*, if a first-time voter who registered by mail is unable to provide any of the above numerical identifiers or the state is unable to match that number, HAVA allows these voters to confirm their identities through a variety of documents: a current and valid photo ID, a current utility bill, bank statement, government check or paycheck, or another government document that shows the name and address of the voter. *Id.* § 15483(b)(2).

HAVA’s list of acceptable identification documents represents Congress’s reasoned view of what is sufficient to combat impersonation fraud, and is considerably more flexible than Albuquerque’s photo ID requirement. Unlike Albuquerque, Congress deemed identification requirements necessary only for first-time voters who have not registered in person and whose information does not match data in existing government databases. Moreover, as recognized by the district court, the possibility of impersonation fraud—along with the necessity for stricter measures to combat it—is significantly reduced by these provisions.

(Applt. Br., Att. A at 64.)

**2. Alternative Methods of Voter Identification Used In New Mexico and Most Other States Provide Adequate Less Onerous Alternatives**

In 48 states and the District of Columbia, a photo ID is not the exclusive requirement for casting a ballot that will count. These states provide alternative means for confirming voters’ identities, and as the absence of any meaningful

evidence of impersonation fraud indicates, these alternatives are sufficient to protect the integrity of elections.

Most states required no documentary proof of voters' identity until very recently. Prior to 2002, only 11 states required all voters to show any documentary identification before voting in person. *See* Electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006* 13 (2006), available at <http://www.electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf> ("Electionline Study"). And although all states have now implemented HAVA's identification requirements and request some form of documentary identification—including non-photo ID—from first-time voters who registered by mail and have not been "matched" against government databases, *see id.* at 17, only two states—Indiana and Georgia—currently require all voters to produce photo identification before their ballot will be counted. *See generally* National Conference of State Legislatures, *State Requirements for Voter Identification* (Feb. 1, 2007), at <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm> ("NCSL Study").

Twenty-three states and the District of Columbia require the documentation enumerated in HAVA only from first-time voters registering by mail. *See* NCSL

Study; *see also* Electionline Study at 17.<sup>20</sup> These states utilize a variety of mechanisms to verify the identities of other voters. *See generally* Electionline.org, Voter ID Laws (Oct. 17, 2006), *available at* <http://www.electionline.org/Default.aspx?tabid=364> (“*Voter ID Laws*”); NCSL Study. Some states permit these voters to verify identity by signing a registration card or book for comparison with a signature on a master list. *See, e.g.*, Nev. Rev. Stat. § 293.277; N.J. Stat. Ann. §§ 19:31a-8. Others confirm voters’ identities by having the voter orally recite or affirm identifying information. *See, e.g.*, Mass. Gen. Laws ch. 54, § 76; Neb. Rev. Stat. § 32-914; Utah Code Ann. § 20A-3-104.

The remaining twenty-five states require all voters—whether first-time or “repeat” voters—to produce some documentary ID. Eighteen of these states,<sup>21</sup> including New Mexico, request that all voters produce some form of documentary identification, but accept both photo and non-photo ID. *See generally* Electionline Study at 17; *Voter ID Laws*. The list of acceptable forms of ID varies, but almost every state’s list includes options for voters that are either contained in the text of HAVA, or closely related to its model. *See generally Voter ID Laws*. Various states have augmented HAVA’s list of acceptable IDs with other documentary

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<sup>20</sup> Kansas and Pennsylvania require the ID specified in HAVA from all first-time voters, not only “unmatched” first-time voters who registered by mail.

<sup>21</sup> Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, New Mexico, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington.

proof. Voters in Alabama and Alaska, for example, can use hunting or fishing licenses, Kentucky and Tennessee voters can use credit cards, and North Dakotans can use a U.S. Postal Service change of address verification letter. *See id.*

Moreover, in some of these states, voters lacking the form of documentary identification requested by the state can still prove identity through non-documentary verification. *See generally Voter ID Laws*; NCSL Study. In New Mexico, as explained above, a voter may confirm identity by stating her name, year of birth, and unique identifier. *See* NMSA 1978, §§ 1-12-7.1, 1-1-24. Similarly, in Connecticut, a voter unable to produce identification documents at the polls may sign an affidavit affirming her identity, under penalty of perjury. Conn. Gen. Stat. § 9-261(a).

Only seven states—Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan, and South Dakota—state that a voter must display a photo ID when they vote in person. But five of these seven states provide meaningful alternatives that allow voters lacking photo IDs to cast votes that are counted. Only Indiana and Georgia fail to provide a non-photo ID alternative to voters lacking a photo ID.<sup>22</sup>

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<sup>22</sup> After initially enjoining Georgia’s original photo ID law, *see Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), a federal district court has since rejected a challenge to an amended version of the law, *see Common Cause/Georgia v. Billups*, No. 05-CV-0201, Order (Sept. 6, 2007). While dismissing the case for lack of standing, it went on to opine that the law was valid. In doing so, the court erroneously employed the deferential rational basis test, *id.* at 154-55, rather than the *Burdick* balancing test, *see supra* at 4 n.3. In any event, the case is distinguishable from this case: the district court

The five remaining states that require photo IDs nevertheless provide voters lacking photo ID with various less burdensome alternatives. In Michigan, for example, a voter lacking a photo ID may sign “an affidavit to that effect before an election inspector and [will] be allowed to vote” a regular ballot. M.C.L.A. § 168.523.

In Hawaii, voters are initially asked to provide a photo ID, but if a voter is unable to produce one, she is asked to recite her date of birth and home address to corroborate the information provided in the poll book. If the recited information is accurate, she may vote a regular ballot. *See* Haw. Rev. Stat. § 11-136; *see also* NCSL Study.

In Louisiana, a voter without a photo ID may vote after signing an affidavit so long as she provides either a current voter registration certificate or other information requested by the election commissioners of the precinct in which the individual is voting. *See* La. Rev. Stat. Ann. § 18:562(A)(2).

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concluded that the law imposed minimal burdens on voters because it not only provided a free photo ID, but because, unlike Albuquerque, Georgia conducted an extensive outreach and education campaign particularly targeted at voters likely to lack photo IDs.

We submit that the Seventh Circuit’s 2 to 1 decision upholding Indiana’s photo ID requirement also failed to properly apply the *Burdick* balancing test. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, *reconsideration and reconsideration en banc denied*, 484 F.3d 436 (7th Cir. 2007), *Petitions for Certiorari Filed* (Jul 02, 2007) (No. 07-21) (No. 07-25).

Florida permits first-time voters to verify identity using various forms of non-photo ID, *see* Fla. Stat. § 97.0535(3)(b). And Florida allows repeat voters who lack photo ID to sign an affidavit, and will count the ballot if the signature on the affidavit matches her registration form: the voter is not required to make an additional trip to an election office or to return to the polls with ID. *See* Fla. Stat. § 101.043(2); *see also* Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice, to Charlie Crist, Florida Attorney General (Sept. 6, 2005), Att. A, at 2 (on file with Brennan Center) (preclearing Florida's photo ID law on the understanding that Florida will count ballots cast by voters lacking acceptable ID if the affidavit signature matches registration files).

Finally, South Dakota voters without a photo ID may complete an affidavit before voting. *See* S.D. Codified Laws § 12-18-6.2. But even this affidavit option does not eliminate the risk that a photo ID requirement will suppress voter participation. Data from the first election conducted under South Dakota's photo ID law, in June 2004, indicate that numerous voters who lacked photo IDs were either not informed of the affidavit alternative, or were expressly refused the option. *See* Overton, *Stealing Democracy: The New Politics of Voter Suppression* 149-50 (2006). Moreover, the data also establishes that Native Americans were far

less likely than other South Dakotans to bring photo IDs to the polls,<sup>23</sup> *id.*, raising the specter of uneven, discriminatory enforcement of photo ID laws that rely on the discretion of local election officials.

In sum, the laws of 48 states and the federal government, together with the absence of evidence of impersonation fraud, show that the integrity of elections may be adequately ensured without requiring a photo ID.

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The United States already suffers from shamefully low voter turnout rates: based on election participation between 1945 and 1998, the U.S. ranks 139th out of 172 nations. *See* International Institute for Democracy and Electoral Assistance, *Turnout in the World—Country by Country Performance* (Mar. 7, 2005), at [http://www.idea.int/vt/survey/voter\\_turnout\\_pop2.cfm](http://www.idea.int/vt/survey/voter_turnout_pop2.cfm). Social scientists have repeatedly demonstrated that our low turnout rate results in part from unduly tight registration restrictions and other limitations that raise the costs of voting, and that even seemingly minor restrictions discourage some number of voters.<sup>24</sup> Partially in response to these concerns, the threat that burdensome election regulations

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<sup>23</sup> While the affidavit option was relied on by less than 2 percent of South Dakota voters statewide, it was utilized by between 5.3 and 16 percent in the five predominantly Native American counties of the state. *See id.* at 149.

<sup>24</sup> *See generally* Piven & Cloward, *Why Americans Still Don't Vote* (2000); Katosh & Traugott, *Costs and Values in the Calculus of Voting*, 26 *Am. J. of Pol. Sci.* 361 (1982).

would disenfranchise voters led to the invalidation of insufficiently justified election requirements in Florida, Ohio and Washington State prior to the 2006 election.<sup>25</sup>

Voting regulations like Albuquerque’s that unnecessarily burden qualified voters require careful scrutiny—whether it be “strict scrutiny” or some intermediate level of scrutiny—to be sure that these requirements do not operate as exclusionary devices that further reduce competitive elections, unfairly disenfranchise disadvantaged groups, and undermine democracy.

Albuquerque’s photo ID requirement does not pass any level of scrutiny. There is no evidence that impersonation fraud represents a genuine, rather than a hypothetical or speculative problem, and the additional hurdle to voter participation erected by Albuquerque cannot be considered a reasonable, nondiscriminatory response to the potential for impersonation fraud, given the variety of effective and less restrictive alternatives that prevail in New Mexico and throughout the rest of the nation. Albuquerque’s decision to impose an additional obstacle to electoral participation by its most vulnerable voters by requiring them to present a photo ID before voting is an unnecessary and unreasonable means of

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<sup>25</sup> See *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006); *Washington Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006).

preventing impersonation fraud. It, therefore, violates the First and Fourteenth Amendments as interpreted in *Burdick*.

### **CONCLUSION**

For the foregoing reasons, the district court's order should be affirmed.

September 17, 2007

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in 14-point Times New Roman and complies with the type-volume limitation of the rule, containing 6762 words, excluding those sections of the brief that do not count towards that limitation, in accordance with Rule 32(a)(7)(B), as determined by the word processing system used to prepare this brief.

/s/ J. Adam Skaggs  
J. Adam Skaggs

**CERTIFICATE OF SERVICE**

This is to certify that I have this day caused a true and correct copy of the foregoing **BRIEF OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS/APPELLEES AND AFFIRMANCE** to be served by Federal Express overnight delivery upon the following:

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