



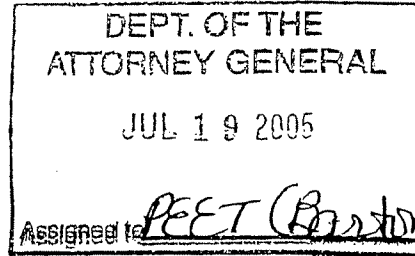
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MICHIGAN HOUSE OF REPRESENTATIVES
 MAJORITY FLOOR LEADER
CHRIS WARD
 STATE REPRESENTATIVE

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 NATURAL RESOURCES, GREAT LAKES,
 LAND USE, AND ENVIRONMENT

July 13, 2005

The Honorable Mike Cox
 Attorney General
 525 West Ottawa Street
 Lansing, Michigan 48909



2005019450A

Dear Attorney General Cox:

I am writing to request that your office issue a formal opinion concerning the implementation and enforcement of MCL 168.523, which requires a registered voter to present a form of picture identification prior to casting a ballot in an election. Although the statute compels all voters to present photo identification cards at polling places, the law has not been enforced since former Attorney General Frank Kelley opined that it violated the Equal Protection Clause of the Fourteenth Amendment. *See Op. Atty. Gen., January 29, 1997, No. 6930.* In the eight years that have passed since Attorney General Kelley's opinion was issued, significant developments in election law have led me to conclude that an immediate review of this issue is merited.

Section 523 of the Michigan Election Law, 1954 PA 116, provides,

"(1) At each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card issued to that individual pursuant to Act No. 222 of the Public Acts of 1972, being sections 28.291 to 28.295 of the Michigan Compiled Laws, an operator's or chauffeur's license issued to that individual pursuant to the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws, or other generally recognized picture identification card and by executing an application showing his or her signature or mark and address of residence in the presence of an election official ... If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. "

ATTORNEY GENERAL OPINION NO. 6930

Since the enactment of 1996 PA 583, state law has required voters to produce a photo ID at the polls on Election Day. However, that law has never been enforced. Shortly after the passage of 1996 P.A. 583, then-House Speaker Curtis Hertel solicited the Attorney General's opinion on the constitutionality of the legislation. The Attorney General began his examination of the statute by invoking the Equal Protection Clause of the Fourteenth Amendment and applying a strict scrutiny analysis, which requires that laws be narrowly tailored to serve a compelling governmental interest. Although the Attorney General acknowledged that the prevention of voter fraud is a permissible exercise of the government's interest, he wrote that "as the chief law enforcement official of the State of Michigan, I am not aware of any substantial voter fraud in Michigan's elections. I have not received complaints regarding voter fraud ... Thus, the picture identification or affidavit execution requirement for voting imposed by the amendment to section 523 of the Michigan Election Law is simply not necessary to promote a compelling governmental interest." *Op. Atty. Gen., January 29, 1997, No. 6930.*

ATTORNEY GENERAL OPINION NO. 6930 RELIES ON INVALID ASSUMPTIONS

That Attorney General opinion rests on two assumptions which, regardless of their merit in 1997, are not valid in 2005. The Attorney General assumed that: (1) laws requiring voters to present photo identification before casting ballots are subject to strict scrutiny analysis; and (2) voter fraud in Michigan is a nonexistent threat to the integrity of our state's system of elections. Subsequent developments render both assumptions invalid and, in my opinion, require a reassessment of 1996 P.A. 583.

Flawed Assumption #1:

Michigan's Voter Identification Statute Is Subject To Strict Scrutiny Analysis

Recent litigation indicates that courts are reluctant to invalidate voter identification laws. For example, in *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich., 2004), the court refused to invalidate a Michigan statute that requires first-time voters who register to vote by mail to present identifying documentation, which may include a photo ID, at the polls on Election Day. *See MCL §168.509t.* The court noted, "[t]he State has an important interest in regulating elections to prevent fraud, and the rudimentary requirements of identifying voters who have never been to the polls or appeared in person before an election official or registrar are reasonable. The plaintiffs have not shown that the regulations are discriminatory or are likely to be applied unevenly." *Id.* at 435 (internal citations omitted). Additionally, in *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio, 2004) the court sustained the Ohio Secretary of State's directive requiring local elections officials to enforce HAVA's requirement that first time voters who register to vote by mail produce proof of identity. The court held,

"The State's interest in requiring some form of commonly available identification from first-time voters who registered by mail is clear: namely to prevent voter fraud ... Few can doubt that deterrence, detection, and avoidance of election fraud

are fundamentally important state and public concerns and interests. Having every ballot cast by every eligible voter is also of fundamental importance ... Balancing these two interests -- avoiding fraud, and ensuring that every ballot counts -- I conclude that, though some small number of provisional ballots may not be counted as a result of the identification requirements of Directive 2004-7, the risk of loss of those ballots ... is justified by the likely inability, if even less burdensome (and less verifiable) forms of identification were allowed or required, to detect and prevent election fraud." *Id.* at 829.

The courts in the *Bay County* and *League of Women Voters* cases did not employ a strict scrutiny analysis, as Michigan's former Attorney General did, in measuring the constitutionality of statutes requiring certain electors to produce identifying documentation when voting. Instead, the courts relied on the rule announced in *Burdick v. Takushi*, 504 U.S. 428 (1992) and determined that the challenged statutes imposed only reasonable restrictions on voting rights:

"However, the United States Supreme Court noted that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* at 433-34 (internal citations omitted).

Flawed Assumption #2:

Michigan Does Not Have A Voter Fraud Problem

Moreover, a troubling trend is emerging with the increasing number of election fraud cases recently charged in Michigan. In just the past eighteen months, state and local prosecutors have pursued criminal charges against numerous defendants and the Secretary of State has warned local clerks of falsified voter registration applications. In particular:

- Ecorse: Three former members of the Ecorse City Council pled guilty to several felony counts of election fraud in December 2003. The charges included conspiracy, vote tampering, and improper possession of absentee ballots.
- River Rouge: A River Rouge resident pled guilty to multiple charges of absentee ballot tampering and improper possession of absentee ballots in February 2004.
- Benton Harbor: In April 2005, a Berrien County judge invalidated a recent recall election after finding that the election results were tainted by a vote-buying scheme, improprieties in the distribution and tabulation of absentee ballots, and deliberate efforts by some to vote more than once. A criminal investigation is ongoing.

- Statewide: Secretary of State Land warned local clerks that "there have been numerous instances of falsified mail-in voter registration applications being submitted to clerks throughout the state." The Secretary's announcement was made only weeks before the 2004 general election.

MANY STATES ARE ENACTING VOTER IDENTIFICATION REQUIREMENTS

Subsequent to the Michigan Attorney General's pronouncement, four states enacted laws that require all voters to display a photo identification card when casting ballots. A Florida law enacted in 1998 requires all voters to present a form of photo identification that contains the voter's signature at the polls. *Fla. Stat. §101.043, §97.0535(3)(a)*. Since July 1997, the state of Louisiana has required all voters to show a photo ID when voting. *La. R.S. § 18:562(2)*. Last month, Georgia Governor Sonny Perdue signed legislation requiring all electors in that state to present a photo ID before voting. *Georgia H.B. 244, 148th General Assembly, Act No. 53*. A new law in Indiana that compels voters to present a photo identification card at the polls took effect July 1, 2005. *Indiana S.B. 483, 114th General Assembly, P.L. No. 109*. Lawmakers in Wisconsin presently are considering similar legislation. Nine additional states require all electors to display identifying documentation, which may include a photo ID, at the polls on Election Day: Alaska, Connecticut, Delaware, Georgia, Kentucky, Missouri, South Carolina, Texas, and Virginia.

In addition, the federal Help America Vote Act of 2002 (HAVA) requires first-time voters participating in national elections who register to vote by mail to produce proof of identity, which may include a photo ID or bank statement, utility bill, paycheck, etc., when voting in person. *42 USC §15483(b)(2)*. In 2004, Michigan enacted identical requirements for first-time voters who mail-in their voter registration forms who participate in state elections. *MCL §168.509t*.

Conclusion

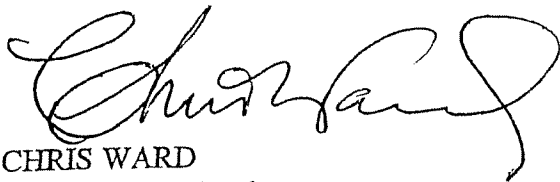
In my view, the state has an interest in detecting and preventing voter fraud before it occurs, and the administration of a photo identification requirement is an indispensable element of this effort. In requiring all voters to present photo identification at the polls and providing a mechanism for voters without proper ID to vote, section 523 of the Michigan Election Law clearly advances the state's interest without unreasonably interfering with the right to vote.

I have no doubt that the Attorney General acted in good faith when he issued Attorney General Opinion No. 6930. However, significant developments during the past eight years--developments which the Attorney General could not possibly have predicted in 1997--confirm that the conclusion reached in Attorney General Opinion No. 6930 relies on two faulty theories: (1) that laws requiring voters to present photo identification before casting ballots are subject to strict scrutiny analysis; and (2) that voter fraud in Michigan is a nonexistent threat to the integrity of our state's system of elections. In 2005, we now know that neither assumption is correct.

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Further, the codification of similar legislation in other states and the enactment of HAVA indicate that Michigan was a leader in the national movement designed to maintain electoral integrity. For these reasons, I respectfully ask you to determine whether state law compels the Secretary of State and local units of government to implement and enforce the photo identification requirement contained in MCL §168.523.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Ward". The signature is fluid and cursive, with a large, sweeping flourish at the end.

CHRIS WARD
Majority Floor Leader
State Representative
66th District

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

ELECTIONS:

Requirement of either producing a picture identification card or executing an affidavit if the elector does not possess such a card before being allowed to vote

The amendment to section 523 of the Michigan Election Law contained in 1996 PA 583, which requires either the production of a picture identification card or the execution of an affidavit that the elector does not possess such a card before being allowed to vote, violates the Equal Protection Clause of the Fourteenth Amendment.

Opinion No. 6930

January 29, 1997

Honorable Curtis Hertel
State Representative
The Capitol
Lansing, MI

You have asked if the amendment to section 523 of the Michigan Election Law, MCL 168.1 *et seq*; MSA 6.1001 *et seq*, contained in 1996 PA 583¹, which requires either the production of a picture identification card or the execution of an affidavit that the elector does not possess such a card before being allowed to vote, violates the Equal Protection Clause of the Fourteenth Amendment.

The amendatory language in section 523 of the Michigan Election Law provides:

(1) At each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card issued to that individual pursuant to Act No. 222 of the Public Acts of 1972, being sections 28.291 to 28.295 of the Michigan Compiled Laws, an operator's or chauffeur's license issued to that individual pursuant to the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws, or other generally recognized picture identification card If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act.

These amendments impose additional requirements on a registered elector to vote. Specifically, the amendments require a registered elector, before being given a ballot, to produce an official state identification card, driver's license or "other generally recognized picture identification card." If the elector does not produce the required identification, the elector must sign an affidavit stating the elector does not have the required identification. The amendments do not expressly state what happens if a registered elector declines to produce the picture identification and does not sign the affidavit. The clear implication is that the registered elector will be denied the right to vote.

The United States Supreme Court has consistently recognized that in our democracy the right to vote is our most precious right. *Wesberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964). It is a fundamental right because it helps preserve all other rights. *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506 (1964).

In *Dunn v Blumstein*, 405 US 330, 336; 92 S Ct 995; 31 L Ed 2d 274 (1972), the Court recognized that any restriction on the

right to vote is subject to close constitutional scrutiny:

In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This "equal right to vote," is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. *But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."*

(Emphasis added) (citations omitted).

The *Dunn* court then, in the context of a durational residency voting requirement, set forth the strict scrutiny test to be applied whenever the fundamental right to vote is at stake.

In sum, durational residence laws must be measured by a strict equal protection test: *they are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest."* Thus phrased, the constitutional question may sound like a mathematical formula. But legal "tests" do not have the precision of mathematical formulas. The key words emphasize a matter of degree: *that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.*

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. *Statutes affecting constitutional rights must be drawn with "precision," and must be "tailored" to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."*

Dunn v Blumstein, 405 US at 342-343 (emphasis added) (citations omitted).

The United States Supreme Court has rejected attempts to burden the fundamental right to vote by requiring payment of a fee. In *Harper v Virginia Bd of Elections*, 383 US 663, 670; 86 S Ct 1079; 16 L Ed 2d 169 (1966), the Court applied the strict scrutiny test and struck down portions of Virginia's Constitution that directed the General Assembly to levy an annual poll tax not exceeding \$1.50 as a precondition for voting.

Our Supreme Court also applies strict constitutional scrutiny to restrictions on the fundamental right to vote. In *Michigan State UAW Community Action Program Council v Secretary of State*, 387 Mich 506, 517; 198 NW2d 385 (1972), the court rejected a statutory provision allegedly designed to prevent voter fraud by removing otherwise qualified citizens from the registration rolls if they had not voted or otherwise reactivated their registration within two years. In doing so, the court held that "[t]he State has the burden of demonstrating that the particular regulation is necessary and essential and not achievable by any less drastic means."

In *Anderson v Celebrezze*, 460 US 780, 789; 103 S Ct 1564; 75 L Ed 2d 547 (1983), the Court set forth some of the considerations inherent in applying the strict scrutiny test to state election laws.

Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

(Citations omitted.)

Within this legal framework, we now turn to a discussion of the amendment in question in the context of a strict constitutional

scrutiny analysis. Consistent with the analytical process set forth in *Anderson v Celebrezze*, we must first consider the magnitude of the burden imposed by this picture identification requirement for voting. For the poor, those who do not drive, especially the elderly, the handicapped and those who, for whatever reason, do not possess a picture identification card², this requirement imposes economic and logistical burdens. If they do not obtain the picture identification card or sign the affidavit, they are denied the right to vote even though they are otherwise qualified to vote.

The governmental interest to be served here is the prevention of voter fraud. The prevention of voter fraud is a valid governmental interest. *Dunn v Blumstein*, 405 US at 345.

But, as the chief law enforcement official of the State of Michigan, I am not aware of any substantial voter fraud in Michigan's elections. I have not received complaints regarding voter fraud. Moreover, the state's chief elections official, Secretary of State Candice Miller, confirmed the fact that Michigan does not have a voter fraud problem when she stated: "We have no real evidence of voter fraud in Michigan. Michigan has historically had very clean elections." Malcolm Johnson, *Photo ID bill raises political hackles*, Jackson Citizen Patriot, December 25, 1996. Thus, the picture identification or affidavit execution requirement for voting imposed by the amendment to section 523 of the Michigan Election Law is simply not necessary to promote a compelling governmental interest.

In *Dunn v Blumstein*, at 346-354, the Court concluded that, in light of the state's total statutory scheme for regulating the franchise, including voter registration laws, and the state's various criminal laws addressing voter fraud, the durational residence laws were not the least restrictive means necessary for preventing voter fraud. This rationale is applicable to the present case.

Like Tennessee, the State of Michigan has a system of voter registration. See generally, chapter XXIII of the Michigan Election Law, MCL 168.491 *et seq*; MSA 6.1491 *et seq*. Under section 495 of that statute, a person registering to vote must execute an affidavit that the person meets the qualifications for voting.

Michigan law also includes statutory sections imposing criminal penalties for various aspects of voter fraud. See, sections 499 (1), 931, 932 and 932a of the Michigan Election Law. Section 932a makes it a felony, among other things, to "vote or attempt to vote under the name of another person."

In addition to the voter registration procedures and criminal sanctions for fraudulent voting, Michigan Election Law provides other mechanisms to prevent voter fraud. In Michigan, once the individual is registered to vote, he or she must go through another process before obtaining a ballot. Another portion of section 523(1) of the Michigan Election Law requires an elector, before obtaining a ballot, to execute an application to vote in the presence of an election official. The elector seeking to vote must execute the application by showing his or her signature or mark and address of residence. *Id.* If voter registration cards are used, the election official is required to compare the signature on the application with the signature on the registration card. *Id.* If voter registration lists are used, the election official checks to see if the name appears on the list. *Id.* If the name is on the list, the elector is required to provide his or her date of birth or other information included on the voter registration list. *Id.* If the elector's signature or an item of information does not match, the vote of the elector shall be challenged under section 727 of the Michigan Election Law.

Additionally, Michigan has recently adopted a number of amendments to the Michigan Election Law designed to establish a statewide qualified voter file. See, sections 509m through 509s of the Michigan Election Law. Under section 509o(1) of the Michigan Election Law the statewide qualified voter file will be the official file for conducting all elections held in Michigan on or after January 1, 1998.

The purposes of the statewide qualified voter file are set forth in section 509m of the Michigan election law as follows:

The purposes of this section and sections 509n to 509 gg are all of the following:

- (a) To establish a statewide qualified voter file that consists of all qualified electors who wish to be registered to vote in local, state, and federal elections.
- (b) To enhance the uniformity of the administration of elections by creating and maintaining a statewide file of qualified voters.
- (c) To increase the efficiency and decrease the public cost of maintaining voter registration files and implementing the national voter registration act of 1993.
- (d) To increase the integrity of the voting process by creating a single qualified voter file that will permit the name of each citizen of this state to appear only once and that is compiled from other state files that require citizens to verify their identity and residence.

(e) To apply technology and information gathered by principal executive departments, state agencies, and county, city, township, and village clerks in a manner that ensures that accurate and current records of qualified voters are maintained.

Once the statewide qualified voter file is established, the possibility of voter fraud will diminish even more.

As demonstrated above, Michigan has numerous statutory provisions in place to protect the integrity of the election process and to protect against voter fraud. These provisions include the present requirements for voter registration, the various criminal sanctions for those who commit voter fraud, the procedure used before an individual may obtain a ballot and the development of the statewide qualified voter file. Thus, it is clear that the State of Michigan is not experiencing any substantial voter fraud. The prevention of voter fraud has already been accomplished by less drastic means than the picture identification or affidavit execution requirements imposed by the amendment to section 523 of the Michigan Election Law.

In summary, the statutory amendment in question imposes a requirement that the elector either possess a picture identification card or executes an affidavit that the elector does not possess such a card. If the elector does not either possess the card or execute the affidavit, the elector may not vote even though the elector is otherwise qualified to vote. In the absence of a showing of substantial voter fraud in Michigan, this restriction on the fundamental right to vote is not necessary to further a compelling state interest. Moreover, Michigan already prevents voter fraud by the less drastic means detailed above.

It is my opinion, therefore, that the amendment to section 523 of the Michigan Election Law contained in 1996 PA 583, which requires either the production of a picture identification card or the execution of an affidavit that the elector does not possess such a card before being allowed to vote, violates the Equal Protection Clause of the Fourteenth Amendment.

Under MCL 8.5; MSA 2.216, a statute is declared to be severable unless severability would be contrary to the manifest intent of the Legislature. There is no language in 1996 PA 583 indicating a legislative intent that the remaining valid portions of the act not be implemented. Furthermore, the remaining amendments to the Michigan Election Law in 1996 PA 583 are capable of being implemented independently of the unconstitutional language in section 523. Thus, the unconstitutional amendment in section 523 of the Michigan Election Law as amended by 1996 PA 583 is severable from the rest of that statute.

FRANK J. KELLEY
Attorney General

[Return to Doc] ¹ Since 1996 PA 583 was not given immediate effect, it will not become effective until "the expiration of 90 days from the end of the session at which it was passed" under Const 1963, art 4, § 27.

[Return to Doc] ² The current fee for the state identification card is \$6.00 under MCL 28.292(1); MSA 4.480(2)(1).