

2006 WL 4495212 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2005 PA 71.

No. 130589.
July 18, 2006.

Oral Argument Requested

Brief of Amici Curiae: National Association for the Advancement of Colored People - Detroit Branch, Michigan State Conference National Association for the Advancement of Colored People, National Bar Association, American Civil Liberties Union of Michigan, League of Women Voters Detroit, American-Arab Anti-Discrimination Committee, Project Vote, Association of Communities for Reform Now, Latin Americans for Social and Economic Development, Inc., City of Detroit, Detroit Urban League, and National Conference Community and Justice-Michigan, in Support of the Position that the Photo Identification Requirements of Section 523 of 2005 PA 71, MCL 168.523 on Their Face, Violate Both the Michigan Constitution and the United States Constitution

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**i Table of Contents*

Index of Authorities	6
The Interests of the Amici Curiae	7
Summary of Argument	16
Statement of Facts	18
Legal Argument:	
I. THE REQUIREMENT UNDER <u>MCL 168.523</u> THAT VOTERS PRESENT PHOTO IDENTIFICATION AT THE POLLS AS A PRECONDITION FOR VOTING, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.	
A. Statutes Representing Direct Barriers To The Right To Vote Are Subject To Strict Scrutiny.	
B. Application Of A Lower Level Of Scrutiny Is Only Appropriate In Cases Involving Minimal Barriers To Voting Rights.	
C. Since Michigan's Photo Identification Requirements Have A Severe Effect On The Right To Vote, The Statute Must Be Reviewed Under Strict Scrutiny.	
D. Michigan's Photo Identification Provision Fails To Pass Strict Scrutiny Analysis.	
E. If Applied, Michigan's Statute Would Not Pass A Lower Level Of Scrutiny.	
F. Since Michigan's Photo Identification Provision Fails Scrutiny It Is An Unconstitutional Violation Of the Equal Protection Clause.	
II. THE ACT VIOLATES SECTION 2 AND SECTION 5 OF THE 1965 VOTING RIGHTS ACT.	
A. Section 2 Analysis Requires Broad Consideration Of The "Totality Of Circumstances."	
B. Michigan's Photo Identification Requirements Violate Section 2 Of The Voting Rights Act.	
C. The Act Was Passed Without Pre-clearance, And Therefore Violates Section 5 Of The Voting Rights Act.	
Conclusion	44

*II APPENDIX:

Exhibit 1 - Michigan Secretary of State; Candice Miller Press Release.

Exhibit 2 - Opinion of Attorney General Frank Kelley

Exhibit 3 - Republican challengers interfering with election process.

Exhibit 4 - Quote from Detroit Free Press "In order to win we must suppress the black vote in Detroit."

Exhibit 5 - Federal District Court issued a temporary restraining Order against the Republican National Committee.

Exhibit 6 - Quote from Secretary of State, Land 370,000 registered voters do not have either a driver's license or state identification.

Exhibit 7 - Affidavit of Daniel Baxter, Director of Detroit Department of Elections

*iii Index of Authorities

Cases

<u>Anderson v. Celebrezze</u> , 460 US 780 (1983)	35
<u>Beer v United States</u> , 425 US 130, 141 (1973)	44
<u>Brown v. Board of Education</u>	7
<u>Brown v. Board of Education</u> in 1954	7
<u>Burdick v. Takushi</u> , 504 U.S. 528 (1992)	25, 35
<u>Chisom v. Roemer</u> , 501 U.S. at 403, 111 S.Ct. 2354	38
<u>Common Cause/Georgia v. Billups</u> , Civ. No. 4:05-CV-0201-HLM (N.D. Ga. Oct. 18, 2005)	9
<u>Dunn v. Blumstein</u> , 405 U.S. 330 (1972)	20
<u>Fox v. Michigan Employment Sec. Comm.</u> 153 N. W. 2d 644 (1996)	24
<u>Harvey v. State Dept. of Management and Budget, Bureau of Retirement Services</u> , 469 Mich. 1, 664 N. W. 2d 767 (2003)	24
<u>Holder v Hall</u> , 512 US 874, 883 (1994)	45

<i>Kramer v. Union Free School Dist.</i> No. 15	25
<i>McDonald v. Grand Traverse County Election Com'n</i> , 255 Mich App 674, 682; 662 NW2d 804, 812 (2003)	25
<i>Nelson v. Quick Bear Quiver</i> , 126 SCt 1026 (2006)	9
<i>Quick Bear Quiver v. Nelson</i> , 387 FSupp2d 1027 (SD, 2005)	9
<i>Reno v. Bossier Parish School Board</i> , 520 US 471, 478 (1997)	45
<i>Rosen v. Brown</i> , 970 F.2d 169 (6th Cir. 1992)	25
<i>State of Texas v. United States</i> , 866 F Supp 20, 27 (DDC, 1994)	45
*iv <i>Stewart v. Blackwell</i> , 444 F.3d 843, 861 (6th Cir. 2006)	26
<i>Stewart v. Blackwell</i> , 444 F.3d 843, 877 (cir. 2006)	38
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351, 358 (1997)	36
<i>United States v. City of Hamtramck</i> , No. 00-73541 (E.D. Mich. 2000))	25

*1 *The Interests Of The Amici Curiae*

National Association for the Advancement of Colored People - Detroit Branch

Founded in 1909, the National Association for the Advancement of Colored People (“NAACP”) is the oldest and largest civil rights organization in the United States. The Detroit Branch of the NAACP is the largest branch in the United States. Detroit Branch has 501(c) (4) status under the Internal Revenue Code. Article I, Section 3 of the NAACP's constitution provides that the purpose and aim of the organization is to improve the political, educational, social and economic status of minority groups, to eliminate racial prejudice, to keep the public aware of the adverse effects of racial discrimination, and to take lawful action to secure its elimination. From Thurgood Marshall's victory in *Brown v. Board of Education* in 1954, to the Detroit NAACP's success in winning injunctive relief in the U.S. District court last November against Michigan Republican Party challengers who were harassing African American voters at the polls, the NAACP, at the national and local levels, has been at the center of nearly every major American civil rights case. Recently, the NAACP was a plaintiff in the case where the federal district court in Atlanta, Georgia struck down the photo identification law passed by the Georgia legislature.

Article IV, Section 4 of the NAACP's constitution establishes a Legal Redress Committee, to utilize the courts to combat discrimination. The Legal Redress Committee has, as its top priority, the protection of voting rights. Under this function, the Detroit NAACP has established a voter protection program which among other things includes publishing and educating the public about its “Voters Bill of Rights”, having duly authorized challengers at polling locations; establishing a hotline for those citizens who have been harassed or intimidated at the polls, advocating for legislation such as the re-authorization of the 1965 Voting Rights Act, litigating to protect the right to vote and working with local law enforcement the U.S. Justice Department to monitor and prosecute voter intimidation and harassment.

Michigan State Conference NAACP

The Michigan State Conference NAACP is the central administrative agency, responsible for coordinating all local NAACP branches around the State. It has been at the forefront in organizing voter protection activities throughout Michigan, and has fought for equality and access to the voting franchise. The state conference was a litigant in the 2004 federal district court action regarding identification for first time voters. It strongly opposes the proposed photo identification requirement on behalf of all Michigan NAACP branches.

The National Bar Association

The National Bar Association (“NBA”) was organized in 1925. With a network of more than 30,000 attorneys, judges, legal scholars and law students, and 80 bar affiliates around the globe, the National Bar Association is the oldest and largest bar association for lawyers of color in the world. When the NBA was founded in 1925, lawyers of color were prohibited from belonging to many other bar associations. Over the past 75 years, the NBA has grown enormously in size and influence. The objectives of the NBA are “... to advance the science of jurisprudence; improve the administration of justice; preserve the

independence of the judiciary and to uphold the honor and integrity of the legal profession; to promote professional and social exchange among the members of the American and the international bars; to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammelled use of the franchise guaranteed by the Constitution of the United States; and to protect the civil and political rights of the citizens and residents of the United States.”

***3** The NBA seeks to promote justice and equality in a democratic system under the rule of law. The NBA and its members contributed greatly to the significant civil rights gains made by people of color in the 20th century, helping to advance our great nation's slow but steady progress toward justice for all. The NBA has a significant interest in voting rights and fair election procedures. Thousands of NBA members participated in Election Protection programs in Michigan and around the nation in 2004, which involved, *inter alia*, election monitoring, discovery of illegal practices, and litigation in several states to protect the right to vote. In Michigan, our members discovered significant obstacles to voting for people of color, including overcrowded polling facilities, inaccurate voter file information, and intentional interference with voting by campaign operatives of the Republican Party, which, if repeated in an atmosphere where photo identification is required of voters, would significantly disenfranchise voters. Accordingly, the NBA has a substantial interest in ensuring that voting requirements and procedures comport with the Constitution and laws of this nation and this state.

The American Civil Liberties Union of Michigan

The American Civil Liberties Union of Michigan (ACLU-M) has a longstanding commitment to ensuring that the civil rights and civil liberties of all citizens are protected. In the area of voting rights, the ACLU played a key role in the passage of the Voting Rights Act of 1965 and has, since that time, litigated key cases around the country to enforce that law. The ACLU has a standing Voting Rights Project, and the organization's record of involvement in these issues over the years is far too extensive to report in full. See www.aclu.org. However, examples of this work include the following: The ACLU blocked an attempt by the state to implement a statewide “emergency redistricting” law, which could have led to the dilution of Indian voting strength in Charles Mix County, without complying with Section 5 of the Voting ***4** Rights Act. Quick Bear Quiver v. Nelson, 387 FSupp2d 1027 (SD, 2005). The Supreme Court dismissed the state's cert. petition as moot. Nelson v Quick Bear Quiver, 126 SCt 1026 (2006). Last year in Georgia, the ACLU sought and obtained an injunction against enforcement of the state's discriminatory photo ID law. Common Cause/Georgia v Billups, Civ No 4:05-CV-0201-HLM (ND Ga, Oct 18, 2005).

The ACLU has also advocated before federal and state agencies around the country to ensure the processes and procedures used to effectuate the promises of the Voting Rights Act are effective and meaningful. For example, the ACLU recently submitted comments to the U.S. Election Assistance Commission which serves as a resource for information and review of procedures relating to the administration of Federal elections. See Comments on Election Assistance Commission's Proposed Voluntary Guidance on Implementation of Statewide Voter Registration Lists, June 13, 2005, www.aclu.org.

League of Women Voters Detroit

The League of Women Voters of the United States is a non-partisan, community - based political organization which encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, it is organized in more than 850 communities and in every state including Michigan. The League of Women Voters of Georgia was a successful Plaintiff in challenging the photo identification law in that state.

The League of Women Voters of Detroit, is affiliated with, but separately incorporated from, the League of Women Voters of the United States. The League of Women Voters of Detroit conducts voter education and protection activities throughout southeast Michigan. It is actively opposed to requiring Michigan voters to present photo identification at the polls as a ***5** condition of voting.

American-Arab Anti-Discrimination Committee

The American-Arab Anti-Discrimination Committee (ADC) protects the civil rights of citizens and non-citizens alike. The ADC Mission Statement provides: *The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization committed to defending the rights of people of Arab Descent and promoting their rich cultural heritage.*

For over a quarter century, ADC has been a leading Arab-American voice on civil rights issues. Indeed, ADC is the largest Arab-American grassroots civil rights organization in the United States counting members in all fifty states. “Civic Participation” is an integral part of ADC's initiative. In working with the immigrant community, ADC is at the forefront in educating the community about the importance of voting. The Organization has registered new voters and encouraged members of the community to vote. In doing so, ADC has helped make the Arab-American voice part of the national political conversation and facilitate the Arab-American community's integration into their new homeland.

ADC's opposition to the proposed photo identification law stems from its strong commitment to deterring discrimination against all people. ADC is concerned that the law will harbor discrimination and will discourage otherwise qualified and eager voters. If passed, this law will have a significantly adverse effect upon the immigrant members of the Arab-American community, many of whom do not possess a driver's license or photo identification card. Furthermore, ADC is not convinced that the photo identification law will deter voter fraud. However, it is convinced that the law will negatively affect minority voters. For the foregoing reasons, ADC requests the opportunity to appear as *amicus curiae* in this matter.

**6 Project Vote*

Project Vote is the leading technical assistance and direct service provider to the civic participation community. Since its founding in 1982, Project Vote has provided professional training, management, evaluation and technical services on a broad continuum of key issues related to voter engagement and participation in low-income and minority communities throughout the United States. In Michigan, Project Vote continues to work closely with ACORN and many other organizations to implement successful voter registration programs. In 2004, Project Vote helped register over 76,000 residents in poor and minority communities in the state of Michigan. Project Vote is also in the process of verifying an additional 29,000 Michigan registrants this election season. Poorly designed bureaucratic systems, insufficient resources, or inefficient practices often result in election administration problems that hamper voting rights. To ensure that every vote counts, Project Vote assists community organizations in overcoming these barriers at every level of the voting process.

Michigan ACORN

ACORN is an organization composed of low and moderate income families who organize around a wide range of social justice issues that affect their communities. Nationwide, ACORN has grown to more than 175,000 member families, organized in 850 neighborhood chapters in 75 cities across the U.S. and in cities in Canada, the Dominican Republic and Peru. Michigan ACORN has offices in Detroit, Lansing, Grand Rapids, Saginaw, Flint, and is continuing to expand throughout the state. Aside from voter education, registration, and GOTV activities, Michigan ACORN community organizations participate in several campaigns and edifying activities, including the recent movement to increase the minimum wage in Michigan, free tax preparation, clearance of abandoned houses, and bulk trash removal. Many ACORN members *7 will be adversely affected by the photo ID requirements. The majority of ACORN's member-base resides in low-income, minority communities where challenges to voters without ID are likely to be frequent. ACORN members anticipate that unnecessary delay and hassle will significantly discourage voter participation. As such, ACORN seeks to ensure that the community voice is not unfairly diluted by unnecessary burdens on the right to vote.

Latin Americans for Social and Economic Development, Inc.

LA SED has been a leading voice for Hispanics in Southeastern Michigan since the late 1960's as a civil rights advocate and as the provider of basic, but essential, services to the community. Its programs have included various youth development initiatives, senior citizen services, employment counseling, education and tutoring.

LA SED considers the right to vote and participate in the political process as a fundamental one, forming a necessary cornerstone to any viable community and ensuring that its citizens have a voice in community affairs. As such, LA SED has activity encouraged and assisted the Hispanic immigrant community in Southeastern Michigan to fully participate in the political and electoral process. Therefore, any measures that seek to impair or prohibit participation in that process run afoul of the principles, policies and mission of our organization and, in our view, do not pass constitutional muster. For these reasons, LA SED supports efforts to prevent the photo identification legislation from becoming law.

City of Detroit

Founded in 1701, the City of Detroit is a Municipal Corporation organized under the House Rule Charter Act. It is the largest city in Michigan. The City Clerk is Detroit's chief elections officer. The clerk's office oversees the election process and maintains voter registration sites throughout the city. Though this office the city conducts extensive voter *8 education and training. The city opposes any effort to require that voters present photo identification at the polls as a precondition of voting as adequate safeguards protecting the integrity of the election process are currently in place.

Detroit Urban League

The Detroit Urban League has been part of the Michigan and Detroit landscape since 1916. Its mission is to enable African American and other minorities to reach their full human potential. It provides social service to residents of the City of Detroit, and addressed the civil rights needs of client through various programs and services and through advocacy on issues affecting the community. Its programs and services have included employment counseling, referral and placement services, educating and tutoring, substance abuse prevention and education and youth development initiatives.

The right to vote and participate in the political process is sacrosanct and critically important to the community the organization serves. The staff and volunteers have conducted voter registration drives and advocated high voter turnout. The Detroit Urban League is directly opposed to a photo identification requirement for voting as it believes that this is an unconstitutional burden on voting.

The National Conference for Community and Justice -Michigan

The National Conference for Community and Justice (NCCJ) is a non profit human relations organization founded in 1927. Historically known as The National Conference of Christians and Jews, NCCJ works with leaders and people from different backgrounds to create communities of justice where each person will be treated with respect and understanding. Our work at NCCJ involves transforming communities through institutional change by empowering leaders so that all people will have access to our nation's opportunities and be included in its *9 promise.

NCCJ's diversity training and consulting offers programs and tools to help corporations, local and regional municipalities, school districts, civic organizations and small businesses achieve an understanding of various human relations issues including racism, religious discrimination and other cultural biases. The NCCJ opposes a photo identification requirement for voting in Michigan.

**10 Summary of Argument*

The legislative scheme of MCL 168.523 and SB 513, which requires Michigan voters to present photo identification at the polls is a solution in search of an imaginary problem. Specifically, there is *no evidence* that election misconduct of any significance exists in Michigan because adequate statutory safeguards already exist to ensure the integrity of elections from the time of

registration to election day. These include requirements that a voter must (1) give his birth date and then (2) sign a voter slip that is compared by polling place officials against the voter's original signature on file contained in the Clerk's Office voter registration records.

Two successive Michigan Secretaries of State have also determined and pronounced that Michigan elections are “clean.” Nonetheless, the Michigan state legislature passed a photo identification law in 1996, (“the Act”), which was signed into law by Governor John Engler, purportedly to prevent voter fraud. The Act is a facial violation of the Michigan and United States Constitutions and violates the Voting Rights Act of 1965 because it is unduly burdensome to many of our citizens and unjustifiably interferes with unhindered access to the ballot.

Voting in Michigan, like the rest of the country, is a fundamental right protected by the federal and state constitutions and statutes. Voting is our most important right as Americans. Therefore, any interference with access to the ballot is illegal. The Act here is unduly burdensome for seniors, the disabled, the poor and people of color because over half a million Michiganders do not have a driver's license or state identification. Many have no need for such Others simply cannot afford it. Thus, the Act violates the Fourteenth Amendment's Equal Protection Clause because it places an illegal burden on the voting franchise; is not narrowly tailored to achieve a compelling state interest where the interests of African-Americans and other *11 people of color are concerned; and because the costs associated with obtaining photo identification are tantamount to a modern day poll tax and is, therefore, illegal.

The proposed photo identification law also violates two distinct provisions of the VRA. The Act violates section 2 of the VRA because it creates a disproportionately negative impact on people of color. In addition, the Act violates section 5 of the VRA because the state failed to obtain prior approval - as required by the VRA - from the United States Department of Justice or, alternatively, a declaratory judgment from the designated federal district court in Washington, D.C., which is specifically empanelled for this type of review. Moreover, even if preclearance had been sought, it would have been denied because implementation of the Act would create a retrogressive effect upon the voting rights of racial minorities. Consequently, the proposed photo identification law is an illegal and unenforceable burden upon the right to vote, and should be recognized as such by this Court.

*12 *Statement of Facts*

In 1996, MCL 168.523 (1996 PA 583, eff. date March 31, 1997, hereafter “the Act”) was passed by the Republican-controlled Michigan legislature and signed into law by Governor John Engler. This law requires voters to present photo identification before they may be given a ballot at the polls. The Act defines photo identification as either an “official state identification card”, “operators or chauffeurs license”, “or other generally recognized picture identification card”. In the event that the voter has no photo identification he is required to sign an affidavit in the presence of an election official, and is made subject to the lengthy and cumbersome “challenged voter” procedures set forth under the Michigan Election Law, MCL 168.777 (hereafter, “the Election Law”).

Legislative History

On February 22, 2006, House Resolution No. 199 (the “Resolution”) was offered pursuant to Article III, Section 8 of the Michigan Constitution.¹ The Resolution, sponsored by Michigan State Representative Chris Ward, provided a single rationale in support - it was “an effort to safeguard the integrity of elections[.]” *See* HR 199 (2-22-06).² But the Resolution's threadbare statement never mentions any threat, perceived or real, to Michigan's electoral “integrity.” And the word “fraud” is conspicuously absent. In fact, the Resolution simply *13 mimics excuse provided in support of its earlier - and equally unconstitutional - incarnation. *See* HB 5420 (1-29-97) (discussing 1996 PA 583, MCL 168.523, and stating that “[i]mposing new identification requirements for voters and candidates will enhance the integrity of elections.”). And, just as before, not a scintilla of evidence of fraud was offered in support of the Resolution.

¹ Article III, Section 8 of the Michigan Constitution provides that “Either house of the legislature or the governor may request the opinion of the Supreme Court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.”

² HR 199 never actually provides any direct rationale for supporting 2005 PA 71. Instead, it simply refers to the purported reason for amending 1954 PA 116 in 1996. *See* HR 199 (2-22-06) (“In an effort to safeguard the integrity of elections, the Legislature and the Governor amended the Michigan Election Law (1954 PA 116) in 1996 to provide that voters must identify themselves at polling places by presenting photo identification ... In 2005, Michigan enacted Senate Bill No. 513 into law as 2005 PA 71 and reenacted the photo identification requirements in [1996 PA 583] MCL § 168.523.... we request the Michigan Supreme Court to issue an opinion ... on the following important question of law: Do the photo identification requirements contained in 2005 PA 71 violate either the Michigan Constitution or the United States Constitution?”).

Although stripped of a voice by the Resolution's form, opponents of its earlier manifestation, House Bill 5420 (1-29-97), provided *substantive* challenges to its alleged rationale. These reasons, echoed in this Brief because they are even more pertinent today, included that:

The requirement that voters show a picture ID card before voting is unnecessary, at the least, and an attempt to make voting more difficult or to intimidate voters, at worst. It is an offensive and onerous requirement. Long-time residents and voters will be forced to produce a picture ID for their neighbors working at the polls and will be subject to a challenge and be required to fill out an affidavit if they do not have the identification available. The requirement will lead to more delay in voting and counteract other provisions in the bill to reduce delay on election day. Why should people need a picture ID card to vote? How can such a requirement be reconciled with the permitted use of absentee voting where not such requirement would apply (and where there is a greater likelihood of voter fraud, according to some election officials)? *There is no voter fraud problem in Michigan* such as to warrant this new requirement. *People have a right to vote and the election laws ought to be merely instrumental, aimed at protecting that right, not thwarting it.*

HB 5420 (1-29-97) (emphasis supplied).

In fact, then-Michigan Secretary of State Candice Miller confirmed the fact that there was no voter fraud problem when she stated that “Michigan has a strong tradition of clean elections.” (Exhibit 1).

Michigan Attorney General Opinion No. 6930

On January 29, 1997, Michigan Attorney General Frank Kelley issued Opinion No. 6930 which concluded that the Act “[w]hich requires either the production of a picture identification *14 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.” (Exhibit 2).

Attorney General Kelley first determined that voting is the most fundamental constitutional right. He relied, in part, upon *Dunn v. Blumstein*, 405 US 330 (1972), where the Supreme Court ruled that, while states may enact voter qualification and voter access standards, “[b]efore 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.” *Id.* at 336.

Attorney General Kelley firmly stated that there is no evidence of fraud in Michigan elections, noting that no complaints of this nature had been filed with his office, and that the Secretary of State confirmed that, “We have no real evidence of voter fraud in Michigan. Michigan has historically had very clean elections.” (Exhibit 2).

He further noted that photo identification would be particularly burdensome “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 card, 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.” *Id.*

Then, after outlining the safeguards Michigan already has to ensure integrity in elections, Attorney General Kelley concluded that photo identification violates the Equal Protection Clause of the 14th Amendment. Since 1997, Opinion No. 6930 has safeguarded the State's voting rights by preventing the Act from becoming effective.

The Supreme Court's April 26, 2006 Order

Again, on February 22, 2006, HR 199 was offered, pursuant to Article III, Section 8 of the Michigan constitution, by Representative Ward, requesting that the Michigan Supreme Court *15 issue an advisory opinion on the following question: “Do the photo identification requirements contained in 2005 PA 71 violate either the Michigan constitution or the United States constitution?”

On April 26, 2006, this Court issued an Opinion (No. 130589) that inserted itself into the issue. The Opinion grants Representative Ward's request for an advisory opinion on the following question: “Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?” Note that the Court unilaterally amended Representative Ward's request by adding the words, “on their face”, which materially changes the legal analysis in the case at bar. The Court directed the Attorney General to submit separate briefs on both sides of the issue, within 84 days of the Court's order. The Michigan Secretary of State, and the Michigan Democratic and Republican Parties were invited to submit amicus briefs. Other interested parties were invited to petition the Court to file amicus briefs. The Court directed the Clerk to schedule oral argument. The ruling was on a vote of 5 to 2, with Justices Michael Cavanagh and Marilyn Kelly dissenting.

There Is No Evidence Of Voter Fraud In Michigan's Recent Elections

In the aftermath of the most recent election in Detroit, the Secretary of State's Bureau of Elections, with the assistance of the Michigan State Police, conducted a probable cause investigation during a recount of the ballots cast in the city's mayoral and city council races. The Secretary of State found, despite assertions to the contrary, not a single irregularity nor any evidence of fraud. So, as was the case in 1996, voter fraud has not been a documented problem in Michigan elections. Most of the media reports of alleged election improprieties have centered on irregularities in absentee ballot voting. But, again, and as the opponents of HB 5420 (1-29- *16 97) noted, the Act is conspicuously silent on this point. That is, voters who have cast absentee ballots without photo identification will continue to do so under the Act.

There Is Substantial Evidence Of Voter Intimidation In Michigan's Recent Elections

While, there is no appreciable evidence of voter fraud, there is *substantial* evidence that, particularly since 2000, the harassment of African American, Arab and Hispanic voters at the polls, has increased dramatically. Rather than alleviating these pressures against the exercise of the franchise, the Act will facilitate even more harassment by allowing each voter who cannot present photo identification to be challenged at polling sites. The Act is an open invitation for increased harassment, intimidation, and chaos at the polls.

NAACP monitors have observed election challengers from the Republican Party or on behalf of Republican candidates asking African American voters standing in line questions such as “Are you up to date on your child support?” or “Have you ever been convicted of a felony?” Those Republican challengers have also menaced Detroit election workers, interfering with the election process. On a number of occasions, these challenges have been removed by law enforcement for their acts of illegal intimidation. (Exhibit 3).

The NAACP has obtained internal Republican Party documents which show that these activities are part of an orchestrated plan to suppress the vote in Detroit and other communities with a high percentage of minority voters. For example even though there were no partisan races on the ballot in last November's election, Republican Party lawyers sent challengers to Detroit and Ecorse as a voter suppression training exercise. At a Republican Party strategy meeting, one party official, John Pappageorge, was quoted in the *Detroit Free Press* as saying that "If we do not suppress the Detroit Vote, we're going to have a tough time in this election." (Exhibit 4)

Since 2000, Justice Department Monitors have been dispatched to Detroit, Flint and Hamtramck because of the concern over the spike in voter intimidation. The NAACP keeps *17 records of complaints from voters, as part of its voter protection program. There is a voter harassment hotline where these complaints are recorded on forms. The complaints are handled by NAACP operators who consult with NAACP monitors in the field, and with NAACP attorneys who oversee polling locations throughout the area.

During the November 2005 election, 119 complaints were registered and recorded. This is up from 87 complaints in the 2004 election. Each complaint of intimidation was communicated to designated Justice Department attorneys by NAACP attorneys. The number and nature of incidents reached a level where the NAACP filed for a temporary restraining order in Federal District Court, against the Republican National Committee and the Republican State Committee seeking to halt the illegal conduct of the Republican challengers (Exhibit 5).

In granting the injunction, U.S. District Judge Gerald Rosen ruled that, "[c]hallengers are not to have any direct contact with voters. All challengers are to go through election inspectors. In addition, it is very clear, again taking the statute as a whole, that the kinds of questions [of voters by Republican challengers] that are alleged by the [NAACP]... would be a violation of the statute. So, for that reason, I am going to grant in part the [NAACP's] Motion for Injunctive Relief. And I'm going to order that all challengers comply with this statute, 168.733 upon pain of contempt."

According to Secretary of State Land, 370,000 of the state's 7 million registered voters currently do not have either a driver's license or a state identification card. (Exhibit 6). Thus, the Act would serve to deny the right to vote to all of these voters, disproportionate numbers of which are people of color, seniors, the poor, and the disabled.

***18 Legal Argument**

I. THE REQUIREMENT UNDER MCL 168.523 THAT VOTERS PRESENT PHOTO IDENTIFICATION AT THE POLLS AS A PRECONDITION FOR VOTING, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. Ensuring that every individual has the right to vote on an equal basis with other citizens in a jurisdiction is of particular importance since voting is the cornerstone of democracy "preservative of all rights." *Dunn v Blumstein*, 405 US 330, 336 (1964) (internal quotations omitted) (invalidating a state's durational residency requirements). To protect this interest, barriers to voting are afforded close constitutional scrutiny. *Id.* at 396 (1972). The appropriate test, however, depends on the interest affected or the classification involved. *Id.* at 335.

Michigan's Equal Protection Clause is coextensive with federal equal protection. *Harvey v State Dept of Management and Budget, Bureau of Retirement Services*, 469 Mich 1, 664 NW2d 767 (2003). See also *Fox v Michigan Employment Sec Comm.*, 153 NW2d 644 (1996) (Equal Protection clause of the Michigan Constitution affords the same rights as federal equal protection).

A. Statutes Representing Direct Barriers To The Right To Vote Are Subject To Strict Scrutiny.

A barrier to voting is properly reviewed under strict scrutiny where it effectually disenfranchises many otherwise eligible citizens of the right to vote. Generally, the Supreme Court has applied strict scrutiny to state statutes that deny the right to vote to certain categories of persons.

For example, in *Dunn, supra*, the Court required that a state's durational residency requirement, not only further a substantial interest, but also be narrowly tailored to serve that *19 interest. 405 US at 343. In so doing, the Court specifically stated that a state must refrain from choosing methods “that unnecessarily burden or restrict constitutionally protected activity” by choosing the “less drastic means” available. *Id.* at 346.

Similarly, in *Harmon v Forssenius*, 380 US 528, 543 (1965), the Court struck down a statute that required residents to either file a certificate of residency or pay a poll tax, holding that the requirement was not “in any sense *necessary* to the proper administration of its election laws.” *Id.* (emphasis supplied).

And, in *Kramer v Union Free School Dist No 15*, 395 US 621, 626-627 (1969), the Court held that where a statute “grants the right to vote to some bona fide residents and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling government interest.” 395 US at 626-27 (striking down a New York statute that restricted the right to vote to in school board elections to property owners, property lessees, or parents of children enrolled in the school district).

Like each of the barriers to voting in each of these cases, the Act is a direct barrier to voting that must be subjected to strict scrutiny.

B. Application Of A Lower Level Of Scrutiny Is Only Appropriate In Cases Involving Only Minimal Barriers To Voting Rights.

Although a lower level of scrutiny has been applied in some cases involving ballot access, these cases involved only minimal restrictions on the right to vote. See *Burdick v Takushi*, 504 US 528 (1992) (holding that a Hawaii prohibition on write-in voting did not unreasonably infringe on rights under the First and Fourteenth Amendments); *McDonald v Grand Traverse County Election Co'n*, 255 Mich App 674, 682; 662 NW2d 804, 812 (2003) (holding that a statute allowing for straight-ticket voting on voting ballots passed “less exacting review” because it imposed lesser burdens); *Rosen v Brown*, 970 F.2d 169 (CA 6, 1992) *20 (holding that the lower court erred in applying strict scrutiny to an Ohio law that prohibited independent candidates from designating their party affiliation on the general ballot, while permitting major parties to do so).

But the barriers to voting in each of these cases - unlike those created by the Act - were minimal and indirect. Thus, whereas the *Burdick* test can be applied to cases that “have little to do with the exercise of franchise,” see *Stewart v Blackwell*, 444 F3d 843, 861 (CA 6, 2006), the Act has much - too much - “to do with the exercise of the franchise.”

C. Since Michigan's Photo Identification Requirements Have A Severe Effect On The Exercise Of The Franchise, The Act Must Be Reviewed Under Strict Scrutiny.

When considering the magnitude of the effects that the Act's photo identification requirements are likely to have in the state of Michigan, it becomes clear that requiring photo identification is not an indirect burden, presenting a minimal barrier to voting; it is a severe burden that must be reviewed properly under strict scrutiny.

1. The Cost Of Obtaining Photo Identification Will Create A Disproportionate Impact On Persons Who Do Not Already Have State-Issued Photo Identification.

The cost of obtaining a driver's license or personal identification card from the state of Michigan ranges from \$9-25.³

³ From Michigan Secretary of State Website, Available at http://www.michigan.gov/sos/0,1607,7-127-1627_8669-75447--,00.html, http://www.michigan.gov/sos/0,1607,7-127-1627_8668-76061--,00.html

But an applicant must also provide three documents that show identity and residency. At least one of these must be the following: (1) military photo identification or dependent ID, (2) out-of-state license with a photo, (3) US passport, or (4) birth certificate issued by a US government (not by a hospital).⁴

⁴ From the Secretary of State website. For more information on identity requirements for state ID: http://www.michigan.gov/documents/DE40_032001_20459_7.pdf May 10, 2006.

***21** Since most Michigan residents lacking identification either do not have or were never issued photo identification from the military or another state, this requirement often comes down to providing a (1) U.S. passport or (2) federally-issued birth certificate. Both options present substantial, additional hurdles for prospective voters.

A U.S. passport is difficult to obtain because, in addition to fees adding up to \$97, obtaining a passport generally requires providing photo identification or a birth certificate issued by a state or the U.S. government.⁵ It is, therefore, no easier to obtain a U.S. Passport than it is to obtain the underlying required documents. Thus, the requirement for many comes down to whether a person has a birth certificate and that option presents its own difficulties.

⁵ US Department of State. "How to Apply in Person for a Passport." <http://travel.state.gov/passport/get/frist/first830.html> May 1, 2006.

For example, those born in Michigan would, paradoxically, need to provide a photo identification card to acquire a state-issued birth certificate. In addition, an applicant must provide a \$26 fee and wait for up to 6 weeks (unless another \$10 fee for rush service is included with the application).⁶ Nationwide, the Center on Budget and Policy Priorities indicates that African-Americans are 50% less likely to have a birth certificate or passport than Caucasians.⁷

⁶ Michigan Department of Community Health. Application for a Certified Copy of Michigan Birth Record. http://www.michigan.gov/documents/birthapp_6360_7.PDF May 10, 2006.

⁷ ?? Ku, Leighton, Donna Cohen Ross, and Matt Broaddus. "Survey Indicates Deficit Reduction Act Jeopardizes Medicaid Coverage for 3 to 5 Million U.S. Citizens." Center on Budget and Policy Priorities. <http://www.cbpp.org/1-26-06health.htm> May 10, 2006.

Since the driver's license is the most common form of state-issued photo identification, viewing federally compiled demographic information relevant to the state of Michigan is useful. In Michigan, a comparison of drivers license data from the U.S. Department of Transportation⁸ with US Census Bureau data⁹ shows that in 2004, about 622,000 Michigan residents of voting ***22** age did not have a driver's license, or over 8 percent of the voting age population. From this data, it is clear that women, senior citizens, and especially female senior citizens, will be disproportionately impacted by requirements to present state-issued photo identification at the polls.

⁸ US Census Bureau Population Estimates. “State Estimates by Demographic Characteristics - age, sex, race and Hispanic Origin: State Single Year of Age and Sex Population Estimates: April 1, 2000 to July 1, 2004 - RESIDENT.” http://www.census.gov/popest/states/files/SC-EST2004-AGESEX_RES.csv. May 10, 2006.

⁹ US Department of Transportation Federal Highway Administration. “Driver Licensing Section of Highway Statistics 2004.” <http://www.fhwa.dot.gov/policy/ohim/hs04/dl.htm>. May 10, 2006

	Total Population	Number With Driver's License	Number Without Driver's License	Percent Without Driver's License
Over age 18	7,579,181	6,956,653	622,528	8.2%
Men over age 18	3,670,539	3,444,873	225,666	6.1%
Women over age 18	3,908,642	3,511,780	396,862	10.2%
Over age 65	1,246,595	1,044,326	202,269	16.2%
Men over age 65	515,707	489,995	25,712	5.0%
Women over age 65	730,888	554,331	176,557	24.2%

Although the Secretary of State does not track data on race, the U.S. Department of Transportation compiled information on race when it conducted the National Household Transportation Survey (NHTS). A comparison of 2001 NHTS data from Census Bureau population estimates from 2001 shows that white individuals are much more likely to have driver's licenses than African Americans in Michigan. ¹⁰ While 10% of white Americans over 20 years old are not drivers, over 18 percent of African Americans over 20 years old in Michigan are not drivers. Thus African-Americans are almost twice as likely not to have a driver's license - and twice as likely to be impacted by the Act.

¹⁰ US Department of Transportation National Household Travel Survey <http://nhts.ornl.gov/2001> May 10 2006; US Census Bureau Population Estimates. <http://www.census.gov/popest> For the complete chart, go to http://www.census.gov/popest/states/asrh/files/sc_est2004_alldata6.csv May 10, 2006.

***23 2. The Affidavit Alternative Does Not Allay The Disparate Impact That Photo Identification Requirements Will Have On Members Of Many Groups, Lacking Photo Identification.**

If an applicant without appropriate identification fails to overcome the perplexing bureaucratic barriers to obtaining photo identification by Election Day, the Act's affidavit alternative plainly fails to allay the burden (and, in fact, may make it worse).

Under the Act, if an applicant does not have the requisite identification, he can “sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act.” MCL 168.523. The Act further states that “an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727.” MCL 168.523. The challenge procedure is a time-consuming process that requires notation in the poll book and placement of a sticker on the ballot prior to running the ballot through the reader.

Moreover, although voters without photo identification have the option to “sign an affidavit to that effect,” individuals who have photo identification, but fail to bring it to the polls on Election Day may believe that they are unable to sign an affidavit affirming that they do not have the requisite identification. As such, these persons may forgo voting instead of returning to the polls at a later time with the appropriate identification on-hand. The substantial delay and confusion resulting from frequent imposition of the challenge procedure is likely to discourage many voters witnessing the chaos who will simply leave the line before casting a ballot. (Exhibit 7). For these reasons, the affidavit alternative does not relieve the burden placed on voters.

In addition to the Act's affidavit requirements, the State Bureau of Elections has indicated that the following procedures must be followed upon occurrence of each challenged voter:

***24** 1.) After the challenge is made, the challenged person takes the oath printed below. The oath is administered by the chairperson of the precinct board or a designated election inspector. “I swear (or affirm) that I will truly answer all questions put to me concerning my qualifications as a voter.”

2.) After the oath has been administered, the precinct chairperson or a designated election inspector may question the challenged voter. Election law stipulates that the questions be confined to the person's qualifications as a voter (citizenship, age and residency).

3.) A challenged voter is permitted to vote a specially prepared “challenged ballot” if the answers given under oath prove that he or she is qualified to vote in the precinct. A challenged voter may *not* vote if he or she refuses to take the oath, refuses to answer appropriate questions under oath or is found to be not qualified to vote through the answers given under oath.

4.) A complete record of the challenge must be entered on the “CHALLENGED VOTERS” page in the Poll Book. The record must include a description of the election disparities or infractions complained of or believed to have occurred; the name of the person making the challenge; the time of the challenge; the name, address and telephone number of the person challenged; and any other pertinent information. ¹¹

¹¹ “The Appointment, Rights, and Duties of Election Challengers and Poll Watchers,” Michigan Department of State: Bureau of Elections. (Sept. 2003).

And any challenged person who takes offense and refuses to comply with this procedure *is denied the right to vote*.

3. The Affidavit Requirement And The Challenge Procedures Disproportionately Impact Minorities Because They Are More Likely To Be Challenged.

Importantly, members of minority groups are more likely to be subjected to challenges than non-minority group members. Studies indicate that minority group members are also more likely to feel harassed by challenge procedures ¹², and the NAACP has documented increased harassment of African Americans at the polls in Michigan. (Exhibit 3). The Republican Party has admitted to placing several hundred “spotters” in heavily Democratic, urban, voting precincts ***25** to challenge voters. ¹³ The illegitimacy of the Republican Party's intentions were brought to light by Michigan State Representative John Pappageorge's (R-Troy) voter suppression comments. ¹⁴ Furthermore, the NAACP's voter protection program has documented Republican challengers asking African-Americans questions such as “Are you up to date on your child support?” or “Have you ever been convicted of a felony?” Even election workers were exposed to harassing behaviors. On several occasions, these challengers had to be removed by law enforcement officials for illegal acts of intimidation. (Exhibit 3). During the November 2005 election, a total of 119 complaints were registered and recorded. Eventually, reports became so frequent that the NAACP requested and won a temporary restraining order. U.S. District Judge Gerald Rosen prohibited challengers from having direct contact with voters and ordered Republican challengers to refrain from making illegal challenges. (Exhibit 5).

¹² There is ample social science to support the view that because of a long and sad history of racial discrimination, African American and people of color may be disinclined to present photo identification at the polls, even if such identification is possessed. Professor A. Whaley at the University of Texas, and Professor Ron Brown at Wayne State University have published important work in this area of cultural mistrust of identification requirements by African Americans, with data specifically dealing with voting. See, “Racial Belief Systems, Religious Guidance, and African American Participation” (R. Brown, *The National Political Science Review*).

¹³ Chris Christoff, *Casting Ballots: GOP To Have Hundreds of Spotters at Polling Sites*, *The Detroit Free Press* (Oct. 30, 2002).

¹⁴ Associated Press, *Democrats Blast GOP Lawmaker's "Suppress the Detroit Vote" Remark*, *Detroit Free Press*, July 21, 2004.

Though African-Americans are frequently targeted, other groups have wrongfully been subjected to challenges as well. In Hamtramck, Michigan, the Justice Department's Civil Rights Division filed suit in Detroit's federal district court, and federal investigators were assigned to observe election procedures in response to complaints of improper challenges to Arab-American, Bengali-American, and other dark-skinned voters. See *United States v City of Hamtramck*, No. 00-73541 (ED Mich, 2000).

As Michigan's identification requirements prevent many otherwise eligible voters from casting ballots and disproportionately affects women, seniors, and minority groups, it represents a severe barrier to an individual's right to vote. This unlawful barrier is, therefore, reviewed under strict scrutiny.

***26 D. Michigan's Photo Identification Provision Fails To Pass Strict Scrutiny Analysis.**

Strict scrutiny requires that the regulation in question be “necessary to promote a compelling governmental interest.” *Dunn, supra* at 343. In addition, “if there are other, reasonable ways to achieve [a state's] goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference.” *Id.*

Although voter fraud is a legitimate government interest, see *id.* at 345, there is little evidence (and if there is any, it has not been brought forth) that voter fraud is a problem in Michigan or nationwide. And fraud involving the impersonation of a registered voter at the polls is exceedingly rare. Moreover, even if preventing fraud was a concern, the Act does not address other forms of fraud, such as double-voting at multiple addresses, voting by ineligible voters, and fraud involving absentee voting.¹⁵

¹⁵ See generally Brennan Center and Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* (Sept. 19, 2005 *Voter Fraud Report Submitted to the New Jersey General* (Dec. 2005), available at <http://www.brennancenter.org/programs/-downloads/NJFraud000Finalresponse.pdf>.

1. Local And National Indications Of In-Person Fraud Are Minimal.

When Michigan Attorney General Kelley reviewed the constitutionality of Michigan's photo identification requirements, he stated: “[A]s 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.” Mich Op Att’y Gen No 6930, 1997 WL 37560, at *3 (Jan 29, 1997).

A more recent investigation into voter fraud in Detroit's last mayoral election turned up similar results. The Secretary of State found that, despite assertions to the contrary, there was not a single irregularity nor any evidence of fraud. Even reports of absentee ballot fraud, which is not addressed by the photo identification requirements, have turned out to be *27

unsubstantiated.¹⁶ So, as was the case in 1996, voter fraud has not been a documented problem in Michigan elections. The most comprehensive study on election fraud to date, which reviewed purported incidences of fraud in 12 states over a 10-year period, indicates that election fraud is but a minor problem that “rarely affects election outcomes.”¹⁷ In fact, on the rare occasion that fraud was detected, it generally involved ballot-box stuffing, fraudulent absentee ballots, or wrongful purging of eligible voters from the rolls. *Id.* at 14. Photo identification requirements do not address these forms of fraud and as previously stated wrongfully many otherwise eligible voters.

¹⁶ Claims that the ‘dead’ voted were wrong, Detroit News (March 5, 2006).

¹⁷ Lorraine Minnite and David Callahan, *Securing the Vote: An Analysis of Election Fraud* 15(2003), available at http://www.demos-usa.org/pubs/EDR_securing_the_Vote.pdf.

2. Michigan Has Adequate Fraud Prevention Measures In Place.

Michigan's election laws, rules, and procedures already adequately address fraud problems. Michigan has appropriately enacted the federal identification requirements under the Help America Vote Act. This Act requires all first-time voters in the state to provide additional proof of identification at the polls if the applicant has failed to do so at the time of voter registration. 42 U.S.C. § 15483(b)(1). HAVA allows voters to provide several different forms of identification, including a current utility bill, bank statement, government check or paycheck, or another government document that shows the name and address of the voter. 42 U.S.C. § 15483(b)(2).

Michigan has various voter fraud provisions on its books, including one that makes it a felony for a person to vote or attempt to vote under the name of another person. *See generally* MCL 168.491 et seq. Michigan Election Law also requires that all eligible voters complete an application to vote prior to receiving a ballot. This provision requires that prospective voters *28 show his signature or mark and address of residence. The poll worker then compares the signature provided to the one on the voter registration card. If lists are used, the voter is required to provide his or her name or date of birth. If any information does not match, the voter is subject to challenge. MCL 168.523. If state laws are not already sufficient deterrents, voter impersonation in federal elections may result in a \$10,000 fine or up to five years imprisonment. 42 U.S.C. § 1973i(c).

In addition, the National Voter Registration Act of 1993 has required Michigan to maintain a statewide qualified voter file. One of the primary goals of this system is “[t]o increase the integrity of the voting process by creating a single qualified voter file that will permit the name of each citizen ... to appear only once and that is compiled from other state files that require citizens to verify their identity and residence.” MCL 168.509m(d). Michigan's Secretary of State has recently made increased efforts to ensure that the registration records are clean by utilizing federal funds to re-issue voter registration cards. In the process, duplicate and inactive files are identified and purged from the system. In doing so, the Attorney General reiterated that her tactic was preventative, as opposed to responsive to fraud issues. “While there is no evidence of wrongdoing involving these files, it is imperative that we further reduce the potential for fraud.”¹⁸

¹⁸ *Land: It's time to scrub the voter lists!*, July 12 2005, available at <http://www.michigan.gov/sos/0,1607,7-127-16409150-122285--M 2005 7,00.html>

3. Michigan's Photo Identification Provision Is Not Narrowly Tailored To Prevent In-Person Voter Fraud.

Several examples of narrowly-tailored provisions that reduce voter fraud without severely burdening the right to vote can be seen by looking at what procedures the majority of states have chosen to enact. First, signature-matching is one of the more common forms of identity verification in other states. Under this methodology, each voter is required to sign the poll sheet. *29 Poll workers then match the signature to the signature acquired at registration on the poll list.¹⁹ Michigan only utilizes this method

in precincts where digital signatures are available. MCL 168.523. To strengthen the effectiveness of this procedure, Michigan need only ensure that all precincts have digital signatures available for matching purposes. Nine states use the oral confirmation method. This methodology requires voters to state their name and other identifying information such as the address prior to voting. Michigan utilizes this method in precincts where the digital signature is unavailable. MCL 168.523.²⁰ Another common methodology is for all voters to provide forms of non-photo identification. Eighteen states utilize this method, and generally do so in conjunction with alternatives for individuals who do not have the preferred form of non-photo identification.²¹ If Michigan were to require flexible non-photo identification in line with procedures in these states, it would avoid the unnecessary disparate impact on eligible voters who do not have state-issued photo identification.

¹⁹ See Electiononline.org *Election Reform Briefing: Securing the Vote 5* (April 2002), available at <http://www.electiononline.-org/Portals/1/Publications/oter-Identification.pdf>

²⁰ *Id.* at 11.

²¹ Study by National Conference of State Legislatures, available at <http://www.ncsl.org/programs/legman/elect/taskfc/voteridreq.htm>.

Unlike the above methodologies, requiring photo identification at the polls poses too extreme a remedy to an unsubstantiated problem. Where the harm caused by the remedy is disproportionate to the nature of the problem and disenfranchises several otherwise eligible voters, it cannot survive strict scrutiny. The aforementioned statutory provisions including criminal sanctions, statewide qualified voter file, and voting procedures all represent “less drastic means” by which the state's legitimate purpose of preventing voter fraud is accomplished.

E. If Applied, Michigan's Statute Could Not Even Pass A Lower Level Of Scrutiny.

Even if the lower standard established in *Anderson v Celebrezze*, 460 US 780 (1983) and *Burdick v Takushi*, 504 US 528 (1992) were applied, Michigan's statute would still fail to pass *30 scrutiny. In determining whether a statute passes a less exacting examination, the Supreme Court has instructed the following:

[A court] 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 plaintiffs rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 US at 789. For a state's important regulatory interest to justify a provision in the electoral process, the interest must be reasonable and nondiscriminatory. *Id.* at 788-89; *Timmons v Twin Cities Area New Party*, 520 US 351, 358 (1997). When balancing the interests of the voters against the interests of the state, a court must also evaluate “the extent to which those interests make it necessary to burden the plaintiffs' rights.” *Burdick*, 504 US at 434.

F. Since Michigan's Photo Identification Provision Fails Scrutiny, It Is An Unconstitutional Violation Of The Equal Protection Clause.

The photo identification statute operates in a discriminatory manner, substantially burdening the voting rights of members of historically disenfranchised groups. It is unnecessary in light of the many statutory provisions that are already in place to prevent voter fraud. Furthermore, considering the exceedingly rare circumstance that voter impersonation represents, it is difficult to believe that photo identification is a reasonable means to accomplish an important objective.

II. THE ACT VIOLATES SECTION 2 AND SECTION 5 OF THE 1965 *VOTING RIGHTS ACT*

The VRA was passed by Congress, and on August 6, 1965, signed into law by President Lyndon Johnson based upon the historical record of African Americans being denied the voting franchise in violation of the constitutional guarantees afforded to all American citizens under the *31 14th and 15th Amendments to the U.S. Constitution. Shamefully, some forces seek to deny them the franchise today.

In the beginning, African Americans were written into the original constitution as “three fifths” of a person. Enslaved and “free” African Americans, alike, were equally denied the right to vote. In post-emancipation America, the elective franchise was extended to a few, in limited fashion. Attempts by African Americans to vote were met with denial, jail, and often-times blood-shed. In the Jim Crow South, and even in the North, statutory barriers were passed by states and political subdivisions thereof, to intimidate, harass, and block African Americans from voting in elections.

African Americans were often stopped from voting by discriminatory registration practices, changing voter qualification standards without notice, failure to place the African American voter's name on the eligibility lists, and removal of said voters from eligibility lists.

At the polls, many devices were used, such as “literacy” tests, where African Americans were asked to recite the entire Bill of Rights by memory, as a precondition to voting. Whites were not similarly tested. Poll taxes, or fees for voting, were also imposed by various legislatures, and applied exclusively against African Americans. (42 U.S.C. §1973 (h)). The requirement of photo identification at the polls became another device to harass and intimidate African Americans from voting.

In this context of statutory and practical denial of the right to vote to African Americans, the 1965 Voting Rights Act was passed. It provides that:

“All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State... shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law. Custom, usage, or regulation of any State or Territory, or by or under its authority.”

42 U.S.C. §1971 (a).

***32 A. Section 2 Analysis Requires Broad Consideration Of The “Totality Of Circumstances.”**

Section 2 of the Voting Rights Act prohibits the use of any electoral practice or procedure that results in the “denial or abridgement of the right of any Citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973(a).

When evaluating alleged violations of the Act, the U.S. Supreme Court has instructed that courts do so in a “manner that provides the ‘broadest possible scope’ in combating racial discrimination.” Chisom v Roemer, 501 US at 403, 111 S.Ct. 2354. Proof of discriminatory intent is not required; instead a plaintiff need only demonstrate that the practice or procedure has a

discriminatory effect on members of a protected group. *Stewart v Blackwell*, 444 F3d 843, 877 (CA 6, 2006). The following factors are to be considered when determining a Section 2 violation:

[I]f based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

B. Michigan's Photo Identification Requirement Violates Section 2 Of The Voting Rights Act.

When applying the above framework, it becomes evident that the photo identification requirements represent a voting procedure that has a disparate impact on the African-American community.

***33 1. Michigan's Photo Identification Requirement Represents A Practice Or Procedure That Affects The Right To Vote.**

The Voting Rights Act defines the right to vote to include “all action necessary to make a vote effective”. 42 U.S.C. § 19731(c) (1). Under Michigan's statute, if an individual cannot present photo identification, his or her vote is subject to challenge even if the person signs an affidavit stating that he or she does not have the requisite identification. MCL 168.523. As discussed above, African-Americans are less likely to have a driver's license in the state of Michigan and more likely to be subject to challenge, upon failing to meet the photo identification requirements. The challenge procedure is particularly onerous in that it is time-consuming and perceived as threatening to members of minority groups. In particular, African-Americans are more likely than members of other racial groups to refuse to undergo the challenge procedure due to perceived threats. *See* fn 9, *supra*. Furthermore, there has been a recent increase in improper and harassing use of challenge procedures in African-American precincts. Not only are African-Americans more likely to be challenged when they fail to provide photo identification, but lines and waiting periods in majority African-American precincts are likely to be longer due to frequent imposition of challenge procedures. As a result, both African-Americans with and without photo identification are likely to be turned away from the polls. (Affidavit from City of Detroit Clerk). Since the photo identification requirement is a practice or procedure necessary to make a vote effective, it is subject to Section 2 of the Voting Rights Act.

2. Based On The “Totality Of Circumstances,” The Photo ID Provision Is An Electoral Procedure That Results In African-Americans Having Less Opportunity To Exercise The Right To Vote.

Based on the “totality of circumstances” related to the photo identification requirement, African-Americans will have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *34 42 U.S.C. § 1973(b). This standard warrants consideration of the prevalence of obtaining state-issued ID in the African-American community, voter mobility rates, the current rise in unjust imposition of challenge procedures in African-American precincts, and the relevant costs of obtaining state-issued ID.

Some extent of the disproportionate impact on African-Americans in the state of Michigan can be seen by viewing the numbers from the 2001 U.S. Department of Transportation's National Household Transportation Survey (NHTS) in conjunction with numbers from the 2001 Census Bureau.²²

²²

US Department of Transportation National Household Travel Survey <http://nhts.ornl.gov/2001> May 10 2006; US Census Bureau Population Estimates. <http://www.census.gov/popest> For the complete chart, go to http://www.census.gov/popest/states/asrh/files/sc_est2004_alldata6.csv May 10, 2006.

	Number of Drivers in Michigan Over Age 20 in 2001	Number of Michigan Residents 20 and Older in 2001	Number of Non- Drivers 20*	Percent Non- Drivers
White Americans	5,265,000	5,853,591	588,591	10.0%
African Americans	744,000	915,512	171,512	18.7%

While only 10% of white Americans over 20 years old in Michigan are not drivers, over 18% of African Americans over 20 years old in Michigan are not drivers. Thus, it is fair to approximate that almost twice as many African-Americans in Michigan do not have driver's licenses when compared to white Americans.

In addition, according to the U.S. Census Bureau, African-Americans have a mobility rate of 19.4% compared to 12% of white Americans in Michigan.²³ Individuals who frequently move are less likely to have current and valid driver's licenses or state identification cards. Since Michigan's Election Law already requires that the address on one's voter registration and *35 driver's license be the same, individuals who move frequently are less likely to have received updated address information from the Secretary of State and more likely to avail themselves of special rules that allow a voter who has recently moved to cast a ballot, despite inaccurate address information. MCL 168.523a. Despite the nonexistent history of in-person fraud at the polls, the focus on photo ID will subject voters with inaccurate address information to unnecessary increased scrutiny. In fact, these voters may be subject to challenge despite having state-issued photo ID. Since African-Americans move more frequently than white Americans in Michigan, the adverse impact will be more severe in majority African-American districts. As indicated above, the more challenge procedures are performed in a precinct, the longer the precinct's lines, and more likely that voters will be turned away from the polls. (Statement from City of Detroit Clerk). It is important to note that partisan challengers have a history of unlawful use of challenge procedures to harass and discourage African-American voters. The NAACP has documented these practices. (Exhibit). Since Michigan's ID provision makes any voter without appropriate photo ID subject to challenge, and African-Americans are almost two times as likely to lack photo ID, the ID provision essentially provides malicious challengers with a license to suppress the African-American vote. The Voting Rights Act of 1965 was enacted to prevent precisely this type of voting procedure or practice from unfairly disenfranchising members of historically-marginalized groups.

²³

US Census Bureau. "Michigan - Geographic Mobility by Selected Characteristics." Subject Table S0701. American Communities Survey. http://factfinder.census.gov/servlet/STTable?_bm=y&-context=st&-qr_name=ACS_2004_EST_G00_S0701&-ds_name=ACS_2004_EST_G00_-CONTEXT=st&-tree_id=304&-redoLog=true&-all_geo_types=N&-_caller=geoselect&-geo_id=04000US26&-format=&-lang=en May 10, 2006.

Although burdensome challenge procedures under the ID provision can be avoided by simply obtaining the appropriate photo identification from the state, the cost of doing so is tantamount to a poll tax. The state of Michigan charges \$9-25 to provide a resident with a drivers license or state ID card.²⁴ As detailed above, the cost may increase substantially if a resident must first pay the cost of acquiring a birth certificate before applying for a state ID card. *36 See *supra*. As almost twice as many African-Americans are lacking a driver's license when compared to white Americans,²⁵ it is evident that the cost of obtaining state-issued photo ID will disparately impact African-Americans.

²⁴ See Secretary of State website, http://www.michigan.gov/sos/0,1607,7-127-1627_8669-75447--,00.html

²⁵ US Department of Transportation National Household Travel Survey <http://nhts.ornl.gov/2001> May 10 2006; US Census Bureau Population Estimates. <http://www.census.gov/popest> For the complete chart, go to http://www.census.gov/popest/states/asrh/files/sc_est2004_alldata6.csv May 10, 2006.

When considering the troubling history of poll taxes, literacy tests, and other devices enacted to suppress the African-American vote in conjunction with the barriers that the state's photo ID provision presents today, a Section 2 violation of the Voting Rights Act is clear. Based on the “totality of circumstances”, including the cost of obtaining state-issued ID, and the barriers that challenge procedures present at the polls, the photo ID provision is an electoral procedure that results in African-Americans having less opportunity to exercise the right to vote. Since the Voting Rights Act was enacted to enforce the 15th Amendment of the U.S. Constitution, the Court should find this information compelling when making a constitutional determination.

C. The Act Was Passed Without Pre-clearance, And Therefore Violates Section 5 Of The Voting Rights Act.

Because Michigan contains jurisdictions that are covered under the Voting Rights Act, Section 5 of the Voting Rights Act requires that any changes in voting procedures be pre-cleared with either the Justice Department or the designated federal district court in Washington, D.C. 42 U.S.C. §1973 b(a). And, because this mandatory preclearance was never applied for and was never granted, the Act violates Section 5. Moreover, even if preclearance had been sought - which it was not - it would have been denied because implementation of the law in question would create a retrogressive effect upon the voting rights of racial minorities.

*37 1. Michigan Must Seek And Obtain Preclearance For The Act

Under Section 5 of the 1965 Voting Rights Act any state, or any political subdivision of a state, that is covered under Section 4(b) of the VRA, must obtain the pre-clearance of either (1) the Attorney General of the United States, or (2) a special panel of the United States District Court for the District of Columbia, before said covered jurisdictions may impose new “[v]oting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1968.” 48 U.S.C. § 1973c (emphasis added). Michigan is one of 16 states that is covered by the VRA. It has two political subdivisions specifically cited under this provision. Clyde Township in Allegan County (coverage date November 1, 1972), and Buena Vista Township in Saginaw County (coverage date November 1, 1972) (hereafter, “the Michigan Covered Jurisdictions”) 28 C.F.R. Part 51, Appendix. Thus, while Michigan is a “non-designated” state, the Supreme Court has ruled that even non-designated states that contain designated political subdivisions must apply for and obtain federal approval for any changes in its voting laws, before the proposed changes may be put into effect. *United States v Board of Commissioners*, 435 US 110 (1978).²⁶

²⁶ This continuing obligation arises each time a state tries to enact new un-cleared voting standards, practices or procedures. *Dotson v. Indianola*, 514 F. Supp 397 (ND Miss. 1981), aff’d 455 US 936 (1982).

In writing for the majority in *Board of Commissioners*, Justice Brennan noted that, “[W]e need not consider the question of how §5 applies when a political subdivision is the designated entity. But we observe that a similar argument can be made concerning §5’s reference to ‘[designated] states.’” The legislative background of §14 (c)(2); definition of ‘political subdivision’ reflects that Congress intended to define ‘political subdivision’ as areas of a non-designated state, not only as functional units or levels of government. * * * By the same token, *38 it is equally clear that Congress never intended the §14 (c)(2) definition to limit the substantive reach of the Act’s core remedial provision *once an area of a non-designated state had been determined to be covered; all state actors within designated political subdivisions are subject to §4 (a).*” Id. At 128-129, (emphasis added). Michigan, therefore, is covered by Section 5.

And the law is plain - *no election changes* can go into effect in Michigan, for the Covered Jurisdictions, absent a letter from the Justice Department to the Michigan Attorney General approving same, or absent a declaratory judgment from the previously cited special district court in Washington. *South Carolina v Katzenbach*, 383 US 301 (1996).

The courts have ruled, consistently, that voting changes covered by Section 5 are to be given the broadest possible scope of application to reach even minor election law changes. The changes contained in the Act fit squarely within the scope of Section 5's reach.

2. The Act Violates Section 5 Because Michigan Never Sought - And Never Obtained - Preclearance For The Act.

The procedures for when and how the Michigan Attorney General is to apply for the required preclearance are set forth under 28 C.F.R. 51.52, subpart F. And there is an affirmative and unambiguous obligation placed on the Michigan Attorney General to obtain the specific authorization of the US Attorney General, via letter; or from the special 3 judges' panel of the District of Columbia Federal district court, via declaratory judgment. Because this mandatory preclearance was never applied for and was never granted, the Act violates Section 5.

3. In Any Event, Preclearance Would Have Been Denied Because The Act Would Create A Retrogressive Effect Upon The Voting Rights Of Racial Minorities.

Even if preclearance had been sought - which it was not - it would have been denied because implementation of the Act would create a retrogressive effect upon the voting rights of racial minorities. *See 42 USC 1973c*. *See also Beer v United States*, 425 US 130, 141 (1973) *39 (noting the objective of VRA, §5 is to ensure that “no voting procedure change would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”); *Reno v Bossier Parish School Board*, 520 US 471, 478 (1997).

In order to determine whether an election law meets the definition of retrogression, a comparison must be made between the new voting plan and the existing law, which “is the benchmark against which th[e] ‘effect’ of voting change is measured.” *Holder v Hall*, 512 US 874, 883 (1994) (plurality opinion). *See also State of Texas v United States*, 866 F Supp 20, 27 (DDC, 1994). Thus, if the new system “places minority voters in a weaker position than the existing system,” pre-clearance,²⁷ as required by the VRA, of the new law will be denied.²⁸

²⁷ 42 USC 1973c.

²⁸ *Id.* Section 2 of the VRA, 42 USC 1973(b) also prohibits any voting procedure that has a discriminatory effect on the ability of minority voters to participate in the political process, even if the procedure is adopted and applied without the intent to discriminate. *Holder v Hall*, 512 US 874, 918 (1993). The Section is violated when, “based upon the totality of the circumstances, a protected class has ‘less opportunity’ to participate in the electoral process.” 42 USC 1973(b).

The Act fails to comply with the pre-clearance strictures of §5 of the VRA because Michigan cannot show that the new law will not have a retrogressive effect upon racial minorities. Consequently, the Act must fail.

CONCLUSION

The right to vote is the most fundamental and precious right we have as Americans. It ensures that the people are in charge of their government and not the other way around. Therefore, the government must not place burdens on the franchise, such as requiring photo identification at the polls, because it will only serve to limit access to the ballot, and disenfranchise qualified

voters, particularly the poor, the elderly, the disabled, and people of color. We therefore respectfully request that this Honorable Court grant the attached Motion for Leave to File Amicus Curiae Brief, and adhere to state precedent, upholding Attorney General *40 Frank Kelly's Opinion that requiring photo identification of voters at the polls violates the U.S. and Michigan constitutions.

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