



# State Notes

## TOPICS OF LEGISLATIVE INTEREST

September/October 2007

### **Michigan's Photo ID Requirement for Voters** **By Suzanne Lowe, Bill Analysis Coordinator**

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In the general election on November 6, 2007, election officials will implement Michigan's requirement that voters present photo identification. This statutory requirement was first enacted in 1996, found unconstitutional by the Attorney General in 1997, re-enacted in 2005, and upheld by the Michigan Supreme Court in July 2007. As a result, in order to receive a ballot, voters must present a driver license, an official State personal identification card, or another generally recognized picture ID card (a U.S. passport, State or Federal ID, military ID card, tribal ID card, or high school or university ID). Voters who do not have one of these forms of identification must be allowed to vote if they sign an affidavit at the polling place. The photo ID requirement applies only to those who vote in person on election day; it does not affect absentee voting.

Like the requirement in Michigan, other states' photo ID requirements for voters have been and continue to be the subject of controversy and litigation. To a large extent, the grounds for upholding or opposing the requirements are similar or the same in the various jurisdictions. A challenge to Indiana's law, which is considered the most stringent, presently is before the United States Supreme Court.

This article discusses the history of Michigan's voter ID requirement, the recent Michigan Supreme Court decision, the Secretary of State's implementation of the requirement, and developments in other states.

#### **History**

This State's voter ID requirement is found in Section 523 of the Michigan Election Law (MCL 168.523). The language in question was added by Public Act 583 of 1996, which made a number of other amendments to the Election Law. The relevant part of Section 523 states:

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..., an operator's or chauffeur's license..., or other generally recognized picture identification card...If the elector does not have an official state identification card, operator's or chauffeur's license..., 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. However, an elector being allowed to vote without the identification required...is subject to challenge as provided in section 727.

(Under Section 727, an election inspector is required to challenge a person applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct. Any registered elector of the precinct who is present in the polling place is permitted to challenge a person attempting to vote if the challenger knows or has good reason to believe that the individual is not a registered elector in that precinct.)

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On January 29, 1997, before Public Act 583 took effect, then-Attorney General Frank Kelley issued an opinion that the amendment to Section 523 violated the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States Constitution (OAG No. 6930). (That clause essentially prohibits the government from treating people differently on the basis of certain characteristics that do not justify disparate treatment.) The Attorney General's opinion is described below because virtually the same issues were discussed 10 years later by the Michigan Supreme Court, though at much greater length, taking into consideration subsequent developments, and with the opposite outcome.

When a law is subject to an equal protection challenge, the court is required to apply one of three levels of review, depending on the nature of the alleged classification. The highest level, "strict scrutiny", is applied when the law results in a classification based on a "suspect" factor, such as race or national origin, or when "fundamental rights" are violated. Under this standard, the law must be narrowly tailored to serve a compelling governmental interest. If strict scrutiny is not required, courts apply either a "rational basis" review or an intermediate "heightened level" of review. Under a rational basis review, courts will uphold legislation as long as it is rationally related to a legitimate governmental purpose. When a heightened level of review is used, a challenged statutory classification will be upheld if it is substantially related to an important governmental objective.

Based on U.S. Supreme Court and Michigan Supreme Court precedent, the Attorney General determined that it was proper to apply the strict scrutiny test to the photo ID requirement, because the law imposed a restriction on the fundamental right to vote. The Attorney General then examined the magnitude of the burden imposed by the requirement and stated, "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 photo identification card or sign the affidavit, they are denied the right to vote even though they are otherwise qualified to vote."

The Attorney General found that the ID requirement was designed to serve a valid governmental interest: the prevention of voter fraud. Due to the lack of evidence of voter fraud in Michigan, however, the Attorney General held that the requirement was "simply not necessary to promote a compelling governmental interest". The Attorney General also pointed out that Michigan had numerous other statutory provisions in place to safeguard the integrity of the election process and protect against voter fraud. As a result of this opinion, the voter ID requirement was not implemented, although it remained in the law.

Eight years later, Public Act 71 of 2005 amended Section 523 as well as other sections of the Election Law. The amendments to Section 523 added language but did not change the photo ID requirement in any way. By amending that section, Public Act 71 in effect re-enacted the requirement. Because of the 1997 Attorney General opinion, however, the Secretary of State evidently would not have taken steps to implement the re-enacted provisions unless they were found to be constitutional.

Before the January 1, 2007, effective date of Public Act 71, the Michigan House of Representatives adopted House Resolution 199, requesting the Michigan Supreme Court to



issue an opinion on the constitutionality of the photo ID requirement. The House resolution was adopted on February 22, 2006, pursuant to Article III, Section 8 of the State Constitution. That section provides, "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law...as to the constitutionality of legislation after it has been enacted into law but before its effective date." Specifically, the House asked for an 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, the Michigan Supreme Court granted the request of the House of Representatives for an advisory opinion, although the Court order phrased the request as asking whether the photo ID requirements "on their face" violate either Constitution (474 Mich 1230). (A party challenging the facial constitutionality of a statute must show that there are no circumstances under which the act would be valid. An "as applied challenge", on the other hand, considers the application of a law to individual facts.) Justice Cavanagh would have declined to issue an advisory opinion, and Justice Kelly dissented on two grounds: 1) The subject matter of the request was overly broad, and 2) the Court altered the question asked in the House resolution.

### **Michigan Supreme Court Advisory Opinion**

On July 18, 2007, the Michigan Supreme Court issued its advisory opinion upholding the photo ID requirement in Section 523 of the Michigan Election Law (*In Re Request for Advisory Opinion*, 479 Mich 1). According to the majority of the Court, "The identification requirement is a reasonable, nondiscriminatory restriction designed to preserve the purity of elections and to prevent abuses of the electoral franchise..., thereby preventing lawful voters from having their votes diluted by those cast by fraudulent voters." The Court also found that the requirement is not an unconstitutional poll tax under the 24<sup>th</sup> Amendment to the U.S. Constitution, because no voter is required to incur the costs of obtaining a photo ID as a condition of voting.

Before discussing the requirement's constitutionality, the Court described events that took place in the years after the Attorney General's 1997 opinion. In particular, Congress passed the Help America Voter Act (HAVA) in 2002, after the 2000 presidential election revealed "alleged deficiencies in the electoral system in several states". Among other things, HAVA requires first-time voters who register by mail to present proof of identity in the form of photo identification or other documentation. The Commission on Federal Election Reform then was formed to assess HAVA's implementation. In September 2005, the Commission issued its recommendations, including a proposal that voters provide photo ID, in order to deter fraud and enhance ballot integrity.

The Court recognized that a citizen's right to vote is fundamental, but said that it competes with the State's compelling interest in preserving the integrity of its elections and the Legislature's obligation, under Article II, Section 4 of the State Constitution, "to enact laws to preserve the purity of elections" and "to guard against abuses of the elective franchise". According to the Court, this obligation includes ensuring that lawful voters do not have their votes diluted by fraudulent voting.

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Although the right to vote is fundamental, the Court found that it was not necessary to apply the strict scrutiny test when evaluating the constitutionality of every election law, in reliance on U.S. Supreme Court precedent, particularly *Burdick v Takushi* (504 US 428). Rather, the proper level of review depends on the severity of the burden imposed on an elector. If the burden on the right to vote is severe, then the restriction must be narrowly drawn to serve a compelling state interest. On the other hand, if the restriction is reasonable and nondiscriminatory, the law is justified by an important regulatory interest identified by the state.

Applying this flexible standard, the Michigan Supreme Court found that the requirement to present a photo ID or sign an affidavit does not impose a severe burden on the right to vote, and imposes only a reasonable, nondiscriminatory restriction on the election process in furtherance of Michigan's compelling regulatory interest in preventing voter fraud and enforcing the constitutional obligation to preserve the purity of elections and guard against abuses of the elective franchise. Thus, the Court held that the law is facially constitutional. The Court also rejected opposing counsel's argument that the Michigan Constitution grants a higher level of protection and that the flexible test is not consistent with it.

The Court then rejected the argument that the photo ID requirement amounts to an unconstitutional poll tax because a voter must pay \$10 for a State identification card or \$25 for a driver license, as well as incur the costs of transportation to a Secretary of State office, taking time off work to do so, and procuring documentation necessary to obtain an ID card or a license. The Court pointed out that a voter without photo ID simply may sign an affidavit in the presence of an election inspector. In addition, under the law providing for the official State identification card, the Secretary of State is required to waive the fee if the applicant is 65 years of age or older; has had his or her driver license suspended, revoked, or denied due to a mental or physical infirmity or disability; presents evidence of statutory blindness; or presents other good cause for a fee waiver (MCL 28.292(14)).

In separate dissenting opinions, Justice Cavanagh and Justice Kelly both found the photo ID requirement unconstitutional under the U.S. and Michigan Constitutions, on the ground that it infringes on the actual right to vote and is not narrowly tailored to achieve a compelling governmental interest. Justice Kelly said that the majority was "badly mistaken" in applying a more relaxed standard and had misread *Burdick*. Both justices pointed out that the ID requirement is designed to prevent *in-person* polling place fraud, and no evidence of such fraud had been presented. Justice Cavanagh also noted that Michigan has numerous statutes that criminalize voter fraud, as well as a statutory scheme that manages all aspects of elections. In addition, the dissenting justices found that the requirement will have a disparate impact on racial, ethnic, or disadvantaged populations.

Regarding the option to sign an affidavit, Justice Kelly said that even if signing an affidavit is just a minor obstacle, as the majority held, it is imposed only on a select group of otherwise qualified voters. Justice Cavanagh said that the affidavit exception will not help because, even if citizens know about it, voters may face harassment and intimidation through the challenge process, or may have difficulty understanding the affidavit. Justice Cavanagh concluded that the law fails not only the strict scrutiny test, but also the rational basis test, "...because it is not a reasonable and nondiscriminatory restriction justified by an important state interest".



To date, no suit challenging the Michigan law has been filed in Federal court. If such a suit were filed, it would likely be held in abeyance, pending the United States Supreme Court's decision on the Indiana statute.

### **Implementation**

According to a press release issued on September 5, 2007, Secretary of State Land provided Michigan's election officials with instructional materials designed to help them implement the photo ID requirement, and the Bureau of Elections is conducting training on the law for the local officials. Although a public information campaign apparently is not being undertaken, question-and-answer materials evidently are being delivered to Secretary of State branch office employees.

The website of the Bureau of Elections contains a "Notice to Voters: New Voter Identification Requirement in Effect". This explains that every Michigan voter will have to show picture ID or sign an affidavit attesting that he or she is not in possession of a picture ID. The notice also informs voters that they can satisfy the requirement by showing a Michigan driver license, a Michigan personal identification card, or one of the following:

- Driver license or personal ID card issued by another state.
- Federal or state government-issued photo identification.
- U.S. passport.
- Military ID card with photo.
- Student ID card with photo from a high school or an accredited institution of higher education.
- Tribal ID card with photo.

The Department of State website contains a document entitled, "Picture Identification in the Polls: Questions and Answers". This gives instructions to election officials for implementing the photo ID requirement. For example, it explains that the affidavit form may be used by 1) voters who do not have picture ID, and 2) voters who have picture ID but did not bring it to the polls. On the other hand, if a voter has a photo ID that is not acceptable and he or she cannot produce a second piece of picture ID, the election inspector is instructed to issue a provisional ballot and contact the clerk. (When a provisional ballot is cast, the local clerk must determine, within six days after the election, whether the voter was eligible to vote and whether to tabulate the ballot. When a voter signs an affidavit, however, his or her vote will be tabulated on election day.)

The question-and-answer document explains that a voter may not be challenged *just* because he or she is not in possession of picture ID or did not bring it to the polls and signs an affidavit. Like any other voter, he or she may be challenged if an election inspector or challenger has good reason to believe that the person is not qualified to vote in the precinct.

The document also states that local clerks must retain completed affidavit forms for two years, but precinct boards are not required to create or maintain any other records associated with the picture ID requirement.





In addition, the Department of State website contains the affidavit form that will be used for those voting without picture ID. This two-part form contains the voter's affirmation that he or she is not in possession of a driver license, a State-issued ID card, or any other form of picture identification, as well as the election inspector's certification that the voter completed the affidavit in the inspector's presence. The affidavit also contains the following statement: "Penalty: Making a false statement in this affidavit is perjury, punishable by a fine up to \$1,000.00 or imprisonment for up to 5 years, or both."

(Under Section 933 of the Election Law, making a false affidavit for the purpose of voting is perjury, and Section 936 prescribes the \$1,000/five-year penalty. These provisions are not limited to making a false statement in the affidavit described above. The Law also contains a number of additional criminal penalties for violations, and makes it a misdemeanor to challenge a qualified and registered voter for the purpose of annoying or delaying voters.)

### **Developments in Other States**

According to the National Conference of State Legislatures, voters in 24 states (besides Michigan) are required to show identification before voting, and all of these states have some sort of recourse for voters without ID to cast a vote. (This information was last updated in February 2007.) Eight of the 24 states require voters to show *photo* ID: Arizona, Florida, Georgia, Hawaii, Indiana, Louisiana, Ohio, and South Dakota. The laws in Arizona, Georgia, and Indiana have been litigated in Federal court, as described below.

On September 25, 2007, the United States Supreme Court agreed to consider a challenge to the Indiana law (*Indiana Democratic Party v Rokita* and *Crawford v Marion County Election Board*). This statute, with certain exceptions, requires a voter to show valid photo ID before casting a ballot in a primary or general election, unless the person votes by absentee ballot or lives in a nursing home. A voter who does not have valid ID, if challenged, may cast a provisional ballot and then has until 10 days after the election to sign an affidavit affirming that he or she is the person who cast the provisional vote and either provide valid ID or sign an affidavit claiming indigence or religious objection to having his or her photograph taken.

The U.S. Court of Appeals for the Seventh Circuit upheld Indiana's law in January 2007. The opinions of the majority and dissenting judges were similar to those of the Michigan Supreme Court justices, including the majority's conclusion that the law does not have to serve a compelling state interest, and that the purpose of the law is to reduce voting fraud, which impairs the right of legitimate voters to vote by diluting their votes. The majority also said that the lack of prosecutions for impersonating a registered voter was explained by the "endemic underenforcement of minor criminal laws...and by the extreme difficulty of apprehending a voter impersonator". The dissenting judge described the law as "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic" (a view shared by other opponents of voter photo ID laws). This judge would have applied a strict scrutiny test, and concluded that the law "imposes an undue burden on a recognizable segment of potential eligible voters" and therefore violates their rights under the U.S. Constitution.

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The Arizona law, which was approved by the state's electors in 2004, requires a voter to present one form of identification that bears his or her name, address, and photograph, or two different forms of ID that bear the voter's name and address. A voter who does not have the required ID must receive a provisional ballot, which will be counted if the voter provides ID to a county official within five business days after the election. A voter who knows that he or she cannot secure proper ID within that time frame has the option to vote before election day. The law also requires voters to present proof of citizenship when they register to vote. In September 2006, the U.S. District Court denied a request for a preliminary injunction. The U.S. Court of Appeals for the Ninth Circuit then enjoined Arizona from enforcing the law pending disposition of appeals of the denial of the preliminary injunction. On October 20, 2006, the U.S. Supreme Court vacated the order of the Court of Appeals, allowing the November 2006 election to proceed without an injunction suspending the voter ID rules (*Purcell v Gonzalez and Arizona v Gonzalez*, 549 US \_\_\_\_).

The U.S. Supreme Court discussed a state's interest in preserving the integrity of the election process and said, "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." The Court emphasized, however, that it was expressing no opinion on the correct disposition of the appeals from the District Court's original order, or on the ultimate resolution of the cases. In April 2007, the U.S. Court of Appeals affirmed the denial of the preliminary injunction, and in August 2007, the District Court granted the defendants summary judgment.

Georgia's current voter ID requirements were enacted in 2006, when a law repealed and re-enacted requirements that had been approved in 2005. Essentially, registered voters in Georgia who vote in person must present a government-issued photo ID as a condition of being admitted to the polls and before being issued a ballot and being allowed to vote. A voter who does not have any of the types of ID listed in the act must be allowed to vote a provisional ballot. The 2006 law added a requirement that the board of elections in each county issue a Georgia voter ID card containing a photo, without charge to voters residing in the county, upon presentation of certain identifying documents. A voter must swear that he or she does not have any other form of acceptable ID and must produce evidence that he or she is registered to vote in Georgia. (The 2006 law struck a former requirement that a voter execute an affidavit of poverty in order to obtain an ID without charge.)

Both the 2005 and the 2006 statutes were challenged in the U.S. District Court and various preliminary injunctions were issued. In August 2007, a trial was held on the plaintiffs' request for a permanent injunction. The Court applied the *Burdick* "sliding scale" standard of review, and denied the permanent injunction (*Common Cause/Georgia v Billups*). The Court found that the plaintiffs had failed to demonstrate that the photo ID requirement placed an undue or significant burden on the right to vote, failed to show that it was not reasonably related to the state's interest in preventing fraud in voting, and failed to succeed on the merits of their claim that the act violated the Equal Protection Clause. On October 2, 2007, an appeal was filed with the U.S. Court of Appeals for the 11<sup>th</sup> Circuit.



## **Conclusion**

According to the Secretary of State's office, approximately 370,000 registered voters in Michigan (or about 5.0% of all registered voters in the State) do not have either a driver license or an official State identification card. There are no data on the number of voters who also do not have any of the other types of photo ID that the Secretary of State considers acceptable. Of the voters who do have photo ID, there is no way of knowing how many will not bring it to the polls because they forget to or do not know about the law's requirement. It also is not possible to predict how many voters who do not have photo ID, or have it but do not bring it to the polls, will be unable to sign an affidavit because they cannot read or understand the document, or will be unwilling to sign one because they feel intimidated or embarrassed or simply do not want to take the time.

Whether the photo ID requirement actually represents a "barrier to the ballot box", as critics contend, may be known only after the requirement is implemented, and perhaps only after it is enforced during the November 2008 general election. Whether the requirement serves to prevent voter fraud may never be known. Although there have been convictions in Michigan for illegal activity during voter registration drives, there does not appear to be any evidence of the type of in-person polling place voter impersonation that the photo ID requirement might deter. As some contend, this may be because of the difficulty of detecting such activity and catching the offenders. On the other hand, to the extent that such fraud does occur, it is questionable whether the penalty for signing a false affidavit will deter someone who is willing to commit a felony by voting under a false name or impersonating another elector.

The issue of voter fraud is subject to considerable debate not only in Michigan but across the country. Most reports appear to indicate that actual voter fraud is negligible and isolated, and voting irregularities simply may be the result of mistakes or outdated voter files ("In 5-Year Effort, Scant Evidence of Voter Fraud", *The New York Times*, 4-12-07). The absence of pervasive voter fraud, however, has not swayed the courts that have upheld voter photo ID laws. It remains to be seen whether the United States Supreme Court will agree that these laws serve an important (or compelling) state interest by preventing potential voter fraud from diluting legitimate votes.

The impact on Michigan of the Court's eventual decision in the Indiana case will depend on the outcome, of course. That case is expected to be heard in the spring of 2008, and the Court may or may not make a decision before the November 2008 general election. If the Court finds that the Indiana statute is unconstitutional, it is safe to say that Michigan's photo ID requirement likely will be challenged. The result of such an action cannot be predicted, however, because the states' laws differ and the grounds for a challenge will depend on the Court's reasoning.

If the U.S. Supreme Court upholds the Indiana law, opponents of the Michigan photo ID requirement will have little or no recourse in the courts, but could seek a statutory amendment (as they can now). To date, one bill to repeal the requirement has been introduced in the Michigan Senate. Senate Bill 758, whose primary sponsor is Senator Cherry, has been referred to the Senate Committee on Campaign and Election Oversight.