STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE REQUEST FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF 2005 PA 71.
_____/

SC: 130589

BRIEF OF AMICI CURIAE MICHIGAN CIVIL RIGHTS COMMISSION AND MICHIGAN DEPARTMENT OF CIVIL RIGHTS ARGUING 2005 PA 71 VIOLATES MICHIGAN CIVIL RIGHTS LAW

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STATEMENT OF INTEREST

Amici are the Michigan Civil Rights Commission ("Commission") and the Michigan Department of Civil Rights ("Department"). The Commission was created under the Michigan Constitution of 1963 for the purpose of protecting individuals from discriminatory treatment by both government and private citizens and organizations.[1] The Department, established two years later, acts as the investigative arm of the Commission, and is the actual agency that investigates and resolves discrimination complaints. It also works to prevent discrimination through educational programs that promote voluntary compliance with civil rights laws. Together, the Commission and the Department utilize their constitutional and statutorily derived powers to help prevent and prosecute unlawful discrimination by enforcing Michigan's two civil rights statutes: the Elliott-Larsen Civil Rights Act ("Elliott-Larsen")[2] and the Persons with Disabilities Civil Rights Act ("Persons' with Disability Act").[3] We believe that the photo identification requirement of Section 523 of 2005 PA 71, MCL 168.523 ("Section 523") creates a significant obstacle to voting on the part of hundreds of thousands of Michigan voters protected under both Michigan statutes, including racial and ethnic minorities, the elderly, and the disabled. This will significantly diminish the opportunity for these protected groups to participate in the political process, and for that reason, we urge the Court to issue an opinion finding Section 523 unlawful.

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[1] Const 1963, art 5, § 29.
[2] MCL 37.2101 et seq.
[3] MCL 37.1101 et seq.

STATEMENT OF FACTS

Amici adopts the Statement of Facts presented in the brief by the Attorney General Opposing Constitutionality of 2005 PA 71.

ARGUMENT

This brief addresses the narrow issue of Section 523's application to the Elliott-Larsen Civil Rights Act and the Persons with Disabilities Act.[4] The Commission and Department submit that Section 523's photo identification requirement violates both statutes. It does so because it has a disparate impact on racial and ethnic minorities, the elderly and disabled voters - all protected classes under these two statutes - by diminishing the opportunity for these individuals to participate in the political process. Implementing Section 523 will have a far-reaching retrogressive impact that disenfranchises these voters, who in many cases do not possess the proper identification to allow them to vote. Some of these voters simply cannot afford to obtain such identification because the cost is prohibitive. Others would face insurmountable obstacles in gathering the documents necessary to obtain photo identification or to travel great distances to obtain the identification.

I. The photo identification requirement of Section 523 violates both the Elliott-Larsen Civil Rights Act and the Persons with Disability Civil Rights Act, because it has a disparate impact on protected groups such as racial and ethnic minorities, the elderly, and the disabled, since they often do not possess photo identification or are more likely than Whites, younger adults and non-disabled to be unable to obtain photo identification.

The disparate impact theory of discrimination has developed from Title VII of the Civil Rights Act, the federal counterpart to Elliott-Larsen.[5] In addressing disparate impact, the United States Supreme Court held that facially neutral practices that are "fair in form, but discriminatory in operation" were prohibited if the practices fell more harshly on a statutorily protected group

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[4] Amici believe that Section 523 also violates the equal protection requirements of both the United States and Michigan Constitutions, the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act. However, this brief addresses none of those issues, which are covered at length in other amicus briefs before this Court. Amici adopts by reference the arguments set forth in the brief submitted on behalf of the Attorney General's office Opposing Constitutionality of 2005 PA 71.

and could not be justified by necessity.[6] In other words, the legality of a practice is determined by its consequences, not its motivation. In disparate impact cases, a practice may be deemed discriminatory if it has a statistically significant adverse impact on members of a protected group. To meet their burden of showing disparate impact, protected parties must only show they will likely be treated differently than persons of a different class for the same or similar conduct.[7] Amici submit that Section 523 undoubtedly affects minority, elderly, and disabled voters differently than their non-minority, non-elderly, and non-disabled counterparts, by creating financial obstacles to voting that are unduly burdensome, and in many cases would result in prohibiting these residents from exercising their most fundamental right - the right to vote. Statistical evidence gathered from around the United States confirms this.

A. Statistical evidence confirms that citizens without photo identification required under Section 523 are largely low income voters, comprising mainly of racial and ethnic minorities, the elderly, and the disabled: all protected classes under the Elliott-Larsen Civil Rights Act and the Persons with Disabilities Civil Rights Act.

Section 523 permits only three acceptable forms of photo identification in order for a Michigan resident to cast a vote: (1) an official state identification card, (2) a driver's license, or (3) "other generally recognized picture identification card."[8] Empirical studies have shown there are millions of Americans who currently do not possess a driver's license or some other form of government-issued photo identification card.[9] In fact, it is estimated that about 12% of the

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[5] *Jones v Pepsi-Cola Metro Co*, 871 F Supp 305 (1994).
[6] *Griggs v Duke Power*, 401 US 424, 431; 91 S. Ct 849, 853 (1971).
[7] *Clarke v Kmart Corp.*, 197 Mich App 541, 545; 495 NW2d 820, 822 (1992). *See also, Reisman v Regents of Wayne State University*, 188 Mich App 526, 538; 470 NW2d 678, 684 (1991).
[8] MCL 168.523.
[9] CARTER/BAKER COMMISSION ON FEDERAL ELECTION REFORM, *Building Confidence in US Elections: Response to the Report of 2005 Commission on Federal Election Reform* (Carter/Baker Dissent), at 3 (2005)

American-age electorate do not possess driver's licenses, and as of 2001, 6 to 10% did not possess other forms of such identification.[10] This equates to approximately 20 million eligible voters nationwide without such identification.

In line with these national statistics, Michigan voting records indicate that about 370,000 of the State's 7 million registered voters do not have a driver's license or State identification card.[11] Even with the implementation in this State of a "mobile office" program for photo identification registration, 10% of voting-age citizens in Michigan are still without driver's licenses and non-driver's photo identification cards.[12] Furthermore, as of the 2004 Census, the United States Census Bureau compiled statistics showing that while 10% of the eligible voting population of Michigan is living below the poverty line, over 27% of those people are from minority groups.[13] This number is greater than the 20% of Michigan residents of voting age who are minorities. Studies from across the United States show similar patterns of disparity among minorities, the elderly and the disabled:

- The American Association of People with Disabilities estimates that more than 3 million Americans with disabilities do not possess a driver's license or State-issued photo identification.[14]
- A University of Milwaukee study found that approximately 23% of Wisconsin residents age 65 and older do not have driver's licenses or photo identification, while fewer than 3% of Wisconsin students have driver's licenses showing their current address. That study also found less than half of African-American and

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[10] Carter-Baker Dissent, at 3.

[11] Bell, *Court Jumps into Dispute over voter ID checks,* DETROIT FREE PRESS, 2006, (quoting Spokeswomen for the Michigan Secretary of State Kelly Chesney).

[12] Carter-Baker Dissent, p 7, n 40 (citing Telephone Conference with Christopher Thomas, Michigan Director of Elections, Sept 21, 2004).

[13] United States Bureau of Census, 2004 American Community Survey, *Poverty Status in the Past 12 Months by Sex by Age* (Washington DC: United States Government).

[14] American Association of People with Disabilities, *Statement in Opposition to a National Voter Identification Card*, June 29, 2005. <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/NATIONAL_ID_STATEMENT.PDF>.

Hispanic adults (47% and 43% respectively) living in Milwaukee County have valid driver's licenses.[15]

- The American Association for Retired Persons (AARP) of Georgia estimates that about 153,000 Georgia seniors who voted in 2004 do not possess a State-issued photo identification.[16]

- The 2001 Commission on Federal Election Reform estimated that 6 to 10% of voting-age Americans do not have a driver's license or State-issued photo identification card. This equates to as many as 20 million eligible voters. The same report found those without photo identification were disproportionately poor and urban.[17]

- The United States Department of Justice found that African-Americans living in Louisiana were four to five times less likely to have government-issued photo identification than Whites.[18] This 1994 report pre-dated the Hurricane Katrina disaster, where thousands of those victimized by the storm have lost birth certificates, social security cards and all other government-issued documentation.

- The last United States Census indicates 5.6% of Whites in Michigan do not have a vehicle, compared to 19.7% of African-Americans.[19] This is nearly 4 times more African-Americans than Whites who do not own a car, making it harder for them to obtain identification. It is also reasonable to infer that approximately the same number do not have a valid driver's license.

These are a mere sampling of recent socio-economic studies compelling the conclusion that photo identification requirements create disparate obstacles for low-income, minority, elderly, and disabled residents, which comprise tens of thousands of Michigan's eligible voting population.

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[15] John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* (June 2005) < http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf.>

[16] *States Debate Photo ID at the Polls*, THE ASSOCIATED PRESS (Mar 31, 2005).

[17] John Mark Hansen, Task Force on the Federal Election System Report, at VI-4 in Task Force Reports to Accompany the Report of the National Commission on Election Reform (Aug. 2001); National Commission on Election Reform, To Assure Pride and Confidence in the Electoral Process, at 32 (Aug. 2001).

[18] Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, US Department of Justice, to Sheri Marcus Morris, La Assistant Attorney General (Nov 21, 1994).

B. Section 523's photo identification requirement creates an undue economic hardship for many impoverished Michigan citizens, many of whom are protected minorities, the elderly, and the disabled, effectively making it cost prohibitive for them to vote.

The economic burden created by Section 523 undoubtedly has a significant impact on the ability to vote for a large segment of Michigan's minority voting population. Not only do many of these residents lack the requisite identification, they simply cannot afford to obtain this type of identification. The driver's license, by all estimates the most widely used form of photo identification, costs $25. The documents required in order to obtain a license and other acceptable State-issued photo identification also cost money. For example, a certified copy of a birth certificate costs $36, plus an $8.50 shipping and handling fee that is almost a required cost, as there are only two pick-up centers for birth certificates in the entire State of Michigan.[20] Michigan voters who were born in other states would face similar or even more difficult obstacles in trying to secure the documents necessary to obtain Michigan photo identification. Residents who don't drive and now need to obtain a photo identification card may be confronted with this expensive burden.

Other permissible forms of identification also carry a high price tag. A passport in Michigan costs $85.00; certified naturalization papers cost $19.95. Although there are no studies showing how many Americans lack readily available proof of citizenship, Arizona's recent experience under that state's Proposition 200 (requiring proof of citizenship in order to register to vote) suggests that the number is extremely high. One county reported in February 2004 that it was forced to reject nearly 75% of new voter registration forms for failure to provide adequate

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[19] United States Census Bureau 2000, Summary File 4 Table HCT32.
[20] See Michigan Department of State Website at <http://www.michigan.gov/sos>

proof of citizenship.[21] Michigan residents without documentary proof of citizenship necessary to obtain identification cards will face similar burdensome obstacles.

There are also the transportation expenses associated with obtaining the required documents: for some impoverished residents, this cost alone will prohibit them from acquiring the required identification, let alone the cost of the identification itself. Since state-issued identification cards may only be obtained at specified government offices, which may be far from voters' residences and workplaces, costs that must be considered include taking time off work to visit those offices during business hours. While Michigan may prohibit employers from penalizing employees for taking time off to vote, it does not have similar protections for those taking time off to obtain State-issued identification. Hourly wage employees may not be able to bear these costs. These seemingly nominal costs create very real hardships for many people, especially poor minorities and the elderly.

These and other considerations all came to the attention of the 11th Circuit in the well-publicized - and on-going battle - over Georgia's statute with similar photo identification requirements. In *Common Cause/Georgia v Billups,*[22] a coalition of civil rights organizations filed suit seeking a declaratory judgment that Georgia's statute was unconstitutional and requesting an injunction against its enforcement. The District Court granted plaintiff's motion for preliminary injunction, finding they had a substantial likelihood of success on the merits.[23] The Court recognized the potential impact the statute would have on those minority voters who did not have the means to procure the necessary identification:

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[21] Press Advisory, Maricopa County Recorder and Elections Department, *Voter Registration is Different Following DOJ Approval* (Feb 4, 2005). <http://recorder.maricopa.gov/pressrelease.aspx.>

[22] *Common Cause/Georgia v Billups*, 406 F Supp 2d 1326 (SD Ind 2005).

[23] *Billups,* 406 F Supp 2d at 1376.

> Given the fragile nature of the right to vote, the Court finds that the Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID would be a hardship. Unfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting. For those citizens, the character and magnitude of their injury – the loss of their right to vote – is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.[24]

Amici believe the 11th Circuit Court's reasoning is based on sound statistical evidence, and properly acknowledges the potential undue hardships that face many impoverished citizens that would otherwise be able to vote. Since the 11th Circuit Court decision in *Billups*, *supra*, the Georgia General Assembly modified the identity verification process in an effort to address the 11th Circuit's concerns. *See* 2006 Amendment to OCGA 21-2-417. However, on July 13, 2006, in a 193 page order, the Court granted a *second* preliminary injunction enjoining defendants from enforcing or applying the 2006 Photo I.D. Act in any form. In a separate action, the Superior Court of Fulton County, Georgia, also issued a temporary restraining order enjoining the state Governor and State Election Board from requiring voters to produce photo-identification of any kind required by either version of Georgia's new law.[25] Amici believe that the 11th Circuit and the Georgia Supreme Court have correctly ruled on this issue, and that like Georgia's requirements, Section 523's requirements endanger many Michigan residents with the same potential irreparable injury: the loss of their fundamental right to vote.

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[24] *Id* at 1365-66 .

[25] See *Rosalind Lake v Hon Sonny Perdue,* Superior Court of Fulton County, Georgia, File No 2006CV119207, Temporary Restraining Order at 4, July 7, 2006.

CONCLUSION

Should it stand, the photo identification requirement of Section 523 will have the potentially devastating effect of suppressing the voting rights of many Michigan residents who are protected from such disparate treatment under this State's civil rights laws. Racial and ethnic minorities, the disabled, and the elderly - all of whom are protected citizens under Michigan's civil rights statutes - are both less likely to possess and to be able to procure the necessary photo identification required by Section 523, effectively depriving them of their most precious and fundamental right to vote. The Michigan Civil Rights Commission and Department of Civil Rights urges the Court to issue an opinion declaring Section 523's photo identification requirement unlawful.*

Respectfully submitted,

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