STATE OF MICHIGAN
IN THE SUPREME COURT

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

SC: 130589

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BRIEF *AMICI CURIAE* OF MICHIGAN DEMOCRATIC PARTY, MICHIGAN HOUSE DEMOCRATIC CAUCUS, MICHIGAN SENATE DEMOCRATIC CAUCUS AND MICHIGAN LEGISLATIVE BLACK CAUCUS

ORAL ARGUMENT REQUESTED

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Michigan Democratic Party has been invited by the Court to file this Brief *Amicus Curiae*. The Michigan Democratic Party has a abiding interest in ensuring that access to the ballot, unhindered by needless conditions and requirements, is freely available to all Michigan citizens qualified to vote.

The Michigan House Democratic Caucus is comprised of the 49 elected Democrats of the Michigan House of Representative. It is recognized under the Michigan Campaign Finance Act as a house political caucus committee, MCL § 169.224a(1), with an identity separate from that of the House. The House Democratic Caucus maintains an interest in this matter through its role as a body of legislators, as well as its overriding role in representing the citizens of the State of Michigan. In 1996, when Section 523 originally was amended to add the photo identification requirement, the House Democratic Caucus opposed the requirement and voted against the bill. *See* House Journal Dec. 12, 1996, pp. 2506-2507, Roll Call No. 1077. The Caucus maintains the same beliefs as it held at that time: that Section 523, as amended, is unconstitutional because it constitutes an improper burden on the fundamental right to vote. The photo identification requirement will have a disproportionate effect on the poor, racial and ethnic minorities and elderly and disabled voters. The Caucus further believes that the requirement is unnecessary and is motivated by a desire to impede legal voting in Michigan.

The Michigan Senate Democratic Caucus is comprised of the 16 elected Democrats of the Michigan Senate. It is recognized under the Michigan Campaign Finance Act as a senate political caucus committee, MCL § 169.224a(2), with an identity separate from that of the Senate. *See also*, Senate Rule 1.104 9 (discussing election of caucus officers). The Senate Democratic Caucus

maintains an interest in this matter through its role as a body of legislators and representatives of the citizens of Michigan. In 1996, when Section 523 originally was amended to add the photo identification requirement, members of the Senate Democratic Caucus voted as one to oppose the amendment. Eight Democratic Senators spoke out against the amendment. *See* Senate Journal Dec. 10, 1996, pp 2077-81, Roll Call Nos. 870 and 871. The Senate Democratic Caucus maintains the views stated at that time: that the photo identification requirement in Section 523 constitutes an improper burden upon our most cherished right, and is motivated by misunderstanding and a desire to impede legal voting in Michigan.

The Michigan Legislative Black Caucus is comprised of 21 Michigan Legislators. Membership is open to any person of color who is a member of the Michigan Legislature. The Black Caucus was created "[t]o seek the fulfillment of the goals and aspirations of people of color by having a major forum primarily for Black State Legislators interested in improving the quality of life for people of color; to conduct research and planning and to take appropriate legislative and administrative action directed toward the improvement of living, working, housing, health, and educational conditions of people in respective communities, with a view of lessening neighborhood tensions, combating community deterioration, and lessening burdens of government in our respective communities of Michigan." *See* Black Caucus Bylaws, Article II, Sec. 1. The Michigan Legislative Black Caucus maintains an interest in the instant matter through its role as a body of state legislators of color interested in protecting qualified voters in their respective communities of Michigan against disenfranchisement.

ARGUMENT

I. Section 523 Violates The Equal Protection Clauses of the U.S. and Michigan Constitutions.

Because the right to vote is fundamental to our democracy, any significant burdening of that right must withstand strict scrutiny. Section 523, on its face, fails to satisfy strict scrutiny. There is no compelling justification for impeding access to the franchise through a photo identification requirement. Voter impersonation at the polls -- which is the only form of electoral fraud addressed by the photo identification requirement -- is a non-existent problem. If such misconduct were ever to become a problem, there are far less restrictive remedies available, including existing provisions of the Election Code.

A. Because Voting Is A Foundational Right In Our Democracy, Any Significant Interference With The Exercise Of That Right Must Withstand Strict Judicial Scrutiny.

Voting is "a fundamental political right because [it is] preservative of all rights." *Yick Wo v Hopkins*, 118 US 356, 390; 6 S Ct 1064; 30 L Ed 220 (1886). The U.S. Supreme Court has stated: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964). Justice Hugo Black elaborated that because the right to vote is fundamental to all other rights, "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Id* at 17-18.

Because the right to vote is so precious, courts have consistently applied the most demanding level of scrutiny under Equal Protection to government action that burdens or interferes with access

to the voting booth. *E.g., Dunn v Blumstein*, 405 US 330; 92 S Ct 995; 31 L Ed 2d 274 (1972)(applying strict scrutiny analysis to a durational residency requirement for voting); *Kramer v Union Free School Dist No 15*, 395 US 621, 626; 89 S Ct 1886; 23 L Ed 2d 583 (1969)(overturning law requiring property ownership as a qualification to vote in a school district election, applying a "close and exacting examination"); *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964)(stating, "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Anderson v Celebrezze*, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983)(holding that an early filing deadline for independent candidates violated the voting rights of the candidate's supporters); *Harper v Virginia Bd of Elections*, 383 US 663, 670; 88 S Ct 1079; 16 L Ed 2d 169 (1966)(stating that classifications that restrain the exercise of fundamental rights such as the right to vote "must be closely scrutinized and carefully confined."). Recently, in applying strict scrutiny under Equal Protection to overturn Ohio's use of inadequate voting equipment, the Sixth Circuit Court of Appeals (citing the foregoing decisions and others) observed:

> Zealous protection of the right to vote has been the norm. Few rights have been so extensively and vigorously protected as the right to vote. Its fundamental nature and the vigilance in its defense, both from the courts, Congress, and through the constitutional amendment process, stem from the recognition that our democratic structure and the preservation of other rights depends to a great extent on the franchise. To that effect, from *Yick Wo* to *Reynolds* to *Bush* [*v Gore*, 531 US 98; 121 S Ct 525; 148 L Ed 2d 388 (2000)(*per curiam*)], Supreme Court precedent is clear: we must apply strict scrutiny to the challenged voting practice at issue here.

Stewart v Blackwell, 444 F 3d 843, 862 (CA 6 2006). There the Court of Appeals held that Ohio's differential use of voting technology allow more votes to be undercounted in some jurisdictions

violated Equal Protection, along with the Voting Rights Act.[1]

This Court, as well, has applied strict scrutiny to a statute that impairs the right to vote, under the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2. *Wilkins v Ann Arbor Clerk*, 385 Mich 670; 189 NW2d 423 (1971). In *Wilkins*, in declaring unconstitutional a statute establishing a rebuttable presumption that a college student's place of residency for voting is not the location of the institution, this Court said:

> It can be stated without exaggeration that the right to vote is one of the most precious, if not the most precious, of all our constitutional rights.
>
> * * *
>
> Thus, in determining whether [the statute] as it applies to students, violates the Equal Protection Clause, we must apply the compelling state interest test. If the state is unable to demonstrate a compelling interest, that part of the statute must fall.

Id at 681-82.

Some have argued that after the U.S. Supreme Court decision in *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992), a more relaxed Equal Protection standard applies to government measures that burden the right to vote. As discussed at length in *Stewart v Blackwell*, *supra*, that analysis is mistaken. *Burdick* involved a state law prohibition on write-in voting. Answering the dissent's argument that *Burdick* signals that more relaxed rational basis scrutiny should apply to voting restrictions, the Sixth Circuit panel majority in *Stewart v Blackwell* pointed out that *Burdick* involved not access to the vote, but a candidate's right to appear on the ballot. *Stewart*, *supra*, at 861. Moreover, in *Burdick* the Supreme Court viewed the prohibition on write-in votes as, "only a 'limited burden on voters' rights to make free choices and to associate politically

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[1] An application for rehearing *en banc* has been filed in that case, but it has not been acted upon at this time.

through the vote.'" *Stewart*, *supra*, at 861 (*quoting*, *Burdick,* 504 US at 438-39). The statute imposed only a minor restriction on the small complement of voters who had failed to timely place their candidate on the ballot. *Id.* Ultimately, "[t]he voter in *Burdick* had access to the ballot on equal terms with the rest of the electorate." *Stewart*, *supra*, at 861. Finally, the U.S. Court of Appeals noted that in *Bush v Gore*, *supra*, the Supreme Court applied a heightened standard of review to vote recount procedures without citing or addressing *Burdick*. *Stewart*, *supra*, at 862.[2]

B. Section 523 Manifestly Burdens The Fundamental Right To Vote.

Attorney General Frank Kelley was correct in opining that strict scrutiny must be applied to the photo identification requirement in Section 523, in Attorney General Opinion No. 6030 (January 29, 1997).[3] Section 523 significantly impairs the right to vote. It burdens that right by imposing a requirement as a condition for voting (the affidavit procedure notwithstanding, as discussed below),

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[2] *Bay County Democratic Party v Land*, 347 F Supp 2d 404 (ED Mich 2004), and *League of Women Voters v Blackwell*, 340 F Supp 2d 823 (ND Ohio 2004), do not call into question the foregoing law. Those decisions cited *Burdick* in discussing the voter identification requirement under the Help America Vote Act (HAVA), 42 USC § 15301 et seq. Apart from the fact that the analysis in those cases likely would be different after *Stewart v Blackwell*, which was decided later, the regulatory restrictions at issue in the *Bay County* and *League of Women Voters* cases had a very narrow and limited application, and did not significantly affect access to the ballot. Those cases dealt with implementation of the provisional ballot provisions of HAVA. At issue was HAVA's requirement that a first-time voter who has registered by mail without providing documentary proof of identity must present such proof in person at the polling place in order to vote for the first time. HAVA permits a wide range of documentation, including not only a driver's license, but also a copy of a utility bill, bank statement, government check, paycheck, or any government document containing the voter's name and address. Obviously, the voting regulation there at issue is a minimal and extremely limited restriction compared to the photo identification requirement. As was the case in *Burdick*, the HAVA requirement affects only a small subset of voters: first time voters, and only those who registered by mail without including identity documentation. Moreover, unlike Section 523, HAVA permits a wide range of identity documentation. The statute at issue here, by contrast, affects every single Michigan citizen who votes in person.

[3] Attorney General Opinion 6030 examined the photo identification requirement first introduced in 1996 PA 583.

and it classifies and differentially treats otherwise eligible voters based on their ability to meet the requirement. In *Bush v Gore* and *Stewart v Blackwell*, among other cases, courts found a constitutionally cognizable impairment of the right to vote in government actions that resulted in some voters having a better chance of having their vote counted than others. Here, the issue is not having a ballot counted, but gaining entry to the voting booth in the first place. Where access to the ballot box is impeded based on voting qualifications or requirements -- such as a poll tax, as in *Harper v Virginia Bd of Elections*, *supra*, or a durational residency requirement, as in *Dunn v Blumstein*, *supra*, or a property ownership requirement, as in *Kramer v Union Free School Dist No 15*, *supra* -- the most exacting level of scrutiny must be applied.

1. The Photo Identification Requirement Will Impose Costs And Burdens On A Significant Portion Of The Electorate.

Like the voting requirements in the foregoing cases, the photo identification requirement will affect a significant portion of the eligible electorate.[4] Secretary of State Terri Lynn Land estimates that 370,000 Michigan registered voters do not have photo identification. D. Bell, "Court Jumps Into Dispute Over Voter ID Checks" *Detroit Free Press* (April 27, 2006)(Exh A). This number amounts to 5.3 % of registered voters. The Michigan Director of Elections recently estimated that approximately 8 per cent of Michigan's voting age population does not have a Michigan driver's

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[4] Because this is an advisory opinion and the Court has framed the issue as a "facial" determination, there is, of course, no evidentiary record. *Amici* present evidence and information because the Court can and should take judicial notice of factual matters bearing on Section 523's constitutionality. Even in a facial review, courts cannot ignore the "real world" effects of the laws they examine. "Courts do not exist in a vacuum. They may take cognizance of facts and events surrounding the passage and purpose of legislation." *Wilkins v Ann Arbor Clerk*, *supra*, at 691 (taking into account "extrajudicial material" in evaluating the State's interest in a voting restriction affecting college and university students).

license or personal identification card.[5] Based on a 2004 voting age population of 7,541,000, as reported on the Secretary of State's website, eight percent of the voting age population translates into 603,280 potential voters.[6] This estimate falls in line with the national trend. *See, e.g.*, The Report of the Commission on Federal Election Reform ("Carter-Baker Commission"), *Building Confidence in U.S. Elections* (Sept. 2005), p. 73, n. 22 (estimating that twelve percent of voting-age Americans do not have driver's licenses)[7]; National Commission on Election Reform, *To Assure Pride and Confidence in the Electoral Process*, (2001)("Ford-Carter Report") at p. 32 (" . . . perhaps about 5 to 7% [of adults] do not possess a driver's license or other photo identification. They are disproportionately poor and urban . . . .")[8].

For the many registered voters who do not possess a drivers license or State identification card, obtaining the documentation for voting will be expensive and onerous.[9] The forms of photo identification required by Section 523 cost money to obtain. The fee for obtaining a Michigan personal identification card is $10.00. MCL § 28.292(12). The fee is waived if the applicant is blind, age 65 or older, or has had a driver's license revoked because of a disability, or for "other good cause." MCL § 28.292(14). The fee for obtaining a driver's license is $25.00; a renewal costs

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[5] Affidavit of Christopher M. Thomas in *Bay County Democratic Party v Land*, ¶ 36, p. 18 (copy attached as Exh B).

[6] *See*, http://www.michigan.gov/sos/0,1607,7-127-1583-29616--,00.html

[7] Available at: http://www.american.edu/ia/cfer/

[8] Available at: http://millercenter.virginia.edu/programs/natl_commissions/final_report.html

[9] Section 523 refers also to a "generally recognized picture identification card." However, there is no interpretive guidance as to what kind of identification will meet that definition. Given the uncertainty, on a facial challenge the only certain qualifying forms of photo identification are a State identification card and a driver's license.

$18.00. Further, these are recurring expenses. A Michigan identification card expires every four years. MCL § 28.292(13). Thus, unless covered by an exception, a Michigan voter without a drivers license will be required to pay the $10.00 fee every time he or she wishes to vote in a Presidential election.

The fee is not the only cost to the voter, or even the least burdensome. In order to obtain a state identification card, a person is required to present, in person at a Department of State branch office, at least three official documents establishing identity. At least one of the documents must be a certified, raised seal birth certificate, issued by a U.S. or Canadian governmental unit. A hospital birth certificate is not acceptable.[10] In order to procure an authenticated birth certificate from the State of Michigan Vital Records Office, a $29.00 fee must be paid ($7.00 for senior citizens). It takes five to six weeks to receive the document. A rush order costs an additional $10.00, and another $8.50 is charged for credit card payment. (Exh D). Local units of government also charge fees: Wayne County charges $22.00 for a birth certificate (Exh E); Macomb County charges $10.00 (Exh F); Oakland County charges $15.00 (Exh G); and the City of Detroit charges $17.00 (discounted to $5.00 for senior citizens). In Detroit, payment must be made by money order or certified check. (Exh H) Those born in other states must apply directly to those jurisdictions and pay any costs required.[11] The two identity documents that must be presented in addition to a birth certificate or

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[10] These requirements are set forth on Department of State Form, DE-40W. (Exh C) According to the Form, the following alternative primary forms of identification can be used: a photo U.S. military identification card or military dependent identification card; an out-of-state or Canadian driver license or photo identification; a U.S. or Canadian passport or for foreign-born residents, a Resident Alien Card/Permanent Resident Card, Certificate of U.S. Naturalization, Certificate of U.S. Citizenship, Employment Authorization Document, or a translated passport.

[11] A recent study by the Center on Budget and Policy Priorities suggests that approximately 5.7 percent of all U.S. born adults, and 8 percent of low income adults, do not have a birth certificate

acceptable equivalent may include: a marriage license or divorce decree, a foreign drivers license (translated), foreign vital records (which must be applied for from the Embassy representing the country of birth, with translation if necessary), and certain other records. Obtaining these required records inevitably entails additional expense and delay. Finally, some voters, especially elderly voters born in rural or impoverished areas, and citizens who were adopted or foster children, may not be able to obtain a birth certificate or the other required vital records.[12]

Second, a resident must appear in person at a Secretary of State branch office in order to obtain a driver's license or identification card. The time and expense involved will impose an additional burden on a citizen wishing to vote. For some, access to a branch office is difficult and time consuming. Those without their own means of transportation must incur the expense of public transit or find some other method of travel. Disabled voters will face additional hurdles in order to obtain identification. Distances may be great.[13] For many, the time required waiting and transacting business at a Secretary of State branch office (often excruciatingly long) must be taken during working hours, with resultant loss of pay (assuming they can obtain leave from their employer).

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or passport in their possession. Ku, Ross and Broaddus, "Survey Indicates Deficit Reduction Act Jeopardizes Medicaid Coverage For 3 to 5 Million U.S. Citizens" Center on Budget and Policy Priorities (available at: http://www.cbpp.org/1-26-06health.htm) Certain segments of the population, such as African Americans, senior citizens, and those living in rural areas, appear to be relatively less likely to have the documents.

[12] The study by the Center on Budget and Policy Priorities cited in the preceding footnote cites an earlier academic study estimating that perhaps one fifth of African Americans born in 1939-1940 lack birth certificates because they were born at home. "Survey Indicates Deficit Reduction Act Jeopardizes Medicaid Coverage For 3 to 5 Million U.S. Citizens" n 5.

[13] To take one example, Chippewa County, 1,561.1 square miles in size, has a single Secretary of State branch office, located in Sault Sainte Marie. A voter in Whitefish Point without a driver's license would have to find transportation for the approximately 70 mile trip each way (about an hour and a half trip) in order to obtain identification there.

Additional costs such as childcare may be incurred by some for whom applying at a branch office entails lengthy time and travel. In *Harman v Forssenius*, 380 US 528; 85 S Ct 1177; 14 L Ed 2d 50 (1965), the U.S. Supreme Court held that requiring voters to travel to a county courthouse to obtain qualification for voting imposed "a real obstacle" and unconstitutionally burdened the right to vote because it served no legitimate purpose.

The foregoing expenses and inconvenience may appear insignificant to some. But obtaining the required photo identification would impose a formidable burden on many who are economically disadvantaged or who, for any number of reasons, lack the means or opportunity to travel to the Secretary of State's office.[14] Under Section 523, the right to vote can be exercised only at a cost that is considerable, if not prohibitive, for many otherwise eligible voters. As discussed below, this cost is the equivalent of a poll tax, and it would disproportionately burden minorities and the poor. Section 523 would have broad and pervasive application, and it would impose significant burdens on a large sector of the voting population.

2. The Affidavit Provision Will Not Ameliorate The Burden Imposed By Section 523, And It Raises Due Process Concerns.

Section 523 contains a provision allowing for a conditional waiver of the photo identification requirement if a voter signs an affidavit. Section 523 states in relevant part:

> If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before

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[14] In enacting the National Voter Registration Act of 1993, 42 USC § 1973gg (the "Motor Voter" law), congress was acutely aware of the burden faced by voters when they are required to appear at a particular location in order to register or qualify to vote. The law seeks to alleviate this burden by mandating registration by mail and at a wide variety of sites. Section 523 is contrary to the intent and effect of the National Voter Registration Act of 1993 because it requires personal appearance at a limited (and sometimes inaccessible) location to obtain voting credentials.

> 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 under this subsection is subject to challenge as provided in section 727."[15]

It is reasonable to conclude that the affidavit provision will not significantly ameliorate the burden the photo identification requirement will impose on the right to vote. There is, of course, no guidance available from the Secretary of State on how the affidavit provision would be implemented. From the wording of the provision, it appears that the affidavit simply attests that the voter does not have the required form of identification. This alone will narrow the availability of the exception, since it will not aid voters who have the documents but who, for any number of reasons, did not bring them to the polling place. Such voters will be unable to sign the affidavit, and will have to retrieve the identification and return to the polling place if they wish to vote. The loss of time and the inconvenience will make voting more difficult for many. It can be expected that for voters who have already spent time waiting in long lines, or who have limited time away from their jobs for voting, exercising the franchise will become impracticable.

Further, a vote cast under the affidavit provision is "subject to challenge as provided in section 727." The challenge procedure will impose another roadblock that inevitably will discourage and dissuade many citizens from voting. Under Section 727(1) of the Election Code, an election inspector "s*hall* challenge an applicant 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." MCL § 168.727(1)(emphasis added). In addition to non-discretionary challenge by an inspector, designated challengers also may challenge a voter on these grounds. *Id.* While it is uncertain, it is very likely

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[15] The affidavit language was added in 1996 PA 583, effective March 31, 1997. It was included in the Section as reviewed by former Attorney General Kelley in Opinion No. 6930. The language was not changed in the 2005 amendment, 2005 PA 71.

that inspectors and challengers will take the position that not having photo identification is *per se* "good reason" to question the voter's qualification. Thus it should be expected that many if not all voters who take advantage of the affidavit procedure will have their right to vote challenged.

The challenged voter is taken aside and subjected to questioning under oath. MCL § 168.729.[16] The person is asked to swear or affirm that he or she will answer all questions truthfully. (Department of State Election Inspectors' Procedure Manual (June 2004), p. 12, Exh I). An applicant who refuses to take the oath will not be permitted to vote. After the applicant takes the oath, the precinct captain or a designated inspector must question the applicant, presumably regarding his or her identity and/or qualification to vote (citizenship, age and residency). It is unclear what kind of residency information the challenged person will have to provide in order to surmount the challenge. The inspector must determine at the time, based on the applicant's answers, whether the applicant is qualified to vote. MCL § 168.736 ("When an elector applying to vote shall not be challenged, or, having been challenged, if the answers to questions asked him while under oath as to his qualifications shall show that he is a qualified elector at that poll, he shall be permitted to vote. . . .").

The Election Code does not provide any right of appeal or other recourse if a voter is successfully challenged. Hence, the ability of challenged electors to cast a ballot on election day will

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[16] "If any person attempting to vote shall be challenged as unqualified, he shall be sworn by 1 of the inspectors of election to truthfully answer all questions asked him concerning his qualifications as an elector and any inspector or qualified elector at the poll may question said personas to such qualifications. If the answer to such questions show that said person is a qualified elector in that precinct, he shall be entitled to receive a ballot and vote. Should the answers show that said person is not a qualified elector at that poll, he shall not be entitled to receive a ballot and vote. If any one of his answers concerning a material matter shall not be true, he shall, upon conviction, be deemed guilty of perjury." MCL § 168.729

be subject solely to the discretion of the election inspectors who decide the challenges. The absence of appeal or recourse for a challenged elector raises serious due process concerns, given that the fundamental right to vote is at stake.[17] In *Wilkins v Ann Arbor Clerk*, this Court struck down a statute that gave each locality's registration clerk unrestricted discretion to determine whether a student had overcome a presumption of residency elsewhere, concluding that the statute violated due process because it was "overly broad and grants a constitutionally prohibited discretion to local clerks in Michigan." *Id* at 679. This Court said: "Courts have closely scrutinized any law that interferes with fundamental rights to insure that they are not unduly vague or give local officials unfettered discretion." *Id* at 676.

There can be little doubt that the challenge procedure will subject affidavit voters to significant delay and inconvenience. The Election Code specifically provides that, "[i]f at the time a person proposing to vote is challenged, there are several persons awaiting their turn to vote, said challenged person shall stand to one side until after unchallenged voters have had an opportunity to vote, when his case shall be taken up and disposed of." MCL § 168.728. In the crowded and sometimes chaotic polling sites endemic particularly to urban areas, many challenged voters

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[17] The challenge procedure differs in this important respect from the "provisional ballot" or "envelope ballot" procedure set forth elsewhere in the Election Code. The provisional ballot procedure described in MCL § 168.523a applies where an applicant's name is not on the voter list for the precinct at which he or she appears and the applicant does not present a receipt showing a new voter registration. The "envelope ballot" procedure also is used, pursuant to HAVA, 42 U.S.C. § 15483(b)(2)(A)(i), for a first time voter who registered by mail and does not produce required identification at the polling place. A voter who does not establish his or her eligibility to vote at the polling place may cast provisional or envelope ballot under MCL § 168.523a(5), which is not tabulated on election day but which is secured for verification after the election. The voter then has the opportunity to establish his or her qualification to vote within six days after the election, in which case the ballot will be counted. MCL § 168.523a(7). Provisional ballot voters, unlike voters who are successfully challenged, are given the opportunity to cure a deficiency in their voting credentials.

relegated to the end of the line by overworked election inspectors inevitably will abandon the effort. This inescapable effect can be expected to play into the hands of the coordinated vote suppression efforts that have plagued Michigan elections in the last several years. Section 523's affidavit procedure will be a hollow and worthless consolation for the legions of voters who will be subjected to the delay, inconvenience and embarrassment of a challenge. The constitutional electoral rights of those who are willing to endure the challenge procedure will be subject to the unanswerable discretion of poll workers.

In sum, despite the possibility that some voters without photo identification may have the opportunity to vote using the affidavit/challenge procedure, the practical reality is that for many such voters the burden, delay, embarrassment and inconvenience will be sufficient to deter them from voting. Strict scrutiny is mandated not only when the government imposes an absolute bar to voting, but also when the government places impediments and hurdles between the voter and the ballot box. This Court has said:

> [I]t is not mandatory that these plaintiffs demonstrate an absolute denial of the right to vote in order to require the state to show a compelling interest. Plaintiffs need only show that a burden has been placed on this precious right in order to avail themselves of the Equal Protection Clause. . . . The Equal Protection clause . . . guards against subtle restraints on the right to vote, as well as outright denial.

Wilkins v Ann Arbor Clerk, *supra*, at 684. Notwithstanding the affidavit provision, it is clear that Section 523 significantly and severely burdens the fundamental constitutional right to vote. Accordingly, the government must justify this regulation by showing that it is narrowly drawn to advance a compelling state interest

C. Section 523 Cannot Be Sustained Under Applicable Constitutional Scrutiny.

Under the strict scrutiny that should be applied in determining the facial constitutionality of Section 523, "a heavy burden of justification is on the State, and . . . the statute will be closely scrutinized in light of its asserted purposes." *Dunn v Blumstein*, *supra*, at 343. The State must demonstrate that Section 523 is "necessary to promote a compelling government interest." *Id* at 342; quoting *Shaplro v Thompson*, 394 US 618; *Kramer v Union Free School Dist No 15*, *supra*, at 627. Further, even if a compelling interest is shown, the State must use the least restrictive means to advance that interest:

> [T]he State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' [citations], and must be 'tailored' to serve their legitimate objectives. [citation] And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' [citation].

Dunn v Blumstein, *supra*, at 343 (*quoted in*, *Stewart v Blackwell*, at 859). There is no compelling interest justifying the significant burden Section 523 imposes on the right to vote, and Section 523 is far from the least restrictive means of accomplishing the purported rationale for its enactment.

1. There Is No Compelling Interest Justifying The Burden On Voting.

The government interest that has been suggested to justify the photo identification requirement is the prevention of voter fraud. See, *e.g.*, Attorney General Opinion No. 6930; Letter of Rep. Chris Ward Requesting Attorney General Opinion (July 13, 2005)(Exh J); Letter of Terri Lynn Land Requesting Attorney General Opinion (April 20, 2006)(Exh K). The prevention of voter fraud, as a general concept, certainly is a legitimate government objective. There is no evidence, however, that voter fraud is a significant problem in Michigan. In *Bay County Democratic Party*

v Land, *supra*, U.S. District Judge Lawson concluded that, "Michigan enjoys an election history that is relatively fraud-free." 347 F Supp 2d at 437 (*citing* Attorney General Opinion No. 6930). Judge Lawson further concluded: "The defendants have offered no evidence that circumstances have changed." *Id.* In fact, the overall incidence of voter fraud nationally appears to be extremely low. L. Minnite & D. Callahan, *Securing the Vote: An Analysis of Election Fraud* (Demos 2003), p. 17.[18] (The incidence of election fraud has not been studied systematically. A study to determine the frequency of ineligible persons attempting to vote in Ohio in the 2002 and 2004 elections found four instances out of 9,078,728 votes cast -- a rate of 0.00004%. *See*, Ohio & League of Women Voters Coalition, *Let the People Vote* (2005).)[19]

More important, blanket observations such as, "people are willing to commit fraud and disrupt the integrity of the election process" (Letter of Terri Lynn Land Requesting Attorney General Opinion (April 20, 2006), Exh K, p. 1), contribute little to a thoughtful analysis of the constitutionality of Section 523. There are many types of voter fraud, ranging from stuffing ballot boxes to destroying ballots to paying off voters. *See,* Minnite & Callahan, *Securing the Vote: An Analysis of Election Fraud*, *supra*, at pp. 14-17. The specific form of voter fraud that Section 523 attempts to address is polling place fraud, involving impersonation of a registered voter. By all accounts, that type of voter fraud is exceedingly rare. *See*, *Balancing Access and Integrity* (Century

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[18] Available at: http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf This is the most comprehensive study of election fraud currently available. Based on a review of news and legal databases and interviews with state election officials, the authors found that between 1992 and 2002, election fraud was "very rare" and a "minor problem" that "rarely affects election outcomes." *Id* at 4, 17. The study concludes that wrongful disenfranchisement of qualified voters is a "far bigger problem" than all forms of voter fraud. *Id* at 15.

[19] Available at: http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf

Foundation 2005), p. 53.[20] It stands to reason that in person voter impersonation should be virtually unheard of. Few people would attempt to impersonate a registered voter at the polling place. Such an endeavor entails high risks to the imposter, and would yield low rewards. The voter who falsely impersonates another person risks serious criminal prosecution.[21] An imposter must not only know the name, address and birthdate of the registered voter, but also that the voter's name is in the State Qualified Voter File (QVF), that the voter has not voted absentee or earlier in the day, and that inspectors, challengers or others will not recognize that he or she is not the actual registered voter. An imposter who tries to impersonate a deceased person or someone who has moved out of state takes the risk of detection if the registration list is up to date (which is more likely than ever with the QVF system). Conversely, the advantage of adding a single vote is negligible. An attempt to mount a scheme of widespread fraud of this type would involve a high risk of detection and questionable political results.

It should come as no surprise that no documented instances of in-person voter fraud have been identified.[22] In her letter to the Attorney General requesting an opinion as to the

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[20] Available at: http://www.tcf.org/list.asp?type=PB&pubid=542

[21] Michigan law makes it a four year felony to vote or attempt to vote by impersonating another, or by assuming a false name. MCL § 168.932a. Other statutes criminalize a wide range of election-related fraud, falsification and vote buying. *E.g.*, MCL §§ 168.499, 168.931, 168.932. Federal law makes it a five year felony to falsify eligibility to vote in a federal election. 42 USC § 1973i(c).

[22] In response to a request under the Michigan Freedom of Information Act for public records "relating to any incident known to the Department of State of a person impersonating or falsely or fraudulently claiming to be a person other than him or herself, for the purpose of casting a vote at a polling place in a Michigan election, for the period January 1, 1996 to present," the Secretary of State produced documents relating to one incident. (documents attached as Exh L) These documents appear to concern a person's attempt to vote under his father's name. The documents reflect that after detecting that the applicant's age did not correlate with the birth date on the

constitutionality of Section 523, Secretary of State Land cited "reports of fraudulent voter registrations in Wayne, Oakland, Ingham, and Eaton Counties." (Letter of Terri Lynn Land, *supra*, Exh K, p. 1) Obviously, a photo identification requirement will do nothing to remedy fraudulent *voter registrations*. (Moreover, the Election Code already contains provisions, some pursuant to HAVA, to prevent fraudulent registration. MCL §§ 168.499(1), 168.519, 168.521, 168.499(c),168.500c.) The Secretary of State commented in her letter, "I do not believe we should wait for rampant fraud to occur in Michigan before taking action to protect against it." (*Id*, p. 2) Whether or not one agrees, there is little doubt that impersonation of voters at the polls will not contribute to any anticipated wave of "rampant" fraud. Further, the argument for photo identification as a nostrum for diminished voter confidence in the integrity of the electoral system is not a constitutionally sufficient government interest. Such a rationale arguably could be used to justify any repressive government measure so long as it could be packaged as an anti-fraud device.

The photo identification requirement is a solution in search of a problem. Such a criticism normally does not take on constitutional dimensions – except where, as here, the measure impacts and restricts exercise of the fundamental constitutional right to vote. To pass constitutional muster, a constitutionally sufficient compelling government interest must be shown. Such an interest is conspicuously absent here.

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registration list, poll workers did not permit the person to vote. Apparently the city clerk discussed prosecution with the city attorney, but criminal charges were not brought. The documents have not been authenticated or investigated, but they do suggest that attempts at impersonation, infrequent as they are, can be dealt with adequately under existing law and practices.

2. Photo Identification Is Not The Least Restrictive Means Available.

Putting aside the absence of a justification, the Constitution requires that the government employ the least restrictive means of furthering its asserted interest. Michigan already has in place an effective regulatory framework for detecting and deterring election fraud. *See*, *Wilkins v Ann Arbor Clerk*, *supra*, at 685-687 (stating that existing statutes were adequate to preserve the purity of elections and prevent students from voting twice, making a presumption of residency unnecessary). As discussed above, severe criminal penalties attach to such activity. Michigan's sophisticated qualified voter file (QVF) preserves the integrity of elections. The identification requirements for new voters imposed under HAVA also reduce the likelihood of voter fraud. For these reasons and others, in the face of reported concern about fraudulent voter registrations in the 2004 election, the Secretary of State commented through her spokesperson: "We have a number of checks and balances inherent in the process to prevent 'fake people' from voting. . .. We do believe the safeguards in place will protect the integrity of the election." (*quoted in*, C. Selweski, "Flood of Voter Registrations Raises Specter of Election Fraud" *The Macomb Daily* (September 30, 2004)).[23] The sufficiency and efficacy of existing anti-fraud protections explains why in-person voter fraud is virtually a non-existent phenomenon.

The strict scrutiny considerations discussed above prompted the U.S. District Court for the Northern District of Georgia to enjoin implementation of a very similar photo identification requirement enacted by Georgia in 2005. *Common Cause v Billups*, 406 F. Supp. 2d 1326 (N D Ga 2005). Like Michigan, Georgia sought to require voters appearing at the polls to present a government-issued photo identification document. Based on an evidentiary record showing that the

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[23] Available at: http://www.macombdaily.com/stories/093004/loc_fraud001.shtml

identification requirement would impose a "severe" restriction on the right to vote, 406 F Supp 2d at 1365-66, and that in-person voter fraud was a minimal if not non-existent problem, *Id* at 1366, the court found a strong likelihood that the plaintiffs would prevail in their Equal Protection challenge. *Id.* The court found that the severe burden of the photo identification requirement would fall disproportionately on citizens who already are comparatively disenfranchised:

> 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.

Id at 1365-66. The federal court also noted in particular that while the State had severely impaired the right to vote out of a professed concern about a non-existent election fraud problem, the intrusive measure did not address the particular types of voter fraud that were documented in the record: voter registration and absentee voter fraud. *Id* at 1366. Hence, the court concluded, "[t]he Photo ID law thus does nothing to address the voter fraud issues that conceivably exist in Georgia." *Id* at 1361. And finally, the court took into consideration the fact that Georgia, like Michigan, allowed voters who did not have the required identification to vote, in that case by using a provisional ballot, but found that remedy to be constitutionally inadequate:

> Given the difficulty of obtaining a Photo ID discussed above, it is highly unlikely that many of the voters who lack Photo ID and who would vote via provisional ballots could obtain a Photo ID card within the forty-eight hour period. . . . The ability to vote a provisional ballot thus is an illusion.

Id at 1365. (It should be noted that Georgia's provisional ballot procedure afforded a much more effective means of restoring the franchise to voters unable to produce identification at the polls than the affidavit and challenge mechanism in Section 523, inasmuch as Michigan's challenge

determination is made immediately by poll workers and it is non-reviewable.) As discussed below, the federal court also found that the photo identification requirement effectively would function as an unconstitutional poll tax.

Following the above ruling in *Common Cause v Billups*, the Georgia General Assembly enacted an amendment making photo identification cards available free of charge. Two courts have now enjoined implementation of the amended photo identification provisions that include free identification. On July 12, 2006, the federal District Court for the Northern District of Georgia again enjoined the photo identification requirement, as amended.[24] A week earlier, a state trial court issued a temporary restraining order against implementation of the amended identification law, on grounds that, "the current statute unduly burdens the fundamental right to vote . . .." *Lake v Perdue*, (Civ. Action No. 2006CV119207, Fulton County Superior Ct.), Temporary Restraining Order, July 7, 2006 (attached as Exh N), p. 3. The Georgia Supreme Court has denied an emergency motion to stay the injunction. (Supreme Court of Georgia Docket Sheet Search Result, Exh O)

The photo identification requirement in Section 523 is a significant and unjustifiable impairment of the Michigan electorate's fundamental constitutional right to vote, which does not satisfy the strict scrutiny called for by Equal Protection.

D. Section 523 Does Not Satisfy Even More Relaxed Equal Protection Scrutiny.

The most demanding level of judicial scrutiny applies to Section 523; however, even if the Court concludes that a more relaxed level of scrutiny is appropriate, the photo identification requirement fails to pass constitutional muster. The standard articulated in *Burdick v Takushi*,

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[24] *Common Cause v Billups*, Civil Minute Sheet (July 12, 2006)(attached as Exh M). A written order and opinion has not yet issued.

supra, is as follows:

> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

Id at 434 (*quoting*, *Anderson v Celebrezze*, 460 US 780, 789 (1983)). The "State's important regulatory interests are generally sufficient" only when "reasonable, non-discriminatory" regulations are at issue; more pervasive or severe restrictions warrant strict scrutiny. *Burdick v Takushi*, *supra*, at 433. Given the utter absence of any evidence that in-person voter fraud exists to any cognizable degree -- and consequently the minimal government interest involved -- together with the likelihood that a photo identification requirement will deter many otherwise eligible voters from casting ballots, Section 523 is not sustainable even under a less demanding Equal Protection standard of review. The District Court came to the same conclusion in the comparable situation of Georgia's photo identification requirement, in *Common Cause v Billups*, *supra*, at 1366.

E. Section 523 Arbitrarily Treats Absentee Voters Differently.

On its face, Section 523 applies only to those voters who appear at a polling place to cast their ballot.[25] Those who vote using an absentee ballot are not required to present any identification. This arbitrary differential treatment violates Equal Protection.

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate

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[25] Section 523 plainly applies to in person voting at the polls and not to absentee voting. Section 523 states that a person must establish eligibility for a ballot by "presenting" an acceptable form of photo identification. The affidavit of a voter without identification must be signed "before an election inspector" and the resultant challenge under Section 727 takes place at a polling place.

treatment, value one person's vote over another.

Bush v Gore, *supra*, at 104-105. Section 523 will subject Michigan's electorate to disparate treatment by imposing a burden on those who vote in person that is not imposed on other voters. This differential treatment is not supportable. If the objective of Section 523 is to prevent voter fraud, there is no reason to conclude that voters who appear at the polls are more likely to vote fraudulently than those who file absentee ballots. To the contrary, while the threat of election fraud occurring by voter impersonation at the polls is negligible, all of the instances of alleged irregularities cited by proponents of the identification requirement relate to voter registration and absentee voting, to which the requirement does not even apply.[26] Section 523 does "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to vote. *Bush v Gore*, *supra*, at 105.

II. The Photo Identification Requirement Violates The Voting Qualifications Clause Of The Michigan Constitution.

The photo identification requirement in Section 523 independently violates the voting qualifications clause of the Michigan Constitution, Const 1963, art 2, § 1. The clause provides:

> Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes.

Section 523 impermissibly adds a requirement to those set forth in Const 1963, art 2, § 1.

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[26] We do not mean to imply that an identification requirement should be imposed on absentee voters. There is no evidence of any trend toward "rampant" election fraud, and nothing suggests that the very few and isolated cases of improper activity cannot be dealt with under the existing regulatory framework.

In *UAW v Secretary of State*, 387 Mich 506; 198 NW2d 385 (1972), this Court considered whether a statute automatically disqualifying inactive voters was in conformity with the Constitution's voting qualifications clause, and held that it was not. Citing by analogy to the federal Equal Protection case law discussed above, the Court held that the State must demonstrate a compelling interest in order to augment the Constitution's voting qualifications. This Court said:

> The right to vote has always received a preferred place in our constitutional system. The importance of this right can hardly be overemphasized. It is the basic protection that we have in insuring that our government will truly be representative of all of its citizens.

UAW v Secretary of State, *supra*, at 514. Indeed, the Court said, "[a]ny burden, however small, will not be permitted unless there is demonstrated a compelling state interest." *Id* at 516.[27] The government argued that disqualifying inactive voters was within the Legislature's powers under Const 1963, art 2, § 4, which authorizes the enactment of "laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." As is the case here, in *UAW v Secretary of State* the asserted government interest was the prevention of voter fraud. *Id* at 517. The Court did not superficially accept this rationale, but rather demanded that the chosen means fit the asserted need precisely:

> [I]t is not sufficient to demonstrate a compelling interest. A statute that impinges on a preferred right in order to solve a legitimate and compelling governmental need must be precise in its regulation.

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[27] It cannot be argued that Section 523 is distinguishable because qualified electors wishing to vote can preserve their rights by obtaining identification, or by using the affidavit/challenge procedure. The statute in *UAW v Secretary of State* allowed electors to cure disqualification by applying to the clerk for reinstatement. *Id* at 512.

Id at 517. As discussed earlier, and as found by the federal court in *Common Cause v Billups*, *supra*, the means-end fit between photo identification and voter fraud is anything but precise. This Court came to the same conclusion, for much the same reasons, in *UAW v Secretary of State*. The Court inventoried the "comprehensive set of safeguards" already present in Michigan law to prevent fraudulent voting -- *including Section 523 prior to addition of the photo identification requirement*. *Id* at 518. The Court concluded that the then-existing statutory protections -- which have been expanded and strengthened in the three and a half decades since -- "might in themselves be sufficient to rebut defendant's assertions that [the challenged statute] is necessary to prevent fraud." *Id* at 519[28]

Given that Section 523 will deter many otherwise qualified electors from voting, and given that the specific form of voter fraud addressed by Section 523 is virtually non-existent, and given that Section 523 ignores voting practices that arguably provide an opportunity for fraud (absentee voting and registration), and given that Michigan law already provides strong deterrents to voter impersonation at the polls, there can be little doubt that Section 523 fails to meet the stringent test imposed under the Michigan Constitution's voter qualifications clause on any measure that adds requirements for exercising the franchise.

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[28] All but three of the Election Code provisions cited by the Court (MCL §§ 168.493, 168.509, and 168.513) are in effect today. The Code's protections against voter fraud have been significantly fortified since *UAW v Secretary of State*. For example, the HAVA provision in MCL § 168.509t(2) requires identifying documents for a person who has registered to vote by mail when they vote for the first time; MCL §§ 168.759, 168.761, and 168.932 impose strict limitations on the identity of persons who can be in possession of an absent voter ballot application or absentee ballot, or be present when an absent voter ballot is being voted; MCL § 168.759(8) makes it a misdemeanor to make a false statement on an absent voter ballot application, and forging a signature on such an application is a felony; MCL § 168.761 provides that making a false statement on an absent voter ballot return envelope is a misdemeanor and a knowingly false statement on an absent ballot return envelope by a person assisting an absent voter is a felony.

III. Section 523 Effectively Imposes an Unconstitutional Poll Tax.

Poll taxes violate the Twenty-Fourth Amendment to the U.S. Constitution, US Const XXIV amnd., § 1 (stating, "The right of citizens of the United States to vote in any [federal election] shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."), as well as Voting Rights Act, 42 USC § 1973h.[29] Poll taxes are unlawful because, "[v]oter qualifications have no relation to wealth . . .." *Harper v Virginia State Bd of Elections, supra*, at 666; *see also*, *Harman v Forssenius, supra* (striking down a requirement that those who do not pay a poll tax must file a certificate of residence). In addition to the unconstitutionality of a required fee as a poll tax, in *Harper* the Court said, "[w]e conclude that a State violates the *Equal Protection Clause of the Fourteenth Amendment* whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id* at 666.

While some might argue that the $10 or $25 fee to obtain Michigan photo identification is minimal, that simply is not the case for many low-income voters, and it ignores the significant attendant costs of obtaining identification discussed earlier. It should be noted that the $1.50 fee struck down as unconstitutional in *Harper v Virginia State Bd of Elections* in 1966 is equivalent to $8.79 in today's dollars. As the U. S. Supreme Court said in *Harper*, "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to

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[29] 42 USC § 1973h(a) states in pertinent part: "The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting."

be so burdened or conditioned." *Id* at 670.

The federal District Court in *Common Cause v Billups*, *supra*, found that Georgia's photo identification requirement violated the Twenty-Fourth Amendment because the fees and costs required for obtaining photo identification effectively amounted to a poll tax:

> Because, as a practical matter, most voters who do not possess other forms of Photo ID must obtain a Photo ID card to exercise their right to vote, even though those voters have no other need for a Photo ID card, requiring those voters to purchase a Photo ID card effectively places a cost on the right to vote. In that respect, the Photo ID requirement runs afoul of the *Twenty-fourth Amendment* for federal elections....

Common Cause v Billups, *supra*, at 406 F Supp 2d at 1369. The District Court specifically found that an exemption from the fee for indigent applicants did not ameliorate the unconstitutional effect of the identification requirement, because applicants would be unaware of the exemption, or they would be hesitant or embarrassed about invoking it, and because of the other attendant costs involved in obtaining the identification. *Id* at 1369-70.[30]

IV. Section 523 Will Have a Discriminatory Effect On Protected Groups In Violation of The Voting Rights Act.

The Court has confined the scope of its advisory opinion to the constitutionality of Section 523 under the Michigan and U.S. Constitutions. Nevertheless, the deleterious effects of Section 523 also warrant the Court's attention because they will violate the Section 2 of the Voting Rights Act (VRA), 42 USC § 1973(a). Section 523 will violate the VRA because it will, in many case, deny members of racial and ethnic minority groups access to the vote, and because it its negative impact on voting will fall disproportionately on racial and ethnic minorities, who already suffer impediments

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[30] While MCL § 28.292(14) provides for an exemption from the fee requirement for "other good cause," the Secretary of State's web site does not mention that exemption along with the other statutory exemptions listed, and no guidance is provided as to what constitutes good cause. (*See* Exh C)

to full political participation. Section 2 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; 114 S Ct 2581; 129 L Ed 2d 687 (1993)(Thomas, J., conc.) Section 2 is violated when, based on the totality of the circumstances, a protected class has "less opportunity" to participate in the electoral process. 42 USC § 1973(b). Here, not only will the photo identification requirement result in minority group members having relatively less opportunity for political participation, but it also will categorically prevent many such individuals from exercising political power through the vote. *See*, *Thornburg v Gingles*, 478 US 30, 45 n 10; 106 S Ct 2752; 92 L Ed 2d 25 (1986)(stating that, "Section 2 prohibits all forms of voting discrimination . . ..").

As discussed above, Section 523 would interfere with voting by the sizable population of otherwise qualified voters who either do not have the required identification documents or who will be deterred by the affidavit and challenge procedure. Empirical evidence strongly suggests that this affected population contains large numbers of low income, urban voters, and that it is comprised disproportionately of racial and ethnic minorities. There is empirical evidence that requiring voters to present a driver's license or other photo identification has a disproportionate impact on racial and language minorities. A June 2005 study of Wisconsin citizens concluded that the rate of driver's license possession among African Americans was half that for whites. John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin,* (June 2005) n. 15.[31] The disparity increased among younger drivers, where white adults aged 18-24 were three times as likely as African Americans in that age group to possess a driver's license. Only 22% of African American

[31] Available at: http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf

males in the 18-24 age bracket had a driver's license. *Id* at 3.

In preparation for a possible voter education initiative for implementation of a photo identification requirement in Georgia, the Georgia Secretary of State conducted a study of drivers license and state ID card holders. "Demographic Analysis Shows That Registered Voters Lacking a Driver's License or State-Issued Georgia ID Card Are Disproportionately Elderly and Minority" Georgia Secretary of State News Release (June 23, 2006).[32] The study found that 13.6% of all registered voters did not have one of these forms of identification. The study also found that African-American voters were, in general, more likely not to have the photo identification documents (17 % of African-American voters lacked ID, compared to 12% of white voters). Of African-American voters over age of 65, approximately one-third (33.2%) did not have photo identification. (In general, elderly voters were significantly more likely to lack photo identification --(22.8% among voters age 65 and older, compared to 13.6% overall).

Further, there is evidence that racial and ethnic minorities are less likely to obtain identity documents that require a trip to government offices where driver's licenses are issued. Census data demonstrate that African Americans and Latinos are more than three times more likely than whites to register to vote at a public assistance agency, and that whites are more likely than African Americans and Latinos to register when obtaining a driver's license. U.S. Census Bureau, Voting and Registration in the Election of November 2000, tbl. 14.[33]

As discussed above, the photo identification documentation required under Section 523 costs money to obtain. The financial burden imposed by the photo identification required under Section

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[32]Available at: http://www.sos.state.ga.us/pressrel/062306.htm.

[33] http: www. census. gov/population/ www/ socdemo/ voting/p20-542.html

523 will fall disproportionately on those with limited incomes. A disproportionate number of minorities are poor. The percentage of African American families with annual income below the poverty level is 25.19, compared with 7.53 per cent for whites. Comparatively larger percentages of Hispanics and Latinos (19.21%) and Native Americans (16.8%) fall below the poverty line. U.S. Census 2000.[34] Hence, the photo ID requirement is likely to exclude racial and language minorities in disproportionately greater numbers.

It is for this very reason that Congress considered and rejected inclusion of a photo identification requirement in HAVA. The decision to permit a more expansive choice of identification documents required of a smaller subset of voters (first-time voters who register by mail) was in large part prompted by concern regarding the disparate effects of more restrictive requirements on minority and low income voters.[35]

CONCLUSION

There are two salient points to be re-emphasized regarding the photo identification requirement of Section 523. The first point is that the requirement is a solution in search of a problem. If Michigan were experiencing a significant incidence of miscreants impersonating voters at the polls, arguably the photo identification requirement of Section 523 might make some sense, because the requirement addresses only that narrow species of electoral mischief. But Michigan is

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[34] U.S. Census 2000; www.census.gov

[35] *See, e.g.*, 148 Cong. Rec. S1227 (daily ed. Feb. 27, 2002) (statement of Sen. Landrieu, "History has shown that requiring photo identification or certain other documents most significantly impacts minority voters."); 148 Cong. Rec. S1224 (daily ed. Feb. 27, 2002); (statement of Sen. Schumer, "The intent of this legislation is to take people, particularly those who live in the corners of America who do not fly airplanes and use their credit cards all the time but rather people who may not have a driver's license, who may not have a utility bill, and allow them to vote, our most sacred right.")

not experiencing that form of voter fraud. In fact, there appear to be no documented cases of such misconduct in Michigan, and it is almost unheard of nationally. The photo identification requirement is completely unnecessary. The second point is that the photo identification requirement unquestionably will deter and hinder some qualified voters from exercising the franchise. The requirement would make voting substantially more difficult and more costly for some otherwise eligible electors. The injury to democracy produced by needlessly impeding voters is compounded by the fact that the suppressive effect will fall disproportionately on the poor, racial and ethnic minorities, and elderly and disabled voters. This combination of factors should doom Section 523 under the stringent judicial scrutiny mandated by the U.S. and Michigan Constitutions when a government impedes citizens from exercising the keystone right to vote.

Respectfully submitted,

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