FAIR ELECTIONS LEGAL NETWORK

Working to remove barriers to voting and improve election administration across the United States.

Testimony on Michigan HB 6066, HB 6067 & HB 6068 (December 1, 2016)

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My name is Jon Sherman, and I am Counsel with the Fair Elections Legal Network, a national non-partisan election reform organization. I submit this testimony in opposition to HB 6066, 6067 and 6068, which collectively implement a strict photo ID requirement for in-person voting in the State of Michigan. This law would violate the U.S. Constitution, the Voting Rights Act, and potentially provisions of the Michigan Constitution, and needlessly waste state resources.

Instead of recounting the same arguments that have been made in other testimony submitted to the House Elections Committee, I want to focus on a few points, including questions that were raised in yesterday's hearing on these three bills but met with inadequate and/or inaccurate responses.

First, enacting these bills would put Michigan even further outside the mainstream of election codes in the country. While thirty states currently have some form of in-person voter ID law in place, including Michigan, the list of acceptable IDs varies substantially from state to state.[1] Some states have expansive lists including both photo and non-photo forms of ID, with many of these states offering an alternative procedure to presenting ID at the polls. The remaining 20 states plus the District of Columbia have no voter ID law whatsoever or it is currently enjoined by the courts or not yet in force. Sixteen of the thirty voter ID states permit voters without ID to sign a personal identification affidavit instead of presenting ID, cast a provisional ballot which will be counted if the signature matches the registration database, or otherwise authorize alternative verification of the voter's identity. They include: Alaska, Connecticut, Delaware, Florida, Idaho, Hawaii, Louisiana, Michigan, Missouri, Montana, New Hampshire, Oklahoma, Rhode Island, South Dakota, Utah, and Washington. That leaves 14

[1] ALA. CODE § 17-9-30; ALASKA STAT. § 15.15.225; ARIZ. REV. STAT. § 16-579; COLO. REV. STAT. ANN. §§ 1-1-104(19.5)(a), 1-7-110; CONN. GEN. STAT. ANN. § 9-261; DEL. CODE ANN. tit. 15, § 4937; FLA. STAT. ANN. §101.043; GA. CODE ANN. § 21-2-417; HAW. REV. STAT. § 11-136; IDAHO CODE ANN. §§ 34-1106, 34-1113, 34-1114; IND. CODE. ANN. §§ 3-5-2-40.5, 3-11-8-25.1; KAN. STAT. ANN. §§ 25-2908, 25-1122, 8-1324; KY. REV. STAT. ANN. § 117.227; 31 KY. ADMIN. REGS. 4:010 (Sept. 2015); LA. REV. STAT. ANN. § 18:562; MICH. COMP. LAWS ANN. § 168.523; MISS. CODE ANN. § 23-15-563; MO. REV. STAT. § 115.427(13); MONT. CODE ANN. § 13-13-114; N.H. REV. STAT. ANN. § 659:13; OHIO REV. CODE ANN. § 3505.18; OKLA. STAT. ANN. tit. 26, § 7-114; R.I. GEN. LAWS § 17-19-24.2; S.C. CODE ANN. § 7-13-710; S.D. CODIFIED LAWS §§ 12-18-6.1, 6.2; TENN. CODE ANN. § 2-7-112; TEX. ELEC. CODE ANN. §§ 63.001, 63.0101; UTAH CODE ANN. §§ 20A-1-102, 20A-3-104; VA. CODE ANN. § 24.2-643; WASH. REV. CODE ANN. § 29A.40.160; WIS. STAT. §§ 5.02(6m), 6.79(2a).

"strict voter ID" states, states that will reject a ballot if the voter cannot present ID. Therefore, the overwhelming majority of the country – 36 states plus the District of Columbia – have much less restrictive in-person voting requirements than what these bills propose.

Second, the Supreme Court's 2008 decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), is not a license to pass any and all voter ID laws. That case only concerned a single type of legal challenge to a single state's law on a single factual record. That case concerned a challenge to strike down the Indiana voter ID law in full under the U.S. Constitution's Fourteenth Amendment. It did not include any other claim, including Voting Rights Act claims, which have now successfully blocked Texas and North Dakota's strict voter ID laws, poll tax claims which forced changes to Texas and Wisconsin's voter ID laws, or state constitutional claims which have been used to strike down voter ID laws in Pennsylvania, Arkansas and Missouri. *See Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. 2014); *Martin v. Kohls*, 2014 Ark. 427 (2014); *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006). Federal litigation over voter ID laws began but did not end with *Crawford*. Indiana's law was challenged in only one way and on a wholly undeveloped record. The Supreme Court noted that its decision was limited by the extremely thin factual record: "*[O]n the basis of the record that has been made in this litigation*, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." *Crawford*, 553 U.S. at 202 (emphasis added).

But every case is evaluated individually, and demographics and burdens vary from state to state. Subsequent litigation in Texas, North Carolina, North Dakota and on and on has shown significant and racially disparate burdens on the right to vote. *See Veasey v. Abbott*, 830 F.3d 216 (2016) (en banc); *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016) (disparate impact of photo ID law on minority voters militates in favor of intentional racial discrimination finding); *Brakebill v. Jaeger*, No. 1:16-cv-008, slip op. (D.N.D. Aug. 1, 2016) (preliminarily enjoining strict voter ID law as violation of Voting Rights Act). Even the conservative U.S. Court of Appeals for the Fifth Circuit ruling *en banc* found a racially disparate impact on black and Latino voters and a violation of the Voting Rights Act. *See Veasey v. Abbott*, 830 F.3d 216, 250-64 (2016) (en banc) (striking down Texas photo voter ID law as violation of Section 2 of Voting Rights Act and remanding to district court for determination on intentional racial discrimination claim); (citing an expert witness study which found "Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers to lack SB 14 ID"). Yesterday, the sponsor of this legislation, Committee Chair Rep. Lisa Posthumus Lyons, appeared to suggest that the courts are uniformly rubberstamping voter ID laws. That is wrong. After costly and time-consuming litigation, many strict voter ID laws have been struck down on legal claims and evidence different from what was advanced in *Crawford*, and these cases have succeeded before Republican- and Democratic-appointed federal judges.

Third, following on the last point, most judicial opinions in this field have found racial disparities in the rates at which eligible voters hold valid forms of photo ID they can use to vote. Even the state's expert witnesses are compelled to concede there is a racially disparate impact. *See Veasey*, 830 F.3d at 251 ("Even the study performed by the State's expert, which the district court found suffered from 'significant methodological oversights,' found that 4% of eligible

White voters lacked SB 14 ID, compared to 5.3% of eligible Black voters and 6.9% of eligible Hispanic voters."). In the federal case against the voter ID law in Wisconsin, a state with comparable demographics to Michigan, the district court found and the U.S. Court of Appeals in reversing did not dispute the expert studies' findings of a disproportionate impact on minority voters. *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd by* 768 F.3d 744 (7th Cir. 2014). The following are excerpts from the district court opinion in that case:

- Beatty Study: "Specifically, he found that data for the year 2012 showed that African American voters in Wisconsin were 1.7 times as likely as white voters to lack a matching driver's license or state ID and that Latino voters in Wisconsin were 2.6 times as likely as white voters to lack these forms of identification. Tr. 646–47, 658; LULAC Ex. 2. He also found that data for the year 2013 showed that African American voters in Wisconsin were 1.4 times as likely as white voters to lack a matching driver's license or state ID and that Latino voters were 2.3 times as likely as white voters to lack these forms of identification." 17 F. Supp. 3d at 871.
- Barreto Study: "Barreto found that while only 7.3% of eligible white voters lack a qualifying form of ID, 13.2% of eligible African American voters and 14.9% of eligible Latino voters lack a qualifying form of ID." *Id.* at 872.
- Burden Study: "Another reason why it will be more difficult for many Blacks and Latinos to obtain IDs is that Blacks and Latinos are more likely to have been born outside of Wisconsin than whites. Professor Burden identified survey results showing that for the 5-year period ending in 2011, 75% of white residents were born in Wisconsin, yet only 59% of Blacks and 43% of Latino residents were born in the state. LULAC Ex. 811 ¶ 60. As discussed in Section II.B, it generally takes more time and expense to obtain a birth certificate from outside one's state of residence than it does to obtain a birth certificate from within the state. See also id. Therefore, Blacks and Latinos who need to obtain a birth certificate are likely to find themselves facing a more daunting task than their white counterparts. Moreover, Latino 36 voters who speak primarily Spanish will face additional difficulties as they try to navigate a process that was designed to accommodate those who speak English." *Id.* at 876.

Michigan's state legislators are on notice that its proposed strict voter ID requirement will have a disparate racial impact, particularly on African-American and Latino voters in impoverished urban areas of Michigan. The law is vulnerable to the challenge of intentional racial discrimination which was recently successful in the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit struck down North Carolina's strict voter ID requirement, amongst other election law changes. *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016). This argument is buttressed by the legal standard, which requires courts to consider the factors outlined in the Supreme Court's landmark decision *Arlington Heights* for assessing a racial discrimination claim. These include: (1) "[t]he historical background of the [challenged] decision"; (2) "[t]he specific sequence of events leading up to the challenged decision"; (3) "[d]epartures from normal procedural sequence"; (4) the legislative history of the decision; and (5) of course, the disproportionate "impact of the official action—whether it bears more heavily on one race than another." *Village of Arlington Heights v. Metro. Hous. Dev.*

Corp., 429 U.S. 252, 266–67 (1977) (internal quotation marks omitted). By giving barely any notice of the November 30 hearing and rushing debate on the bill, the Committee has already "depart[ed] from normal procedural sequence" in passing a bill that will certainly "bear[ ] more heavily on one race than another." *Id.*

Fourth, it was noted at the November 30th hearing that by-excuse absentee voters will be exempt from this voter ID requirement, as proposed. The absentee voting excuses, *i.e.* the ways in which someone can cast a ballot without presenting voter ID, include: "**age 60 years old or older;** unable to vote without assistance at the polls; expecting to be out of town on election day; in jail awaiting arraignment or trial; unable to attend the polls due to religious reasons; and appointed to work as an election inspector in a precinct outside of your precinct of residence."[2] On the first excuse, passing this legislation would effectively exempt anyone aged 60 or over from the voter ID law, as long as they cast their ballot by mail. That will skew the electorate towards older Michigan voters while all younger voters will need to comply with the strict voter ID law. This disparate treatment may well violate the Twenty-Sixth Amendment to the U.S. Constitution, which forbids age discrimination in voting.

Fifth, the birth verification procedure in HB 6067, which is modeled on the procedure implemented by Wisconsin's Department of Transportation in response to federal litigation, should not be restricted to those voters for whom the cost is "prohibitive" but must include those voters who face reasonable impediments in obtaining this underlying proof of U.S. citizenship. Many black voters who were born in the Jim Crow South were born at home by midwife because they were denied admission to segregated hospitals; consequently they lack birth certificates. Often state vital records offices lack old birth certificates or these certificates have errors on them such as inverted names or ethnic versions of names before the name became Anglicized. A voter should be able to initiate this process for any reasonable impediment to acquiring a birth certificate. Wisconsin has one of the strictest voter ID laws in the country, which is still mired in federal litigation after five years. Currently a Wisconsin voter without valid ID need not even establish a reasonable impediment to initiate the birth verification procedure, and the voter is given a temporary receipt that can be used to vote. *See One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-324-jdp, 2016 WL 4059222, at *1-19 (W.D. Wis. July 29, 2016), *stay denied* (7th Cir. Aug. 22, 2016), *en banc reh'g denied* (7th Cir. Aug. 26, 2016) (en banc). There is absolutely no reason for Michigan to adopt an even more restrictive procedure than Wisconsin which has begrudgingly been forced to this point after years of litigation.

Sixth, HB 6066 should be amended to contain a reasonable impediment affidavit, not an indigency affidavit. Since "indigency" is not defined, a fact conceded by the bills' sponsor Committee Chair Rep. Lyons at the hearing, a voter will have no way of knowing whether they can sign such an affidavit under penalty of perjury. Without knowing the definition of "indigent," these voters will not know whether they are committing a crime or not by signing an affidavit. After successful litigation under the Voting Rights Act, both South Carolina and Texas were compelled or ordered to adopt a reasonable impediment affidavit as an alternative for voters

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[2] Michigan Department of State, Absentee Voting, *available at* http://www.michigan.gov/sos/0,4670,7-127-1633_8716_8728-21037--,00.html (emphasis added); *see* Mich. Comp. Laws § 168.758.

without a qualifying form of photo ID. South Carolina has not faced another legal challenge since the implementation of its reasonable impediment affidavit alternative. While Texas is still mired in litigation over its ID law, the interim relief awarded to the plaintiffs included a reasonable impediment affidavit option. Under this order, voters could cast a regular ballot if they represented under penalty of law that they faced a reasonable impediment in obtaining a valid voter ID. *See* S.C. CODE ANN. § 7-13-710; *Veasey v. Abbott*, No. 2:13-cv-00193 (Aug. 10, 2016) (order regarding interim plan for 2016 general election in Texas), *available at* http://www.campaignlegalcenter.org/sites/default/files/texas-id-order.pdf.

Seventh, at yesterday's hearing, a clerk appeared to testify that voter registration requires the presentation of a photo ID. That is absolutely false. The Michigan voter registration form is here: https://www.michigan.gov/documents/MIVoterRegistration_97046_7.pdf. According to federal law, if a first-time mail-in registrant puts down his/her correct Michigan driver's license or state ID number or – if the voter does not have a driver's license or state ID number – the last 4 digits of their Social Security Numbers, and that number is matched against the Department of State database or Social Security Administration database, then the registrant does not need to show any ID whatsoever to satisfy the federal Help America Vote Act identification requirement. If the voter registration applicant cannot be matched, then and only then does s/he need to submit or show "HAVA ID" at the time of registration or at the polls. However, the HAVA list includes both photo and non-photo forms of ID: "one of the following forms of identification when mailing this form to your county, city or township clerk: a COPY of a current and valid photo identification (such as a driver license or personal ID card) or a COPY of a paycheck stub, utility bill, bank statement, or a government document which lists your name and address." This federal requirement – as effected by Michigan state law – appears on the first page of the voter registration form. *See* 52 U.S.C. § 21083(b).

Eighth, contrary to assertions of the Committee Chair, there is no uniform photo ID requirement to buy a gun. *See* U.S. Dep't of Justice, Office of the Inspector General, Review of ATF's Project Gunrunner at 10 (Nov. 2010), http://www.justice.gov/oig/reports/ATF/e1101.pdf ("Individuals who buy guns from an unlicensed private seller in a 'secondary market venue' (such as gun shows, flea markets, and Internet sites) are exempt from the requirements of federal law to show identification . . . ."). Therefore, the Second Amendment right to possess a firearm is not universally conditioned on a photo ID requirement.

Ninth, local government photo ID cards should be added to the list of accepted voter IDs. This will allow low-income and minority voters more options to obtain a valid ID they can use to vote, and there is no valid reason to exclude local government-issued photo ID cards.

Thank you for your time and consideration of these comments.

Respectfully submitted,

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