



Via Facsimile and U.S. Mail

Christopher M. Thomas
Director, Bureau of Elections
Michigan Department of State
Treasury Building, 1st Floor
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Lansing, MI 48918

September 27, 2004

Dear Mr. Thomas:

Thank you very much for taking the time to talk with us on Tuesday in response to our letter of August 2, 2004 concerning Michigan's election administration and implementation of the Help America Vote Act ("HAVA"). We write to confirm the substance of our conversation and to ask you to reconsider two of our proposals in particular relating to provisional ballots. Specifically, we urge you to adopt directives (1) allowing voters who cast provisional ballots but do not provide identification at the polling place on election day to have their votes counted if they provide identification within six days after the election, and (2) requiring election officials to count the votes cast by provisional ballot in the wrong precincts for all offices for which the voter would have been eligible to vote had she voted in the correct precinct.

Voters who do not have accepted forms of identification on election day

In response to the concerns we raised regarding identification requirements for first-time voters who register by mail, you said that Michigan will not require identification from any voter who provides their driver's license number or their personal identification number (from a non-driver's state identification card) on their registration form. You explained that Michigan's Qualified Voter File system will automatically clear all such persons and will not flag their names for an identification check. You estimated that approximately 90% of eligible voters in Michigan possess driver's licenses. Pursuant to this system, you said that approximately 5,000 voters in Michigan were flagged to show identification as of June. You indicated that you expected the

numbers to increase by November given the substantial voter registration activity since June.

You said that your office is preparing a list of examples of documents that qualify as acceptable identification under HAVA, and you agreed to share that list with us when it is finished. We hope that you intend to notify registered voters in advance of the election if they have been flagged to provide identification at the polls (or afterward) and to send them the list you are preparing of approved forms of identification. Please let us know if that is the case.

We asked whether you would consider exempting from the identification requirements first-time voters who register by mail and provide either the last four digits of their Social Security Numbers or their full Social Security Numbers, as contemplated by Section 303(b)(3) of HAVA. This should be relatively easy to accomplish since the new mail-in registration form gives registrants the option to provide those numbers. You rejected our proposal, indicating that Michigan will not exempt those voters until the federal government develops a workable system for matching those numbers. We ask you to reconsider our proposal given that HAVA intended to exempt all such individuals from its identification requirements. *See* 42 U.S.C. § 15483(b)(3).

You said that Michigan will require identification from all first-time voters who register by mail and do not provide a driver's license or state identification number, as well as from all voters whose names do not appear on the voter registration lists. If a covered voter does not have an approved form of identification, you said that the voter will be allowed to vote on a provisional ballot, but the provisional ballot *will not be counted*. We asked whether the pollworkers will inform each such voter orally at the time they are offered a provisional ballot that their votes will not be counted because they did not provide identification. You said you would consider instructing the pollworkers to so inform prospective voters. Please let us know whether you will notify such voters, both orally and in writing, as to how you intend to treat their ballots.

We also asked whether you would consider developing some mechanism to count those provisional ballots other than simply discarding them wholesale. You rejected our proposals to count the provisional ballots cast by such voters if they sign affidavits, under penalty of perjury, affirming their identities and addresses, or if their signatures can be matched. These procedures have been employed successfully by a number of states in a variety of election contexts.

We were pleased, however, to hear that you were considering a new directive that would allow such voters to provide identification up to six days after the election in order to have their provisional ballots counted. We strongly urge you to adopt that directive as soon as possible. If you adopt such a policy, the notice provided to voters should be changed to clearly indicate that their ballots will not be counted unless they submit the required identification to a city or township clerk within six days.

If you do not adopt that directive, we urge you to develop some other procedure for determining which of those individuals are eligible to vote and for counting the provisional ballots cast by those who are eligible. As they currently stand, the rules the Department of Elections has promulgated for rejecting (instead of counting) provisional ballots cast by persons who do not provide identification at the polling place on election day do not comply with HAVA's requirements of "fail-safe voting."

Although HAVA imposes certain identification requirements on first-time voters who register by mail, HAVA explicitly includes a "fail-safe voting" provision to ensure that voters who cannot meet those requirements are not thereby disenfranchised. Thus, HAVA requires states to permit first-time voters who register by mail but cannot provide the specified identification to cast provisional ballots. 42 U.S.C. § 15483(b)(2)(B). HAVA then obligates states to transmit the provisional ballots to appropriate election officials for verification, *id.* § 15482(a)(3), and to "count[] as a vote in that election" the provisional ballot cast by any individual who is eligible under state law to vote, *id.* § 15482(a)(3).

A blanket refusal to count all provisional ballots cast by first-time voters who register by mail and do not provide identification at the polling place would render superfluous these "fail-safe voting" mechanisms in HAVA. Under the procedure outlined in the June 16 directive, the criterion making an individual eligible to receive a provisional ballot is the very criterion used to deny his or her vote. HAVA does not sanction the creation of such meaningless provisional ballots. On the other hand, the procedures we recommend comply with both federal and Michigan law,¹ ensuring that no eligible voter is unnecessarily disenfranchised, while protecting against voter fraud. Michigan has never before found it necessary to use identification requirements as an *absolute prerequisite* to voting by any group, *cf.* Mich. Op. Att'y Gen. No. 6930, 1997 WL 37560 (Jan. 29, 1997), including first-time voters who register by mail, and it should not do so now. Accordingly, we strongly urge you to adopt our proposals relating to the counting of provisional ballots cast by persons who do not provide identification on election day.

Voters who appear in the wrong precincts

In response to the concerns we raised regarding persons who appear to vote in the wrong precincts, you said that the pollworkers in each precinct will have access to computerized information indicating the correct precincts for those voters and will direct those persons to the correct precincts.

If a voter would still like to vote in the precinct, you indicated that the voter will be offered a provisional ballot, as required by HAVA. You further stated that Michigan will *not count* any provisional ballots cast in the wrong precincts. You said that the

¹ Michigan's Election Law does not address first-time voters who register by mail. Michigan law does, however, address identification requirements for persons who cast provisional ballots because their names do not appear on the voter registration list. See M.C.L. § 168.813. The proposal you are considering is consistent with this provision.

pollworkers would inform those voters at the time they are given provisional ballots that their ballots will not be counted.

We asked whether you would consider counting as validly cast the votes for all offices for which the voter would have been eligible to vote had he or she voted in the correct precinct. You rejected our proposal, indicating that you thought that such a rule was beyond your authority and would require legislative action. We disagree with your position and ask you to reconsider our proposal.

Michigan's Election Law expressly charges the Secretary of State to "issue instructions and promulgate rules," consistent with Michigan law, to govern "the conduct of elections," M.C.L. § 168.31(a), and to "advise and direct local election officials as to the proper methods of conducting elections," *id.* § 168.31(b). That duty comprises a duty to ensure compliance with the requirements of both federal and Michigan law. *See id.* § 168.509n. The Director of Elections is "vested with the powers" of the Secretary of State "with respect to the supervision and administration of the election laws." *Id.* § 168.32. Pursuant to that authority and duty, the Director of Elections has consistently issued directives setting forth standards for counting ballots, including provisional ballots.

Nothing in Michigan's Election Law prevents the Director of Elections (or the Secretary of State) from issuing a directive requiring election officials to tabulate the votes cast on provisional ballots issued in the wrong precincts for all the races for which the voter would have been eligible to vote. To the contrary, Michigan law clearly contemplates that election officials (1) will issue provisional ballots to individuals who seek to vote in the wrong precincts, and (2) will verify and *count* those provisional ballots, rather than discard all such ballots from the outset.

Section 168.523a(1)(b) of Michigan's law provides that, after an election inspector informs an individual who appears to vote in the wrong polling place of the appropriate polling place, "[i]f the individual refuses to go to the appropriate polling place, the election inspector shall issue the individual a provisional ballot that shall be processed according to subsection (5)." Subsection (5) provides that if "the individual is not in the correct precinct, ... the individual shall be issued a provisional ballot that is not tabulated on election day but is *secured for verification after the election.*" M.C.L. § 168.523a(5) (emphasis added). Subsection (7) further provides that, "[f]or a provisional ballot issued under subsection (5), the election inspector shall provide the voter with a notice that the voter's information will be verified by the clerk of the jurisdiction within 6 days after the election *to determine whether the ballot will be tabulated*" *Id.* § 168.523a(5) (emphasis added).

These provisions clearly require election officials to "verify" provisional ballots cast in the wrong precincts after the election and to make a "determination," within six days, as to whether and how to "tabulate" each of those ballots. These provisions would make no sense if all provisional ballots cast in the wrong precincts could simply be not counted at all. There would be nothing further for the election official to "verify" after the determination – made prior to, and as a precondition of, the issuance of the

provisional ballot – that the voter was in the wrong polling place. On the other hand, the provisions of Michigan’s Election Law are consistent with the rule we propose; after election day, officials would “verify” which races on the provisional ballot cast the voter was eligible to vote in, and would “tabulate” the votes for those races.

HAVA similarly requires that states adopt some procedure for actually *counting* provisional ballots rather than discarding them. HAVA requires each state to permit an individual whose name does not appear on the “official list of eligible voters for the polling place” or whom a state official claims is ineligible to vote for any reason “to cast a provisional ballot” if the individual declares that he or she is registered to vote in the jurisdiction and is eligible to vote in an election for federal office. 42 U.S.C. § 15482(a). Once a voter casts a provisional ballot, HAVA requires election officials to “transmit” the ballot or the voter information contained in the accompanying written affirmation “to an appropriate State or local election official for prompt verification.” *Id.* § 15482(a)(3). If the election official determines that “the individual is eligible under State law to vote,” HAVA provides that the individual’s provisional ballot “*shall be counted as a vote* in that election.” *Id.* § 15482(a)(4) (emphasis added). In other words, eligibility to vote under state law is the only permissible precondition for a provisional ballot to be counted. Under Michigan law, a properly registered citizen is eligible to vote in the “township, city, or village in which he or she resides.” *See* M.C.L. § 168.492 (setting forth comprehensive list of conditions for eligibility to vote). There is no support in Michigan law for a requirement that would disenfranchise a voter who casts a provisional ballot in the wrong precinct. HAVA therefore requires that Michigan develop some procedure for determining in which races the individual is eligible to vote and to count the votes cast in those races.

The procedure set forth in the June 16 directive does not comply with these requirements of federal and Michigan law. By directing *in advance* that all provisional ballots cast in the wrong precincts will not be counted for *any* races, the directive turns the provisional ballots distributed to those voters into sham ballots. If all persons who vote in the wrong precincts presumptively will not have their votes counted, there is simply no reason to allow them to cast provisional ballots. Such a result is contrary to HAVA, which expressly requires provisional ballots as a “fail-safe voting” mechanism and contemplates that such ballots will be verified and counted. Put another way, HAVA’s mandate that eligible voters who do not appear on a polling place’s list of registered voters be given provisional ballots would be rendered meaningless and certainly would not serve as “fail-safe” voting if those same ballots are not counted at all.

In light of the requirements of Michigan and federal law, we ask that you reconsider our proposal to count the votes cast by provisional ballot for all offices for which the voter would have been eligible to vote. This proposal not only vindicates HAVA’s purpose to ensure “fail-safe voting” for all eligible voters, but it also would be reasonably easy for election officials to implement, given the sophistication of Michigan’s Qualified Voter File system. Indeed, other jurisdictions that use less sophisticated technologies for managing their voter lists – including, for example, New

Mexico – have adopted a similar counting rule to ensure that no eligible voter is disenfranchised due to a technicality.

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In addition to our general concern over the unnecessary disenfranchisement of eligible voters, we are especially concerned that the precinct and identification requirements set forth in your June 16th directive will disproportionately burden minority voters. As you are aware, the legislative redistricting of 2002 resulted in the redrawing of many precinct lines. We have commissioned an analysis of census and redistricting data that demonstrates that 60% of black voting-age individuals in Michigan had their precinct lines redrawn as a result of the 2002 redistricting, while only 40% of white voters were similarly affected. An inviolate precinct-based requirement, then, carries a considerable risk of disproportionately disenfranchising black voters. Furthermore, your current policy of rejecting the votes of all first-time voters who register by mail and do not provide identification at the polling place also carries the risk of disproportionately affecting low-income and minority voters, as well as domestic violence victims, persons with disabilities, and the elderly, all of whom are much less likely than other voters to carry approved forms of identification. Again, we urge you not to nullify the protections in both Michigan law and HAVA for eligible voters who arrive in the wrong precincts or do not have specified forms of identification.

As we informed you on Tuesday, we have been working with a broad coalition of civic groups, voter protection groups, individuals, and attorneys on these issues. We and our coalition partners would very much like to cooperate with you to achieve an acceptable resolution of the concerns raised in this letter rather than pursuing other means of protecting the voting rights of Michigan citizens, such as litigation. In that spirit, we ask that you inform us by the morning of October 1 whether you intend to issue directives (1) requiring election officials to count the votes on provisional ballots cast in the wrong precincts for all offices for which the voter would have been eligible to vote had he or she voted in the correct precinct; and (2) allowing voters who cast provisional ballots but do not provide identification at the polling place to have their votes counted if they show identification within six days after the election. In addition, we request that you provide us with any updated directives sent to clerks since your June 16 directive, as well as any pollworker training materials. If you have any questions, please feel free to contact us. Thank you, and we look forward to hearing from you soon.

Sincerely,

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