ALAN WILSON
ATTORNEY GENERAL

March 3, 2011

The Honorable Alan D. Clemmons
South Carolina House of Representatives
522B Blatt Building
Columbia, SC 29201

Dear Representative Clemmons:

We received your inquiry regarding the constitutionality of a provision which is part of the Senate-passed version of the "Voter ID" Bill pending in the General Assembly. The Voter ID legislation requires that voters present photo identification before voting. However, we understand your concern is with a proposed "grandfather clause" provision which would, in essence, exempt those over age 65 from the requirement of showing photo identification.[1] In other words, only those born after January 2, 1947 would be required to present photo identification before voting. You have asked whether it is constitutionally valid to make an exception for voters over a certain age, while requiring all other voters to comply with the provisions of the Act. We believe that this "grandfather" provision of the Voter ID Bill would raise serious constitutional concerns under the Equal Protection Clause of the Fourteenth Amendment.

Law / Analysis

It is well established that the right to vote is a fundamental right. As the United States Supreme Court has repeatedly emphasized, it is beyond dispute that "voting is of the most fundamental significance under our constitutional structure." Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). In Romer v. Evans, 517 U.S. 620, 650 (1996), the Court stated that the right to vote is a "fundamental political right . . . deprivation of which triggers strict scrutiny." See also, Greidinger v. Davis, 988 F.2d 1344, 1348-9 (4th Cir. 1993) ["[n]o 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

[1] Section 13 reads as follows: "Section 7-13-715. After January 2, 2010, an elector who was born on or before January 2, 1947, is exempt from the identification requirements in Section 7-13-710(A). These individuals must show either a valid South Carolina driver's license or other form of identification containing a photograph issued by the Department of Motor Vehicles, or the written notification of registration provided for by Sections 7-5-125 and 7-5-180, if the notification has been signed by the elector."

good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."]

The United States Supreme Court has held that an Indiana statute, requiring voters to present photo identification before voting, is constitutional. In Crawford v. Marion County Election Board, 553 U.S. 181 (2008), the Court upheld the Indiana statute under a flexible balancing analysis. The Court noted that "[t]he State has identified several state interests that arguably justify the burdens" that the Indiana Voter ID "imposes on voters and potential voters." Such interests included "deterring and detecting voter fraud." Moreover, the State argued that it possessed "a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient." Further, the State contended that enactment of the legislation addressed the problem that Indiana's voter registration rolls include "a large number of names of persons who are either deceased or no longer live in Indiana." Finally, the State urged that the Voter ID law safeguarded voter confidence. Crawford, 553 U.S. at 191.

In terms of the burdens imposed by the Indiana Voter ID statute, the Court acknowledged that should it analyze the constitutionality under the strict scrutiny requirement imposed by decisions such as Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the fact "that most voters already possess a valid driver's license or some form of acceptable identification, would not save the statute . . . ." However, according to the lead opinion of the Court, Harper's strict scrutiny analysis was inapplicable for purposes of the Indiana law. Thus, according to the Court, the burden of photographic identification "surely does not qualify as a substantial burden on the right to vote . . . ." Crawford, 553 U.S. at 198.

Accordingly, the Crawford Court concluded that the Indiana statute was facially valid. In the view of the lead opinion,

> . . . on 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. See, Storer v. Brown, 415 U.S. 724, 738 . . . (1974) . . . .

Id, at 198. In sum, Crawford found that

> [w]hen we consider only the statute's broad application to all Indiana voters we conclude that it " imposes only a limited burden on voters' rights." . . . The " 'precise interests'" advanced by the State are therefore sufficient to defeat petitioners' facial challenge . . .

Id, at 202 - 03. Other cases are in accord with Crawford's analysis. See, Common Cause / Georgia, League of Women Voters, Inc. v. Billups, 554 F.3d 1340 (11th Cir. 2009) [District Court did not abuse its discretion when it declined to permanently enjoin Georgia Voter ID law; statute did not impose on Georgia voters an undue or significant burden and Georgia's interest in deterring voter

fraud was sufficiently weighty to justify the burden imposed]; League of Women Voters v. Rokita, 929 N.E.2d 758 (Ind. 2010) [Indiana statute was valid under state constitution].

Thus, based upon the foregoing authorities, we conclude that the South Carolina Photo ID legislation is facially constitutional.

The "grandfather provision" referenced in your letter, however is a different matter. We believe a court would likely conclude that such provision violates the Equal Protection Clause of the 14th Amendment.

Certain "grandfather clauses" have been invalidated, as unconstitutional, depending upon the particular situation at issue. In Sklar v. Byrne, 727 F.2d 633, 639 (7th Cir. 1984), the Seventh Circuit summarized the general analysis determinating the validity of such "grandfather" provisions:

> [g]randfather provisions always grant preferences to a special group, and newcomers or those who never arrive in the favored area rarely share the benefits. We recognize that such clauses create a risk of political exploitation working to the disadvantage of unfavored classes, and courts must certainly scrutinize grandfather clauses to learn whether they are masks for exploitation or invidious discrimination. E.g., Guinn v. United States, 238 U.S. 347, 364-65, 35 S.Ct. 926, 931, 59 L.Ed. 1340 (1915) (grandfather clause used to violate fifteenth amendment voting rights). See Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 641 F.2d 1087, 1095-96 (3rd Cir.1981) (dangers of grandfather clauses).

Moreover, the Court in Sklar noted that "[w]here plaintiffs can show that a grandfather provision impinges on a fundamental personal right (other than through its indirect effects on those who travel), or that the provision is a substitute for a suspect form of discrimination, courts should apply the compelling internet standard." Id.

As noted above, voting rights clearly fall into the category of fundamental rights. Thus, to make the statute's applicability rest upon a person's date of birth will present serious constitutional issues. Long ago, the United States Court in Guinn v. United States, 238 U.S. 347 (1915) concluded that the Oklahoma suffrage amendment which imposed a literacy test as a condition to voting to these "persons [who were] not, on or prior to January 1, 1866, entitled to vote under some form of government . . ." violated the 15th Amendment to the United States Constitution. Thus, the "grandfather" clause in that case there was invalidated as being in conflict with the federal Constitution.

While discrimination on the basis of age has generally been treated under the Equal Protection Clause by the United States Supreme Court as only requiring a rational basis in order to be valid, see Massachusetts v. Murgia, 427 U.S. 307 (1976), we think, in this instance, that because voting rights are involved, a court will likely impose a much higher requirement for justification of the

amendment in order for it to be upheld. In any event, we believe the grandfather provision could be deemed by a court to be arbitrary because it does not further the interest of the statute – the detection and deterrence of voter fraud.

Accordingly, in our opinion, the "grandfather clause" amendment in question would be subject to serious constitutional challenge under the Equal Protection Clause. Here, the right to vote, a fundamental right, is involved. In short, this amendment is not the usual "grandfather clause," but is one which imposes different requirements, based upon what appears to be an arbitrary distinction. Thus, in order for the amendment to be upheld, a court would likely require the demonstration of a substantial justification to validate the facially discriminatory amendment. Of course, only a court, not an opinion of this Office, may adjudge the constitutionality of the legislative amendment. However, in our opinion, the amendment would be subject to a serious constitutional challenge under the Equal Protection Clause of the 14th Amendment.

Conclusion

In our opinion, a court would likely conclude that the South Carolina "Photo ID" legislation is facially constitutional. The State's interest in deterring and detecting voter fraud, election modernization, and other interests articulated by the Court in Crawford are "sufficiently weighty" to override the relatively slight burden imposed upon voters by the legislation. Thus, in our view, the legislation is facially valid.

On the other hand, the "grandfather clause," contained in Section 13 of the Senate passed version of the Photo ID Bill, is constitutionally suspect. We believe the unequal applicability of the legislation, dependent upon a person's date of birth, would be subject to serious constitutional challenge. Because the clear purpose of the legislation is to detect and deter voter fraud, this provision exempting the broad category of persons born before January 2, 1947 would not promote such interest and would likely be deemed by a court to be arbitrary, and thus unconstitutional.

Sincerely,

Robert D. Cook
Deputy Attorney General