



ALAN WILSON  
ATTORNEY GENERAL

August 16, 2011

Marci Andino, Executive Director  
South Carolina Election Commission  
PO Box 5987  
Columbia, South Carolina 29250

Dear Ms. Andino:

You seek our opinion concerning a provision in the recently enacted legislation, H.3003, or commonly known as the "Photo ID" or "Voter ID" legislation. More specifically, you state:

I am writing to request guidance on the meaning of "reasonable impediment". Section 5(D)(1)(b) of the bill states:

If an elector does not produce a valid and current photograph identification because the elector suffers from a reasonable impediment that prevents the elector from obtaining photograph identification, he may complete an affidavit under the penalty of perjury at the polling place and affirm that the elector; (i) is the same individual who personally appeared at the polling place; (ii) cast the provisional ballot on election day; and (iii) the elector suffers from a reasonable impediment that prevents him from obtaining photograph identification. The elector also shall list the impediment, unless otherwise prohibited by state or federal law. Upon completion of the affidavit, the elector may cast a provisional ballot. The affidavit must be submitted with the provisional ballot envelope and be filed with the county board of registration and elections before certification of the election by the county board of canvassers.

If the Department of Justice does not request additional information and time to review the information, preclearance could be granted before the end of August. Since this legislation is effective upon preclearance, elections held on August 30 as well as in early September could be impacted because we would not have time to educate voters on the change. Would voters who participate in these elections suffer from a reasonable impediment because of the short timeframe between potential preclearance and the date of the election?

#### **Law / Analysis**

H.3003, or the "Voter ID" Bill, is designed to "protect against in-person voter fraud ... ." See, *Democratic Party of Georgia v. Perdue*, 288 Ga. 720, 707 S.E.2d 67, 69 (2011). The United States Supreme Court, in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), has upheld as

facially constitutional Indiana's Voter ID law. Like similar such provisions enacted in other states, the South Carolina legislation requires voters to produce a valid and current photo ID in order to be able to vote. The object of the requirement is to insure that the person presenting himself to vote is the elector on the poll list. Such ID required to be able to vote may be in the form either of a South Carolina driver's license; other form of identification containing a photograph issued by the Department of Motor Vehicles; a passport; a military identification containing a photograph issued by the federal government; or a South Carolina voter registration card containing a photograph of the voter pursuant to Section 7-5-675. The latter card is issued free of charge by the South Carolina Election Commission in an effort to insure that the 178,000 registered voters who have no driver's license or State-issued Photo ID may be able to vote. See Section 5 of H.3003.

The South Carolina Voter ID law also makes provisions to insure that those who are unable to obtain a Photo ID of any kind may still be able to vote. If the voter cannot produce such an ID, Subsection (D)(1)(b) of Section 5, which is the source of your inquiry, provides as follows:

- (b) If an elector does not produce a valid and current photograph identification because the elector *suffers from a reasonable impediment that prevents the elector from obtaining photographic identification*, he may complete an affidavit under the penalty of perjury at the polling place and affirm that the elector: (i) is the same individual who personally appeared at the polling place; (ii) cast the provisional ballot on election day; and (iii) the elector suffers from *a reasonable impediment that prevents him from obtaining photographic identification*. The elector shall list the impediment unless otherwise prohibited by state or federal law. Upon completion of the affidavit, the elector may cast a provisional ballot. The affidavit must be submitted with the provisional ballot envelope and be filed with the county board of registration and elections before certification of the election by the board of county board of canvassers.

(emphasis added).

Subsection D(2) of Section 5 further states:

- (2) If the county board of registration and elections determines that the voter was challenged only for the inability to proof of identification and the required affidavit is submitted, the county board of registration and elections shall find that the provisional ballot is valid unless the board has grounds to believe the affidavit is false.

Subsection (E) also explains:

[t]he purpose of the identification required pursuant to subsection (A) is to confirm the person presenting himself to vote is the elector on the poll list. Any address listed on the identification is not determinative of an elector's domicile for the purpose of voting. An elector's domicile for the purpose of voting is determined pursuant to the provisions of Section 7-1-25.

Thus, your question is the meaning of the phrase “suffers from a reasonable impediment that prevents the elector from obtaining photographic identification.” Your focus is upon what is a “reasonable impediment?” A number of principles of statutory construction may be employed in answering your inquiry. First and foremost, is the cardinal rule that the primary purpose in interpreting statutes is to ascertain the intent of the Legislature. *State v. Martin*, 293 S.C. 46, 358 S.E.2d 697 (1987). In addition, a statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *Caughman v. Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. *State v. Blackmon*, 304 S.C. 270, 403 S.E. 2d 660 (1991). Furthermore, a court should not consider a particular clause or provision in a statute as being construed in isolation, but should read it in conjunction with the purpose of the statute and the policy of the law. *State v. Gordon*, 356 S.C. 143, 588 S.E.2d 105 (2003). In addition, in determining the legislative intent, a court will, if necessary, reject the literal import of the words used in a statute. It has been said that “words ought to be subservient to the intent, and not the intent to the words.” *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942).

As noted above, Subsection (E) of Section 5 of H.3003 expressly provides that “[t]he purpose of the identification required pursuant to subsection (A) is to confirm the person presenting himself to vote is the elector on the poll list.” In terms of the meaning of the phrase “suffers from a reasonable impediment that prevents the elector from obtaining photographic identification,” we note that the Voter ID legislation does not define such phrase. Thus, the common and ordinary definition would typically be applied by a court. *State v. Blackmon, supra*.

As the Fourth Circuit stated in *Minter v. Beck*, 230 F.3d, 663, 666 (4<sup>th</sup> Cir. 2000), the “dictionary definition” of the word “impediment” is an “‘obstruction’; ‘hindrance’; [or] ‘obstacle.’” Further, the Court, in comparing the words “impediment” and “futile” noted that “[t]hese definitions make clear that the chief distinction between these two terms is that the term ‘impediment’ speaks to hindering an effort while the term ‘futile’ speaks to an unsuccessful result for an already undertaken effort.” *Id.* Ordinarily, the word “suffer” means to “undergo,” or “endure” or “bear.” *New World Dictionary of the American Language* (2<sup>nd</sup> College ed.). The word “suffer” implies “responsible control” and does not usually apply to an incumbrance which is within the power of a party to prevent. *Smith v. Eigerman*, 31 N.E. 862, 863 (Ind. 1892).

Based upon the words used in Subsection (D)(1)(b) – “suffers a reasonable impediment that prevents the elector from obtaining photograph identification” – it is evident that the General Assembly sought to make allowances for those voters who have a valid reason, beyond their control, which would prevent them from obtaining a Photo ID. One such reason which is obvious is that there are numerous South Carolinians, generally over age 50, who do not have a birth certificate. A primary cause is that, decades ago, many babies were not born in hospitals, but were delivered by midwives and thus no birth certificates were obtained. See, “Many Face Fight to Prove Identity,” *The State*, July 19, 2011. In addition, persons with disabilities also might be unable to obtain a Photo ID. Thus, the Legislature, cognizant of the conditions beyond a person’s control, for obtaining photographic identification, provided the affidavit mechanism as a means to vote for those who presented themselves at the polls, lacking such identification because of these circumstances.

Moreover, in this regard, we also note Subsection (D)(2) of Section 5. As Subsection (D)(2) expressly states, “[i]f the county board of registration and elections determines that the voter was challenged only for the inability to provide proof of identification and the required affidavit is submitted the county board of registration and elections *shall find that the provisional ballot is valid unless the board has grounds to believe the affidavit is false.*” (emphasis added). It appears the Legislature thus sought to allow persons to vote by provisional ballot, even without the required photographic identification, and that, in addition, pursuant to (D)(2) of Section 5, such ballot, must be considered valid “unless the board has grounds to believe the [voter’s] affidavit is false.” In short, once such affidavit stating the reason [the “reasonable impediment”] which prevented the voter from obtaining photographic identification is provided, even though the ballot is deemed a provisional ballot, it must, nevertheless, ultimately be deemed valid and counted unless the board has reason to believe the voter’s affidavit is false.

An analogy to this approach can be found in the criminal law context, where a law enforcement officer provides an affidavit to obtain a search warrant. While the determination of the issuance of the warrant, based upon probable cause, is, of course, up to the magistrate, the Officer’s affidavit itself is not subject to attack unless “the defendant makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless regard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause.” *Franks v. Delaware*, 438 U.S. 154, 156 (1978). Otherwise, the officer’s affidavit for a search warrant speaks for itself.

### Conclusion

In our opinion, the term “reasonable impediment,” as used in the Voter ID legislation, was intended by the General Assembly to mean any valid reason, beyond the voter’s control, which created an obstacle to the voter’s obtaining the necessary photographic identification in order to vote. Examples of such obstacles which come readily to mind as “reasonable impediments” are that the voter cannot obtain a birth certificate, or the voter has a physical disability of some kind. Thus, the voter who cannot obtain a Photo ID due to suffering reasonable impediments such as these, is expected to specify such impediment in the affidavit he or she presents at the voting booth.

At the same time, 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). Any interpretation by a court of the Voter ID Act will certainly be well cognizant of the fundamental nature of the right to vote.

Thus, the General Assembly has balanced the powerful State interest in protection against voter fraud with the fundamental nature of the right to vote. The Legislature has put in place a uniform system statewide which allows the voter who, through no fault of his own, could not obtain a Photo ID, to vote. Accordingly, the affidavit provided by the voter stating the reason the Photo ID could not be obtained, will be deemed to speak for itself. The Legislature has required that such affidavit stating the reasonable impediment which prevented the voter from obtaining the Photo ID will be honored unless there is some

Ms. Andino  
Page 5  
August 16, 2011

basis to believe it is false. In other words, unless there is reason to believe the affidavit contains falsehoods, the vote will ultimately be deemed valid. Of course, this conclusion assumes there is no basis for a challenge to the ballot other than the voter did not present a Photo ID at the polls.

Therefore in response to your specific question, the short time frame between any preclearance of the legislation<sup>1</sup> and the date of any election immediately thereafter would constitute a “reasonable impediment” for purposes of the Voter ID legislation. Such short time period is beyond the voter’s control.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert D. Cook". The signature is fluid and cursive, with a large initial "R" and "C".

Robert D. Cook  
Deputy Attorney General

RDC/an

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<sup>1</sup> We note that the United States Supreme Court recently avoided the question of whether the Voting Rights Act exceeds the constitutional power of Congress to enforce the Fifteenth Amendment, but that Justice Thomas would have decided the constitutional question against the constitutionality of the Act. See, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S.Ct., 2504 (2009).