STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2013-025

March 25, 2013

The Honorable Jim Nickels
State Representative
Post Office Box 6564
Sherwood, Arkansas 72124-6564

Dear Representative Nickels:

I am writing in response to your request for my expedited opinion on the following question:

> Would Senate Bill 2, if passed into law, violate Article 3 of the Arkansas Constitution by imposing additional qualifications on the right of a citizen to vote?

Of necessity, given your request that my review be expedited, the ensuing opinion does not include a discussion of all the pertinent case law I considered in reaching my conclusions.

RESPONSE

In my opinion, although no Arkansas precedent exists addressing this issue, a court entertaining an Article 3 challenge to SB 2 would likely conduct two inquiries. First, it would probably review SB 2 to determine as a matter of law whether it impermissibly imposes a qualification to vote in addition to those prescribed as exclusive in art. 3, § 1. Second, assuming that the answer to the first question is "no," the court would address whether SB 2 "impairs" the right to vote under art. 3, § 2. These two levels of inquiry—whether the voter-ID law is an additional qualification; and second, whether it is an impairment of the right to vote—frequently occur in the voter-ID litigation in other jurisdictions.

The question is not whether the legislature can add an additional qualification to art. 3, § 1, for all sides agree that cannot be legally accomplished. The dispositive question is whether SB 2 is best characterized as either imposing a substantive, additional qualification upon a voter or as merely providing a procedural and regulatory means by which a qualified voter proves that he or she meets the four criteria stated in art. 3, § 1.

Most courts faced with the question have held that rather than imposing an additional qualification, voter-ID laws merely provide a permissible procedural condition on the right to vote. Those courts, however, are often influenced by specific language in those state constitutions that require the legislature to enact laws that regulate elections, police the elections process for fraud, or otherwise "protect the purity of the ballot box." Because our constitution lacks any such language, an Arkansas court might be persuaded to side with those few courts that consider voter-ID to be an impermissible additional qualification. Because this is a case of first impression in Arkansas, I cannot predict with certainty how an Arkansas court would rule on this question.

The second level of inquiry—whether SB 2 impairs the right to vote under art. 3, § 2—is more straightforward. As explained briefly below, I believe an Arkansas court faced with this question would likely follow the majority of courts and apply the federal standard for assessing allegations of infringements or impairments on the right to vote. Further, given certain provisions in SB 2 that seem crafted with other states' litigation in mind, I believe an Arkansas court would, after applying this federal standard, reach the conclusion that most authorities have reached and uphold SB 2 under art. 3, § 2.

DISCUSSION

I. Is SB 2 per se unconstitutional under art. 3, § 1?

Section 1 of Article 3 of the Arkansas Constitution sets forth the following qualifications to vote:

> Except as otherwise provided by this Constitution, any person may vote in an election in this state who is:
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> 1. A citizen of the United States;

2. A resident of the State of Arkansas;

3. At least eighteen (18) years of age; and

4. Lawfully registered to vote in the election.[1]

The provisions of Section 1 are unambiguous in declaring that anyone meeting the four recited conditions is entitled to vote. The Arkansas Supreme Court has discussed at great length the primacy of the Arkansas Constitution over any legislative enactments in setting voting qualifications.[2] The court in *Rison v. Farr* bluntly declared that the constitution "fixes the qualifications, and determines who shall be deemed qualified voters in this state in direct, positive, and affirmative terms, and these qualifications cannot be added to by legislative enactment."[3]

The dispositive question is whether SB 2 is best characterized as either imposing a substantive, additional qualification upon a voter or as merely providing a procedural and regulatory means by which a qualified voter proves that he or she meets the four criteria stated in art. 3, § 1. If the bill imposes an additional qualification, then—per *Rison v. Farr*—SB 2 is unconstitutional per se given that art. 3, § 1 is exhaustive in listing qualifications. But if the bill is merely regulatory in nature and is best characterized as requiring evidence of voters' qualifications, SB 2 will not violate art. 3, § 1.

In the absence of any Arkansas authorities on this question, I will examine some representative cases from other jurisdictions that illustrate the arguments for and against the constitutionality of photo-ID laws.

Some courts faced with this question have held that voter ID laws are additional qualifications. Specifically, trial courts in Wisconsin and Missouri have found that

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[1] Ark. Const. art. 3, § 1.

[2] *Rison v. Farr*, 24 Ark. 161 (1865) (striking a legislative enactment requiring a voter to swear that he had never borne arms against the United States). *Rison* was more recently cited in support of the proposition stated in my text in *State ex rel. Atty. Gen. v. Irby*, 190 Ark. 786, 794, 81 S.W.2d 419 (1935). *But see* dictum in *Rison* noting that "[t]he legislature may compel a voter to take an oath to the effect that he possesses the qualifications prescribed by the constitution; and may fix the time of holding elections, and the manner of making returns, etc.; for those things are within the constitutional powers of the legislature."

[3] *Id.* at 170. Although the currently applicable 1874 Arkansas Constitution was not in effect when *Rison* issued, the court's pronouncements regarding the primacy of constitutional declarations continue to apply.

the voter ID laws at issue in those states added qualifications to vote.[4] The Wisconsin case is pending appeal and the Missouri Supreme Court affirmed the trial court on other grounds.

The majority of courts faced with this question, however, have decided that voter-ID laws are best characterized as procedural or regulatory conditions requiring persons to verify their identity. Specifically, the state supreme courts in Michigan, Indiana, Georgia, and Florida have all so held. Some of these state supreme courts were influenced by the fact that, unlike Arkansas, these states have constitutional provisions that direct the legislature to police the election system for fraud or to "guard against abuses of the elective franchise."[5]

In weighing these various authorities, I am struck by the following. First, many of the authorities—both for and against the voter-ID laws—offer only conclusory analyses of the distinction between a qualification and a procedural regulation to evidence qualification. Typically, a court simply states that the voter ID law under discussion seems more like one than the other. So, on the critical distinction at issue under art. 3, § 1, there is not much authority.

Second, Arkansas's constitution lacks any reference to the legislature policing the election process for fraud or for protecting the purity of elections. Consequently, it seems that case law upholding a state's voter-ID laws that relies at least in part upon a constitutional policing provision may well be less persuasive to an Arkansas court when it is faced with this question. I will note in this regard that the only reference in the Arkansas Constitution to legislative control over elections—namely, the phrase "lawfully registered" in subsection 1(4) of Article 3

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[4] **Wisconsin:** See Decision and Order Granting Summary Declaratory Judgment and Permanent Injunction, in *League of Women Voters of Wis. Ed. Network, Inc. v. Walker*, Case No. 11-CV-4669, Wis. Circuit Court, Dane County (March 12, 2012). **Missouri:** *Weinschenk v. State*, 203 S.W.3d 201, 212 n.16 (Mo. 2006) ("The trial court found that the Photo–ID Requirement amounted to an unconstitutional additional qualification for voting in violation of article VIII, section 2 of the Missouri Constitution. Appellants argue that it is not a qualification but necessarily agree that it is an additional showing that must be made in order to vote. Because it is not necessary to determine whether this requirement constitutes an additional "qualification," this Court does not finally resolve the issue.").

[5] For example, the Michigan Supreme Court upheld its state's voter-ID law in light of, among other things, a provision in its state constitution requiring the General Assembly "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." *See* Mich. Const. art. 2, § 4; *In re Request for Advisory Opinion*, 740 N.W.2d 444, 454 (Mich. 2007). The Georgia Supreme Court, in upholding that state's voter-ID law, also noted that its state constitution specifically provided for the legislature to enact laws governing election process, *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 71–72 (Ga. 2011).

quoted above—is oblique and contextually restricted to setting conditions for *registration*, not *actually voting* once registered.

In summary, an Arkansas court might be influenced by the fact that the majority of courts have upheld voter-ID laws as not constituting additional qualifications. But an Arkansas court might find it significant that most of these courts based their conclusion, at least in part, upon the application of language that is absent from our state constitution. Under these circumstances, I cannot predict with certainty how an Arkansas court would rule on this question.

II. Does SB 2 impermissibly "impair" the right of suffrage under art. 3, § 2?

In my opinion, in all likelihood, a challenge based upon this constitutional provision would fail.

Article 3, section 2 states:

> Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; ***nor shall any law be enacted whereby such right shall be impaired or forfeited***, except for the commission of a felony, upon lawful conviction thereof.

In the event a reviewing court did not consider the proof-of-identity requirement set forth in SB 2 as imposing an impermissible additional "qualification," it would need to consider whether the measure's restrictions upon the right of suffrage are impermissible under Section 2 of Article 3 as constituting a "law . . . whereby such right shall be impaired or forfeited." In considering similar challenges, courts have applied a standard of review that tracks the following standard set forth by the United States Supreme Court:

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit

> the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."
>
> Instead . . . , a more flexible standard applies. 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."[6]

One court applied this standard but decided that strict scrutiny should be used to review the voter-ID law instead of the more lenient "flexible standard" set out above. In *Weinschenk v. State of Missouri,*[7] the Missouri Supreme Court addressed whether the imposition of a photo-ID requirement compromised the fundamental right to vote of citizens whose constitutionally mandated qualification requirements were materially indistinguishable from those applicable in Arkansas. The court applied the above standard, determining that the challenged measure severely burdened the right to vote and hence warranted a strict-scrutiny review. The court struck the measure based upon this review. All other cases I have found addressing similar measures have applied the more lenient standard described above and have upheld the legislation.

SB 2 appears to have been drafted with *Weinschenk* in mind, since it attempts to avoid the *Weinschenk* result by including, for instance, provisions putatively ensuring that voter identification cards will be provided free of charge to individuals lacking other proof of identity. Not being a finder of fact, I will not speculate whether obtaining a voter identity card under SB 2 would indeed be free, thus possibly avoiding one of the difficulties that prompted a strict scrutiny analysis in *Weinschenk.* I will further not speculate whether the administrative inconvenience attending a registered voter's efforts to comply with SB 2 would be sufficiently onerous to trigger a strict scrutiny analysis under the standard applied by the court in *Weinschenk.* I will merely note that under the federal standard

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[6] *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (internal citations omitted).

[7] 203 S.W.3d 201 (Mo. 2006).

outlined above, which I believe an Arkansas court would employ,[8] the court would initially inquire whether the burden imposed by SB 2 was sufficiently "severe" to trigger the application of strict scrutiny. Given that SB 2 was drafted with apparent care to avoid the pitfalls in the Missouri legislation, I suspect a reviewing court would apply the lower standard of review set forth above. Moreover, although the review would ultimately turn upon a consideration of the facts, I have no reason to assume the Arkansas legislation—unlike all similar legislation I have found that has been reviewed under this standard—would be stricken.

Assistant Attorneys General Jack Druff and Ryan Owsley prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

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[8] My reason for drawing this conclusion is that the federal and state standards applicable to challenges alleging equal protection violations that implicate a fundamental right like voting are essentially identical. *See Talbert v. State,* 367 Ark. 262, 239 S.W.3d 504 (2006). The case law reviewing measures that condition voting upon providing proof of identity invariably link the claim of a voting-rights violation to an equal-protection claim. *See, e.g., Crawford v. Marion County Elec. Bd.*, 553 U.S. 181 (2008); *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011); *League of Women voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010). This fact is understandable because such claims are necessarily based on a contention that two equally situated classes—namely, registered voters with the required identification and registered voters without—are unconstitutionally treated differently, with the first class being permitted to vote and the second class being denied that permission.