

August 18, 2005

Mr. John Tanner
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Georgia's Elimination of Affidavit Identification Option under Section 5 (#2005-2029)

Dear Mr. Tanner:

We are law professors who specialize in voting rights. In the absence of additional information, we write to urge you to object to Georgia House Bill 244 pursuant to Section 5 of the Voting Rights Act.

Georgia law currently permits registered voters to cast a ballot after presenting various forms of identification, including a birth certificate, social security card, certified naturalization documentation, a current utility bill, bank statement, government check, or any government document bearing the name and address of the voter. Voters who do not bring one of seventeen forms of identification to the polls may, under current law, confirm their identity by executing a sworn affidavit stating that they are qualified to vote.

House Bill 244 would alter Georgia's voting procedures by reducing the permissible forms of identification from seventeen to six (all government issued photo identification) and eliminating the affidavit identification option (the "affidavit ID option"). The bill was signed into law by Governor Perdue on April 22, 2005 and has been submitted to you for preclearance.

Under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, a covered jurisdiction may not implement a change in its election laws or practices unless **the jurisdiction carries the burden** of demonstrating that the change will be free of any racially discriminatory purpose or effect. *Georgia v. United States*, 411 U.S. 526, 538 (1973). The objective of Section 5 "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."¹ **Georgia has not carried its burden** to show that H.B. 244 does not have a retrogressive impact.

¹ *Beer v. United States*, 425 U.S. 130, 141 (1973) (emphasis added); see also *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. . . . It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured."); *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion) (under Section 5, "the proposed voting practice is measured against the existing voting practice"); *State of Texas v. United States*, 866 F. Supp. 20, 27 (D.D.C. 1994) (non-retrogression requirement "mandates that preclearance be denied under the "effects" prong of Section 5 if a new system places minority voters in a weaker position than the existing system").

⁴ Letter dated July 7, 2005, from Seth A. Cohen, Esq., to John Tanner, Chief, Voting Section, at 3.

I. Eliminating the affidavit ID option and disenfranchisement of minority voters in Georgia.

Existing law allows voters without photo identification to sign a sworn affidavit of identity as an alternative to presenting identification. Georgia has not shown that House Bill 244's elimination of this affidavit "safety net" is not retrogressive.

Georgia has failed to produce critical information relevant to the retrogressive impact of the new law. Each county in Georgia retains affidavits submitted by voters for two years. The affidavits executed by voters to establish their identity can be matched with Georgia's statewide computerized voter registration list, which includes racial identification for at least 97.3% of voters. An alternative approach would require that Georgia provide the number of affidavits submitted by precinct and county, and would cross reference this data against U.S. Census county and precinct-level demographic data on race. Examination of this data would provide important insights about the extent to which racial minorities previously made use of the sworn statement provision because they failed to bring a photo identification or other documentary identification with them on Election Day. Such data is essential to determining the retrogressive impact of eliminating the affidavit ID option.

In other states, data shows that an elimination of an affidavit ID option would have a retrogressive impact. South Dakota, for example, allows voters who do not to bring photo identification to the polls to sign an affidavit to establish their identity. According to a July 15, 2004 *Aberdeen News* article written by Chet Brokaw, during a June 2004 statewide election voters in South Dakota counties with large concentrations of American Indians were 2 to 8 times more likely to sign affidavits than voters in other parts of the state. The article indicates:

Voter turnout was up in both reservation and non-reservation areas, and the use of affidavits was particularly high in reservation counties, [Republican Secretary of State Chris] Nelson said. While affidavits were signed by about 2 percent of the voters statewide, affidavits were used by 16 percent of the voters in Shannon County, 9 percent in Todd County, about 7 percent in Corson and Dewey counties, and 5.3 percent in Ziebach County.

American Indians make up only 8.3% of South Dakota's population, but a much higher percentage of the population in Shannon County (94.2% American Indian), Todd County (85.6%), Corson County (60.8%), Dewey County (74.2%), and Ziebach County (72.3%).

While Georgia could easily compile similar information that shows the racial identity of those who use affidavits in the state, it has failed to do so. Granted, affidavit data might be less than perfect due to under-trained or overworked poll workers in particular precincts who either barred voters lacking documentary ID from voting without telling them about the affidavit ID option, or let such voters cast ballots without providing affidavits to avoid the hassle of extra paperwork. Nevertheless, the affidavits provide essential information and should be examined by the Department of Justice. Georgia's failure to provide available data on the actual use by minority citizens of affidavits prevents it from meeting its burden of establishing a lack of retrogressive effect under Section 5.

II. Eliminating the affidavit ID option is especially problematic in light of the state’s reduction of permissible forms of identification from seventeen down to six.

By reducing the permissible forms of identification from seventeen down to six, Georgia has enhanced the likelihood that eliminating the affidavit ID option will be retrogressive. Under prior law, a voter could show a variety of documents to establish identity, including a birth certificate, social security card, certified naturalization documentation, a current utility bill, bank statement, government check, or any government document bearing the name and address of the voter. Existing evidence suggests that in the absence of these acceptable forms of identification, an elimination of the affidavit ID option would be retrogressive, and Georgia has failed to provide adequate evidence to the contrary.

For example, existing data suggests that minorities have less access to the government agencies that can provide one of the six forms of identification required under H.B. 244. In Georgia’s 159 counties there are only 56 Department of Driver Services (“DDS”) locations where driver’s licenses or other government-issued photo identification are available to the general public (on July 1, 2005, the Department of Motor Vehicle Safety became the Department of Driver Services). The state recently eliminated the two locations that previously served Atlanta, the state’s largest population center where, according to the 2000 Census, over 65% of the population, or more than a quarter-million people, are African-American or Hispanic.⁴

Moreover, in ten Georgia counties with the highest percentage of African-American residents, only one (Dougherty) has a DDS office.

County	Percent Black Population	DDS Office
Hancock	77.8	0
Talbot	61.6	0
Stewart	61.5	0
Terrell	60.7	0
Calhoun	60.6	0
Clay	60.5	0
Dougherty	60.1	1
Randolph	59.5	0
Warren	59.5	0
Macon	59.5	0

Moreover, to obtain a photo identification card, voters must obtain documentation such as a birth certificate or passport, requiring payment of fees ranging from \$10.00 to \$85.00.⁵ The poverty rate is 26% for African Americans in Georgia and 30% for Hispanics, compared to only 11% for whites.⁶ Georgia has provided no evidence that establishes that these fees—which one

⁵ *Id.* at 4.

⁶ Kaiser Family Foundation, Georgia: Poverty Rate by Race/Ethnicity, 2002-2003 (available at <http://www.statehealthfacts.kff.org/cgi-bin/>)

could construe as de facto poll taxes in the absence of an affidavit ID option—will not fall most heavily on persons of color.

Further, census data demonstrate that in the United States African Americans and Latinos are more than three times more likely than whites to register to vote at a public assistance agency. Whites are more likely than either African Americans or Latinos to have registered to vote when seeking a driver's license.⁷ In Georgia, 77.3% of citizens who are served by the Temporary Assistance for Needy Families program are black, compared to 20.1% who are white.⁸ Public assistance offices in Georgia, unlike DDS offices, do not provide photo IDs to clients as a regular part of their services to the public. Accordingly, a form of voter registration far more likely to be used by minorities than by whites will no longer provide the voter with full eligibility to vote in Georgia. Unlike voters who register at DDS, voters who register at public assistance offices must visit another government office to become fully eligible, with no option of proving their identity by affidavit if they do not make the additional visit. Georgia has failed to meet its burden under Section 5 by demonstrating that the disproportionate use of public assistance voter registration by minorities as reflected in national data is not the case in Georgia.⁹

The findings of independent studies of photo identification requirements elsewhere also suggest that H.B. 244's elimination of the affidavit ID option would substantially burden minority voters. The Report of the National Commission on Federal Election Reform, chaired by former Presidents Gerald Ford and Jimmy Carter, identified two problems with voter identification provisions: the burden the requirements place on voters; and the risk of selective and discriminatory enforcement. The report found that rural poor and urban voters are disproportionately represented among the 6 to 10 percent of registered voters who do not possess official state identification. Additionally, the Task Force report found that identification requirements create the opportunity for selective enforcement that can take either innocuous or invidious forms when poll workers request photo identification only from voters unknown to them.¹⁰

Studies conducted in other states confirm the evidence and conclusions above. The University of Wisconsin-Milwaukee Employment and Training Institute published a report in June 2005 highlighting the disparate rates of driver's license possession between white and minority citizens in that state.¹¹ The study found that the rate of driver's license possession

healthfacts.cgi?action=profile&area=Georgia&category=Demographics+and+the+Economy&subcategory=People+in+Poverty&topic=Poverty+Rate+by+Race%2Fethnicity).

⁷ U.S. Census Bureau, Voting and Registration in the Election of November 2000, Detailed Tables for Current Population Report, P20-542, Table 14, "Method of Registration Among Those Who Registered After January 1, 1995, By Selected Characteristics: November 2000 (available at <http://www.census.gov/population/www/socdemo/voting/p20-542.html>).

⁸ Georgia Department of Human Resources, Fact Sheet, "TANF in Georgia," November 2003 (available at http://dfcs.dhr.georgia.gov/DHR-DFCS/DHR-DFCS_CommonFiles/4922055TANF_in_Georgia.pdf).

⁹ Georgia's new structure also runs counter to the purpose of the National Voter Registration Act, which was designed to remove bureaucratic hurdles to voter participation.

¹⁰ JOHN MARK HANSEN, TASK FORCE ON THE FEDERAL ELECTION SYSTEM: VERIFICATION OF IDENTITY (Jul. 2001) (available at http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/hansen_chap6_verification.pdf).

¹¹ JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN (June 2005) (available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>).

among African-Americans was half that for whites. This disparity increased among younger drivers, where white adults 18-24 were three times as likely as their black peers to possess a driver's license. Only 22% of black males in that age group had a driver's license.

The Department of Justice is familiar with these facts and has denied pre-clearance to similar photo identification schemes. In 1994, Louisiana passed legislation that would require only first-time voters, who registered by mail, to produce photo identification before they could vote.¹² The Department objected, pointing out that African-Americans are “four to five times less likely than white person in the state to possess a driver's license”¹³ The Attorney General concluded that such a disparity “will eliminate certain of the gains to minority voters . . . and ‘would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.’”¹⁴ Louisiana now allows voters to establish their identity through signed affidavit.

Georgia's African-American population is five times less likely than whites to have access to a motor vehicle. However, Georgia's H.B. 244—unlike the Louisiana statute that applied only to first-time voters who registered by mail—requires a driver's license or other photo identification to be presented *every time any voter attempts to cast a ballot*.¹⁵

In August 2005, the state of Georgia provided the Justice Department with data regarding racial identity of those with government-issued identification cards such as driver's licenses, organized by county. Of the Georgians with state-sponsored ID whose racial identity is known, the racial breakdown is as follows: 67% white, 27.5% black, 2% Hispanic, 1.3% Asian American. At first glance, this appears to roughly track the demographics of the state's broader population. The racial categorization data is inconclusive, however, because Georgia does not know the race of 42% of those to whom a driver's license or identification card was issued.

Indeed, closer examination of the county data suggests that African Americans in Georgia may be less likely to possess a driver's license or other form of government identification. The data provided by Georgia allows a comparison of the total number of driver's licenses and identification cards per county. United States Census data identifies the 10 Georgia counties with the highest percentage of African-Americans as those listed above on page 3 of this letter, and the 10 counties with the highest percentage of whites as Towns, Fannin, Union, Dade, Dawson, Catoosa, Pickens, Walker, Brantley, and White. The African-American counties

¹² 1994 La. ALS 10 § 115(F).

¹³ Letter from Deval L. Patrick, United States Assistant Attorney General, to Sheri Morris, Louisiana Assistant Attorney General (Nov. 21, 2004).

¹⁴ *Id.* (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

¹⁵ Georgia has also failed to produce adequate data that grapples with the practical consequences of its law. Without the affidavit ID option, for example, a Georgia voter whose wallet or purse is stolen on or just before election day may also suffer the theft of her right to vote. National data show that blacks are almost three times more likely than whites to be victims of purse snatching and pocket picking. *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Criminal Victimization in the United States, 2003, Table 5 “Personal Crimes 2003: Number of victimizations and victimization rates for persons age 12 and over, by type of crime and race of victims” (available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus0301.pdf>).

have only 87.7% of the IDs per 1000 voting-age residents as the overwhelmingly white counties.¹⁶

Jurisdiction	Racial Population	# of IDs per 1000 Voting-Age Residents
10 Georgia counties where greatest percentage of population is black	59.5%-77.8% black	913
State of Georgia	28.7% black 65.1% white	986
10 Georgia counties where greatest percentage of population is white	93.4%-97.1% white	1041

This data does not indicate that 91.3% of voting-age African Americans have state-issued identification. While the predominantly white counties are only 2.9% to 6.6% minority, the predominantly black counties range from 21.5% to 39.2% white. It is possible that by omitting the whites in these predominantly black counties the disparities would be even starker.

This county analysis, however, is valuable in that it demonstrates the need for Georgia to provide better data about whether H.B. 244 is retrogressive. Indeed, the ultimate question is *not* whether state records show that minorities are just as likely as whites to have applied for a driver’s license or other government-issued ID. ***The most important question is what minorities bring to the polls on Election Day to establish their identity.*** On that score, Georgia has failed to satisfy its burden by providing the most relevant information—racial data on those who have utilized the affidavit ID option. Under the earlier law, voters used affidavits not simply because they were never issued a valid photo identification, but also because they may have misplaced or forgotten that information when coming to their polling place. Thus, the affidavit data provides critical insight into whether or not H.B. 244 will have a retrogressive impact.

III. Eliminating the affidavit ID option is particularly severe in light of loosened restrictions to cast an absentee ballot.

Georgia has failed to show that its elimination of the affidavit ID option will not be retrogressive, especially in light of its liberalization of absentee ballot use. Georgia law currently limits absentee voting to persons who are required to be absent from their precinct of residence throughout election day, are 75 years of age or older, disabled, or meet other narrow requirements.¹⁸ House Bill 244 would allow any voter to cast an absentee ballot by mail without

¹⁶ U.S. Census, County Population Estimates by Age, Sex, Race, and Hispanic origin, July 1, 2004 (available at <http://www.census.gov/popest/datasets.html>).

¹⁸ Ga. Code 21-2-380.

an excuse within a 45-day period. Absentee voters are exempt from any photo identification requirement.

The Georgia Legislature loosened absentee voting requirements even though it had far more evidence of past fraud arising from absentee ballots than from casting ballots at the polls. In 2001, Georgia's Secretary of State established an Election Fraud Task Force to investigate problems with Georgia's election administration. The Task Force was "especially concerned about absentee ballot abuse" ¹⁹ In terms of voting at the polls, however, Georgia's Secretary of State has written that she is not aware of a single instance of such fraud occurring during her tenure as both Assistant Secretary of State, and Secretary of State. The Secretary also points out that such fraud would be discovered when the actual voter voted either before or after the impersonator. The record of the first vote would prevent a second vote, a fact likely to be protested by the legitimate voter.

According to Hans A. von Spakovsky, the former vice chairman of Fulton County's elections board and current Counsel to the Assistant Attorney General of the Civil Rights Division, "absentee ballots represent the easiest way to steal an election." ²⁰

Proponents of H.B. 244 most frequently cited a case of *absentee ballot fraud* in Dodge County in 1996 as justification for restricting permissible identification for voters at the polls. But H.B. 244 expands the pool of absentee voters while exempting them from identification requirements imposed on those who vote at the polls.

A national study has found that whites are about twice as likely as blacks to vote by absentee ballot. ²¹ House Bill 244 makes voting by absentee ballot easier, and makes voting at the polls more difficult. To the extent that Georgia fails to show that its absentee voters are not disproportionately white and that significant numbers of minority voters have not used affidavits at the polls, the state fails to meet its burden of showing that H.B. 244 is not retrogressive. One can create colorful hypotheticals in which most minority voters who fail to bring government-issued ID to the polls suddenly muster the foresight to apply for a no-excuse absentee ballot and submit the absentee ballot weeks before the election. But speculation and conjecture do not substitute for evidence establishing lack of retrogressive impact that Section 5 requires Georgia provide to meet its legal burden.

¹⁹ Editorial, *Focusing on Fraud; Numbers and anecdotes show the need for a task force targeting flaws in Georgia's election process*, Atlanta Journal-Constitution, Aug. 17, 2001, at 20A.

²⁰ Memorandum from Hans A. von Spakovsky, Attorney and Government Affairs Consultant, on No Fault Absentee Balloting, p. 1 (Mar. 29, 2001) (available at http://www.hss.caltech.edu/~voting/von_spakovsky-1.pdf).

²¹ JOHN MARK HANSEN, TASK FORCE ON THE FEDERAL ELECTION SYSTEM: EARLY VOTING, UNRESTRICTED ABSENTEE VOTING, AND VOTING BY MAIL (Jul. 2001) (available at http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/hansen_chap5_early.pdf).

IV. A Note on Partisan Application of Section 5

Recently, various commentators have called into question the stellar nonpartisan credentials of the Justice Department. We continue to have faith that the Department of Justice can administer Section 5 in a nonpartisan way.

Given that Georgia's racial minorities vote predominantly Democratic, this bill obviously raises partisan concerns. But questions of whether H.B. 244 advantages one political party or an individual's personal policy preference for or against the affidavit ID option are irrelevant to a Section 5 analysis. The burden is on the state of Georgia to show that the elimination of the affidavit ID option does not worsen the political position of minorities. The state of Georgia has not provided the most important information needed to determine this objective fact—the racial identity of those who have used affidavits in past elections.

This matter is therefore an excellent opportunity for the Voting Section to reaffirm its commitment to protecting minority voters while demonstrating its ability to administer Section 5 in a nonpartisan fashion.

V. Questions for Letter for Additional Information

Georgia cannot carry its burden without providing additional data culled from affidavits. Specifically, the Department of Justice should ask the following questions regarding Georgia's 2004 Primary and General Elections, as well as the March 2004 Presidential Preference Primary:

- a) How many affidavits affirming identity were submitted by minority voters?
- b) How many affidavits affirming identity were submitted in each county in Georgia? How many were submitted in each precinct?
- c) How many affidavits affirming identity were submitted by voters in predominantly minority precincts? What was average percentage of voters who submitted affidavits in predominantly minority precincts? What percentage of all voters statewide submitted affidavits?
- d) How many absentee ballots were cast? How many were cast by minority voters? How many absentee ballots were cast in each county in Georgia, and how many from voters who live in each precinct?

Conclusion

Section 5 requires a particularly searching examination of Georgia's elimination of the affidavit ID option because it affects access to the franchise itself. The preclearance requirements of Section 5 were designed in direct response to the history of exclusionary tactics that denied black citizens the opportunity to register and cast a ballot. South Carolina v. Katzenbach, 383 U.S. 301, 308-317 (1966). Accordingly, new hurdles that prevent qualified and eligible voters from casting a ballot on Election Day require the most stringent scrutiny under Section 5.

Based on the evidence submitted, Georgia has failed to carry its burden pursuant to Section 5. Without additional information regarding those who have used affidavits in past elections, H.B. 244 should be denied preclearance under Section 5 of the Voting Rights Act.

Very truly yours,

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