ID to vote absentee. (Id.) Voters who registered by mail and provided some information concerning their identity, however, are not required to provide a Photo ID to vote absentee. (Id.) Additionally, if a voter does not present identification when registering by mail, but the State can verify certain information provided by the voter through a State database, such as the voter’s date of birth, the voter need not present a Photo ID to vote absentee. (Oct. 12, 2005, Hr’g Tr.; Cox Dep. at 26.)

e. Absentee Ballots and Absentee Voting

HB 244 expanded the opportunity for voters to obtain absentee ballots. (Oct. 12, 2005.) Prior to July 1, 2005, voters seeking to obtain absentee ballots had to aver that they met certain requirements. (Id.) After July 1, 2005, those requirements no longer apply for purposes of obtaining absentee ballots. (Id.)

To obtain an absentee ballot, a voter must send in a request to the local registrar providing his or her name, address, and an identifying number, or must appear in person at the registrar’s office and provide such information. (Oct. 12, 2005, Hr’g Tr.) Local elections officials are supposed to compare the signature on the request to the signature on the voter’s registration card. (Id.) If the signatures match, the local elections officials will send an absentee ballot to
the address listed on the voter’s registration. (Id.) A voter who wishes to vote an absentee ballot need not provide a Photo ID unless that voter registered by mail, did not provide identification, and is voting for the first time by absentee ballot. (Oct. 12, 2005, Hr’g Tr.; Cox Dep. at 27.)

After receiving an absentee ballot, the voter must complete the ballot and return it to the registrar, either by hand-delivery to the registrar’s office by the voter or certain relatives of the voter, or by mail. (Oct. 12, 2005, Hr’g Tr.) Even if an absentee ballot contains a postmark indicating that the voter mailed it on an earlier date, elections officials will not count the absentee ballot if the ballot is not received in the registrar’s office by 7:00 p.m. on the day of the applicable election. (Id.) Exceptions to this rule exist for voters who are members of the military or reside overseas. (Id.)

An absentee ballot that arrives in the registrar’s office should be returned in two envelopes—an inner blank “privacy” envelope and an outer envelope that contains an oath signed by the voter. (Oct. 12, 2005, Hr’g Tr.) Local elections officials compare the signature on the oath contained on the outer envelope to the signature on the voter’s registration card to verify the voter’s identity. (Oct. 12, 2005, Hr’g Tr.; Cox Dep. at 35.) The signature verification procedure is
the only safeguard currently in place in Georgia to prevent imposters from voting by using absentee ballots. (Oct. 12, 2005, Hr’g Tr.) The verification process is done manually. (Id.) Absentee ballots are submitted to the local registrars’ offices over a forty-day period. (Id.) However, if fifty percent of voters decided to vote by absentee ballot in any given election, local elections officials would have a difficult time completing the necessary signature verifications. (Id.)

Once a voter returns an absentee ballot to the registrar’s office, the voter cannot change that ballot. (Oct. 12, 2005, Hr’g Tr.) The voter, however, has the right to notify the registrar that the voter intends to cancel the absentee ballot and vote in person. (Id.)

In the November 2004 general election, 422,490, or approximately ten percent, of Georgia’s 4,265,333 registered voters voted absentee ballots. (Pls’ Ex. 4 at 1.) 46,734, or approximately seven percent, of Georgia’s 697,420 registered African-American female voters voted absentee ballots, as compared with 189,143, or approximately twelve percent, of Georgia’s 1,548,916 registered Caucasian female voters. (Id.) 26,144, or approximately six percent, of Georgia’s 467,835 registered African-American male voters voted absentee ballots, as compared with 150,722, or approximately eleven
percent, of Georgia’s 1,376,368 registered Caucasian male voters. (Id.)

**f. Signature Comparison for In-Person Voting**

Presently, elections officials do not compare signatures on voter certificates of in-person voters to signatures on voter registration cards. (Oct. 12, 2005, Hr’g Tr.; Cox Dep. at 36-37.) The voter registration cards are not physically present at the polling places. (Oct. 12, 2005, Hr’g Tr.; Cox Dep. at 36-37.) Secretary of State Cox testified that it would be possible to send voter registration cards to polling places, but that comparing signatures on voter certificates to signatures on voter registration cards for in-person voters would be time-consuming. (Oct. 12, 2005, Hr’g Tr.; Cox Dep. at 37.)

**g. Voters Without Photo ID**

A number of Georgia voters are elderly, have no driver’s licenses, and have no need for a state-issued Photo ID card other than for voting purposes. (Oct. 12, 2005, Hr’g Tr.) Further, a number of Georgia voters who are elderly or have low incomes do not have automobiles or use mass transit, and would have difficulty obtaining Photo ID to vote. (Id.) Secretary of State Cox does not have information concerning the number of Georgia voters who lack Photo ID. (Oct. 12, 2005, Hr’g Tr.; Cox Dep. at 23.) Secretary of State Cox also
has received no correspondence concerning significant problems with the new Photo ID requirement or concerning significant numbers of voters who have not been allowed to vote because of the Photo ID requirement. (Id.)

An individual who votes in person but does not present a Photo ID may vote a provisional ballot. (Oct. 12, 2005, Hr'g Tr.; Cox Dep. at 27-28.) Elections officials, however, will not count the provisional ballot unless the voter returns to the registrar's office within forty-eight hours and presents a Photo ID. (Oct. 12, 2005, Hr'g Tr.; Cox Dep. at 27-28.) Secretary of State Cox has no information indicating that voters have cast a significant number of provisional ballots in the elections conducted after the Photo ID requirement received preclearance. (Id.)

h. Training by Elections Division

After the Photo ID requirement received preclearance from the Justice Department, Secretary of State Cox ensured that the Elections Division conducted necessary training, distributed necessary supplies, and did everything possible to ensure that the Photo ID requirement was carried out in every election, including the elections held on August 26, 2005, September 20, 2005, September 27, 2005, and November 8, 2005. (Cox Decl. ¶ 7; Oct. 12, 2005, Hr'g Tr.) The Elections Division also provided information to the public concerning
the Photo ID requirement via the website for the Secretary of State's Office and through other public information efforts. (Cox Decl. ¶ 7; Oct. 12, 2005, Hr'g Tr.)

i. Connection to Local Elections Officials

Local elections officials for counties are connected to the Secretary of State's Office through a mainframe computer. (Oct. 12, 2005, Hr'g Tr.) The Secretary of State's Office has the capability of e-mailing information concerning a preliminary injunction order to the various county elections officials. (Id.) The Secretary of State's Office does not have that capacity for municipal elections officials; however, in many cases, county elections officials also manage elections for municipalities within their counties. (Id.)

j. Effect of a Preliminary Injunction

Secretary of State Cox believes that a preliminary injunction precluding Georgia from applying the Photo ID requirement in the November 8, 2005, elections likely would cause confusion for election officials, poll workers, and voters, especially in jurisdictions that already have conducted elections under the new law. (Cox Decl. ¶ 8; Oct. 12, 2005, Hr'g Tr.) Additionally, the Elections Division would have to reprint and distribute new election forms and materials for the jurisdictions conducting November 8, 2005, elections in a very short period of time. (Cox Decl. ¶ 8;
Oct. 12, 2005, Hr’g Tr.) Secretary of State Cox anticipates that such a preliminary injunction would result in some local election officials applying the Photo ID requirement, some local election officials applying the former law, and others applying a variation of the laws. (Cox Decl. ¶ 8.)

H. Procedural Background

On September 19, 2005, Plaintiffs filed this lawsuit. Plaintiffs assert that the Photo ID requirement violates the Georgia Constitution, is a poll tax that violates the Twenty-fourth Amendment and the Equal Protection Clause, unduly burdens the fundamental right to vote, violates the Civil Rights Act of 1964, and violates Section 2 of the Voting Rights Act.

On September 19, 2005, Plaintiffs requested that the Court schedule a preliminary injunction hearing. On that same day, the Court entered an Order scheduling a preliminary injunction hearing for October 12, 2005. (Order of Sept. 19, 2005.)

On October 6, 2005, Plaintiffs filed a formal Motion for Preliminary Injunction. On October 7, 2005, Secretary of State Cox filed a Motion to Dismiss Individual Capacity Claims. On October 11, 2005, individual Plaintiff Tony Watkins filed a Stipulation of Dismissal Without Prejudice of his claims. Finally, on October 12, 2005, Plaintiffs filed
their First Amendment to Complaint, which addresses the issue of standing for the organizational Plaintiffs.

On October 12, 2005, the Court held a hearing with respect to Plaintiffs' Motion for Preliminary Injunction. During the October 12, 2005, hearing, the parties presented evidence and arguments in support of their respective positions. The Court concludes that the Motion for Preliminary Injunction now is ripe for resolution by the Court.

II. Standing

Defendants argue that Plaintiffs lack standing to pursue this lawsuit. The Court addresses the issue of standing before turning to the merits of Plaintiffs' Motion for Preliminary Injunction.

Article III of the federal Constitution limits the power of federal courts to adjudicating actual "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. "The most significant case-or-controversy doctrine is the requirement of standing." Nat'l Alliance for the Mentally Ill, St. Johns Inc. v. Bd. of County Comm'r's, 376 F.3d 1292, 1294 (11th Cir. 2004). "'In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" Id. (quoting Warth v.
Seldin, 422 U.S. 490, 498 (1975)).

The party invoking federal jurisdiction has the burden of proving standing. Nat’l Alliance for the Mentally Ill, 376 F.3d at 1294. At least three different types of standing exist: taxpayer standing, individual standing, and organizational standing. Id. To establish those types of standing, a plaintiff must “‘demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.’” Id. at 1295 (citing Bennett v. Spear, 520 U.S. 154, 162 (1997)) (internal quotation marks omitted). For purposes of this Order, the Court focuses on whether the organizational Plaintiffs have standing to pursue this action.2

“‘An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to

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One of the individual Plaintiffs, Tony Watkins, dismissed his claims without prejudice prior to the October 12, 2005, hearing, apparently because he did not wish to submit to a deposition. Defendants argue that the remaining individual Plaintiff, Clara Williams, lacks standing because she has a MARTA card that would qualify as a Photo ID card under the new Photo ID requirement and because she could vote by absentee ballot. In light of the need to issue a ruling quickly, and in light of the Court’s decision infra concerning Plaintiffs’ Section 2 claims, the Court does not address Defendants’ arguments pertaining to Plaintiff Williams at this point.
the organization's purpose, and neither the claim asserted nor
the relief requested requires the participation of individual
members in the lawsuit."

Nat'l Alliance for the Mentally
Ill, 376 F.3d at 1296 (quoting Friends of the Earth, Inc. v.
693, 704 (2000)). Here, Plaintiffs' First Amendment to
Complaint adds a new paragraph 1(i) to their Complaint that
states:

Common Cause, the League, the Central Presbyterian
and Advocacy Center, Inc., Georgia Association of
Black Elected Officials, Inc., The National
Association for the Advancement of Colored People
(NAACP), Inc., GLBC, and the Concerned Black Clergy
of Metropolitan Atlanta, Inc., (in the aggregate,
the "Non-Profit Plaintiffs"), are non-profit
organizations composed of members who would have
standing to sue in their individual right for the
allegations set forth in the Complaint, the
interests which each of the Non-Profit Plaintiffs
and their members seek to protect in the Complaint
are germane to the purpose of each of the Non-
Profit Plaintiffs, and neither the claim or the
relief sought requires participation by the
individual members of the Non-Profit Plaintiffs.

(First Am. to Compl.) The Court concludes that Plaintiffs'
allegations satisfy the organizational standing requirements,
for purposes of Plaintiffs' Motion for Preliminary Injunction.

III. Plaintiffs' Motion for Preliminary Injunction

To obtain a preliminary injunction, a movant must show:
(1) a substantial likelihood of ultimate success on the
merits; (2) the preliminary injunction is necessary to prevent
irreparable injury; (3) the threatened injury outweighs the harm the preliminary injunction would inflict on the non-movant; and (4) the preliminary injunction would serve the public interest. McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998). In the Eleventh Circuit, "'[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion' as to the four requisites." Id. (quoting All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc., 887 F.2d 1535, 1537 (11th Cir. 1989)) (internal quotation marks omitted) (alterations in original).

A plaintiff seeking to enjoin enforcement of a state statute bears a particularly heavy burden. "'[P]reliminary injunctions of legislative enactments--because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits--must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts.'" Bankwest, Inc. v. Baker, 324 F. Supp. 2d 1333, 1343 (N.D. Ga. 2004) (quoting Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990)).
A. Substantial Likelihood of Success on the Merits

1. Claims Under the Georgia Constitution

Plaintiffs allege that the Photo ID requirement violates article II, section 1, paragraph 2 of the Georgia Constitution. Article II, section 1, paragraph 2 of the Georgia Constitution provides: "Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people. The General Assembly shall provide by law for the registration of electors." Ga. Const. art. II, § 1, ¶ 2.

Article II, section 1, paragraph 3 of the Georgia Constitution sets forth the following exceptions to the right to register to vote:

(a) No person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence.

(b) No person who has been judicially determined to be mentally incompetent may register, remain registered, or vote unless the disability has been removed.

Ga. Const. art. II, § 1, ¶ 3.

Plaintiffs argue that the new Photo ID requirement violates the Georgia Constitution because it denies certain Georgia citizens the right to vote. According to Plaintiffs,
the Georgia Constitution lists only two grounds for denying a Georgia citizen who is registered to vote the right to vote: (1) having a conviction for a felony involving moral turpitude; or (2) having a judicial determination of being mentally incompetent to vote. Plaintiffs contend that the Georgia legislature simply has no power to regulate voting outside the areas of defining residency and establishing registration requirements.

Defendants argue that any claim that the State Defendants are violating Georgia law is barred by the Eleventh Amendment. Defendants quote Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), for the proposition that the Eleventh Amendment bars federal courts from enforcing state law either prospectively or retroactively. According to Defendants, because Georgia state courts are the correct arbiters on the meaning of state law, "it would be a 'gross intrusion'" for this Court to grant a preliminary injunction on the basis of Plaintiffs' claims arising under the Georgia Constitution claims. (State Defs.' Br. Opp'n Pls.' Mot. Prelim. Inj at 56.)

Defendants also argue that even if Eleventh Amendment immunity does not exist, Plaintiffs cannot succeed because the constitutionality of a Georgia statute is presumed, and "'all doubts must be resolved in favor of its validity.'" (Id. at 57
(citations omitted). According to Defendants, the General Assembly did not prescribe qualifications for voters when enacting the Photo ID law; instead, they were attempting to regulate the voting process itself. Defendant argue that the in-person Photo ID requirement is a "time, place, or manner" regulation, and that the Georgia Constitution does not require that citizens be permitted to vote in person nor does it state that citizens have an absolute right to be free from any regulation of in-person voting. (Id. at 59.)

Before the Court can consider Plaintiffs' claims regarding the Georgia Constitution, the Court must determine whether the Eleventh Amendment to the United States Constitution bars those claims. McClendon v. Ga. Dept. of Cmty. Health, 261 F.3d 1252, 1257 (11th Cir. 2001); Silver v. Baggiano, 804 F.3d 1211, 1213 (11th Cir. 1986).

The Eleventh Amendment to the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court has made clear that this language also bars suits against a state by its own citizens. DeKalb County School Dist. v. Schrenko 109 F.3d 680, 687 (1997) (citing Hans v. Louisiana, 134 U.S. 1
(1890)). "In short, the Eleventh Amendment constitutes an "absolute bar" to a state's being sued by its own citizens, among others." *Id.* (citing *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934)).

"[A]bsent its consent, a state may not be sued in federal court unless Congress has clearly and unequivocally abrogated the state's Eleventh Amendment immunity by exercising its power with respect to rights protected by the Fourteenth Amendment." *Id.* at 688 (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) ("*Pennhurst II*"')). "Congress may not nullify a state's immunity with respect to alleged violations of state law." *Id.* "For that reason, a federal court may not entertain a cause of action against a state for alleged violations of state law, even if that state claim is pendent to a federal claim which the district court could adjudicate. *Id.* (citing *Pennhurst II*, 465 U.S. at 117-23). In *Pennhurst II*, the United States Supreme Court explained that:

[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. *Pennhurst II*, 465 U.S. at 106.
Because Plaintiffs' suit is against State officials, rather than the State itself, a question arises as to whether the suit is actually a suit against the State of Georgia. "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" Id. at 101 (quoting Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 464 (1945)). A state is the real party in interest when the judgment sought would "restrain the Government from acting, or compel it to act." Id. at 101 n.11 (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)) (internal quotation marks and citations omitted).

The injunction Plaintiffs seek here would restrain the State from attempting to enforce the Photo ID requirement imposed by HB 244. The Court therefore finds that the State of Georgia is the real party in interest. Further, the Court finds that Plaintiffs' claim—that the Act violates two sections of the Georgia Constitution—clearly is a cause of action against a state for alleged violations of state law. The Court therefore concludes that this portion of Plaintiffs' Complaint is barred by the Eleventh Amendment.3

3 The Court notes that Plaintiffs' claims under the Georgia Constitution do not fall within the Ex Parte Young exception to the States' Eleventh Amendment immunity from suit. Ex Parte Young, 209 U.S. 123 (1908). The Young doctrine, as interpreted by later Supreme Court cases, provides that a suit for prospective relief that challenges a state official's
For the reasons discussed above, the Eleventh Amendment precludes the Court from entertaining Plaintiffs' claims asserted under the Georgia Constitution. The Court therefore concludes that Plaintiffs have failed to show a substantial likelihood of success with respect to those claims. 4

2. Undue Burden on the Right to Vote

The Supreme Court has made it clear that voting is a fundamental right, Burdick v. Takushi, 504 U.S. 428, 433 (1992), under the Fourteenth Amendment in the context of equal protection, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629 (1969). Indeed, in Wesberry v. Sanders, 376 U.S. 1 (1964), the Court observed:

No 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 good citizens, we

conduct as being contrary to the supreme authority of the United States is not a suit against the State and therefore is not barred by the Eleventh Amendment. Pennhurst, 465 U.S. at 102 (citing Young, 209 U.S. at 160; Edelman v. Jordan, 415 U.S. 651, 666-67 (1974)). Plaintiffs' claims under the Georgia Constitution, which challenge the enforcement of a state law as being contrary to a state constitution, do not implicate the supreme authority of the United States. Therefore, the Young exception to the Eleventh Amendment's bar on suits against a State does not apply to allow the Court to consider those claims.

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The Court will not dismiss Plaintiffs' claims arising under the Georgia Constitution in this Order because the case is not before the Court on a motion to dismiss those claims. The Court will address Secretary of State Cox's Motion to Dismiss Individual Capacity Claims in a separate Order to be issued at a later date.
must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

376 U.S. at 17-18. Similarly, in Reynolds v. Sims, 337 U.S. 533 (1964), the Court stated:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

337 U.S. at 561-62.

"[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." Dunn v. Blumstein, 405 U.S. 330, 336 (1972). The equal right to vote, however, is not absolute. Id. at 336. Instead, states can impose voter qualifications and can regulate access to voting in other ways. Id. at 336. Under the United States Constitution, states may establish the time, place, and manner of holding elections for Senators and Representatives. U.S. Const. art. I, § 4, cl. 1. Those qualifications and access regulations, however, cannot unduly burden or abridge the right to vote. Tashjian, 479 U.S. at 217 ("[T]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote." ) (citing
Wesberry v. Sanders, 376 U.S. 1 (1964); Dunn, 405 U.S. at 359-60 (striking down Tennessee's durational residency requirement for voting of one year in state and three months in county); Beare v. Briscoe, 498 F.2d 244, 247-48 (5th Cir. 1974) (invalidating provisions of Texas Constitution and implementing statute requiring persons who wished to vote in any given year to register each year during registration period beginning on October 1 and ending on January 31 of following year) (per curiam). In particular, the Supreme Court has observed that the wealth or the ability to pay a fee is not a valid qualification for voting. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666-68 (1966) (citations omitted; footnote omitted).

A number of Supreme Court cases have set forth standards for determining whether a state statute or regulation concerning voting violates the Equal Protection clause. In Dunn, the Supreme Court stated that a court must examine: "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." Dunn, 405 U.S. at 335. Another Supreme Court case indicates that the Court should "consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged
by the classification.‘" Kramer, 395 U.S. at 626. Those cases apply strict scrutiny when examining state statutes or regulations that limit the right to vote. Id. at 627 ("[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." ); see also Hill v. Stone, 421 U.S. 289, 298 (1975) ("in an election of general interest, restrictions on the franchise of any character must meet a stringent test of justification").

In a more recent line of cases, the Supreme Court has not necessarily applied the strict scrutiny test automatically to regulations that relate to voting. Burdick, U.S. at 433-34; Tashjian v. Republican Party, 479 U.S. 208, 213 (1986) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). Indeed, the Supreme Court observed in Burdick:

Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, 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.”

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s most important regulatory interests are generally sufficient to justify” the restrictions.

Burdick, 504 U.S. at 433-34 (citations omitted).

Defendants argue that the Photo ID requirement simply regulates the manner of voting, and that requiring a Photo ID for in-person voting is a reasonable means of achieving the legitimate state interest of regulating voting and preventing in-person vote fraud. According to Defendants, the Photo ID requirement is not a severe restriction on voting because it prevents no one from voting. Defendants argue that anyone may
vote by absentee ballot under HB 244's more relaxed absentee voting requirements. Defendants state that even voters who register by mail may vote for the first time via absentee ballot without showing a Photo ID, and that such voters simply must include a utility bill, a bank statement, or other form of identification permitted by HAVA with their absentee ballots as a means of voter identification. (Oct. 12, 2005, Hr'g Tr.)

According to Defendants, at most, the Photo ID requirement prevents some individuals who wish to vote in person from doing so until they obtain proper identification. Defendants also contend that those individuals without a Photo ID may obtain one free of charge from a State DDS Office, the State's GLOW Bus, or through certain organizations serving indigent clients merely by completing an Affidavit for Identification Card for Voting Purposes ("Affidavit"). Defendants note that although the Affidavit requires the applicant "to swear[] under oath that he or she is indigent and cannot pay the fee," (State Defs.' Initial Br. Opp'n Pls.' Mot. Prelim. Inj. at 48), anyone who desires a non-driver Photo ID card for voting purposes may complete the form and receive the free Photo ID card (Watson Decl. ¶ 5).

Defendants also point out that although opportunities for voter fraud via absentee ballot may exist, the legislature may
address one method of voting at a time. In this case, the legislature has chosen to address voting fraud via in-person voting first.

a. Under Strict Scrutiny

There seems to be little doubt that the Photo ID requirement fails the strict scrutiny test: accepting that preventing voter fraud is a legitimate and important State concern, the statute is not narrowly drawn to prevent voter fraud. Indeed, Secretary of State Cox pointed out that, to her knowledge, the State had not experienced one complaint of in-person fraudulent voting during her tenure. In contrast, Secretary of State Cox indicated that the State Election Board had received numerous complaints of voter fraud in the area of absentee voting. Furthermore, the Secretary of State’s Office removes deceased voters from the voting rolls monthly, eliminating the potential for voter fraud noted by the Atlanta Journal-Constitution’s article alleging that more than 5,000 deceased people voted during a twenty-year period.

Further, although Defendants have presented evidence from elections officials of fraud in the area of voting, all of that evidence addresses fraud in the area of voter registration, rather than in-person voting. The Photo ID requirement does not apply to voter registration, and any Georgia citizen of appropriate age may register to vote.
without showing a Photo ID. Indeed, individuals may register to vote by producing copies of bank statements or utility bills, or without even producing identification at all. The Photo ID law thus does nothing to address the voter fraud issues that conceivably exist in Georgia.

Rather than drawing the Photo ID law narrowly to attempt to prevent the most prevalent type of voter fraud, the State drafted its Photo ID requirement to apply only to in-person voters and to apply only to absentee voters who had registered to vote by mail without providing identification who were voting absentee for the first time. By doing so, the State, in theory, left the field wide open for voter fraud by absentee voting. Under those circumstances, the Photo ID requirement simply is not narrowly tailored to serve its stated purposes—preventing voter fraud. See Dunn, 405 U.S. at 343 ("Statutes affecting constitutional rights must be drawn with 'precision,' and must be 'tailored to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'") (citations omitted). Further, the State has a number of significantly less burdensome alternatives available to prevent in-person voting fraud, such
as the voter identification requirements it previously used and numerous criminal statutes penalizing voter fraud, to discourage voters from fraudulently casting ballots or impersonating other voters.

For the reasons discussed above, the Court finds that the Photo ID requirement is not narrowly tailored to serve the State’s interest in preventing voter fraud, and that a number of significantly less burdensome alternatives exist to address the State’s interest. Consequently, the Court concludes that Plaintiffs have a substantial likelihood of succeeding on the merits of their Equal Protection Clause claim under a strict scrutiny analysis.

b. Under Burdick

Even if the Court applies the Burdick test, Plaintiffs still have a substantial likelihood of succeeding on the merits of their Equal Protection Clause claim. Specifically, “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” outweighs “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.” Burdick, 504 U.S. at 433-34.
i. The Asserted Injury

For the reasons discussed below, the Court concludes that the character and magnitude of the asserted injury to the right to vote is significant. Many voters who do not have driver’s licenses, passports, or other forms of photographic identification have no transportation to a DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain licenses, or cannot travel to a DDS service center during the DDS’s hours of operation because the voters cannot take off time from work. It is beyond dispute that the DDS service centers, particularly those in suburban areas near Atlanta, frequently have lengthy lines, and that obtaining a driver’s license or Photo ID at a DDS service center often may require several hours of one’s time. Many voters who are elderly, disabled, or have certain physical or mental problems simply cannot navigate the lengthy wait successfully—even if the DDS allows those voters to sit and wait until a DDS worker calls their numbers.

Further, DDS service centers are not located in every Georgia county. Some of the service centers, particularly in south and middle Georgia, are so widely spaced that the service centers may be a lengthy drive away from many of the citizens those centers service. Most of the DDS service centers are located in largely rural areas where mass transit
likely is not available, and registered voters who have no need for a driver’s license but do not have another form of Photo ID simply may not be able to obtain transportation to a DDS service center.

The Court acknowledges that the DDS has a mobile licensing unit, the GLOW bus. The fact remains, however, that the DDS has only one GLOW bus and Georgia has 159 counties. It therefore is not reasonable to expect that the GLOW bus can travel to all of Georgia’s counties and the communities contained within those counties to service a significant number of voters who lack Photo IDs prior to the November 8, 2005, elections. Further, unless some effort is made to notify the public that the GLOW bus will be in a particular area on a particular date, many voters simply would not know of the GLOW bus alternative or would not be able to make arrangements for transportation to take them to the GLOW bus. As Plaintiffs’ evidence indicates, even calling the DDS to request information concerning the GLOW bus’s schedule of appearances may result in a voter receiving inconsistent information.

In any event, Plaintiffs have presented evidence indicating that the GLOW bus has steps for entering the bus and is not wheelchair-accessible. Many of the voters who do not possess Photo IDs are elderly or disabled and are
wheelchair-bound or have difficulty walking or navigating steps. The GLOW bus simply is not a feasible alternative for those voters, as the voters cannot enter the GLOW bus and the GLOW bus’s photographic and computer equipment apparently cannot be moved outside the bus to service the voters.

Still other voters do not have the $20 or $35 to pay for a Photo ID card, although they may not qualify as “indigent” for purposes of the fee waiver provision. Although Defendants contend that any voter who needs a Photo ID card for voting and who does not have another form of Photo ID may obtain a Photo ID card for free simply by completing an Affidavit, which the DDS does not question, the evidence fails to indicate that the State has made efforts to publicize the DDS’s “no questions asked” policy to voters or that DDS employees tell DDS customers that policy. The Affidavit requires a voter to sign the following statement:

I hereby swear or affirm that I am eligible for a free identification card for voting purposes pursuant to O.C.G.A. §40-5-103(d). I am eligible for this card because:

1. I am indigent and cannot pay the fee for an identification card;
2. I desire an identification card in order to vote in a primary or election in Georgia;
3. I do not have any other form of identification that is acceptable under O.C.G.A. § 21-2-417 for identification at the polls in order to vote;
4. I am registered to vote in Georgia or I am applying to register to vote as part of my application for an identification card; and
5. I do not have a valid driver's license issued by the State of Georgia.

A voter who reads the Affidavit without knowing the DDS’s “no questions asked” policy most likely would believe that he or she actually must be indigent and lack funds to pay for an Photo ID card before he or she could obtain a card for free. Such a voter might not even bother completing the Affidavit, for fear that signing a statement under oath that is not true and submitting the Affidavit to a State agency would result in penalties. Thus, the availability of free Photo ID cards simply does not reduce the burden that the Photo ID requirement imposes on the right to vote.5

The State Defendants argue that the Photo ID requirement does not deprive voters of the right to vote, as voters can vote via absentee ballot without producing any Photo ID at all in most instances. Most voters, however, likely are unaware that they can vote via absentee ballot without a Photo ID, and the State has not demonstrated that it has publicized the fact that a Photo ID is not necessary to vote via absentee ballot.

5 In any event, the Court finds it ironic that the State seeks to prevent one type of lying--fraudulent in-person voting--yet the State points to a DDS policy that apparently allows voters who want Photo ID cards to “lie” about their financial status as support for its argument that the Photo ID requirement does not unduly burden the right to vote.
Further, HB 244 also changed the law governing absentee voting to eliminate the conditions previously required for obtaining an absentee ballot, which had been in effect for some time. Counsel for the State Defendants, in response to the Court’s question concerning publication of the new absentee voting requirements, stated that the State has not publicized the new requirements for absentee voting any more or less than the State publicizes any other change in election law. Secretary of State Cox testified that the absentee voting rules in effect prior to the passage of HB 244 required voters to aver that they met one of several specified requirements to obtain an absentee ballot. Absent more information indicating that the State made an effort to inform Georgia voters concerning the new, relaxed absentee voting procedures, many Georgia voters simply may be unaware that the rules have changed. Those voters therefore still may believe that they must satisfy one of the former requirements to obtain an absentee ballot. Voters who cannot satisfy the former requirements likely will not even attempt to obtain an absentee ballot. Consequently, the Court simply cannot assume that Georgia voters who do not have a Photo ID will make the arrangements necessary to vote via the absentee voting process.