

SERVICE COPY

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

DEMOCRATIC PARTY OF GEORGIA,)
INC., a non-profit corporation)
organized and existing under Georgia law,)

Plaintiff,)

v.)

CIVIL ACTION

FILE NO. 2008-CV-151081

SONNY PERDUE, in his)
official capacity as Governor;)
KAREN HANDEL, in her official)
capacity as Secretary of State and)
Chief Election Official of Georgia; and)
STATE ELECTION BOARD,)

Defendants.)

DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

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I. INTRODUCTION

By the filing of its motion for a temporary restraining order, supported by its selective and inaccurate recitation of facts, Plaintiff acts as if nothing has happened since the Supreme Court of Georgia vacated the injunction entered by Fulton Superior Court Judge Bedford against Georgia's 2006 Photo ID Act over one year ago. See Perdue v. Lake, 282 Ga. 349 (2007). Aside from the outlandishness of seeking a temporary restraining order *to alter the status quo* one week before the July 15, 2008 general primary (and after voting for that primary has begun), Plaintiff and its counsel apparently have developed a severe case of amnesia concerning: (1) the upholding of the 2006 Photo ID Act by the United States District Court for the Northern District of Georgia, with that Court's concomitant *rejection* of the same evidence Plaintiff attempts to use here to support its state constitutional claims, see Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007); (2) the fact that the 2006 Photo ID Act has now been implemented in four election cycles over the past nine months, with no evidence of *any* voter, let alone "hundreds of thousands" of voters, being deprived of a right to vote; (3) the validation of the Indiana photo ID law, a *more* restrictive legislative act, by the United States Supreme Court in the face of a constitutional challenge, see Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008); and (4) the well-settled Georgia law that precludes the entry of a temporary restraining order to do anything other than *to preserve the status quo* which, in this case, is the presentation of photographic identification pursuant to the 2006 Photo ID Act in order to vote in person in Georgia elections. Based on these facts alone, Plaintiff's motion should be summarily rejected.

Even if Plaintiff gets past these disqualifying events, it still fails to present any evidentiary support for or legal argument to justify the entry of a temporary restraining order,

because Plaintiff lacks standing to bring this action, there is no merit to Plaintiff's arguments, the "harm" allegedly suffered by Plaintiff due to the implementation of the 2006 Photo ID Act is not legally cognizable, and there would be great harm to Defendants if the 2006 Photo ID Act were enjoined at the Eleventh Hour after it has been in effect for ten months.

II. STATEMENT OF FACTS

One or more of Plaintiff's counsel have filed four challenges to Georgia's 2006 Photo ID Act over the past three years. The prior three challenges have all proven ultimately unsuccessful due to the failure to produce *one person* who has standing to challenge the law or to produce any admissible evidence which establishes that the 2006 Photo ID Act constitutes an undue burden on the right to vote. Plaintiff's "Statement of Facts" fails to accurately report these previous facts and proceedings which, when considered, operate to defeat Plaintiff's motion for temporary restraining order. Defendants therefore are compelled to present the following accurate summary of this prior voluminous record.

A. Methods of Voting and Voter Identification in Georgia Prior to the Enactment of the Photo ID Acts¹

Both before and after the enactment of the Photo ID Acts, Georgia registered voters could exercise their right to vote in one of two ways: (1) by absentee ballot or (2) at the polls. Depending upon which method the voter chooses, specific rules apply. The Photo ID Acts did not alter these methods of voting but simply changed certain procedures applicable to these processes.

Prior to the Photo ID Acts, a voter could vote before a primary or general election by absentee ballot submitted through the mail or in person at the registrar's or absentee ballot

¹ The "Photo ID Acts" refer to both "the 2005 Photo ID Act" (2005 Ga. Laws 253, § 59/HB 244 and "the 2006 Photo ID Act" (2006 Ga. Laws 3, § 2/SB 84).

clerk's office. See 2003 Ga. Laws 517, §§ 35 & 36 (codified as O.C.G.A. §§ 21-2-380(b) & -381 (2003)). In order to obtain an absentee ballot through the mail, a voter was – and still is – required to submit a written request that contains “sufficient information for proper identification of the elector.” Id. § 36 (codified as O.C.G.A. § 21-2-381(a)(1) (2003)). Upon receipt of the ballot, the voter's signature would be matched with a signature on file at the registrar's office, and no other identification was required.

In addition to casting a ballot by mail, an absentee voter could also vote his or her ballot in person at the registrar's office. A voter casting an absentee ballot in person was required to present “proper identification to a poll worker.” Proper identification included the presentation of one of 17 possible documents specified in the law. Id. § 48 (codified as O.C.G.A. § 21-2-417(a) (2003)).

Except for voters appearing during the week prior to a primary or election (sometimes characterized as “advanced voting”), absentee ballot voters were also subject to another important requirement. Prior to the enactment of the Photo ID Acts, in order to cast an absentee ballot by mail or in person at any time other than the advance voting period, a voter would also have to assert a specific statutory reason why that voter could not vote in person on the day of the primary or election. Id. § 35 (codified as O.C.G.A. § 21-2-380(a) (2003)).²

As a second option, a registered voter could vote in person at the polls on the day of the primary or general election. Such voters would have to present one of the 17 forms of “proper identification to a poll worker” of the same type required for in-person voters. Id. (codified at O.C.G.A. § 21-2-417(a) (2003)).

² Voters who cast their ballots in-person during the advance voting period were not required to state an excuse but were required to show one of the 17 forms of ID.

B. Changes to Requirements for Absentee and In-Person Voting in 2005

1. Changes to Absentee Voting by Mail in 2005

Georgia law was amended in 2005 to enable registered voters to vote an absentee ballot by mail without having to state an excuse for not voting in person on the day of a primary or election. O.C.G.A. § 21-2-380(b). Although this change expanded the opportunity to vote by mail, it did not alter the documentation required to obtain an absentee ballot. See id. § 21-2-381(a)(1)(C). Therefore, a registered voter who votes by mail is not required to present a photo ID prior to being permitted to cast his or her vote.

Although there is no photo ID requirement when voting by mail, to protect against voter fraud, the law requires election officials to take a number of steps to ensure that the person voting by mail is the same person who registered to vote. Upon receiving an absentee ballot application, a registrar or absentee ballot clerk must record the date of receipt and determine the applicant's eligibility to vote in the primary or election. O.C.G.A. § 21-2-381(b)(1). Absentee ballots are mailed only to eligible applicants after eligibility is determined according to law. Id. §§ 21-2-381(b)(2)-(4); 21-2-384(a)(2). The absentee voter is required to sign an oath verifying eligibility. Id. § 21-2-384(c)(1). When the voted ballot is returned, the registrar or clerk is required to compare the identifying information and signature of the voter on the absentee ballot envelope with the identifying information on the voter registration and absentee ballot application. Id. § 21-2-386(a)(1)(B).

In contrast, when a registered voter appears in person at the polls, the voter executes a voter's certificate and the poll officer checks the name of the certificate against the electors' list at the precinct. Id. § 21-2-431(a). Unlike the verification process for an absentee ballot by mail, poll officers do not have the ability to compare the signature on the voter's certificate with the

registration card and absentee ballot application. As the evidence revealed in the federal litigation challenging the 2006 Photo ID Act, the voluminous registration cards are not reasonably or practically available at polling places and, in any event, comparing voter signatures would be much too onerous and time-consuming on a primary or election day to be practical. See Common Cause/Ga. v. Billups, 504 F. Supp. at 1359.

2. Changes to In-Person Voting in 2005

In conjunction with expanding the opportunity for registered voters to cast an absentee ballot by mail, the Georgia General Assembly enacted the 2005 Photo ID Act. In an effort to protect against in-person voter fraud, that Act changed the manner in which registered voters who vote in person can verify their identity. Registered voters who chose to vote in person were required to present one of the following forms of government-issued identification:

- A Georgia driver's license issued by the appropriate state agency;
- A valid photographic identification card issued by any agency or branch of the United States or any state government agency;
- A valid U.S. passport;
- A valid photographic employee identification card issued by the United States or a Georgia state or county government agency;
- A valid photographic U.S. military identification card; or
- A valid tribal photographic identification card.

2005 Ga. Laws 253, § 59. An in-person voter unable to produce any of these alternative photo IDs would be permitted to vote a provisional ballot. That ballot would be counted if the registrar was able to verify current and valid identification of the registered voter no later than two days after the polls close. Id.

For voters who did not possess one of the acceptable forms of photo ID, service centers operated by the Department of Driver Services (“DDS”) made photo ID cards available for a fee

ranging from \$20 for a five-year card to \$35 for a ten-year card. See id. § 66 (amending O.C.G.A. § 40-5-103). However, applicants seeking a card for voting who swore under oath they were indigent could obtain one for free. Id.

C. The Challenge to the 2005 Photo ID Act in District Court

On September 19, 2005, a group of non-profit corporations, organizations, and associations (including the NAACP), and two registered voters, represented by many of the same counsel that represent Plaintiff in this case, filed a complaint against a group of county election officials and Cathy Cox, in her individual and official capacities as Georgia's then-Secretary of State and Chair of the State Election Board.³ Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1328 ("Common Cause/Ga. I"). These plaintiffs alleged, in part, that the 2005 Photo ID Act violated the Fourteenth and Twenty-Fourth Amendments of the United States Constitution. Id.

On October 18, 2005, the District Court granted the plaintiffs' motion for preliminary injunction and enjoined the enforcement of the 2005 Photo ID Act. Common Cause/Ga. I, 406 F. Supp. 2d at 1377. The District Court found that the plaintiffs were likely to succeed on the merits of their federal constitutional challenge on two grounds. First, the District Court found that, based on the evidence before it on the motion for preliminary injunction, there appeared to be a significant burden on the right to vote. The District Court noted its concern that because the DDS service centers offering the photo IDs were "not located in every Georgia county," the centers were not readily accessible to those who might need a photo ID. Id. at 1362-63. Second, the District Court found that the fee for a photo ID card issued by DDS constituted a poll tax in violation of the Twenty-Fourth Amendment to the United States Constitution. Id. at 1369-70. The District Court

³ One of the original two registered voters in the federal action was dismissed shortly after the case was filed. In addition, after the 2006 general election, Karen Handel succeeded Cathy Cox as Secretary of State of Georgia and Chair of the State Election Board. See Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1337-38, 1341 (2007).

also found that voters had been inadequately educated about the new photo ID law as well as changes to the absentee ballot provisions permitting absentee voters who vote by mail to do so without stating a statutory excuse for not voting on the day of a primary or election. Id. at 1364.

D. The Enactment of the 2006 Photo ID Act

In early 2006, the Georgia General Assembly enacted the 2006 Photo ID Act. While the requirement for the presentation of a government-issued photo ID was maintained for in-person voters, the legislation provides that photo ID cards are available free of charge from each of the 159 county voter registrar offices, as well as any DDS service center. O.C.G.A. §§ 21-2-417 & -417.1; see also id. § 40-5-103(d).

E. Previous Challenges to the 2006 Photo ID Act

1. The Second and Third District Court Preliminary Injunctions

Following the enactment of the 2006 Photo ID Act, the Common Cause/Ga. plaintiffs asserted the same claims against the 2006 Photo ID Act as they raised in their original complaint against the 2005 Photo ID Act. Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1298 (N.D. Ga. 2006) (“Common Cause/Ga. II”). On July 14, 2006, the District Court granted a preliminary injunction only with respect to the July 18, 2006 primary and primary run-off elections.

The District Court found that the limited efforts to educate voters by running public service announcements two weeks before the primary and distributing a letter at the polls on the day of the primary would not give voters adequate time to become aware of the 2006 Photo ID Act’s requirements. Id. at 1346. Therefore, the District Court concluded that the plaintiffs had demonstrated a likelihood of success that the 2006 Photo ID Act unduly burdened the right to vote for those specific elections. Id. at 1360. However, the District Court noted the limitations on the reach of its Order and offered the following guidance:

In issuing this Order, the Court does not intend to imply that all Photo ID requirements would be invalid or overly burdensome on voters. Certainly, the Court can conceive of ways that the State could impose and implement a Photo ID requirement without running afoul of the requirements of the Constitution. Indeed, if the State allows sufficient time for its education efforts with respect to the 2006 Photo ID Act and if the State undertakes sufficient steps to inform voters of the 2006 Photo ID Act's requirements before future elections, the statute might well survive a challenge for such future.

Id. at 1351.

Two months later, on September 15, 2006, the District Court preliminarily enjoined the application of the 2006 Photo ID Act with respect to the September 2006 special elections. See Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1340-41 (N.D. Ga. 2007) ("Common Cause/Ga. III"). Again, the District Court stressed that it was not ruling on any issue other than the appropriateness of a preliminary injunction for the September 2006 special elections, and reiterated that if the State allowed sufficient time for its education efforts with respect to the 2006 Photo ID Act before an upcoming primary or election, then the Act might well survive a constitutional challenge. Id. at 1349-50.

2. The Constitutional Challenges in Superior Courts

a. The *Berry v. Perdue* Case

On April 12, 2006, Margaret Berry, a registered voter, filed a complaint for declaratory and injunctive relief in the Superior Court of DeKalb County, contending that the 2006 Photo ID Act violated Article II, Section 1, Paragraph 2 and Article II, Section 2, Paragraph 2 of the Georgia Constitution. Margaret Berry v. Sonny Perdue, et al., Superior Court of DeKalb County, Case No. 06CV4751-4. After subsequent evidence showed that Ms. Berry in fact voted absentee on June 23, 2006, and therefore lacked standing to challenge the 2006 Photo ID Act, plaintiff voluntarily dismissed the Berry case prior to trial.

b. **The Lake v. Perdue Case, the Superior Court Injunction, and the Vacating of That Injunction by the Supreme Court of Georgia**

Following the dismissal in Berry, two other registered voters, Rosalind Lake and Matthew Hess, filed another complaint for declaratory and injunctive relief in the Superior Court of Fulton County on July 3, 2006. Rosalind Lake, et al. v. Sonny Perdue, et al., Superior Court of Fulton County, Case No. 2006-CV-119207. Those plaintiffs contended that the 2006 Photo ID Act violated Article II, Section 1, Paragraph 2 of the Georgia Constitution because it requires the presentation of a photo ID as a “condition” to voting and disenfranchises voters who are lawfully registered and meet the state constitutional qualifications for voting.

At the final hearing in superior court, plaintiffs dismissed Mr. Hess from the action because he had obtained a photo ID after the filing of the complaint and therefore lacked standing to maintain his challenge to the Photo ID Act. Although Ms. Lake had other forms of photo ID as well, including a Metropolitan Atlanta Rapid Transit Authority (“MARTA”) transit card, and the State defendants attacked her standing on that ground, the superior court found that Ms. Lake had standing to maintain her action. On September 19, 2006, the superior court entered an order permanently enjoining the enforcement of the 2006 Photo ID Act based on a declaration that the Act violated Article II, Section 1, Paragraphs 2 and 3 of the Georgia Constitution. Id., Order of Sept. 19, 2006, Bedford, J. (“Bedford Order”) (attached as Ex. 2 to Pls.’ Mem. Supp. Mot. for Temp. Restraining Order (“Pls.’ Mem.”)).

On June 11, 2007, the Supreme Court of Georgia vacated the Bedford Order and remanded the case with the direction that it be dismissed, based upon the plaintiff’s lack of standing. Perdue v. Lake, 282 Ga. 348 (2007). The Supreme Court of Georgia held that because Ms. Lake held a photo ID issued by MARTA, she possessed a photo ID which was acceptable for voting and therefore could not demonstrate she was harmed by the statute.

3. The District Court Decision Upholding the 2006 Photo ID Act

Following the Supreme Court of Georgia's decision which ended the superior court litigation, the District Court lifted a previously imposed stay of proceedings⁴ and scheduled a bench trial on the merits of the plaintiffs' constitutional challenge. Common Cause/Ga. III, 504 F. Supp. 2d at 1341. Shortly before trial, the District Court dismissed the remaining individual plaintiff, because she possessed the same MARTA photo ID that the Supreme Court of Georgia found acceptable for voting in-person in Perdue v. Lake. Id. At the same time, the District Court granted the organizational plaintiffs' motion to amend to add two new individual plaintiffs, Eugene Taylor and Bertha Young. Id.

The District Court conducted the trial on the merits on August 22-24, 2007. At trial, the plaintiffs proceeded solely on their claim that the 2006 Photo ID Act unduly burdened their right to vote. Id. at 1342. At the close of the plaintiffs' case, the District Court granted a motion to dismiss all the organizational plaintiffs, except the NAACP, because these organizations failed to offer any facts in support of their standing to sue, which the plaintiffs themselves acknowledged at trial. Id. The District Court indicated that it would revisit the issue of standing for the NAACP and the two new individual plaintiffs in its final order. Id.

By Order dated September 6, 2007, the District Court dismissed the plaintiffs' case in its entirety and directed that judgment be entered in favor of the State defendants. First, the District Court held that the plaintiffs had failed to prove by a preponderance of the evidence that the remaining organizational plaintiff NAACP or the recently-added individual plaintiffs Taylor and Young had standing to sue. Id. at 1371-74. The District Court found that plaintiff NAACP had no standing to sue on behalf of its individual members because no witness identified any member

⁴ The District Court stayed its proceedings during the pendency of the State's appeal of the superior court injunction in Lake. See Common Cause/Ga. III, 504 F. Supp. 2d at 1341.

of the NAACP who would be harmed by the photo ID requirement and the individual plaintiff Eugene Taylor's testimony as to his membership in the NAACP was not credible. Id. at 1372. In addition, the NAACP had no standing to sue in its own right because its claimed injury, that it may choose to re-allocate resources to educate its members about the photo ID requirement, would not result from State defendants' actions but the organization's own choice. Id. at 1372-73.

Second, the District Court concluded that even if standing existed and the merits of the action were considered, the 2006 Photo ID Act imposed no undue burden on the right to vote. Id. at 1377-80. The District Court found that the plaintiffs failed to produce admissible evidence to establish that the character and magnitude of the asserted injury was significant. Id. at 1377. The District Court also found that the State defendants' "exceptional" efforts to educate voters about the requirements of the 2006 Photo ID Act undertaken after the entry of the earlier preliminary injunctions belied the plaintiffs' contention that voters were unaware of those requirements.⁵ Id. at 1378-79. Given that the plaintiffs "proffered precious little admissible evidence" to support their allegation that the photo ID requirement was burdensome and "failed to uncover anyone" who could attest to the fact that they would be prevented from voting due to that requirement, the District Court held that the 2006 Photo ID Act is rationally related to the State's interest in preventing voter fraud. Id. at 1378, 1380-81.

⁵ Immediately following the Lake decision, in an effort to comply with the District Court's previous orders, the Secretary of State's office undertook a substantial and multi-faceted effort to educate Georgia's voters concerning the requirements of the 2006 Photo ID Act, the availability of free photo ID or DDS-issued ID cards, as well as the option to vote an absentee ballot by mail without a photo ID. This voter outreach program, developed beginning February 2007 and finalized after the Lake decision, began well in advance of the September 2007 and November 2007 special elections and the February 2008 Presidential Preference Primary. These efforts are detailed by the District Court in its September 6, 2007 Order and were an important factor leading to the District Court's ultimate rejection of the Common Cause/Ga. plaintiffs' constitutional claim. See Common Cause/Ga. III, 504 F. Supp. 2d at 1365-69.

Importantly for the case at hand, the District Court considered the plaintiffs' purported "evidence" of a number of Georgia registered voters whose names did not "match" with persons on the DDS list of persons with Georgia driver's licenses or DDS-issued identification cards. The District Court ruled that such evidence was inherently unreliable and also excluded all of the plaintiffs' purported expert testimony concerning the so-called "no-match" lists:

Further, although Plaintiffs contended at the preliminary injunction hearing that many voters who lack an acceptable Photo ID for in-person voting are elderly, infirm, or poor, and lack reliable transportation to a DDS service center or a county registrar's office, the evidence in the record fails to support that contention. Even if Dr. Hood's testimony indicating that a higher percentage of the individuals who appear on the DDS no-match lists are elderly, or are African-American or other minorities, the testimony in the record established that the large numbers reported on the DDS no-match list were far from reliable. [Footnote – The undersigned appeared on one of the no-match lists.] . . . Further, even if a voter's name appears on a DDS no-match list, the voter still may have some other form of acceptable Photo ID, and neither Dr. Hood's analysis nor the DDS no-match list purported to address that issue. Plaintiffs thus simply have not satisfied their burden of proving that the 2006 Photo ID Act unduly burdens minority or elderly voters.

Id. at 1378 (record citation omitted; footnote included in original). Finally, as Plaintiff attempts to do in this proceeding, the District Court rejected the Common Cause/Ga. plaintiffs' attempt to use unsupportable and inadmissible statistics to bolster its claims that the 2006 Photo ID Act unduly burdens Georgia voters:

Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to [the 2006 Photo ID Act] because of his or her inability to obtain the necessary photo identification. Similarly, Plaintiffs have failed to produce any evidence of any individual . . . who would undergo any appreciable hardship to obtain photo identification in order to be qualified to vote.

Id. at 1380 (quoting Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 822-23 (S.D. Ind. 2006), aff'd sub nom. Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), aff'd, 128 S. Ct. 1610) (alterations in original and emphasis added).

F. The 2006 Photo ID Has Been Implemented in Four Series of Elections, and Neither Plaintiff Nor Its Counsel Have Attempted to Enjoin Its Operation Until Now.

After the Supreme Court of Georgia issued its June 11, 2007 decision in Perdue v. Lake, neither Plaintiff nor its counsel filed another superior court action to enjoin the enforcement of the 2006 Photo ID Act until the instant Complaint, filed nearly one year later on May 23, 2008. Moreover, neither Plaintiff nor its counsel filed such an action even after the September 6, 2007 decision of the United States District Court in Common Cause/Ga. III, which lifted the previous federal injunction against the enforcement of the 2006 Photo ID Act nearly nine months earlier.

Following the decision of the District Court, the 2006 Photo ID Act has been implemented for the following elections:

- (1) The September 18, 2007 special elections in 23 counties.
- (2) The November 6, 2007 special elections in 93 counties.
- (3) The February 8, 2008 Presidential Preference Primary conducted statewide (in 159 counties).
- (4) The May 13, 2008 special election and subsequent run-off to fill the vacancy in State House District 93.

Additionally, for the July 15, 2008 general primary that is the subject of Plaintiff's motion, in-person absentee voting began June 2, 2008 and advance voting began on Monday, July 7, 2008, in accordance with state law. See O.C.G.A. §§ 21-2-384(a) (absentee ballots must be available for voting 45 days prior to election day), 21-2-380(b) (advance voting period runs Monday-Friday of the week before election day). Voters who have cast their ballots by either of these methods have been required to present photo ID.

Plaintiff has not offered any admissible evidence that the 2006 Photo ID Act adversely affects "a large number of voters" or "hundreds of thousands" of voters as claimed in its

memorandum. In fact, during the February 2006 Presidential Preference Primary, there was a record turnout of over 2 million registered voters. See Official Election Results, 2008 General Primary Election, available at http://sos.georgia.gov/elections/election_results/2008_0205/swall.htm (visited July 7, 2008). In fact, Plaintiff's counsel has never offered (not has there ever been) any admissible evidence that any voter has been harmed by the implementation of the 2006 Photo ID Act.

[A]lthough Plaintiffs claim to know of people who claim they lack Photo ID, Plaintiffs have failed to identify those individuals. The failure to identify those individuals is "particularly acute" in light of Plaintiffs' contention that a large number of Georgia voters lack acceptable Photo ID. . . . [V]oters who lack Photo ID undoubtedly exist somewhere, but the fact that Plaintiffs, in spite of their efforts, have failed to uncover anyone "who can attest to the fact that he/she will be prevented from voting" provides significant support for a conclusion that the Photo ID requirement does not unduly burden the right to vote.

Common Cause/Ga. III, 504 F. Supp. 2d at 1380 (citations omitted).

G. The United States Supreme Court's Decision Upholding the Indiana Photo ID Law Also Supports the Constitutionality of the 2006 Photo ID Act.

On April 28, 2008, the United States Supreme Court upheld the validity of Indiana's photo ID law, concluding that the law did not violate the Fourteenth Amendment and rejecting similar unsupportable and inadmissible allegations as Plaintiff makes in this case. See Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008). A brief discussion of this recent decision also establishes that Plaintiff's challenge here should also fail, regardless of the fact that Plaintiff is mounting a state, as opposed to a federal, constitutional claim.

The Supreme Court in Crawford began its analysis of Indiana's photo ID statute with a review of the state's interests in enacting the statute. Id. at 1616-17. As here, the plaintiffs argued that "the statute was actually motivated by partisan concerns and dispute[d] both the significance of the State's interests and the magnitude of any real threat to those interests," but

the Court disagreed, noting that “[e]ach is unquestionably relevant to the State’s interest in protecting the integrity and reliability of the electoral process.” Id.

The Supreme Court recognized that “[t]he only kind of voter fraud that [the photo ID statute] addresses is in-person voter impersonation at polling places,” but “[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history.” Id. at 1618-19. The Court, however, cited several “flagrant examples of such fraud in other parts of the country,” occasional examples of in-person voter fraud in recent years, and Indiana’s own experience with fraudulent absentee ballot voting in the 2003 Democratic primary, all of which demonstrated to the Court that “not only is the risk of voter fraud real but that it could affect the outcome of a close election.” Id. (footnotes omitted). Accordingly, the Court determined that “[t]here is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.” Id.

The Supreme Court also considered the separate state interest in “protecting public confidence ‘in the integrity and legitimacy of representative government.’ ” Id. at 1620 (citation omitted). “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process,” and the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.” Id.

Furthermore, although “partisan considerations may have played a significant role in the decision to enact [the photo ID statute],” they did not change the Court’s analysis. Id. at 1623-24. “[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications

should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.” Id. at 1624.

Next, the Supreme Court evaluated the alleged burdens the photo ID requirement imposed on those without a photo ID. On summary judgment in the Indiana litigation (like at the trial stage in Common Cause/Ga.), the plaintiffs attempted to introduce an expert report that nearly one million registered voters in Indiana did not possess either a driver’s license or another acceptable form of photo ID, but (like the court in Common Cause/Ga.) the district court judge found the expert’s report to be “utterly incredible and unreliable.” Rokita, 458 F. Supp. 2d at 803 (cited in Crawford, 128 S. Ct. at 1614). The Supreme Court found that all Indiana voters who lacked a photo ID could obtain one for free, and additionally “the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph *surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.*” Crawford, 128 S. Ct. at 1621 (emphasis added).

With respect to the few individuals who may experience a higher burden, the Supreme Court found that the deposition testimony — which did not provide a single example of a registered voter who was prevented from voting because of the photo ID requirement — did “not provide any concrete evidence of the burden imposed on voters who currently lack photo identification.” Id. at 1622. Moreover, with respect to any special burdens imposed on elderly voters, although difficult for the Court to measure based on the deposition testimony, those were mitigated by the fact that Indiana made it easier for elderly voters to obtain photo IDs and allowed them to vote absentee by mail without presenting a photo ID. Id. The Supreme Court thus rejected the plaintiffs’ argument that the Indiana statute imposed “excessively burdensome

requirements” on any class of voters. Id. at 1623 (quoting Storer v. Brown, 415 U.S. 724, 738 (1974)). Because the plaintiffs had “not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result” of the photo ID requirement, the Supreme Court concluded that the potential burden on a few individuals was not “severe” enough to warrant strict scrutiny of the Indiana photo ID statute, and held that the Indiana law imposed no undue burden on voting. Id.

The Supreme Court itself recognized that Georgia’s photo ID law is less burdensome than the Indiana statute. Indeed, although Justice Breyer dissented in Crawford, by way of comparison, he praised Georgia’s 2006 Photo ID Act:

By way of contrast, . . . Georgia [has] put into practice photo ID requirements significantly less restrictive than Indiana’s. . . . While Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, in Georgia any voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so. Finally, . . . Georgia [does not] insist[], as Indiana does, that indigent voters travel each election cycle to potentially distant places for the purposes of signing an indigency affidavit.

Id. at 1644-45 (Breyer, J., dissenting) (citations omitted). Justice Breyer also praised Georgia’s “serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free [State-issued] Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the voters that they can vote absentee by mail without a Photo ID.” Id. (quoting Common Cause/Ga. III, 504 F. Supp. 2d at 1380).

III. ARGUMENT AND CITATIONS OF AUTHORITY

A. Because Plaintiff Does Not Seek to Maintain the Status Quo, Plaintiff Has Failed to Meet the Paramount Legal Standard for the Granting of a Temporary Restraining Order.

The purpose of a temporary restraining order (“TRO”) or an interlocutory injunction is to *maintain the status quo* pending final adjudication. The 2006 Photo ID Act, which has been in effect since the September 6, 2007 decision of the District Court in Common Cause/Ga. III and already has been implemented in four previous election cycles, constitutes the status quo. Both the Supreme Court of Georgia and Georgia Court of Appeals have stated repeatedly that “[i]t is axiomatic that the *sole purpose* of a temporary or interlocutory injunction is to maintain the status quo pending a final adjudication on the merits of the case.” Hampton Island Founders v. Liberty Capital, 283 Ga. 289, 293 (2008) (citing Bailey v. Buck, 266 Ga. 405, 405-06 (1996)) (emphasis added); accord State Farm Mut. Auto. Ins. Co. v. Mabry, 274 Ga. 498, 509 (2001); Poe & Brown of Ga. v. Gill, 268 Ga. 749, 750 (1997); Metro. Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 494 (1979); Hipster, Inc. v. Augusta Mall P’ship, No. A08A0010, 2008 Ga. App. LEXIS 468, at *3 (Apr. 24, 2008); Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., Nos. A07A1720 & A08A0960, 2008 Ga. App. LEXIS 390, at *10 (Mar. 28, 2008); Hicks v. Doors by Mike, Inc., 260 Ga. App. 407, 408 (2003).

Moreover, the status quo “is not defined by the parties’ existing *legal rights*; it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties’ legal rights.” Hampton Island Founders, 283 Ga. at 293 (quoting SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1100 (10th Cir. 1991)) (emphasis in SCFC). The party which seeks a TRO must present evidence that the status quo is “endangered and in need of

preservation,” and it is abuse of discretion to grant the interlocutory injunction without such a showing. See, e.g., Green v. Waddleton, 288 Ga. App. 369, 370 (2007) (citing Kennedy v. W. M. Sheppard Lumber Co., 261 Ga. 145, 146 (1991)). In short, some “vital necessity” is required for the injunction. Chambers v. Peach County, 268 Ga. 672, 673 (1997); accord Kennedy, 261 Ga. at 146.

The status quo here is the 2006 Photo ID Act, which was implemented in the last four elections following challenges made by parties with no standing who relied on the same inadmissible evidence that Plaintiff offers in this case. For in-person absentee voters and advance voters, the Act has already been and continues to be implemented as part of the July 15, 2008 general primary. Because Plaintiff cannot meet the prerequisite legal standard for the granting of a TRO (because it wants to *change* the status quo, not *maintain* it), its motion for a temporary restraining order must be denied.

B. Plaintiff Has No Standing to Bring This Action.

Unable to find one individual with standing to challenge the 2006 Photo ID Act (all three previous state court plaintiffs and all four previous federal court plaintiffs have lacked standing to sue), the Democratic Party of Georgia (“DPG”) now attempts to maintain a lawsuit challenging the Act by reasoning that, because the Indiana Democratic Party was found to have standing to challenge that state’s photo ID law (albeit unsuccessfully), then surely the DPG must have standing to challenge the Georgia law. Once again, Plaintiff’s counsel have bet on a horse than cannot get out of the barn.

Plaintiff’s alleged injury is set forth in its Complaint as follows:

The 2006 Photo ID Act injures the DPG because, as a proximate result of the Act, the Party will be compelled to devote resources to identifying and counteracting the effects of the Act on the Democratic Party’s supporters. Because of the Act, these resources will be expended, *inter alia*, identifying those of its supporters who are

affected by the Act, assisting those supporters in obtaining Photo IDs and getting to the polls those of its supporters who would otherwise be discouraged by the new law from voting. If not for the 2006 Photo ID Act, these resources would be devoted to other activities consonant with the DPG's mission.

Verified Compl. For Decl. & Inj. Relief, ¶ 1(b); see also Pls' Mem. at 20 ("If the Act is not enjoined, DPG will be harmed by the diversion of its resources that will be required to counteract the effects of the Act."). This was the same basis for organizational standing urged by the NAACP in Common Cause/Ga., an argument that was forcefully rejected by both the District Court there and in the Indiana photo ID litigation.

In Common Cause/Ga., the NAACP argued that it "had standing to sue in its own right, based on the possibility that it may have to re-allocate resources to educate its members concerning the Photo ID requirement and to ensure that its members who lack Photo ID cards obtain those." Common Cause/Ga. III, 504 F. Supp. 2d at 1372. The District Court rejected this imprecise and speculative basis for standing upon the same grounds as did the Indiana district court in the challenge brought by the NAACP to challenge Indiana's photo ID law:

"[This interpretation], if accepted, would completely eviscerate the standing doctrine. If an organization obtains standing merely by expending resources in response to a statute, then Article III standing could be obtained through nothing more than filing a lawsuit. Such an interpretation flies in the face of well-established standing principles. Indeed, '[a]n organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation.'"

Id. at 1373 (quoting Rokita, 458 F. Supp. 2d at 817 (quoting Spann v. Colonial Vill., Inc., 899 F. 2d 24, 27 (D.C. Cir. 1990))). The District Court also found that any injury suffered by the NAACP "would be of its own making," so that the alleged harm would not be the result of any action by the State. Id.

The standing of the DPG should be rejected by this Court for the same reasons that the federal courts rejected the standing of the NAACP. “In the absence of our own authority, we frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia’s courts.” Feminist Women’s Health Center v. Burgess, 282 Ga. 433, 434 (2007). Indeed, for associational purposes, the Supreme Court of Georgia has adopted the three-part test for standing set out in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977): “[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization’s purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” See Aldridge v. Ga. Hospitality & Travel Ass’n, 251 Ga. 234, 236 (1983) (quoting Hunt, 432 U.S. at 341); see also Sawnee Electrical Membership Corp. v. Ga. Dep’t of Revenue, 270 Ga. 22, 24 (2005). This is the same Article III standard cited by the District Court in finding a lack of standing for the NAACP under similar circumstances. See Common Cause/Ga. III, 504 F. Supp. 2d at 1371 (citing Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc., 528 U.S. 167, 181 (2000)). Like the NAACP in both Common Cause/Ga. and Rokita, the DPG has not shown that any one of its members would have standing to bring this action nor can the possibility of its having to shift resources establish the DPG’s standing to sue in its own right.

Consequently, because the DPG lack standing to bring this challenge, Plaintiff’s request for a temporary restraining order must fail.

C. **Plaintiff Has Otherwise Failed to Satisfy the “Drastic Extraordinary” Remedy of Obtaining a Temporary Restraining Order Against the State, Particularly Because the 2006 Photo ID Act Has Previously Been Implemented and Upheld as Constitutional.**

To obtain a TRO, assuming that it is the status quo that is to be protected (which, in this litigation, is not the case), a movant must also demonstrate that the balance of equities favor such drastic relief. See Garden Hills Civic Ass’n, Inc. v. Metro. Atlanta Rapid Transit Auth., 273 Ga. 280, 281 (2000). The likelihood of an applicant’s ultimate success on the merits is not by itself determinative, but it is a proper criterion for the trial court to consider in balancing the equities. See id. (“Although the merits of the case are not controlling, they nevertheless are proper criteria for the trial court to consider in balancing the equities.”); see also Lee v. Env’tl. Pest & Termite Control, 271 Ga. 371, 373 (1999) (citing Ledbetter Bros., Inc. v. Floyd County, 237 Ga. 22 (1976)) (“In determining whether the equities favor one party or the other, a trial court may look to the final hearing and contemplate the results.”).

Under the principle of balancing the equities, a TRO should be denied, “where its grant would operate oppressively on the defendant’s rights, especially in such a case where the denial of the temporary injunction would not work ‘*irreparable injury*’ to the plaintiff or leave the plaintiff ‘practically remediless’ in the event it ‘should thereafter establish the truth of [its] contention.’” Id. at 281-82 (citing McKinnon v. Neugent, 226 Ga. 331, 332 (1970)) (emphasis added). Additionally, the Court should consider whether the potential “injury to [the State] outweighs any harm to” Plaintiff. Id. at 282.

Although the decision whether to issue a TRO or interlocutory injunction is generally within the trial court’s discretion, “when there is no material conflict in the evidence, the applicable rules of law cannot be avoided on the basis of discretion.” Id. at 282 (quoting Am. Bldgs. Co. v. Pascoe Bldg. Sys., 260 Ga. 346, 348 (1990)); see also Zant v. Dick, 249 Ga. 799

(1982). Instead, in such cases the trial judge's discretion is circumscribed by the applicable rules of law. See Garden Hills Civic Ass'n, 273 Ga. at 282 (quoting Zant, 249 Ga. at 799-800).

The federal courts have categorized the requirements for TROs and interlocutory (or "preliminary") injunctions as a four-factor test, stating that a movant must demonstrate "(1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest." Zardui-Quitana v. Richard, 768 F.2d 1213, 1216 (11th Cir. 1985); see Newman v. City of East Point, 181 F. Supp.2d 1374, 1377 (N.D. Ga. 2002) (stating that same requirements apply to a TRO as to an interlocutory, or preliminary, injunction).

Both Georgia state and federal courts have emphasized that injunctive relief is a "drastic extraordinary" remedy, and a litigant is not entitled to a TRO or interlocutory injunction unless it has clearly met the prerequisites. Newnan v. Atlanta Laundries, Inc., 174 Ga. 99, 113 (1932); accord Times-Journal, Inc. v. Jonquil Broadcasting Co., 226 Ga. 673, 674-75 (1970) ("[T]his section of the Civil Practice Act deals with *extraordinary* relief . . .") (emphasis added); see Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1240 (11th Cir. 2005); Cafe 207, Inc. v. St. Johns County, 989 F.2d 1136, 1137 (11th Cir. 1993); Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990); United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983) (quoting Canal Auth. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)).⁶ As the Supreme Court of Georgia has emphasized, "[t]here

⁶ In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or [is] more dangerous in a doubtful case, than the issuing of an injunction.” Bruce v. Wallis, 274 Ga. 529, 532 (2001) (quoting Prime Bank v. Galler, 263 Ga. 286, 289 (1993)).

Plaintiff has a particularly heavy burden in this case because it seeks to enjoin enforcement of a state statute that has already been upheld as constitutional by a federal court (and cited with approval in a recent decision of the United States Supreme Court which upheld a similar, more restrictive statute in Indiana). Because a TRO or interlocutory injunction of a legislative enactment will “interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits,” it “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.” Ne. Fla. Chapter, 896 F.2d at 1285; see also Franklin v. Harper, 205 Ga. 779, 790 (1949) (emphasizing that “the legislature has a *wide latitude* in determining how the [voting] qualifications required by the Constitution may be determined”) (emphasis added).

Without even reaching the factors which this Court would normally consider when a proper application for a TRO has been presented, the TRO motion must be denied. First, as stated earlier, a TRO cannot operate to reverse or modify the status quo. Second, Plaintiff has no standing to maintain its Complaint. Third, the TRO motion has no evidentiary support. Plaintiff has not presented sufficient evidence to warrant a TRO. In any event, the District Court already considered and rejected the same evidence Plaintiff seeks to present in this case to support its argument that the 2006 Photo ID Act is an undue burden upon voting. Finally, because the 2006 Photo ID Act has previously been upheld as constitutional in federal court, and has been cited

with approval by the United States Supreme Court, the presumption of its constitutionality in this proceeding is even greater than the great presumption of constitutionality normally accorded laws of the State of Georgia.

D. Plaintiff Cannot Succeed on the Merits.

1. The 2006 Photo ID Act Does Not Violate Article II, Section 1, Paragraph 2 of the Georgia Constitution.

“The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state.” Ga. Const. art. III, § 6, ¶ 1. The General Assembly’s powers are plenary, and it is “absolutely unrestricted in its power to legislate” unless it undertakes an act prohibited by the Constitution. Bryan v. Ga. Pub. Serv. Comm’n, 238 Ga. 572, 573 (1977) (quoting Sears v. State, 232 Ga. 547, 554 (1974)). It is a cardinal rule in Georgia that statutes are presumed to be constitutional and that all doubts must be resolved in favor of their validity. Albany Surgical, P.C. v. Ga. Dep’t of Cmty. Health, 278 Ga. 366, 368 (2004). Not only are acts of the General Assembly presumed constitutional, but “the authority of the Courts to declare them void, will never be resorted to, except in a clear and urgent case” Brugman v. State, 255 Ga. 407, 414 (1986) (quoting Bartow County Bank v. Bartow County Bd. of Tax Assessors, 251 Ga. 831, 833 (1984)). A court cannot reject the plain language of a statute or constitutional provision “unless it will lead to unreasonable consequences or absurd results not contemplated by the Legislature.” Innovative Clinical & Consulting Servs. v. First Nat’l Bank, 279 Ga. 672, 675 (2005).

Plaintiff relies entirely on Judge Bedford’s September 16, 2006 order which, at that time, enjoined the implementation of the 2006 Photo ID Act based upon that court’s view that it

violated Article II, Section 1, Paragraph II of the Georgia Constitution. That view, however, is not binding legal precedent.

First, Judge Bedford's order was vacated by the Supreme Court of Georgia, as his decision was predicated on his erroneous finding that Rosalind Lake had standing to bring the case. See Perdue v. Lake, 282 Ga. 348 (2007). Second, Plaintiff's assertion and Judge Bedford's view were based upon an erroneous interpretation of Article II, Section 1, Paragraph 2 of the Georgia Constitution, which states as follows:

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. Plaintiff believes that this provision absolutely limits the General Assembly to enacting laws affecting voting for only two purposes: (1) to establish minimum residency requirements, and (2) to register electors. In his vacated Order, Judge Bedford actually disagreed with that assertion, recognizing that “[o]nce a voter properly registers, the legislature may impose reasonable identification requirements aimed at ensuring that the person who appears to vote is the person who has registered to vote and who is otherwise qualified to vote.” (Bedford Order at 11 (citing Franklin v. Harper, 205 Ga. 779, 789 (1949)).) Nevertheless, Judge Bedford believed the 2006 Photo ID Act still violated the constitutional provision.

Plaintiff's contention and Judge Bedford's ultimately-vacated decision are contrary to Supreme Court of Georgia precedent and misconstrue the effect of the 2006 Photo ID Act. The Supreme Court of Georgia has emphasized that although the right to vote guaranteed in Article II, Section 1, Paragraph 2 cannot be “absolutely denied or taken away by legislative enactment,” it is “subject to reasonable regulation,” including the legislature's right to prescribe how “qualifications

shall be determined.” Franklin, 205 Ga. at 789; accord Gordon v. Trapp, 205 Ga. 176, 181-82 (1949); Stewart v. Cartwright, 156 Ga. 192, 197 (1923). Once a voter is registered, it is the legislature’s prerogative to provide a reasonable manner in which identification of the voter can be established prior to having that vote count. In citing to a portion of Franklin for the proposition that the legislature cannot “add” to the constitutional qualifications for voting, and then extrapolating the proposition that the legislature cannot then impose an identification requirement for ensuring a registered voter’s identity before voting, Plaintiff ignores the more relevant language in Franklin which specifically *authorizes* such regulation:

The legislature, even in the absence of express constitutional power, can provide for the registration of voters; but where the State Constitution provides who shall be entitled to vote, the legislature cannot take from or add to the qualification unless the power is granted expressly or by necessary implication. *However, the legislature has a wide latitude in determining how the qualifications required by the Constitution may be determined*, provided it does not deny the right of franchise by making the exercise of such right so difficult or inconvenient as to amount to a denial of the right to vote. . . . *The Constitution of this State, in setting up requirements for the qualification of electors, contemplates enactment of laws to determine those qualifications.*

Franklin, 205 Ga. at 790 (emphasis added and citation omitted).

In arguing that the 2006 Photo ID Act is unconstitutional because “it is neither a residency requirement nor is it a condition of registration,” Judge Bedford rejected the Supreme Court of Georgia’s express holding in Franklin which permits the legislature to provide by law for the manner in which the registered voter’s identity is verified before voting. Indeed, by asserting that Article II, Section 1, Paragraph 2 limits the legislature to imposing only a residency requirement or condition of registration, Judge Bedford rejected his own finding that “the legislature may impose reasonable identification requirements aimed at ensuring that the person who appears to vote is the person who has registered to vote” (Bedford Order at 11 (citing Franklin, 205 Ga. at 789).)

In addition to misapplying Article II, Section 1, Paragraph 2 of the Georgia Constitution, Plaintiff ignores the importance of the immediately preceding Article II, Section 1, Paragraph 1, entitled “[m]ethod of voting,” which provides that “[e]lections by the people shall be by secret ballot and shall be conducted in accordance with *procedures provided by law.*” Ga. Const. art. II, § 1, ¶ 1 (emphasis added). The Georgia Constitution thus specifically contemplates that the General Assembly shall enact laws which determine the procedures to use in conducting elections. As the 2006 Photo ID Act affects the method and procedures for in-person voting – as opposed to affecting voter registration (for which no photo ID is required) – Article II, Section 1, Paragraph 1 provides the express authorization for the enactment of that statute.

In AFL-CIO v. Hood, 885 So. 2d 373 (Fla. 2004), the Supreme Court of Florida considered an analogous challenge based upon a similar constitutional issue and decided in accordance with Defendants’ position here. In Hood, Florida law allowed voters to cast provisional ballots which would be counted only upon establishment of the voter’s eligibility to vote at the precinct where the ballot was cast. Id. at 374. This procedure was challenged as violating the state constitution, which grants the right to vote to every citizen over 18 years of age who is a permanent resident of the state and properly registered as provided by law. Id.; see also Fla. Const. art. VI, § 2. In deciding the issue, however, the Florida Supreme Court emphasized the immediately preceding Article VI, Section 1 of the Florida Constitution, which provides, in pertinent part, that “[a]ll elections by the people shall be by direct and secret vote and elections shall . . . be regulated by law.” Hood, 885 So. 2d at 374. The court concluded that Article VI, Section 1 authorized the state legislature to enact laws regulating the election process and required a voter to comply with such “requirements of law as may be imposed upon him as a matter of policing” that process. Id. at 375.

The same constitutional structure exists in the Georgia Constitution, and the same analysis is applicable here. Article II, Section 1, Paragraph 1 of the Georgia Constitution, like Article VI, Section 1 of the Florida Constitution, provides for elections by secret ballot and for their regulation by law. The immediately succeeding Paragraph 2 is not to be read as a prohibition against non-registration-related election laws, as Plaintiff argues in this case, but the Florida Supreme Court correctly rejected in construing similar constitutional provisions. The imposition of identification requirements to ensure that the person who has previously registered is the same person who appears at the polls is a regulation of the in-person voting process similar to the proof that a Florida voter must show regarding eligibility to vote in a particular precinct. It is not a qualification on voting in violation of the state constitution.

2. **The 2006 Photo ID Act Does Not Impose Any Condition Upon the Right to Vote.**

Plaintiff also contends that the 2006 Photo ID Act imposes a condition of voting not required by the Georgia Constitution. Nothing in the Act prohibits any Georgia registered voter from casting a ballot in any election. Any registered voter who does not possess a photo ID, and/or who does not wish to obtain one for free, can still vote.

First, if a registered voter has no photo ID card and does not want to obtain one for free, that voter may vote by mail without presenting a photo ID. See O.C.G.A. 21-2-381(a)(1)(C). Article II, Section I, Paragraph 2 of the Georgia Constitution protects the right of qualified citizens *to vote*, but it does not require that those citizens must be allowed *to vote in any particular manner*. “The legislative branch of our government is charged with the duty of providing the manner of holding elections” Wheeler v. Bd. of Trustees, 200 Ga. 323, 334 (1946). Nothing in the 2006 Photo ID Act conditions *the right to vote* on the presentation of a photo ID, but only requires that a registered voter who chooses to vote *in person* must present

such ID. See Common Cause/Ga. III, 504 F. Supp. 2d at 1379 (“The State thus has not, as Plaintiffs contend, completely barred voters who lack Photo ID from voting.”); Rokita, 458 F. Supp. 2d at 820 (“there is no absolute constitutional right to vote in any specific manner an individual may desire . . .”). Plaintiff’s assertion that voting by absentee is “not an adequate substitute” for voting in person ignores not only the fact that there is no constitutional right to vote in any particular manner, see Burdick v. Takushi, 504 U.S. 428, 433 (1992) (“[i]t does not follow, however, that the right to vote in any manner . . . [is] absolute.”); see also Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 n.6 (1969); McDonald v. Bd. of Election Comm’rs, 394 U.S. 802, 807-08 (1969), but also disregards the recent holding of the U. S. Supreme Court, which approved the constitutionality of Indiana’s photo ID law even though, unlike Georgia, the Indiana law *does not* provide all registered voters with the ability to vote an absentee ballot by mail without a photo ID. “While Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, in Georgia *any* voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so.” Crawford, 128 S. Ct. at 1645 (Breyer, J., dissenting) (emphasis in original).

Second, a registered voter who desires to vote in person can obtain a free photo ID at one or more locations in his or her home county⁷ or at any of the 63 DDS service centers throughout the state. See O.C.G.A. § 21-2-417.1(a). Judge Bedford’s now-vacated order made no finding that such a requirement for an in-person voter imposed any constitutional infirmities, and the Supreme Court of Georgia has held that such an additional step before voting is not unconstitutional. See Franklin, 205 Ga. at 792 (“It may be that those voters who are now on the

⁷ The Act requires that each county board of registrars shall provide at least one place in the county at which free photo ID cards can be issued. Some counties provide additional locations. Fulton County, for example, provides three different locations in the north, south, and downtown Atlanta area for registered voters to obtain the cards.

permanent voters' list will be put to great inconvenience in registering again, but this standing alone is not a sufficient reason to strike down the act.”). The District Court, in upholding the 2006 Photo ID Act, concluded that the state’s substantial educational efforts which were undertaken well in advance of elections held between September 2007 and February 2008 “afford[ed] most voters who lack a Photo ID a reasonable opportunity to obtain one.” Common Cause/Ga. III, 504 F. Supp. 2d at 1380.

Third, if a registered voter appears at the polls without a photo ID, that voter may still vote a provisional ballot and have that vote counted upon presentation of an acceptable photo ID within two days. See O.C.G.A. § 21-2-417(b). It is this provision which evidently convinced Judge Bedford to declare in his now-vacated Order that the 2006 Photo ID Act was unconstitutional, on grounds that, if the voter does not reappear with the proper photo ID, then the ballot is not counted and “[t]he result of this provisional ballot scheme is to disenfranchise an otherwise qualified voter who does not comply with the additional conditions imposed by the legislature.” (Bedford Order at 12.) Judge Bedford mistakenly attempted to distinguish this procedure with the pre-existing law’s “fail-safe” procedure where a registered voter who did not have a proper identification when voting in person could simply sign an affidavit attesting to his or her identity and have that vote counted. (Id.)

In fact, if the 2006 Photo ID Act did not contain a provisional ballot option to enable the voter to cast a ballot and later return with the proper ID, Judge Bedford almost assuredly would have found such a procedure to be violative of the Georgia Constitution. To have based the invalidation on *actually providing* this additional allowance is illogical. Moreover, Judge Bedford’s comparison with the so-called “fail-safe” provision of the pre-2005 law is flawed because under that old law, there was *no* requirement that any in-person voter had to present any

identification in order to have his or her vote counted. The purpose of the 2006 Photo ID Act was to protect against potential in-person voter fraud (a purpose Judge Bedford held to be reasonable and legitimate) so that there would be some assurance that the person who registered to vote was the same person who presented at the polls to vote. Based upon Judge Bedford's vacated order and Plaintiff's argument, the General Assembly would be absolutely precluded from imposing any requirement upon an in-person voter to show any form of identification in order to cast a ballot – including any of the 17 forms of identification allowed under the former law. Under this view, only a law in which the presentation of identification is optional would pass constitutional muster. Such a law, of course, would do nothing to fulfill the legitimate interest of the legislature to prevent in-person voter fraud.

Finally, the procedure for providing voters who fail to produce a photo ID at the polls with the ability to vote a provisional ballot upon the presentation of a photo ID after the election was upheld by the United States Supreme Court in Crawford:

The severity of that burden [to obtain a photo ID for voting in person] is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

Crawford, 128 S. Ct. at 1621 (footnote omitted).

3. **Because the 2006 Photo ID Act Does Not Deny Any Registered Voter the Right to Vote, It Does Not Violate Article II, Section 1, Paragraph 3 of the Georgia Constitution.**

Plaintiff also contends that the 2006 Photo ID Act is also prohibited by Article II, Section 1, Paragraph 3 of the Georgia Constitution, which provides as follows:

- (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. Plaintiff asserts that this provision means that someone who claims to be a registered voter has the absolute right to cast a ballot unless that person is a convicted felon or adjudged to be a mental incompetent. Based on this viewpoint, not only would the legislature be absolutely precluded from requiring any form of identification before voting, but a number of existing statutes would also be invalidated.

If the legislature is authorized to impose reasonable requirements to confirm a registered voter's identity, see Franklin, 205 Ga. at 789, then Plaintiff's restrictive reading of Article II, Section 1, Paragraph 3 makes no sense. Applying this interpretation, the legislature could never enact a law providing for identification requirements for any form of voting: a person who provides the name of a registered voter has the absolute right to vote, unless that person is a felon or mentally incompetent. This constitutional provision does not so restrict the General Assembly, which is authorized under Article II, Section 1, Paragraph 1 to adopt procedures for the conduct of elections, including methods by which voters must prove their identity.

Furthermore, if this restrictive interpretation of Article II, Section 1, Paragraph 3 were adopted – and the only election laws that the General Assembly could enact would be those relating to residency and registration – then a plethora of Georgia laws could be successfully challenged as unconstitutional. See, e.g., O.C.G.A. §§ 21-2-234 & -235 (allowing registered voters who have not voted or contacted election officials within three years to be placed on an inactive list); id. §§ 21-2-260, -261 & -265 (providing for designations of voting precincts and

voting places and changes in such precincts); id. §§ 210-2-380 to -385 (providing for absentee voting procedures); id. § 21-2-403 (providing times for opening and closing of polls); id. § 21-2-413 (regulating the manner in which a voter may occupy and remain in a voting booth); id. § 21-2-451 (requiring eligible voters to execute a voter's certificate in order to cast a ballot). Courts should not "presume that the General Assembly intended to enact an unconstitutional law," Wickham v. State, 273 Ga. 563, 566 (2001), much less a multitude of them.

Plaintiff's attempt to analogize this case to two federal cases involving attempts to impose term limitations on and otherwise exclude qualified persons from becoming members of Congress is inapposite. (See Pls.' Mem. at 14 (citing Powell v. McCormack, 395 U.S. 486 (1969), and U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).) In fact, these cases do not concern the right of individual voters to cast a ballot, and the U.S. Supreme Court and other federal courts have specifically approved of laws that regulate the time, place, and manner of elections. See, e.g., Storer, 415 U.S. at 728-46 (holding that provision of California Election Code forbidding ballot position to independent candidate who had registered affiliation with qualified political party within one year prior to primary election was not unconstitutional as improperly adding qualifications for Congress); Williams v. Tucker, 382 F. Supp. 381, 388 (M.D. Pa. 1974) (holding that Pennsylvania statute, which had effect of preventing candidate defeated in primary from obtaining position on general election ballot as independent candidate, merely regulated the manner of holding elections and did not unconstitutionally add qualifications for Congress). It is telling that the only case law that Plaintiff cites as "analogous" to its allegations are these two federal cases which are in fact wholly unrelated to the state law claim they assert. (See Pls.' Mem. at 14.)

The 2006 Photo ID Act does not violate Article II, Section 1, Paragraph 3 of the Georgia Constitution.

E. Plaintiff Will Suffer No Irreparable Harm If the TRO is Denied.

The only irreparable harm which Plaintiff contends it will suffer if the 2006 Photo ID Act is not enjoined is “by the diversion of its resources that will be required to counteract the effects of the Act.” (Pls.’ Mem. at 20.) As stated above, that has previously been rejected as a harm which would support the DPG’s standing to bring this action. Common Cause/Ga. III, 504 F. Supp. 2d at 1372-73; Rokita, 458 F. Supp. 2d at 815-17. “[T]his particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from the [plaintiff’s] own budgetary choices.” Common Cause/Ga., 504 F. Supp. 2d at 1373 (quoting Rokita, 458 F. Supp. 2d at 816-17) (omissions in original).

In addition, the 2006 Photo ID Act has already been implemented in four election cycles, including the Presidential Preference Primary, where the turnout for voters in the Democratic Presidential Preference Primary was in record numbers, and exceeded the turnout for the Republican Presidential Preference Primary in what is generally perceived as a “Red” State, or State which has voted more Republican in recent years. Compare http://sos.georgia.gov/elections/election_results/2008_0208/swall.htm (2008 Presidential Preference Primary Results) with http://sos.georgia.gov/election_results/2006_1107/swfed.htm (2006 General Election Results), http://sos.georgia.gov/election_results/2004_1102/summary.htm (2004 General Election Results), and http://sos.georgia.gov/election_results/2000_1107/summary.htm (2000 General Election Results). The DPG apparently did not believe it had been harmed in the past nine months when the 2006 Photo ID Act has been implemented without incident. This Court should

not condone any last minute “change of heart” by the DPG’s Eleventh Hour request for a TRO in this matter.

F. The Harm Caused to Defendants By the Entry of a TRO Only Days Before the July 15, 2008 Primary, and After Advance Voting Has Begun, Would Greatly Outweigh Any Harm to Plaintiff.

Plaintiff has the audacity to contend that, absent a TRO, “hundred of thousands” of Georgians will be denied the right to vote and Defendants “will not be harmed at all.” (Pls.’ Mem. at 21.) As stated earlier, Plaintiff’s counsel, while continuing to rant about “hundreds of thousands” of disenfranchised voters, has failed to produce even *one* individual who had standing to challenge the 2006 Photo ID Act in state or federal court in three years of litigation and four lawsuits. The District Court previously lambasted the failure of Plaintiff’s counsel to produce “precious little admissible evidence,” despite “apocalyptic assertions of wholesale voter disenfranchisement.” Common Cause/Ga. III, 504 F. Supp. 2d at 1378, 1380. The truth of the matter is that Plaintiff is making a mountain out of a molehill and now trying to sell climbing equipment.⁸

The harm to Defendants if a TRO is granted would be overwhelming. It cannot be overestimated how extensive (or in the District Court’s words, “exceptional,” Common Cause/Ga. III, 504 F. Supp. 2d at 1378) the Secretary of State’s educational efforts have been since the District Court lifted its injunction against the enforcement of the 2006 Photo ID Act on September 6, 2007. Those educational efforts were in direct response to the District Court’s previous orders, which granted preliminary injunctions only because the State had failed to apprise Georgia voters of the requirements of the photo ID law, the ability to vote an absentee ballot by mail without a photo ID, and the ability to get a free photo ID in sufficient time before

⁸ Paraphrase of a quote attributable to poet Ivern Ball.

the 2006 primary and election. Id. at 1379. The State has undertaken “a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform voters of the availability of free DDS-issued Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the voters that they can vote absentee by mail without a photo ID.” Id. at 1380. Despite that effort and the information that has been disseminated regarding the need for a photo ID to vote in person, Plaintiff asks this Court, well past the Eleventh Hour, to enter an injunction that will result in wholesale confusions of voters – without any evidence or any legal authority for doing so.

Defendants have fully complied with the District Court’s earlier directives, which led the District Court to declare the 2006 Photo ID Act constitutional. A TRO would completely undermine that “exceptional” effort, and leave Georgia voters in a state of mass confusion as to what identification would actually be required for in-person voting. In addition, for the July 15, 2008 primary, absentee voting began on June 2, 2008, which includes the opportunity for voters to vote in-person, and advance voting began on Monday, July 7, 2008, under the same photo ID requirements as for the previous four election cycles. A change in mid-stream would clearly cause confusion and misunderstanding not only among voters but also local election officials and poll workers. Finally, Plaintiff’s own dilatory conduct in seeking to enjoin the 2006 Photo ID Act for nearly one year after the Lake decision, nine months after the Common Cause/Ga. ruling, and a month and a half after first filing this action – and then attempting to do so less than two weeks before an election – strongly supports denying Plaintiff the equitable relief it requests from this Court.

IV. CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court deny Plaintiff's motion for a temporary restraining order.

This 9th day of July, 2008.

Respectfully submitted,

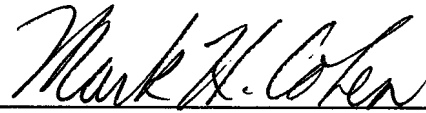
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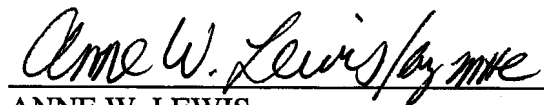
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER upon the following counsel of record via electronic mail and U.S. mail addressed as follows:

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This 9th day of July, 2008.



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