

IN THE SUPREME COURT OF GEORGIA

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

Movant-Appellant,)

v.)

CASE NO. S09M0201

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,)

Respondents-Appellees.)

RESPONDENTS' BRIEF IN OPPOSITION TO MOVANT'S
EMERGENCY MOTION FOR EXPEDITED CONSIDERATION
OF APPEAL AND INTERLOCUTORY INJUNCTION

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I. INTRODUCTION

In yet another Eleventh Hour attempt to disrupt the election process in the State of Georgia, Movant Democratic Party of Georgia, Inc. (“Movant”), asks this Court just two weeks before Election Day to expedite its appeal and enjoin the operation of Georgia’s 2006 Photo ID Act (“the Act”). Movant, represented by many of the same attorneys as have been counsel in previous challenges to Act, makes its extraordinary request notwithstanding the following previous events:

- (1) On September 6, 2007, Judge Harold L. Murphy entered a final judgment upholding the 2006 Photo ID Act in Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).
- (2) Following Judge Murphy’s Order, Movant’s counsel took no action to seek a stay of that decision from the District Court, as permitted by Fed. R. Civ. P. 62(c).
- (3) Following the appeal of Judge Murphy’s Order, Movant’s counsel took no action to ask the Eleventh Circuit Court of Appeals to stay Judge Murphy’s decision during the pendency of that appeal, as permitted by Fed. R. App. P. 8.
- (4) On April 28, 2008, the United States Supreme Court upheld Indiana’s photo ID law in Crawford v. Marion County Election

Board, 128 S. Ct. 1610 (2008), with one of the dissenters calling Georgia’s photo ID law “significantly less restrictive than Indiana’s.” Id. at 1644 (Breyer, J., dissenting).

- (5) Before the filing of the case at hand, eight elections were conducted with the 2006 Photo ID Act in effect, including the February 2008 Presidential Preference Primary.
- (6) Since the filing of the current case, an additional six elections have been conducted with the 2006 Photo ID Act in effect, including the 2008 general primary and run-off elections.
- (7) The Eleventh Circuit refused Movant’s counsel’s request in the Common Cause/Georgia litigation to expedite consideration of that appeal before the November 2008 election.
- (8) The Superior Court of Fulton County denied Movant’s motion for a temporary restraining order in July 2008 and for an interlocutory injunction in October 2008.
- (9) In-person absentee voting (“early voting”) for which photo ID is required began four weeks ago for the November 2008 election, and nearly 700,000 persons have voted without incident.

- (10) Early voting is still in process and continues through October 31, 2008.
- (11) The educational efforts which Judge Murphy's praised in his decision have continued for the past year and are still being conducted.

Given that the 2006 Photo ID Act has been the status quo in Georgia since Judge Murphy's September 2007 Order and the balance of the equities clearly favors Respondents, the superior court did not abuse its discretion by denying Movant's Motion for Interlocutory Injunction. This Court should refuse to take what would be an extraordinary action of enjoining the 2006 Photo ID Act during the remaining two weeks of the 2008 election cycle.

II. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The General Assembly amended certain voting laws in 2005 to (1) provide that one who votes in person must show one of six forms of government-issued photographic identification, O.C.G.A. § 21-2-380(b), and (2) eliminate the excuse required for casting an absentee ballot by mail, 2005 Ga. Laws 253, § 59 ("the 2005 Photo ID Act"). After the enactment of the 2005 Photo ID Act, a group of organizations and two individuals represented by many of the same counsel as represent Movant in this case filed suit to

enjoin its enforcement in the U.S. District Court for the Northern District of Georgia.

On October 18, 2005, Judge Murphy preliminarily enjoined the enforcement of the 2005 Photo ID Act. Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1333 (N.D. Ga. 2005). Judge Murphy based his decision on both the U.S. Constitution's Equal Protection Clause, concluding that the 2005 Photo ID Act appeared to unduly burden the right to vote, primarily because of the alleged difficulty in obtaining a photo ID, and Twenty-Fourth Amendment, because the fee imposed for a photo ID card for voting constituted a poll tax. Id. at 1362-3, 1369-70. Following this decision, the General Assembly amended the photo ID law to provide for issuance of free photo ID cards to registered voters who lacked one and to make the cards more available throughout the State of Georgia. O.C.G.A. §§ 21-2-417 & -417.1 ("the 2006 Photo ID Act" or "the Act"); see also O.C.G.A. § 40-5-103(d).

On July 14, 2006, Judge Murphy granted a second preliminary injunction motion against enforcement of the photo ID law for the July 2006 primary election and August 2006 primary runoff because he concluded that the efforts to educate voters as to the Act's requirements prior to the primary

had been insufficient.¹ Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294 (N.D. Ga. 2006). However, Judge Murphy specifically noted that if future educational efforts occurred sufficiently in advance of an election, then the photo ID law might well comply with the Equal Protection Clause. Id. at 1351.

Meanwhile, two registered voters filed a Complaint in the Superior Court of Fulton County challenging the 2006 Photo ID Act on state constitutional grounds. Lake v. Perdue, No. 2006-CV-119207. One plaintiff was voluntarily dismissed, but the superior court entered an order on September 19, 2006, permanently enjoining the enforcement of the 2006 Photo ID Act based upon a violation of Article I, Section 1, Paragraphs 2 and 3 of the Georgia Constitution. Id. (Order of Sept, 19, 2006, Bedford, J.) On June 11, 2007, this Court vacated that permanent injunction and remanded the case with the direction that it be dismissed, because the remaining plaintiff lacked standing.² Perdue v. Lake, 282 Ga. 348 (2007).

¹ For the same reasons, Judge Murphy also entered a preliminary injunction to prevent the enforcement of the Act for the September 2006 special elections. See Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1340-1, 1349-50 (N.D. Ga. 2007).

² Although the superior court found that Movant had standing for purposes of the motion hearing, just as in Lake, there is an issue concerning Movant's standing to bring this action. The U.S. Supreme Court in Crawford v. Marion County Election Board, 128 S. Ct. 1610, 1615 n. 7 (2008), did not

The District Court, which had stayed all proceedings during the pendency of the Lake appeal, lifted the stay and conducted a trial on the merits of the Common Cause/Georgia plaintiffs' federal claims on August 22-24, 2007. Common Cause/Ga., 504 F. Supp. 2d at 1342. Plaintiffs in the Common Cause/Georgia case presented much of the same evidence that Movant in this case presented to the superior court in support of its motion for interlocutory injunction. (See Mov. Ex. Tab 18, subtabs 3-5.)

On September 6, 2007, Judge Murphy dismissed the Common Cause/Georgia case in its entirety and directed that judgment be entered for the state defendants. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007). First, the District Court found that the remaining organizational and individual plaintiffs lacked standing because they could not establish any harm caused by the 2006 Photo ID Act's implementation. Id. at 1371-4. Second, the District Court concluded that, even if standing existed, the Act imposed no undue burden on the right to vote and therefore did not violate the federal Equal Protection Clause. Id. at 1377-80.

endorse Movant's view of standing. In fact, Movant has not and cannot identify any amount of resources it has expended to "counteract" the effects of the Act (Tr. 10/7/08 hearing at 73-4), nor has it identified any members who would have standing to sue in their own right in order to give Movant associational standing, Aldridge v. Ga. Hospitality & Travel Ass'n, 251 Ga. 234, 236 (1983) (quoting Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 341 (1977)).

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’s “exceptional” and “serious, concerted effort” 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. Id. at 1378-80. 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 he or she 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.

Importantly for the case at hand, the District Court considered and rejected Movant’s argument that one could assume that many Georgia voters did not have any form of photo ID and therefore were harmed by the Act because a number of Georgia registered voters’ names did not “match” with persons on the August 2007 Department of Driver Services (“DDS”) list of persons with Georgia driver’s licenses or DDS-issued identification cards. Although Movant’s counsel have continuously argued in both the Common

Cause/Georgia case and the case at hand that the results of the comparison of the two databases (voter registration and DDS) show the number of Georgians without a form of photo ID, that argument is simply incorrect. This database comparison did not result in a list of voters who do not possess a photo ID but a list of voters who *might* lack two of several acceptable forms of photo ID so that those voters could be targeted by the Secretary of State for direct contact in her educational program. The District Court ruled that the so-called “no-match lists” were inherently unreliable and excluded the plaintiffs’ purported expert testimony regarding all conclusions which could be drawn from these lists. Id. at 1378.

Following the entry of Judge Murphy’s Order upholding the 2006 Photo ID Act, plaintiffs’ counsel in that case made no effort to seek a stay of the decision from either the District Court or the Eleventh Circuit Court of Appeals, where an appeal was filed. See Fed. R. Civ. P. 62(c); Fed. R. App. P. 8. Elections were thereafter conducted with the 2006 Photo ID Act in effect, and extensive educational efforts based upon that Act have been directed to voters, election officials, and poll workers for more than one year and continue to date. (Mov. Ex. Tab 24; Tr. 7/10/08 hearing at 28-42; Tr. 10/7/08 hearing at 82-99.)

Both before and since the entry of Judge Murphy's Order, a major component of the Secretary of State's massive educational effort has involved educating voters as to the need for a government-issued photo ID when voting in person, the fact that an absentee ballot can be cast without a photo ID, and the availability of a free photo ID at either the voter's registrar office or any DDS service center for those wishing to vote in person. (Id.) The information has been distributed by direct mailings to those voters who have been identified as possibly not having two of the acceptable forms of photo ID, as well as education of the voting public in general through media and other public avenues. (Id.) Equally important, the educational program has included numerous seminars and training materials for election officials in every county in Georgia, who then use that information to educate poll workers in mandatory training sessions. (Id.)

Since the entry of Judge Murphy's Order, fourteen elections have been conducted in Georgia, either statewide or in various counties of the state, in which the 2006 Photo ID Act has been implemented. (Id., Mov. Ex. Tab 21 at 19, n.10.) Eight of those occurred before Movant even filed its lawsuit.

On July 3, 2008, Movant sought interlocutory injunctive relief against the application of the photo ID law in the July 15, 2008 primary, arguing

that it is an additional voter “qualification” and therefore a violation of Article II, Section 1, Paragraphs 2 and 3 of the Georgia Constitution. (Mov. Ex. Tab 8.) After considering the evidence at a July 10, 2008 hearing and balancing the equities, the superior court held that Movant failed to meet the standard for obtaining a temporary restraining order. (Mov. Ex. Tab 13.)

On September 17, 2008, Movant again sought interlocutory injunctive relief against the application of the Act for the November 2008 general election “and subsequent elections until a final hearing in this action” occurs, based on the same grounds as its July 2008 motion, as well as the allegation that the Act violates the Equal Protection Clause of the Georgia Constitution. (Mov. Ex. Tab 17.) The superior court conducted a hearing on October 7, 2008 and, after considering all the evidence presented both at the earlier July hearing and the later proceeding (including much of the same evidence presented in the Common Cause/Georgia litigation), that court held that Movant again failed to meet the legal standard for the granting of an interlocutory injunction and denied injunctive relief. (Mov. Ex. Tab 28.)

III. ARGUMENT AND CITATION OF AUTHORITIES

A. As a Matter of Law, An Interlocutory Injunction Cannot Issue to Overturn the Status Quo, Which is The 2006 Photo ID Act.

Movant’s request is for the emergency relief of an interlocutory injunction preventing continued implementation of the 2006 Photo ID Act –

for which voting began four weeks ago and will end on November 4, 2008. That request should be denied as a matter of law because it would upset the existing status quo in which a photo ID for in-person voting has been required not only for the past fourteen elections, but for the nearly 700,000 registered voters who have already cast their votes by early voting in this election.

“The grant or denial of an interlocutory injunction will not be interfered with by this Court in the absence of a manifest abuse of discretion.” Cherokee County v. City of Holly Springs, No. S08A0759, 2008 Ga. LEXIS 740, at *6 (Sept. 22, 2008). This Court has 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 Myer Props. v. Byers, 278 Ga. 139, 140-1 (2004); State Farm Mut. Auto. Ins. Co. v. Mabry, 274 Ga. 498, 509 (2001). It is an abuse of discretion for a trial court to grant an 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)).

As the superior court held, the 2006 Photo ID Act unquestionably constitutes the status quo. Movant nonetheless continues to assert that the status quo should be the circumstances which existed before the 2006 Photo ID Act was upheld and enforced, citing to several legal treatises which discuss the status quo being “the last peaceable uncontested status.” Movant apparently takes the position that, as long as an opponent of a law maintains a lawsuit against that law or files an appeal from such a lawsuit, it is irrelevant whether the challenged law has already been upheld in court and enforced for a significant period of time; by Movant’s interpretation, a subsequent court can still enter an interlocutory injunction to change what is currently in existence. In fact, taken to its logical conclusion, acceptance of Movant’s argument would mean that any challenge to a law entitles a challenger to a stay of the law’s enforcement. No case cited by Movant supports that position.

Movant admits that “Georgia cases do not expressly state a definition of ‘status quo’ in terms of the last uncontested state of affairs.” (Emerg. Mot. at 19.) Moreover, not one Georgia case cited by Movant involves a court enjoining the operation of a state law or activity already judicially upheld and enforced. See Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 661-62 (2008) (interlocutory injunction

granted so that payments would continue to be made under pre-existing contract); Atlanta Country Club, Inc. v. Sanders, 230 Ga. 146, 147-48 (1973) (interlocutory injunction issued to preserve the easement as it previously existed); McMillen Dev. Corp. v. Bull, 228 Ga. 826, 828 (1972) (interlocutory injunction entered to restrain a development company from allowing mud, silt, and debris to accumulate in a stream flowing through plaintiff's lower-situated property); Lee v. Env'tl. Pest & Termite Control, 271 Ga. 371, 373 (1999) (interlocutory injunction entered to prevent former employee of pest control service from doing business with former company's customers based on an existing confidentiality agreement). In none of these cases did a court enjoin the operation of a state law or activity already judicially upheld and enforced.³

³ Movant also relies on United States v. FDIC, 881 F.2d 207 (5th Cir. 1989) for its argument that the implementation of the 2006 Photo ID Act for more than one year after Judge Murphy's Order does not constitute the status quo. This decision has little relevance to the case at hand. In FDIC, the existing law always prevented the issuance of a lien against a national bank, and the "activity" enjoined was in existence in error for nine minutes. That circumstance is hardly the same as a district court upholding the constitutionality of a state statute which is then in force for thirteen months (and without any action undertaken to stay the enforcement of that order for numerous election cycles). The instant case is also far different from a case, such as FDIC, in which a party has notice of the impending injunction proceeding against it and seeks to complete the challenged act immediately before the hearing, in hopes of altering the status quo. See generally 43A C.J.S. Injunctions § 14 (stating that a court may restore the parties to their previous status "[w]here a person who has notice of the injunction

Because the 2006 Photo ID Act was upheld and has been implemented in elections for the past thirteen months, it is unquestionably now the status quo. The fact that Movant's counsel is pursuing an appeal of Judge Murphy's final judgment does not cause the status quo to revert to any other in-person voting procedure. There was no stay of that final judgment, and the photo ID law has now been applied for more than one year. The trial court correctly refused to grant an interlocutory injunction to *change*, rather than *maintain*, the status quo, and its denial was certainly not a "manifest abuse of discretion." See Cherokee County, 2008 Ga. LEXIS 740, at *6.

B. The Superior Court Did Not Manifestly Abuse Its Discretion By Holding That the Balance of the Equities Did Not Favor the Granting of an Interlocutory Injunction.

Even if Movant's flawed status quo argument is accepted, it still must show that the balance of equities favors the relief sought. See Garden Hills Civic Ass'n, Inc. v. Metro. Atlanta Rapid Transit Auth., 273 Ga. 280, 281 (2000). An interlocutory injunction is a "drastic extraordinary" remedy which should not issue unless a movant clearly meets the prerequisites. City of Newnan v. Atlanta Laundries, Inc., 174 Ga. 99, 113 (1932). Movant in

proceeding completes the act which is sought to be enjoined"). Movant never sought a stay of the federal court decision and did not file this action until after a number of elections already had been conducted applying the 2006 Photo ID Act.

this case has a particularly heavy burden because it seeks to enjoin enforcement of a state statute that has already been upheld as constitutional, a decision cited with approval in a recent U.S. Supreme Court decision which upheld a similar, more restrictive Indiana statute. See Crawford, 128 S. Ct. at 1645 (Breyer, J., dissenting). As this Court has emphasized, “[t]here 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)).

1. The Harm Caused to Respondents By the Entry of an Interlocutory Injunction After the Photo ID Law Has Been Implemented in Fourteen Previous Elections, and After Advance Voting Has Begun for the 2008 General Election, Would Greatly Outweigh Any Harm to Movant.

The harm to Respondents if an interlocutory injunction is granted at this stage of the 2008 election would be devastating. (Tr. 10/7/08 hearing at 95-7.) It cannot be overstated how extensive (or in the District Court’s words, “exceptional,” Common Cause/Ga., 504 F. Supp. 2d at 1378) the educational efforts have been leading up to and since the District Court entered final judgment on the 2006 Photo ID Act. Those educational efforts were in direct response to the District Court’s previous orders. Id. at 1379.

The undisputed evidence at the October 7, 2008 hearing revealed that an interlocutory injunction at this stage would result in wholesale mass voter confusion. (Mov. Ex. Tab 24, ¶¶ 17-18.) During the last year, the Secretary of State's office has undertaken and executed a massive education program for the several hundred election officials statewide concerning (a) the types of photo ID that are acceptable for in-person voting, (b) the options that voters who come to vote in person but do not present a photo ID have for casting their ballot, (c) the availability of a free photo ID at any DDS service office or the county registrar's office, (d) the creation and distribution of the Georgia Voter ID Card ("VIC"), and (e) the ability of all Georgia voters to cast a mail-in absentee ballot without excuse or photo ID. (Id. ¶ 6.) Since the education program began, the Secretary of State's office has held training sessions and provided materials on an ongoing basis to county and municipal elections officials, who have then educated poll workers in training sessions conducted before each of the past fourteen elections. (Id.)

The Secretary of State's office also has conducted voter education, both for the public at large and targeted to specific voters through individual letters and mass media. (Id. ¶¶ 8-10.) The messages have clearly been received, as thousands of voters have obtained free voter ID cards, turnout has been tremendous, and no problems have occurred. (Id. ¶¶ 12-15.) At

the time of the October 7, 2008 hearing, more than 275,000 voters had voted in person, all of them showing a photo ID without incident. (Tr. 10/7/08 hearing at 94.) The number of votes cast is now approaching 700,000, and still there are no reported incidents.

The cases on which Movant relies to argue that an interlocutory injunction will not disrupt the upcoming general election simply do not support its position. Perdue v. Palmour, 278 Ga. 217 (2004), Mead v. Sheffield, 278 Ga. 268 (2004), and Howell v. Fears, 275 Ga. 627 (2002), are all election contest cases. None involved the issue of whether an election procedure should be changed midway through an election – especially one such as the current election in which almost 700,000 persons already have voted by presenting a photo ID and changing the procedure now could result not only in confusion but also in one group of Georgia voters having cast their ballot under one particular procedure and then another group of Georgia voters casting their ballot under a different procedure *in the same election*.

The cases of Malone v. Tison, 248 Ga. 209 (1981), and McKinney v. Brown, 242 Ga. 456 (1978), likewise provide no aid to Movant. McKinney had nothing whatsoever to do with voting procedure; it involved a county government campaigning against two constitutional amendments with

county funds. 242 Ga. at 456. Malone is a voter registration case which, in fact, shows this Court's recognition of the chaos that *can* occur if voting procedures are changed shortly before an election and accordingly supports *Respondents' position* that an interlocutory injunction should not issue in this case. 248 Ga. at 213-14 (reversing trial court decision notwithstanding county registrars' failure to comply with statutory requirement for advertisement of certain voter registration locations).

In this case, the Secretary of State testified as to the devastating effects resulting if an interlocutory injunction were granted at this stage. (Tr. 10/7/08 at 82-97; Mov. Ex. 24, ¶¶ 6-21.) As this Court explained in Mead, “[t]he courts should be extremely hesitant to interfere with the electoral process” and should give due consideration to “the duties imposed upon the Secretary of State in the implementation of the election process.” 278 Ga. at 273-74; see also Purcell v. Gonzalez, 549 U.S. 1, 7 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

The evidence was undisputed that enjoining the 2006 Photo ID Act now would create irreparable confusion and chaos in Georgia's election process. There is no effective way to “unring” the photo ID requirement (or

that nearly 700,000 persons have already voted pursuant to its application) or for the Secretary of State to ensure that poll workers who are right now conducting advance voting and requiring photo ID or who will do so on Election Day will receive the opposite message and apply it uniformly. Every document sent to election officials, poll workers, and voters in accordance with the educational program would have to be revised, changes which would not only be very harmful to the electoral system but for which no funds are available.

2. Movant Cannot Succeed on the Merits.

The likelihood of an applicant's ultimate success on the merits is not alone determinative, but it is a proper criterion to consider in balancing the equities. See Garden Hills Civic Ass'n, 273 Ga. at 281. Movant's state constitutional attack of the 2006 Photo ID Act, like its counsel's previous federal constitutional attack in the District Court, is without merit.

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

The General Assembly 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)). Not only are acts of the legislature 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)).

Movant asserts that the 2006 Photo ID Act constitutes an unauthorized condition and qualification upon the right to vote based upon 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. Movant believes that this provision absolutely limits the General Assembly to enacting voting laws for only two purposes: (1) to establish minimum residency requirements, and (2) to register electors.

This Court, however, 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 v. Harper, 205 Ga. 779, 789 (1949); 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 from that partial quote the proposition that the legislature cannot then impose an identification requirement for ensuring a registered voter’s identity before voting, Movant 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 addition, Movant ignores 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 elections. Because 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.

b. The 2006 Photo ID Act Does Not Violate Article II, Section 1, Paragraph 3 of the Georgia Constitution.

Movant contends that the 2006 Photo ID Act is also prohibited by Article II, Section 1, Paragraph 3 of the Georgia Constitution on grounds that one who claims to be a registered voter has the absolute right to cast a ballot unless a convicted felon or adjudged to be a mental incompetent and cannot be required to establish identity at the polls. If the legislature is authorized to impose reasonable requirements to confirm a registered voter's identity, see Franklin, 205 Ga. at 789, then Movant's restrictive reading of Article II, Section 1, Paragraph 3 makes no sense. Applying Movant's interpretation, the legislature could *never* enact a law providing for identification requirements for any form of voting. 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.

Moreover, Movant'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 Emerg. Mot. at 6-7 (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.

- c. The 2006 Photo ID Act Does Not Violate the Equal Protection Clause of the Georgia Constitution.
 - i. Movant's "Evidence" Based on the Database Comparison Is Derived From the Same Inadmissible and Flawed Comparison Rejected by Judge Murphy.

Movant tries to make out a case that the 2006 Photo ID Act discriminates against African American voters by asserting that a larger percentage of such voters appeared on the DDS "no-match lists" than the number of African Americans in the general population or who are registered voters. First, as has already been determined by the District Court in Common Cause/Georgia, the August 2007 DDS no-match lists are unreliable indicators of which registered voters do or do not possess acceptable photo identification for in-person voting. Indeed, the purpose of the DDS comparison of its database of names of persons with driver's licenses and DDS-issued IDs with the list of names of registered voters was

solely to identify voters who might not have a driver's license or DDS-issued ID card so that they could be contacted as part of the voter education effort. (See Mov. Ex. Tab 18, subtab 3, Ex. D. at 17, 36; see also Common Cause/Ga. 504 F. Supp. 2d at 1361.) The results of the database comparisons, however, proved so inaccurate that the District Court refused to consider them as evidence relevant to the issue of how many registered voters lack photo ID for voting. Therefore, any additional breakdown of that list by race (or, for that manner, *any* category) suffers the same flaws. Because of the inaccuracies contained in the August 2007 list (not everyone on the "no match" list lacks a Georgia driver's license or DDS-issued ID card, let alone any other form of acceptable photo ID), no reliable conclusion can be reached concerning the Act's "burden" on any particular voter.

Second, even if one accepted the unsupported proposition that "hundreds of thousands" of registered voters lack a Georgia driver's license, DDS-issued photo ID card, or a State of Georgia employee photo ID, there is no evidence how many of those same voters lack any other acceptable form of photographic identification. See O.C.G.A. § 21-2-417(a). Third, any voter who lacks a photo ID may obtain one for free at his or her county registrar's office or any DDS service center. Fourth, the entire exercise is

irrelevant because no registered voter needs a photo ID to vote in Georgia. Anyone may vote an absentee ballot by mail without obtaining a photo ID.

The truth of the matter is that more Democratic voters and African American voters have voted in elections this year with the photo ID law in place than before its enactment. More persons voted in the Democratic Presidential Preference Primary in person than those voting in the Republican Presidential Preference Primary. During the early voting period for the 2008 general election, of the nearly 700,000 registered voters who have appeared at the polls with photo IDs, approximately 36% of them are African American, which is significantly higher than the total percentage of African American voters. For a law that Movant alleges was designed to stymie and suppress the Democratic vote, the results show precisely the opposite.

- ii. The 2006 Photo ID Act Meets the Constitutional Requirements of the Anderson/Burdick Test Because the Act's Reasonable, Non-Discriminatory Restrictions Are Supported by Georgia's Important Interest in Preventing Voter Fraud and Instilling Voter Confidence.

This Court has held that the Equal Protection Clauses contained in the United States and Georgia Constitutions are “coextensive” and “substantially equivalent.” See, e.g., Smith v. State, 283 Ga. 376, 377 (2008); In re A.N., 281 Ga. 58, 62 (2006); Sears v. Dickerson, 278 Ga. 900, 901 (2005). The

appropriate standard of review under both the federal and Georgia Equal Protection Clause is a balancing test in which “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” are weighed against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); see Cox v. Barber, 275 Ga. 415, 418 (2002). Under this balancing test, only when restrictions placed on voting rights are “severe” will the regulation be subjected to strict scrutiny. Burdick v. Takashi, 504 U.S. 428, 434 (1992). “[W]hen a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters,” the rational basis test is applied, and “‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” Burdick, 504 U.S. at 434 (quoting Anderson, 460 U.S. at 788); see Crawford, 128 S. Ct. at 1616; Common Cause/Ga. III, 504 F. Supp. 2d at 1376-77; Cox, 275 Ga. at 418.

Because the requirements for in-person voting under the 2006 Photo ID Act are not “severe” but merely “reasonable” and “nondiscriminatory,” strict scrutiny is inappropriate, and Movant’s equal protection challenge must be reviewed under the rational basis test. Burdick, 504 U.S. at 434, quoted in Cox, 275 Ga. at 418. The requirements of the 2006 Photo ID Act

are not severe and do not deny any Georgia voter his or her right to cast a ballot.

The Act applies only to those who vote in person. Any registered voter may still vote by mail without presenting a photo ID; for those who wish to vote by mail, the Georgia law now makes it *easier* to vote because the General Assembly repealed the prior requirement that a voter seeking an absentee ballot had to state a reason for not voting in person. See O.C.G.A. § 21-2-380(b). For those who choose not to vote by mail and wish to vote at the polls on Election Day but do not have a photo ID, they may vote a provisional ballot, obtain a photo ID, and present that identification within two days after the election. O.C.G.A. §§ 21-2-417 & -419.

Georgia has a legitimate, even compelling, interest in preventing voter fraud and maintaining the integrity of the election process. See Burdick, 504 U.S. at 441 (stating that “the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system”); Common Cause/Ga., 504 F. Supp. 2d at 1381 (quoting Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006)). Ascertaining an individual’s identity before allowing the person to vote is a rational way to guard against voter fraud. See Rokita, 458 F. Supp. 2d at 825 (“It is beyond dispute that Indiana has a compelling interest in ascertaining an individual’s identity

before allowing the person to vote. It is also well-established that Indiana has an important interest in preventing voter fraud.”).

The U.S. Supreme Court in Crawford v. Marion County Election Board applied the Anderson/Burdick standard and held that Indiana’s photo ID requirement was constitutional, even though “[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history.” Crawford, 128 S. Ct 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, 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. “[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. at 1620.

Movant incorrectly implies that there must be proof of some level of actual fraud before the legislature can take action to prevent its occurrence. As has been judicially recognized, in-person voter fraud is very difficult to detect. See Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007) (explaining the unlikelihood of criminal penalties to suffice because of the “extreme difficulty of apprehending [] voter impersonator[s],” who “are almost impossible to catch”). To prohibit a state from enforcing its photo ID law could “impair[] the right of *legitimate* voters to vote by diluting their votes – dilution being recognized to be an impairment of the right to vote.” Id. at 952-53 (citations omitted and emphasis added).

Moreover, elected officials are permitted to respond to electoral process deficiencies “with foresight rather than reactively.” Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986). “[E]laborate, empirical verification of the weightiness of the State’s asserted justifications” is not required. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997). Courts must defer to the legislature’s judgment because “the striking of the balance between discouraging fraud and other abuses and

encouraging turnout is quintessentially a legislative judgment with which [] judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.” Griffin, 385 F.3d at 1131, quoted in Rokita, 458 F. Supp. 2d at 825. The 2006 Photo ID Act is rationally related to the prevention of in-person voter fraud and prevents no one from exercising his or her right to vote in Georgia.

IV. CONCLUSION

Accordingly, Respondents respectfully request that Movant’s Emergency Motion for Expedited Consideration of Appeal and Interlocutory Injunction be denied.

This 20th day of October, 2008.

Respectfully submitted,

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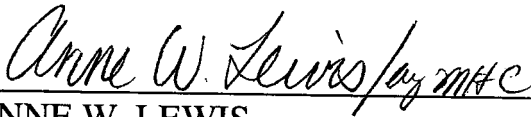
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of RESPONDENTS' BRIEF IN OPPOSITION TO MOVANT'S EMERGENCY MOTION FOR EXPEDITED CONSIDERATION OF APPEAL AND INTERLOCUTORY INJUNCTION upon the following counsel of record via electronic mail and U.S. mail addressed as follows:

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This 20th day of October, 2008.



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