

IN THE SUPREME COURT
STATE OF GEORGIA

MS. ROSALIND LAKE,)
)
 Plaintiff/Appellant,)
) CASE NO. S07A0525
 v.)
)
 HON. SONNY PERDUE, et al.,)
)
 Defendants/Appellees.)

**BRIEF OF AMICI CURIAE COMMON CAUSE / GEORGIA, LEAGUE OF
WOMEN VOTERS OF GEORGIA, INC.; THE CENTRAL
PRESBYTERIAN OUTREACH AND ADVOCACY CENTER, INC.,
GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS, INC.;
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE (NAACP), INC., THROUGH ITS GEORGIA STATE
CONFERENCE OF BRANCHES; GEORGIA LEGISLATIVE BLACK
CAUCUS; CONCERNED BLACK CLERGY OF METROPOLITAN
ATLANTA, INC.; AND MS. CLARA WILLIAMS**

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Amici are Common Cause / Georgia; League Of Women Voters Of Georgia, Inc.; The Central Presbyterian Outreach And Advocacy Center, Inc., Georgia Association Of Black Elected Officials, Inc.; The National Association For The Advancement Of Colored People (NAACP), Inc., Through Its Georgia State Conference Of Branches; Georgia Legislative Black Caucus; Concerned Black Clergy Of Metropolitan Atlanta, Inc.; and Ms. Clara Williams.

Amici are plaintiffs in a separate challenge to the constitutionality of Georgia's photo ID statutes in which the federal district court has enjoined the photo ID requirement on three separate occasions. *See e.g. Common Cause / Georgia v. Billups*, 439 F. Supp. 2d 1294, 1298, 1300-02 (N.D. Ga. 2006); *Common Cause / Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).¹ In Count One of their initial complaint in federal court, Amici asserted that the imposition of a Photo ID requirement as a condition of voting violated Article II, § 1, ¶¶ II and III of the Georgia Constitution. Because the State asserted an Eleventh Amendment objection to the jurisdiction of the federal court to rule on the constitutionality of the Photo ID requirement under the Georgia Constitution, the federal court was prevented from ruling on this issue. The federal court also refused (because of the State's objection) to certify the question to this Court pursuant to O.C.G.A. § 15-2-9. *See* 439 F. Supp. 2d at 1299.

¹ The district court's third preliminary injunction order of September 15, 2006 is not published.

Amici respectfully submit this amici curiae brief urging that the decision of the Superior Court of Fulton County declaring the 2006 Georgia Photo ID Act (O.C.G.A. § 21-2-417) unconstitutional under Article II, § 1, ¶¶ II and III of the Georgia Constitution and permanently enjoining its enforcement be affirmed.

Introduction

In 2005, the Georgia General Assembly amended O.C.G.A. § 21-2-417 to require every citizen of Georgia to present a state approved Photo ID as a condition of being admitted to the polls and allowed to vote in person. 2005 Ga. Laws, p. 253, § 59/HB244. In *Common Cause / Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), the Honorable Harold L. Murphy of the United States District Court for the Northern District of Georgia enjoined the 2005 Act based upon the following findings, among others:

- The Photo ID requirement imposes “severe” restrictions on the right to vote (406 F. Supp. 2d at 1365);
- Absentee voting simply is not a reasonable alternative to voting in person because it is not reasonably available for most voters who lack photo ID (406 F. Supp. 2d at 1365);
- Georgia has sufficient procedures in place to deter voter fraud (406 F. Supp. 2d at 1351);
- Most violations of Georgia’s election laws are felonies, and no evidence indicates that these criminal penalties have failed to deter in-person voter fraud (406 F. Supp. 2d at 1351, 1362);
- In the nine years prior to the October 2005 hearing in this action, not a single instance of fraud involving in-person voting (as opposed to

fraudulent voter registration or fraudulent use of absentee ballots) was reported to the Secretary of State or the State Election Board (406 F. Supp. 2d at 1361); and

- Fraudulent in-person voting has not been a problem in Georgia (406 F. Supp. 2d at 1361).

“The Photo ID law thus does nothing to address the voter fraud issues that conceivably exist in Georgia.” 406 F. Supp. 2d at 1361. Judge Murphy noted:

Rather than drawing the Photo ID law narrowly to attempt to prevent the most prevalent type of voter fraud, the State drafted its Photo ID requirement to apply only to in-person voters and to apply only to absentee voters who had registered to vote by mail without providing identification who were voting absentee for the first time. By doing so, the State, in theory, left the field wide open for voter fraud by absentee voting. Under those circumstances, the Photo ID requirement simply is not narrowly tailored to serve its stated purposes – preventing voter fraud.

Id. at 1361-62. Thus, the district court concluded, “the Photo ID requirement is not narrowly tailored to the State’s proffered interest of preventing voter fraud, and *likely is not rationally based on that interest.*” *Id.* at 1366 (emphasis added).

The General Assembly was unfazed by the ruling of the federal court. In 2006, the General Assembly enacted a new Photo ID statute (2006 Ga. Laws, p. 3, § 2/SB 84; O.C.G.A. §§ 21-2-417 & 21-2-417.1). The 2006 version of the Photo ID Act did not address the known areas of fraud in absentee voting and voter registration, and suffers from many of the same constitutional defects as the 2005 statute.

Under both the 2005 and 2006 Acts, citizens who are lawfully registered and otherwise fully entitled to vote will not be admitted to the polls, issued a ballot, or allowed to vote without a state-issued Photo ID. Although both the 2006 Act and the 2005 Act, allow a duly registered voter who does not have a Photo ID to cast a provisional ballot, his or her provisional ballot will not be counted unless the voter travels to the county registrar's office (not their local precinct) and obtains a Photo ID within two days of the election. *See* O.C.G.A. § 21-2-417(b) and O.C.G.A. § 21-2-419.²

Under the 2006 Act, like its predecessor, only those registered voters who vote **in person** are required to present a Photo ID as a condition of being allowed to vote.³ No Photo ID of any kind is required either to register to vote or to cast an absentee ballot. Although the only identification required of absentee voters is their signature on the voter's oath on the envelope containing their ballots, the legislature repealed the provision in prior Georgia law (1997 Ga. Laws, p. 662, § 3, formerly codified as O.C.G.A. § 21-2-417(b)) that allowed a registered voter who

² In discussing this provision in the 2005 Act, the district court concluded: "The ability to vote a provisional ballot thus is an illusion." 406 F. Supp. 2d at 1365.

³ According to the official records of the Secretary of State, approximately 90% of all Georgians who voted in the November 2004 general election did so in person at the polls, rather than by casting absentee ballots. 406 F. Supp. 2d at 1353. The same data shows that white voters are roughly twice as likely to use absentee ballots as African-American voters. *Id.*

did not have one of the 17 forms of identification to vote by filling out and signing, under oath, an almost identical oath swearing or affirming that he or she is the person identified in the voter's certificate at the polls. For these and other reasons, the district court has enjoined the enforcement of the 2006 Act on two separate occasions.⁴

The parties to the federal case have agreed that an affirmance of the ruling of the Fulton Superior Court by this Court would vitiate the 2006 Act and make it unnecessary for the federal court to rule on the constitutionality of the 2006 Act under federal law. The federal action has, therefore, been stayed with the consent of the parties pending a ruling by this Court.⁵

Argument

The right to vote is one of the most basic and fundamental significance under our constitutional structure on which all other rights under the Constitution depend. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Reynolds v. Sims*, 377 U.S. 533, 554, 562 (1964); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). See also *Ambles v. State*, 259 Ga. 406, 408 (1989).

⁴ *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) and in a second unpublished Order dated September 15, 2006.

⁵ Unpublished Order of September 28, 2006.

As the United States Supreme Court explained in *Reynolds v. Sims*:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government....

[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.

Reynolds, 377 U.S. at 555, 562. “Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

The Georgia Constitution guarantees the right to vote to all who meet the qualifications enumerated in Article II, Section I, Paragraph II of the Georgia Constitution. It also specifies the grounds for which an otherwise qualified voter may be disenfranchised. Art. II, § I, ¶ III.

There is nothing ambiguous or equivocal about either of these sections of the Georgia Constitution. Their plain meaning should be honored by this Court. *See, e.g., Hollowell v. Jove*, 247 Ga. 678, 681 (1981) (“[W]here a constitutional provision or statute is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms.”). *See Weinschenk v. State*, 203 S.W. 3d 201, 221 (Mo. 2006) (enjoining the application of a photo ID law similar to the Act at issue here because it violated the plain terms of the Missouri Constitution).

The 2006 Photo ID Act violates Article II of the Georgia Constitution in two ways: (a) it adds a new qualification or condition on the right to vote, and (b) it

adds a new ground for denying the right to vote of citizens who are lawfully registered. Accordingly, the trial court's order enjoining the 2006 Act was correct and should be affirmed.

A. The 2006 Photo ID Act Violates Article II, § I, ¶ II of the Georgia Constitution.

The 2006 Photo ID requirement unconstitutionally adds a new qualification and condition to the right to vote in Georgia. Article II, Section I, Paragraph II of the Georgia Constitution guarantees the right to vote to every citizen of Georgia who meets the following qualifications: (1) **citizenship** in the United States, (2) **residency** of the State of Georgia as defined by statute, (3) **at least 18 years of age**, and (4) **who is registered to vote**.

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.

Georgia Const., Art. II, § I, ¶ II (emphasis added).⁶

It is well-established under both the law of this State (*Jones v. Fortson*, 223 Ga. 7, 13 (1967); *Franklin v. Harper*, 205 Ga. 779, 790 (1949); *Stewart v. State*, 98

⁶ The Georgia Constitution also specifies only two grounds on which a person who is **lawfully registered** may be denied the right to vote (*i.e.*, “disenfranchised by this article”): (1) conviction of a felony involving moral turpitude, or (2) adjudication of mental incompetence. Art. II, § I, ¶ III. These grounds are discussed in section B, *infra*.

Ga. 202, 205 (1896)), as well as under federal law (*Powell v. McCormack*, 395 U.S. 486 (1969); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995)), that where the qualifications to vote or hold public office are expressly stated in the Constitution, the qualifications so listed are *exclusive*, and neither the legislature nor Congress may add to or subtract from these qualifications.

This Court construed the predecessor of Art. II, § I, ¶ II in the 1945 Georgia Constitution in *Franklin v. Harper*, 205 Ga. at 790. This Court said that “*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.*” (Emphasis added). Similarly, in *Stewart v. State*, 98 Ga. at 205, this Court held that where the Georgia Constitution “undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot thereafter enlarge the list.” And in *Jones v. Fortson*, 223 Ga. at 13, this Court stated that a “[constitutional] provision which expressly prescribes the manner of doing a particular thing is exclusive in that regard and impliedly prohibits performance in a substantially different manner. Thus, where the manner in which, or the means by which, a power granted shall be exercised are specified,

such manner or means are exclusive of all others. . . .” *Id.* (quotation marks and citation omitted).⁷

The role of the legislature in regulating voting is carefully *defined* in Article II, Section I, Paragraph II, and *limited* to two specific functions. The legislature is authorized (1) to establish “*minimum residency requirements;*” and (2) to provide for the *registration* of electors. The 2006 Photo ID Act is not a residency requirement, nor does it make presentation of a Photo ID a condition of registration. *See Franklin*, 205 Ga. at 790 (“Registration statutes have for their purpose the regulation of the exercise of the right of suffrage, **not** to qualify or restrict the right to vote.”) (emphasis added). Under Georgia law, anyone can *register* to vote (or cast an absentee ballot by mail) without presenting a Photo ID. Instead, the 2006 Photo ID Act imposes a new qualification or condition on the right of citizens who are *already lawfully registered* to vote in person. In enacting

⁷ *See also Morris v. Powell*, 25 N.E. 221, 223 (Ind. 1890) (“That when the people by the adoption of the Constitution have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, the legislature can not add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities. The principle is elementary that when the Constitution defines the qualification of voters, that qualification can not be added to or changed by legislative enactment.”); *Koy v. Schneider*, 218 S.W. 479, 480 (Tex. 1920) (“[A]ll the authorities seem in accord with the statement that ‘where the right of suffrage is fixed in the constitution of a State, as is the case in most States, it can be restricted or changed by an amendment to the Constitution or by an amendment to the Federal Constitution, which, of course, is binding upon the States. But it cannot be restricted or changed in any other way. The legislature can pass no law directly or indirectly either restricting or extending the right of suffrage as fixed by the constitution.’”).

this legislation, the General Assembly has exceeded the authority granted to it under the Georgia Constitution. See *Weinschenk*, 203 S.W.3d at 212 (holding that similar provision in Missouri Constitution establishes *exclusive* qualifications for voting). Accordingly, the trial court's injunction of the statute should be affirmed.

B. The 2006 Photo ID Act Violates Article II, § I, ¶ III of the Georgia Constitution.

The 2006 Photo ID requirement also violates Article II, Section I, Paragraph III by making the failure to present a Photo ID at the polls (or within 2 days thereafter) a ground for denying a registered voter the right to vote. Article II, § I, ¶ III of the Georgia Constitution limits the grounds on which a Georgia citizen who is registered may be denied the right to vote by providing only two grounds on which a lawfully registered voter may be denied the right to vote: (1) conviction of a felony involving moral turpitude, or (2) judicial determination of mental incompetency to vote. The Georgia Constitution does not authorize the legislature to specify any additional grounds (such as the presentation of a Photo ID) for denying any citizen the right to vote.

In *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court held that the qualifications for member of the House of Representatives set forth in Article I, § II, ¶ II of the Constitution were exclusive and that Congress could not use the power expressly granted to "Each House" in Section 5 of Article I to "be the judge of the . . . qualifications of its own members" to add to those qualifications

expressly stated in Art. I, § II, ¶ II to either refuse to seat or expel Representative Adam Clayton Powell from the House.

In its subsequent opinion in the *Term Limits* case, the Supreme Court struck down a provision in the Arkansas Constitution imposing term limits on its U.S. Senators and Congressmen on the ground that, “the qualifications for service in Congress set forth in the text of the Constitution are ‘fixed’ at least in the sense that they may not be supplemented by Congress.” *U.S. Term Limits, Inc.*, 514 U.S. at 798.

The Court explained its earlier decision in *Powell* based on the text of the Qualifications Clause:

[T]he enumeration of a few qualifications would by implication tie up the hands of the Legislature from supplying omissions. . . .

It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others.

Id. at 793 n. 9 (internal citations and quotations omitted).

Thus, the trial court correctly held that the 2006 Photo ID requirement violates Article II, § I, ¶ III of the Georgia Constitution. *See* R884 (Order, p. 15) (“Nowhere in the Constitution is the legislature authorized to deny a registered

voter the right to vote on any other ground, including possession of a photo ID of the type required by [the 2006 law]).

By making presentation of a Photo ID by citizens who are lawfully registered an additional condition of voting, and by making the failure to present a Photo ID at the polls an additional ground for denying citizens of their right to vote, the 2006 Photo ID Act violates both Art. II, § I, ¶ II and Art. II, § I, ¶ III of the Georgia Constitution.

C. The 2006 Photo ID Act is Not a Valid Time, Place or Manner Restriction.

The State argues that the Photo ID requirement should be upheld under Article II, Section I, Paragraph I of the Georgia Constitution that allows the State to control the time, place and manner of elections. The Photo ID requirement is not, however, a valid “time, place or manner” restriction on the right to vote.

A similar argument by the State of Arkansas was expressly rejected by the Supreme Court in the *U.S. Term Limits* case. 514 U.S. at 828-836 (Part IV). In that case, the Court held that neither the Tenth Amendment, nor the power granted to the States by Art. I, § IV to prescribe “The Times, Places and Manner of holding Elections for Senators and Representatives,” authorized the states to add to or supplement the qualifications set forth in the Constitution by imposing term limits on members of Congress. *Id.* at 833-34 (Elections Clause, which allows states to regulate “times, places, and manner” of elections, is “a grant of authority to issue

procedural regulations, and not . . . a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”); *see also Statesboro Publ’g. Co. v. City of Sylvania*, 271 Ga. 92, 93 (1999) (holding that ordinance regulating political speech – purportedly under City’s authority to regulate time, place, or manner of expression – must be narrowly drawn under the Georgia Constitution).

Furthermore, adoption of the State’s proffered construction of the “time, place and manner” provision in Art. II, § 1, ¶ 1 would drain all meaning out of the Georgia Constitutional provisions discussed above, Art. II, § 1, ¶¶ 2 & 3. The State’s argument violates well-established canons of construction. *See Service Employees Int’l Union v. Perdue*, 280 Ga. 379, 382 (2006) (in construing a constitutional provision “courts are not authorized either to read into *or to read out that which would add to or change its meaning.*”) (quotation marks and citations omitted) (emphasis added); *Shelley v. Shannon*, 267 Ga. App. 582, 584 (2004) (“It is a basic rule of construction that a statute or constitutional provision should be construed to make *all its parts* harmonize and to give a sensible and intelligent effect to each part, *as it is not presumed that the legislature intended that any part would be without meaning.*”) (quotation marks and citations omitted and emphasis added); *Jones v. Darby*, 174 Ga. 71, 72 (1931) (“In construing statutes, their ordinary signification shall be applied *to all words*, except in certain defined

cases. The same rule of construction is applicable to constitutional provisions.”) (citation omitted) (emphasis added).⁸

Such a construction of the “time, place and manner” provision in Art. II, § 1, ¶ I, which would allow the legislature to make an end run around the mandatory restrictions in paragraphs II and III, is contrary to Georgia law. The legislature is not only prohibited from *directly* denying registered voters the right to vote granted by Article II, § I, ¶ III, by making presentation of a Photo ID an additional condition or qualification of voting or making the absence of a Photo ID a ground for denial of the right to vote in violation of Art. II, § I, ¶ III. The State is also prohibited from accomplishing the same result, *indirectly*, under the guise of restricting the “manner of elections” under Paragraph I of the same section. See *Morris v. Glover*, 121 Ga. 751, 753 (1905) (holding that the legislature may not “by indirection, accomplish what it is restrained from doing by the organic law of the land.”) As the Supreme Court said in rejecting a similar argument in the *Term Limits* case, “[C]onstitutional rights would be of little value if they could be . . . indirectly denied [citation omitted]. The Constitution nullifies sophisticated, as well as simple-minded modes of infringing on constitutional protections.” 514 U.S. at 829 (internal quotations omitted).

⁸ “[T]he general principles governing the construction of statutes apply also to the construction of the Constitution.” *DeJarnette v. Hospital Auth. of Albany*, 195 Ga. 189, 204 (1942) (citations omitted).

In summary, the Georgia Constitution enumerates in clear and unmistakable terms the two areas in which the General Assembly is authorized to regulate by statute (“provide by law”), and also limits the grounds on which citizens of Georgia who meet both the residency and registration requirements may be denied the right to vote. *See also Franklin*, 205 Ga. at 790 (noting that the legislature may 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 2006 Photo ID Act thus falls outside the scope of the General Assembly’s authority.

D. The 2006 Photo ID Act Does Nothing to Establish the Identity of Voters and Disenfranchises Hundreds of Thousands of Registered Voters.

On appeal, the State seeks to excuse its clear violation of both Article II, § 1, ¶ II and Article II, § 1, ¶ III of the Georgia Constitution by arguing that the 2006 Photo ID Act (a) “operates only as a method of establishing the identification of a registered voter,” and (b) disenfranchises no voter because of the “availability of absentee and provisional ballots.” *See* Brief of Appellant, pp. 16-17. These assertions are demonstrably false.

Relying on *Franklin v. Harper*, the State argues that the legislature may provide by law the manner in which the registered voter’s identity is verified before voting. Brief of Appellants, p. 20. *Franklin v. Harper* is, however,

distinguishable. *Franklin v. Harper* involved the validity of literacy tests as a condition of voter registration, a subject that was plainly within the power granted to the legislature by Article I, § 1, ¶ II. *Franklin* did not involve a requirement that registered voters provide identification at the polls as a condition of being issued a ballot and allowed to vote. The State's argument is also based on two premises, both of which are false. First, it incorrectly assumes that the 2006 Act actually ensures that the person who appears at the polls is registered to vote. Second, the State's argument ignores the express admonition in *Franklin* that even in imposing conditions on voter registration, the legislature cannot "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." 205 Ga. at 790.

1. The 2006 Photo ID Act Does Not Act to Establish the Identification of Voters or Prevent Fraudulent Voting.

The requirement of a Photo ID under the 2006 Act does nothing to confirm the identity of in-person voters. The trial court correctly recognized the nonsensical aspect of the Photo ID requirement when it noted that the new law imposes a burden on an otherwise qualified voter to satisfy the registrar that he or she is qualified to vote by "the further condition of producing a photo ID, which coincidentally, can be obtained without showing a photo ID." R879 (Order, p. 10).

Under the 2006 Act and related regulations, the Voter ID card that would allow a registered voter to vote in person may be obtained for free⁹ with no additional form of identification. Thus, the 2006 Act requires no more proof of identification than prior Georgia law. Instead, it only imposes an unnecessary burden on those without a Photo ID.

The 2006 Act adds a new code section (O.C.G.A. § 21-2-417.1) requiring each county's board of elections to issue a "Georgia voter identification card," which contains a photograph of the voter, upon presentation of certain types of identifying documents that are only vaguely described in the statute. *See* 439 F. Supp. 2d at 1305. The details concerning the new voter ID card were left for the State Election Board to establish through regulations.

The SEB's regulations state that an individual who requests a Georgia Voter ID must provide the following information before being issued a card: (1) a "nonphoto identity document" that includes the applicants full name and date of birth; (2) documentation showing the applicant's date of birth; (3) evidence that the applicant is registered to vote in the state of Georgia; and (4) documentation

⁹ To obtain a free Photo ID, the 2006 Act requires the voter to "produce evidence that he or she is registered to vote in Georgia" and swear "that he or she desires an identification card in order to vote . . . and that he or she does not have any other form of identification that is acceptable under Code § 21-2-417." 439 F. Supp. 2d at 1305.

showing the applicants' name and principal residence address.¹⁰ The regulations further provide that an applicant may establish each of the required characteristics by using, among other things, a Voter Registration Application.¹¹

Thus, a prospective voter can obtain a photo ID despite bringing no documentation to the registrar's office. Upon arrival, one would need only to fill out new voter registration application *in the office*, and then use that application to obtain a Georgia Voter ID Card.¹² In their testimony in the federal action, both the Secretary of State and the Director of Elections confirmed that this was the case. *See* 439 F. Supp. 2d at 1329 ("So long as a voter can show his or her date of birth, full legal name, and residence, all of which should be contained on the voter registration application, the voter would not need to show additional documentation to get a Voter ID card."); *Id.* at 1330 ("[A voter] can get a Voter ID card without showing photo ID. He then can use the Voter ID card to vote in person."); *Id.* at 1331 ("To register to vote, a voter need not present any of the identification required under the rules and regulations under the 2006 Photo ID Act to get a Voter ID card.").

¹⁰ SEB Rule 183-1-20.01 (4)(a). *See* 439 F. Supp. 2d at 1309.

¹¹ *See* 439 F. Supp. 2d at 1309-11 (SEB Rule 183-1-20.01(4)(a)(3) & (4)(b)(4) (application may be used to establish registration); (4)(b)(2)(iii) & (4)(b)(3) (may be used to establish date of birth); (4)(b)(5) (may be used to establish address).

¹² *See Id.* § 183-1-20-.01(4)(a)(3), (b)(2)(iii) & (b)(4).

Moreover, a photo ID may be obtained by directing a registrar to a Voter Registration Application already on file with the Registrar. *Id.* at 1339 (“In theory, a voter who registered fraudulently several years ago now may use his or her fraudulent voter registration application to obtain a Voter ID card, which he or she may use to vote in person.”) Thus, under the 2006 Act a voter ID card can be obtained with **no** documentation. Such a scheme cannot possibly be described as a reasonable identification requirement.

2. The 2006 Act Disenfranchises a Multitude of Georgia Voters.

Contrary to the State’s assertions, the 2006 Act imposes a significant burden that threatens to disenfranchise hundreds of thousands of Georgia citizens who are lawfully registered and entitled to vote. For the poor, the elderly and the disabled who are without automobiles and are the least mobile, the Act makes the exercise of the right to vote so difficult and inconvenient as to amount to a denial of the right to vote. The 2006 Act, like the 2005 Act that preceded it, burdens the hundreds of thousands of Georgia citizens who do not have an approved form of Photo ID.¹³ This severe burden on the right to vote thus is imposed only on the poor, elderly and infirm, who are the least mobile members of the electorate, who

¹³ Based upon the best evidence available, more than 300,000 registered voters lack the most common type of Photo ID that would allow them to vote in person under the 2006 Act. *See* 439 F. Supp. 2d at 1337-38. A match of the Secretary of State’s database of registered voters with databases of those with state-issued photo ID’s is described in the district court’s opinion. *See id.*

will have the greatest difficulty in complying with the requirements of the statute and who do not own, cannot drive or do not have access to a car. The theoretical availability of absentee voting by mail and provisional ballots that will only be counted if the voter presents a photo ID within two days of the election do nothing to lessen the burden on the right to vote.

a. The Ability to Vote Absentee is Not an Adequate Substitute for In-Person Voting.

While the State argues that no one is disenfranchised because of a theoretical ability to vote by absentee ballot, that is not the case. The State made the exact same argument to the district court in the federal action and the court rejected it. As the district court correctly concluded under the 2005 Act, voting by absentee ballot is not an adequate alternative for many voters who lack Photo ID:

[T]he Court finds that absentee voting simply is not a realistic alternative to voting in person that is reasonably available for most voters who lack Photo ID.

406 F. Supp. 2d at 1365. The district court made a similar finding with respect to the 2006 Act. *See* 439 F. Supp. 2d at 1347-49.

Consideration of the requirements of voting absentee demonstrates this obvious conclusion. To vote absentee by mail, a voter must first obtain an absentee ballot, in which a voter relies upon the registrar's office to promptly verify the information on the application for a ballot and mail the ballot to the voter. The ballot must be hand delivered to the registrar's office, not the voter's

local precinct, or the ballot must be mailed sufficiently early that it arrives before 7:00 p.m. on election day. *See* 406 F. Supp. 2d at 1364. Significantly, if the ballot arrives late, the vote (of a voter who is not in the military and does not reside overseas) will not be counted even if it is postmarked prior to election day. *Id.* at 1364. Should information be disclosed in the course of campaigning leading up to election day that changes a voter's mind as to who should receive his or her vote, a voter has the right to cancel the absentee ballot and vote in person (which would require a photo ID), but a voter may not be issued a second absentee ballot, even after canceling his or her absentee ballot. *Id.* at 1353. For these reasons, theoretical availability of absentee voting by mail does not render the 2006 Photo ID Act constitutional. *See Weinschenk*, 203 S.W.3d at 215 (“Those things that require substantial planning in advance of an election to preserve the right to vote can tend to ‘eliminate from the franchise a substantial number of voters who did not plan so far ahead.’”) *quoting Harman*, 380 U.S. at 539-40.

The district court also noted that many Georgia voters view absentee ballots as an unacceptable alternative. They distrust absentee ballots and therefore, prefer to vote in person. *See* 439 F. Supp. 2d at 1313. The federal court acknowledged evidence that “voters have expressed distrust of absentee voting, noting that their ballots may not be counted and that their ballots may not be handled in a way that will protect the secrecy of their votes,” and “those concerns discourage voters from

using absentee voting.” *Id.* Further, the district court acknowledged that the literacy of many Georgians may form a barrier to voting absentee by mail. The absentee ballot application is written at a readability level of tenth grade, which is well above the reading level of over half of Georgia’s adult population. *See Id.* at 1316. Thus, over half of all Georgia adults cannot read, comprehend and complete the application without assistance. *Id.*; *see also* National Institute for Literacy, *The State of Literacy in America* (1998) (reporting that 23% of Georgia’s adults cannot read above Level 1 – Level 1 means that a person can sign his name, but cannot read well enough to “locate eligibility from a table of employee benefits” or “identify and enter background information on a social security card application.” *Id.* at p. 4).¹⁴

In the *Term Limits* case, the state of Arkansas made a similar argument to the absentee ballot argument advanced by the state in this action. There, Arkansas argued that despite the Constitutional prohibition on additional qualifications, the Arkansas term limitation at issue was constitutional because it did not impose a

¹⁴ In addition, requiring voters without Photo ID to vote absentee will negatively impact African-American voters who are less inclined to vote absentee. In the November 2004 general election, approximately ten percent of Georgia’s voters voted by absentee ballot. 406 F. Supp. 2d 1326. Of African-American female voters, approximately 7% (46,734) voted by absentee ballot, compared to approximately 12% (189,143) of Caucasian female voters. *Id.* Of African-American male voters, approximately 6% (26,144) voted by absentee ballot, while approximately 11% (150,722) of Caucasian male voters voted absentee. *Id.*

legal bar to service – the term limits did not prevent a candidate from running as a write-in candidate, and, if elected, serving despite the term limits. 514 U.S. at 829. The Supreme Court rejected this argument, noting that “even if petitioners are correct that incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election.” *Id.* at 831. The Court held that “Petitioners’ argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.” *Id.*

b. The Ability to Cast a Provisional Ballot Does not Cure the Constitutional Defects in the Statute.

In the instant action, the Superior Court concluded that the 2006 Act, by shifting the burden to the registered voter who lacked a photo ID to prove his or her identity, disenfranchised otherwise qualified voters.

On appeal, the State asserts that no one is turned away from the polls under the 2006 Act because of the ability to cast a provisional ballot. The State raised this same argument in *Common Cause v. Billups*, however, and the district court concluded that the ability to vote a provisional ballot is an “illusion.” *See* 406 F. Supp. 2d 1365. The district court noted that many voters may not even attempt to vote a provisional ballot in person because they do not have a photo ID and they do

not believe that they can make the necessary arrangements to obtain a photo ID within 48 hours after casting their votes. *Id. See also* 439 F. Supp. at 1349 (“Faced with those circumstances many of those voters likely will decide not to vote at all.”)

Conclusion

For the foregoing reasons, the ruling of the Fulton County Superior Court declaring the 2006 Photo ID Act unconstitutional and enjoining its enforcement should be affirmed.

This 8th day of March, 2007.

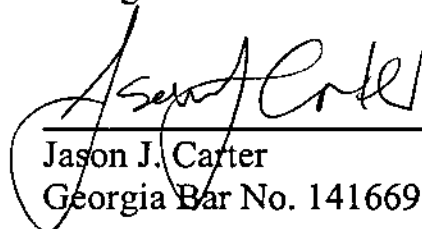
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CERTIFICATE OF SERVICE

This is to certify that on this day, I have caused a true and exact copy of the foregoing **AMICUS CURIAE BRIEF OF COMMON CAUSE / GEORGIA; LEAGUE OF WOMEN VOTERS OF GEORGIA, INC.; THE CENTRAL PRESBYTERIAN OUTREACH AND ADVOCACY CENTER, INC., GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS, INC.; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), INC., THROUGH ITS GEORGIA STATE CONFERENCE OF BRANCHES; GEORGIA LEGISLATIVE BLACK CAUCUS; CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC.; AND MRS. CLARA WILLIAMS** to be served on all counsel of record by hand delivery as follows:

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This 5th day of March, 2007.

A handwritten signature in black ink, appearing to read "Emmet J. Bondurant", written over a horizontal line.

Emmet J. Bondurant