

IN THE SUPREME COURT OF GEORGIA

SONNY PERDUE, in his official)
capacity as Governor, and)
STATE ELECTION BOARD,)
)
Appellants/Defendants,)
)
v.)
)
MS. ROSALIND LAKE,)
)
Appellee/Plaintiff.)

Case No. S07A0525

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I. INTRODUCTION

This is an appeal from an order of the Superior Court of Fulton County in which that court erroneously concluded that Article II, Section 1, Paragraphs 2 and 3 of the Georgia Constitution prohibit the General Assembly from requiring a registered voter to present *any* document verifying his or her identity at the polls. Based on that flawed premise, the superior court declared unconstitutional and permanently enjoined the enforcement of the 2006 amendment to O.C.G.A. § 21-2-417, which required in-person voters to present photographic identification (“photo ID”) at the polls.

After correctly recognizing that it is within the exclusive province of the legislature to enact statutes which deal with potential voter fraud and that it is improper for the courts to “second-guess” the legislature’s reasons for doing so, the superior court nevertheless concluded that the imposition of the requirement of a photo ID for in-person voting is an unauthorized “condition” upon the right to vote. This conclusion directly contradicts this Court’s precedent that the legislature is allowed to 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.” See Franklin v. Harper, 205 Ga. 779, 789 (1949). It also disregards that there is no constitutional right to vote in any particular manner and no requirement that registered voters present a photo ID

prior to voting absentee by mail. Therefore, voters who do not have a photo ID and choose not to obtain a free one (as Appellee Lake) are, as a matter of fact, never prohibited from voting because they lack a photo ID; they can always vote an absentee ballot by mail.

The superior court also erred in holding that the Georgia Constitution mandates that – except for those persons who have been convicted of a felony involving moral turpitude or adjudged to be mentally incompetent – any person registered to vote must be permitted to do so without the State ever requiring proof that he or she is in fact the person who previously registered. This interpretation is neither supported by the Georgia Constitution nor this Court’s precedent and grossly disregards the General Assembly’s plenary authority to enact laws which regulate the method of voting, including procedures for in-person voting.

As a final error, the superior court appears to have concluded that the only constitutional identification requirement is one that allows a voter lacking identification to “self-authenticate” his or her identity. According to the superior court, the law in existence prior to 2005, which provided for the presentation of one of 17 forms of identification at the polling place by a voter, was constitutional only because of a “fail-safe” provision which allowed a voter without identification to sign an affidavit swearing or affirming to his or her identity. Consequently, under the superior court’s view, there can only be an identification “requirement”

if there is a corresponding option not to produce identification. If this interpretation is allowed to stand, the General Assembly cannot ever enact a statute which requires the presentation of any type of identification, photographic or otherwise, when a person appears at the polls to vote. This result flies in the face of the Georgia Constitution, this Court's decisions, and common sense.

II. JURISDICTION OF THE SUPREME COURT

This appeal involves a case in which the constitutionality of a law enacted by the General Assembly has been drawn into question and, as such, is within the exclusive appellate jurisdiction of this Court. See Ga. Const. art. VI, § 6, ¶ 2. The issue as to the constitutionality of O.C.G.A. § 21-2-417 was properly presented to and directly passed upon by the court below. See Pitts v. General Motors Acceptance Corp., 231 Ga. 54, 56 (1973). Because the superior court entered a permanent injunction against the operation of a statute, this case also comes within this Court's general appellate jurisdiction which extends to all equity cases. See Ga. Const. art. VI, § 6, ¶ 3.

III. STATEMENT OF THE CASE

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

Prior to the enactment of the Photo ID Acts, Georgia registered voters could vote in one of two different ways: by absentee ballot or at the polls on Election Day. Depending upon which method the voter picked, specific rules applied.

First, a voter could vote prior to a primary or general election or subsequent run-off election by absentee ballot submitted either through the mail or in person at the registrar's or absentee ballot clerk's office. 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 an application containing "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. See O.C.G.A. § 21-2-386(a)(1)(B).

In addition to casting a ballot by mail, an absentee voter also could vote his or her ballot in person as part of the advance voting process or independent from that process. Either way, a voter casting an absentee ballot in person was

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

requested to present “proper identification to a poll worker.” Proper identification included the presentation of one of 17 possible documents specified in the law. 2003 Ga. Laws 517, § 48 (codified as O.C.G.A. § 21-2-417(a) (2003)). If the registered voter was unable to produce one of the 17 forms of identification, that voter was permitted to sign “a statement under oath . . . swearing or affirming that he or she is the person identified on the elector’s voter certificate,” id. § 48 (codified as O.C.G.A. § 21-2-417(b) (2003)) – in this litigation sometimes referred to as the “fail-safe” option (R-872-73).

Absentee ballot voters (other than advance in-person voters) were also subject to another important requirement. Prior to the enactment of the 2005 Photo ID Act, in order to cast an absentee ballot by mail or in person at any time other than the advance voting period, a voter also was required to assert one of various reasons why he or she could not vote in person on Election Day, such as being 75 years of age or older, being absent from the precinct during the time of the primary or election, being physically disabled or having to care for someone who is physically disabled, the election falling on a religious holiday observed by the voter, or being required to remain on the job for the protection of the public health and safety. 2003 Ga. Laws 517, § 35 (codified as O.C.G.A. § 21-2-380(a) (2003)).

As a second option, a registered voter could vote in person by appearing at the polls on the day of the primary or general election or subsequent run-off

election. If following this method, the voter would be asked to present one of the 17 forms of “proper identification to a poll worker” of the same type required for in-person absentee voters. A voter who did not have any of those forms of identification could sign a statement under oath that he or she was the person identified on the elector’s certificate (the “fail-safe” option).

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

1. Changes to Absentee Voting by Mail in 2005

The 2005 Photo ID Act was enacted as a portion of a larger piece of legislation making numerous changes to the Georgia Election Code. See 2005 Ga. Laws 253. One significant change gave registered voters the ability to vote an absentee ballot by mail without having to claim any excuse for choosing not to vote in person. See O.C.G.A. § 21-2-380(b). Though the General Assembly expanded the opportunity for registered voters to vote by mail in Georgia, it did not alter the documentation required to obtain an absentee ballot. See id. § 21-2-381(a)(1)(C) (“The application shall be in writing and shall contain sufficient information for proper identification of the elector . . .”). Therefore, a registered voter who votes by mail is not required to present photo ID prior to being permitted to cast his or her vote.²

² There is one exception. In accordance with the requirements of the federal Help America Vote Act, 42 U.S.C. § 15301 et seq., a person who registered to vote through the mail and then votes for the first time by absentee ballot must include

Although there is no requirement for the presentation of a photo ID when voting by mail, to protect against voter fraud, election officials are required to ensure that the person voting by mail is the same person who registered to vote. When an application for an absentee ballot is made, a registrar or absentee ballot clerk must record the date the ballot is received and determine if the applicant is eligible to vote in the primary or election involved. See id. § 21-2-381(b)(1). There are specific means by which the registrar or clerk declares the potential absentee voter eligible or ineligible or requests additional information prior to the primary or election to confirm the voter's identity. See id. § 21-2-381(b)(2)-(4). Absentee ballots are mailed only to eligible applicants. See id. § 21-2-384(a)(2). The absentee voter is required to sign an oath verifying eligibility. See id. § 21-2-384(c)(1). When the voted ballot is returned, the registrar or clerk is required to compare the identification and signature of the voter on the absentee ballot with the identifying information on the voter registration and absentee ballot application:

Upon receipt of each [absentee] ballot, a registrar or clerk shall write the day and hour of the receipt of the ballot on its envelope. The registrar or clerk shall then compare the identifying information on the oath with the information on file in his or her office, shall compare the signature or mark on the oath with the signature or mark on the absentee elector's application for absentee ballot or a facsimile of said signature or mark taken from said application, and shall, if the

for identification purposes with his or her absentee ballot a photo ID or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of such elector. O.C.G.A. § 21-2-386(a)(1)(D); see also 42 U.S.C. § 15483(b)(2)(A).

information and signature appear to be valid, so certify by signing or initialing his or her name below the voter's oath. Each elector's name so certified shall be listed by the registrar or clerk on the numbered list of absentee voters prepared for his or her precinct.

Id. § 21-2-386(a)(1)(B).

In contrast, when a registered voter appears in person to vote at the polls, the voter executes a voter's certificate, and the poll officer checks the name of the certificate against the electors list present in the precinct. See id. § 21-2-431(a). Unlike the identification requirement imposed when voting an absentee ballot by mail, there is no requirement that a poll officer check the signature on the voter's certification with the signature on the voter's registration.

2. Changes to In-Person Voting in 2005

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

- 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 who was unable to produce any of the 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 closed. See id. Photo ID cards for voting purposes were available at service centers operated by the Department of Driver Services (“DDS”) for a fee ranging from \$20 for a five-year card to \$35 for a ten-year card, but applicants seeking a card for voting who swore under oath they were indigent could obtain one for free. See id. § 66 (amending O.C.G.A. § 40-5-103).

C. The Federal Court Order Preliminarily Enjoining the 2005 Photo ID Act in *Common Cause/Georgia v. Billups*

On September 19, 2005, a group of plaintiffs filed an action in the United States District Court for the Northern District of Georgia, seeking to declare the 2005 Photo ID Act unconstitutional. Common Cause/Georgia v. Billups, No. 4:05-CV-201-HLM. By Order dated October 18, 2005, the federal court granted the plaintiffs’ motion for a preliminary injunction against the enforcement of the 2005 Photo ID Act. See Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1377 (N.D. Ga.

2005). The court found that the plaintiffs were likely to succeed on the merits of their federal constitutional challenge on two grounds. First, the court found that there was a significant burden on the right to vote, based principally on the conclusion that, because the DDS service centers “are not located in every Georgia county,” these centers were not readily accessible to those who may need a photo ID. See id. at 1362-63. Second, the 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. See id. at 1369-70.

D. The General Assembly Responded to the Federal Court’s Concerns by the Enactment of the 2006 Photo ID Act

In response to the order in Common Cause/Georgia, during its 2006 Regular Session, the General Assembly enacted amendments to O.C.G.A. § 21-2-417 and added O.C.G.A. § 21-2-417.1 (collectively “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 from each of the county voter registrar offices, as well as any DDS service center, and no fee is charged for their issuance. See O.C.G.A. §§ 21-2-417 & -417.1; see also id. § 40-5-103(d).

The 2006 Photo ID Act was submitted to the United States Department of Justice as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and was precleared by letter dated April 21, 2006. (R-559-60.) The State Election

Board promulgated rules and regulations for the implementation of the 2006 Photo ID Act and conducted voter education efforts with appropriated funds. (R-562-65.)

E. The Current State Court Challenge to the Constitutionality of the 2006 Photo ID Act

This case was initiated by the filing of a Complaint for Declaratory and Injunctive Relief on behalf of two registered voters, Rosalind Lake and Matthew Hess, on July 3, 2006.³ Plaintiffs contended that the 2006 Photo ID Act violates 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 constitutional qualifications for voting.⁴ (R-23, 25, 28.)

In conjunction with the Complaint, Plaintiffs moved for a temporary restraining order (“TRO”) to prohibit implementation of the 2006 Photo ID Act for the July 18, 2006 primary and August 8, 2006 primary run-off elections. (R-305-06.)

³ Plaintiff’s counsel initially challenged the constitutionality of the 2006 Photo ID Act in the Superior Court of DeKalb County. (R-574-609, 648.) However, that action was dismissed by Plaintiff’s counsel after the DeKalb plaintiff’s standing to bring the action was called into question both by State Defendants and that superior court. (R-648-49.)

⁴ Named as Defendants were Governor Sonny Perdue, in his official capacity; the State Election Board, which is required under Georgia law to supervise and coordinate the work of the Secretary of State and local election officials relating to the practices and procedures in all primaries and elections, see O.C.G.A. § 21-2-31(1) (collectively “State Defendants”); and various elections officials of Fulton County. (R-5.) The Fulton County Board of Registration and Elections was substituted for the various county election officials. (R-677-79.) The Fulton County Board of Registration and Elections is not a party to this appeal.

Following a July 6, 2006 hearing, the Honorable Melvin K. Westmoreland, serving as presiding judge, issued a TRO on July 7, 2006, prohibiting Defendants from requiring registered voters “to produce state-issued photographic identification of the kind enumerated in the 2006 Photo ID Act as a pre-condition to casting a ballot in Georgia’s July 18, 2006 primary election or any resulting run-off election.” (R-683-86.) State Defendants filed a notice of appeal and an emergency motion in this Court to stay the TRO, which motion was denied on July 12, 2006.⁵ Because the TRO related only to the primary and primary run-off elections, State Defendants withdrew their notice of appeal after those elections were conducted. (R-711-13.)

A final hearing on the request for declaratory judgment and injunctive relief was held before the Honorable T. Jackson Bedford, Jr. on September 8, 2006, and this appeal is from final judgment entered on September 19, 2006. (R-870-88.)

⁵ Following the enactment of the 2006 Photo ID Act, the plaintiffs in the Common Cause/Georgia litigation (see supra Part III.C) amended their complaint to challenge that Act and enjoin its provisions. On July 14, 2006, the federal court preliminarily enjoined the enforcement of the 2006 Photo ID Act for the 2006 primary and run-off elections based upon the likelihood of those plaintiffs’ success on their federal constitutional challenge. Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294 (N.D. Ga. 2006). That court later extended its preliminary injunction to cover special elections held in September 2006. Common Cause/Georgia v. Billups, No. 4:05-CV-201-HLM, slip op. at 46 (N.D. Ga. Sept. 15, 2006). However, based upon the permanent injunction entered by the Superior Court of Fulton County, the federal court has stayed all proceedings in the Common Cause/Georgia litigation pending the resolution of the current appeal in this Court. Common Cause/Georgia v. Billups, No. 4:05-CV-201-HLM, slip op. at 2 (N.D. Ga. Sept. 28, 2006).

1. Standing Issues

At the hearing before Judge Bedford, Mr. Hess was dismissed as a Plaintiff because the undisputed evidence established that he had obtained a photo ID after the filing of the Complaint and consequently was fully capable of presenting acceptable identification to vote in person. (R-902.) State Defendants challenged Ms. Lake's standing because she possessed a photographic identification card from Florida International University ("FIU") that would be an acceptable photo ID for voting in person under the 2006 Photo ID Act,⁶ regardless of whether it would be valid for use at FIU. (R-653, 542-47.) However, the lower court, noting what it deemed conflicting testimony on the validity of the FIU photo ID card, ruled that Ms. Lake had standing to challenge the law. (R-877-78.)

2. Ruling on the Constitutionality of the 2006 Photo ID Act

In its September 19, 2006 order, the superior court acknowledged that the 2006 Photo ID Act was enacted to prevent in-person voter fraud in Georgia and rejected Plaintiff's effort to undermine that rationale:

Indeed, the Court accepts and defers to the legislature's stated motive of preventing voter fraud. No one who is interested in the integrity of the electoral process can argue with the legislature's concern with ensuring the integrity of that process. The Court's only concern is with the constitutionality of the legislature's method of dealing with perceived voter fraud.

⁶ See O.C.G.A. § 21-2-417(a)(2) (authorizing the use of a "valid identification card issued by a branch, department, agency, or entity of the State of Georgia, [or] *any other state . . .*") (emphasis added).

(R-874.) Nevertheless, the superior court concluded that the 2006 Photo ID Act “disenfranchises” registered voters, basing its decision on an argument which was never raised by Plaintiff⁷ and which misconstrues the law.

Under the 2006 Photo ID Act, if an elector is unable to produce one of the six acceptable forms of photo ID at the polls, he or she may still vote a provisional ballot which shall be counted if the registrar is able to verify current and valid identification of the elector within two days. See O.C.G.A. § 21-2-417(b); id. § 21-2-419(c). The superior court found fault with this procedure, concluding that it places a “burden” on those who possess no photo ID at the polls to appear with a photo ID at the registrar’s office within two days thereafter. (R-879.) The court attempted to compare that procedure with the affidavit portion of the pre-2005 law in which, in the court’s view, allowed the vote to be counted “with the burden being on the State to demonstrate through its registration records that the voter was not otherwise qualified to vote.”⁸ (R-879.)

⁷ The superior court stated, “Although Plaintiff’s challenge to the 2006 Voter ID law, at first blush, seems to focus entirely on the need for a photo ID, particularly a state-issued photo ID, as a condition to vote, the Court’s analysis sees the issue a little differently.” (R-878.)

⁸ The superior court appears to have misunderstood the effect of the pre-2005 law and confused the verification procedure for provisional ballots with an identity verification procedure. Under that former law, a person who appeared at the polling place without any identification would have his or her vote counted without reservation upon the self-authenticating procedure of completing an affidavit. There was no mechanism for the registrar to have that vote stricken even if subsequent investigation proved that the voter was not the person registered to

The superior court therefore concluded that the photo ID requirement for in-person voting operates as a “condition of voting” prohibited by the Georgia Constitution, because an elector without a photo ID on Election Day who votes a provisional ballot must return within two days with the required ID for that vote to be counted. (R-880-85.) Holding that the requirement to present a photo ID to prove a registered voter’s identity is neither a residency requirement nor a condition of registration, the superior court concluded that it violated Article II, Section 1, Paragraph 2 of the Georgia Constitution. (R-882-83.) In arriving at this conclusion, however, the court failed to consider Article II, Section 1, Paragraph 1, which provides that elections “shall be conducted in accordance with procedures provided by law.” Ga. Const. art. II, § 1, ¶ 1.

The court also held that the photo ID requirement violates Article II, Section 1, Paragraph 3 of the Georgia Constitution. Under the court’s analysis, that constitutional provision limits the denial of the right to vote to those voters who

vote. The only “remedy” would have been a prosecution against the imposter for false swearing. See 2003 Ga. Laws 517, § 48 (codified at O.C.G.A. § 21-2-417(b) (2003)). The superior court apparently confused the two separate portions of the same Code section. Under the pre-2005 law, an in-person voter who failed to produce one of the 17 forms of identification was allowed to sign a sworn statement verifying his or her identity and vote unconditionally. The only exception to this rule was a voter who registered for the first time by mail and did not present one of the 17 forms of identification *at the time of registration* and then tried to vote in person for the first time; that voter was permitted to vote a provisional ballot and have that ballot counted if the registrar was able to verify information. Id. There was no subsequent verification of identity for those voters who had no form of identification and completed a sworn statement.

have been convicted of a felony involving moral turpitude or determined to be mentally incompetent, and the photo ID requirement “denies” the right to vote. (R-881, 884.) That conclusion, aside from being factually incorrect, would mean that the General Assembly could never enact any law requiring voters to identify themselves at the polls.

IV. JUDGMENT APPEALED

State Defendants appeal from the September 19, 2006 Order of the Superior Court of Fulton County declaring O.C.G.A. § 21-2-417, as amended in 2006, unconstitutional pursuant to Article II, Section 1, Paragraphs 2 and 3 of the Georgia Constitution, and permanently enjoining Defendants and all political subdivisions from enforcing or applying the 2006 Photo ID Act to any Georgia registered voter in any election. (R-886.)

V. ENUMERATION OF ERRORS

1. The superior court erred by holding that the 2006 Photo ID Act places an unconstitutional condition on voting, when it operates only as a method of establishing the identification of a registered voter who chooses to vote in person.

2. The superior court erred by holding that the 2006 Photo ID Act disenfranchises voters notwithstanding that (a) any registered voter may vote an absentee ballot without the requirement of a photo ID and (b) any registered voter who chooses to vote in person and appears without a photo ID may still vote a

provisional ballot and have that vote counted by presenting a photo ID within two days.

3. In holding the 2006 Photo ID Act unconstitutional, the superior court failed to recognize the plenary authority of the General Assembly to enact laws to provide for identification requirements to ensure that the person who appears at the polls to vote is the same person who is registered to vote and, in effect, ruled that the General Assembly is prohibited from enacting any law to provide for voter identification at the polls.

VI. ARGUMENT AND CITATION OF AUTHORITY

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

1. The General Assembly Has Plenary Power to Enact Laws Regulating the Manner in Which Elections Are Conducted, Including the Manner of Verifying Identity at the Polls.

“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).

The superior court erroneously held that the 2006 Photo ID Act violates 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. The court, however, also contradictorily recognized 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.” (R-880 (citing Franklin v. Harper, 205 Ga. 779, 789 (1949)).)

The superior court's holding is contrary to this Court's precedent and misconstrues the effect of the 2006 Photo ID Act. This Court 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, the superior court ignored 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).

By declaring the 2006 Photo ID Act unconstitutional because “it is neither a residency requirement nor is it a condition of registration” (R-884), the trial court rejected this Court’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, the superior court rejected its 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” (R-880 (citing Franklin, 205 Ga. at 789).)

The superior court’s further reliance on two cases from other states is completely misplaced. In Morris v. Powell, 25 N.E. 221 (Ind. 1890), the Indiana Constitution provided that an eligible voter must have resided in the state for six months and in the precinct for thirty days. Id. at 222. The Indiana legislature enacted a law that required any person who had been a resident of Indiana but was absent from the state for at least six months to register that person’s intention to vote, declare his or her precinct at least three months prior to that election, and present a certificate from the county auditor that the voter still owned taxable property and remained a taxpayer during his or her absence from the state. Id. at

221-22. The Indiana Supreme Court held that these requirements amounted to adding a property ownership and ninety-day precinct residency qualification for voting not authorized by the state constitution. Id. at 223-24. In the case at bar, there is no additional residency or other qualification being placed upon a voter, only a requirement that the voter prove his or her identity before voting in person.

The other case relied upon by the trial court, Koy v. Schneider, 218 S.W. 479 (Tex. 1920), is even further removed from the facts of this case. In Koy, the Texas Supreme Court was presented with the question of whether a statute allowing women the right to vote in primaries violated the Texas Constitution, which at the time granted the right to vote in an “election” to “every male person.” Id. at 479. Because the court determined that primaries were conducted by political parties and not the government, the court held that there was no constitutional violation. Id. at 480, 483. Nothing in that case has any applicability to a requirement to present identification at the polls.

2. *Article II, Section 1, Paragraph 1 of the Georgia Constitution Authorizes the General Assembly to Enact Laws for the Conduct of Elections, Which Includes the Procedures for Verifying a Voter’s Identity.*

In addition to misapplying Article II, Section 1, Paragraph 2 of the Georgia Constitution, the superior court ignored 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 in this case has argued but the Florida Supreme Court correctly rejected in construing similar constitutional provisions. The imposition of identification requirements to ensure that one who has previously registered is the 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.

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

The superior court also erred by holding that the 2006 Photo ID Act imposed 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 has several options.

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); see also Ind. Democratic Party v. Rokita, No. 1:05-CV-0634-SEB-VSS, 2006 U.S. LEXIS 20321, at *115 (S.D. Ind. Apr. 14, 2006), aff’d, Crawford v. Marion County Election Bd., Nos. 06-2218, 06-2317 (7th Cir. Jan. 4, 2007) (emphasizing in a case upholding a state photo ID law that “there is no absolute [federal] constitutional right to vote in any specific manner an individual may desire . . .”). Because 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, the superior court’s holding is erroneous.

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 county⁹ or at any of the 60

⁹ 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. Fulton County, for example, provides three different locations in the north, south, and downtown

DDS service centers throughout the state. See O.C.G.A. § 21-2-417.1(a). The superior court made no finding that such a requirement for an in-person voter imposed any constitutional infirmities, and this Court 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 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.”).

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 caused the superior court to declare the 2006 Photo ID Act 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.” (R-881.) The trial court 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

Atlanta area for registered voters to obtain the cards and, at the time of the hearing below, had ordered an additional unit to take to locations such as nursing homes and other locations to make it easier for people who have difficulty in getting to one of the other county offices. (R-529, 531, 647.)

identification when voting in person could simply sign an affidavit attesting to his or her identity and have that vote counted. (R-879; see also supra note 8.)

The superior court's view is illogical. If the 2006 Photo ID Act had not contained a provisional ballot option to enable the voter to cast a ballot and later return with the proper ID, the trial court almost assuredly would have found such a procedure to be violative of the Georgia Constitution. To base invalidation on actually providing this additional allowance makes no sense. Moreover, the court'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 the superior court 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 the superior court's holding, 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. Under this view, only a law in which the presentation of identification is optional would pass constitutional muster which, of course, would do nothing to fulfill the legitimate interest of the legislature to prevent in-person voter fraud. Rather than "defer[] to the legislature's stated motive of preventing

voter fraud” (R-874) as it purported to do so, the superior court substituted its own judgment for that of the General Assembly in an area expressly reserved to the latter.

B. 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.

The superior court held 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. The superior court contended 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 as the trial court conceded (R-880; see also Franklin,

205 Ga. at 789), then the superior court's restrictive reading of Article II, Section 1, Paragraph 3 makes no sense. Applying the court's 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 the superior court's 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. The 2006 Photo ID Act does not violate Article II, Section 1, Paragraph 3 of the Georgia Constitution, and the superior court committed error in holding so.

C. **The Superior Court’s Rejection of the 2006 Photo ID Act as a “Burden Shifting” Procedure Lacks Merit and Is Belied by *Franklin v. Harper*.**

Finally, the superior court concluded that the 2006 Photo ID Act “appeared to be inconsistent” with the former “fail-safe” provisions of the pre-2005 voter identification law and with the “current scheme to identify voters.” (R-885-86.) As indicated above, the trial court’s comparison of the 2006 Photo ID Act to the “fail-safe” scheme of the pre-2005 law is inaccurate because under that provision no voter was required to present any type of identification and could have his or her vote counted simply by signing an affidavit, and the court appears to have confused the process for verifying the registration of voters with that for verifying the identity of voters. Contrary to the trial court’s belief, it was not “incumbent on the registrar to compare signatures and other identifying information before challenging the vote.” (R-886.) The vote counted unconditionally by law. See O.C.G.A. § 21-2-417(b) (2003) (“Such person [who signs a sworn statement] shall be allowed to vote without undue delay.”). The only “remedy” would be an action for false swearing. Id.

In addition, it is not an unconstitutional burden for a person who opts to vote in person but does not possess the necessary identification to vote a provisional ballot and return within two days to confirm his or her identity. As previously explained, this Court has recognized that the legislature has the right to establish identification requirements, and even those which may cause “great inconvenience,” such as re-registration, do “not deprive [a voter] of his constitutional right of suffrage, but is only a reasonable regulation under which the right may be exercised.” Franklin, 205 Ga. at 789 (emphasis added). The 2006 Photo ID Act imposes far less of a burden on the voters of Georgia and should be upheld as a constitutional enactment of the General Assembly.

VII. CONCLUSION

The 2006 Photo ID Act is a reasonable method by which election officials in Georgia are required to determine that those who cast ballots in person are the qualified voters they claim to be. The Superior Court of Fulton County erred in holding that the statute violated Article II, Section 1, Paragraphs 2 and 3 of the Georgia Constitution, and Appellants respectfully urge this Court to reverse that decision.

(signatures on following page)

This 8th day of January, 2007.

Respectfully submitted,

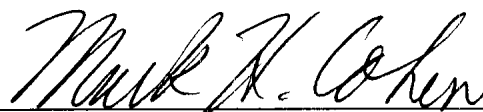
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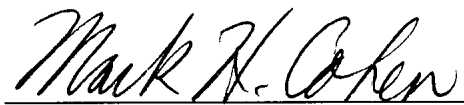
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of BRIEF OF APPELLANTS upon counsel for Appellee via electronic mail and U.S. mail addressed as follows:

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