

I. INTRODUCTION

The State Constitution gives every Georgia citizen, who is duly registered and otherwise qualified, the right to vote. There is nothing equivocal about the words: **“shall be entitled to vote at any election by the people.”** Yet, the General Assembly has undertaken to further condition that right by requiring that citizens who cast their ballot in person show a government issued photo identification card.

While the State Constitution grants the General Assembly limited power to provide for the registration of electors and the limited power to regulate the time, place, and manner of our State’s elections, the State Constitution does not allow the General Assembly to put further conditions on the exercise of the franchise. It follows that if a voter obeys the laws that the General Assembly has passed, that are within the parameters of the power given to it by the State Constitution, that is, the voter is properly registered, the voter presents herself at the proper polling place at the times designated, and complies with how she is to vote (e.g., paper ballot, electronic voting machine), that voter is entitled to have her ballot counted.

Because the effect of the 2006 Photo ID Act is to disenfranchise a registered voter who possesses the qualifications specified in the Georgia Constitution, the Act cannot withstand constitutional scrutiny.

II. JURISDICTION OF THE SUPREME COURT

Appellee concurs with Appellants' statement of the jurisdiction of this Court.

III. STATEMENT OF THE CASE

A. Background of State Constitutional Challenge to 2006 Act

Rosalind Lake and Matthew Hess filed their Complaint for Declaratory and Injunctive Relief, and their motion to temporarily enjoin the State from enforcing the 2006 Photo ID Act for the July 18, 2006 primary and August 8, 2006 run-off elections, on July 3, 2006, in the Superior Court of Fulton County. Ms. Lake and Mr. Hess asserted that the photo identification requirement ran afoul of Article II, Section 1, Paragraphs 2 and 3 of the Georgia Constitution in that the identification requirement constituted a further condition or qualification of voting not expressed in the Constitution.¹

After hearing arguments on Ms. Lake and Mr. Hess's motion for temporary injunction, Presiding Judge Melvin K. Westmoreland issued a temporary restraining order on July 7, 2006, prohibiting Appellees from enforcing the 2006 Act.² Judge T. Jackson Bedford, Jr. heard final arguments on September 8, 2006,

¹ (R-23, 25, 28, 305-06.)

² (R-683-86.)

on Ms. Lake and Mr. Hess's state constitutional challenge to the 2006 Act. At that hearing, Appellee voluntarily dismissed Mr. Hess because he had acquired a state issued photo identification card after the entry of the TRO, leaving Ms. Lake as the sole complainant.³ On September 19, 2006, Judge Bedford declared the 2006 Photo ID Act unconstitutional, and ordered that it be permanently enjoined.⁴ This appeal followed.

B. Background of Voter Identification Requirements in Georgia

1. There was no identification requirement prior to 1998

Prior to the 1998 elections, voters in Georgia, like registered voters in a majority of other states, were not required to present any form of identification as a condition of voting.

2. Seventeen forms of identification were acceptable prior to the 2005 Amendment to O.C.G.A. § 21-2-417

As a result of the adoption of O.C.G.A. § 21-2-417 in 1997 by the General Assembly, Georgia voters were required for the first time to present one of seventeen forms of identification to election officials as a condition of being admitted to, and allowed to vote at the polls.⁵

³ (R-902.)

⁴ (R-886.)

⁵ See former O.C.G.A. § 21-2-417.

Under O.C.G.A. § 21-2-417 as it existed prior to its amendment by the Photo ID Acts in 2005 and 2006,⁶ registered voters had the option of using a Georgia driver's license or other form of official photographic identification as a method of identification as a condition of voting. Photographic identification was not required, however. Voters were free to use any of eight other methods of identification, including such commonly available documents as a social security card, a current utility bill, a government check, a payroll check, or a bank statement that showed the name and address of the voter.⁷

Moreover, Georgia law provided for an alternative means of identification for a voter who did not have or was unable to find one of the seventeen forms of photographic or non-photographic identification specified in former O.C.G.A. § 21-2-417(a) on election day. Such a voter was entitled under Georgia law, as it existed prior to the enactment of the Photo ID Acts of 2005 and 2006, to be admitted to the polls, issued a ballot and allowed to vote simply by signing a statement under oath swearing or affirming that he or she is the person identified

⁶ The 2005 Voter ID Act was and is known as House Bill 244 ("HB 244"). After the 2005 Act was enjoined by a federal court, the General Assembly repealed HB 244 and enacted Senate Bill 84, which is referred to herein as the 2006 Voter ID Act. The 2006 Act was intended to "fix" the most serious problems identified by the federal court, namely the provisions that the Federal Court felt were the equivalent of a modern poll tax.

⁷ See former O.C.G.A. § 21-2-417(a)(10), (11), (14), (15), (16).

on the elector's certificate.⁸ This "fail safe provision" guaranteed the right to vote of each person at the polls of any registered voter who did not have or was unable to find one of the 17 forms of photographic or non-photographic identification specified in O.C.G.A. § 21-2-417(a). This "fail-safe provision" was essential to ensure that no voter who possessed the qualifications specified in the Georgia Constitution, and who had not been disenfranchised for one of the two reasons stated in the Georgia Constitution, would be allowed to vote, even if the voter did not have one of the 17 forms of approved identification specified in the statute, thereby avoiding a conflict between the constitutional right to vote and the 1997 voter identification statute.

3. The 2005 Photo ID Act

In 2005, the General Assembly of Georgia amended O.C.G.A. § 21-2-417, to eliminate the fail-safe provision and require only those registered voters in Georgia who vote *in person* in primary, special, or general elections for state, national and local offices held on or after July 1, 2005, to present a government-issued photographic identification card ("Photo ID") to election officials as an absolute condition of being admitted to the polls and being issued a ballot and allowed to vote ("the 2005 Photo ID Act").

⁸ Former O.C.G.A. § 21-2-417(b).

The Secretary of State, as the Chief Election Officer in Georgia, informed the General Assembly before the passage of 2005 Photo ID Act in a memorandum, and also informed the Governor in a letter before he signed the bill into law, that 2005 Photo ID Act would open the door even wider to fraud in absentee balloting, while imposing a severe and unnecessary burden on the right to vote of hundreds of thousands of poor, elderly, and minority voters.⁹ The Secretary of State stated that during her two terms as Secretary of State, there had been no documented cases of fraudulent voting involving in-person voting by persons who obtained ballots unlawfully by misrepresenting their identities as registered voters to poll workers reported to her office. In spite of the Secretary of State's efforts, the 2005 Photo ID Act was approved by the General Assembly.

The 2005 Photo ID Act was signed into law by Georgia's Governor, Sonny Perdue, on April 22, 2005, and was scheduled to become effective on July 1, 2005, subject to pre-clearance by the United States Department of Justice.

At the same time that it voted to make the presentation of a Photo ID a mandatory condition of voting in person, the General Assembly also voted to amend O.C.G.A. § 40-5-103(a), by doubling the minimum fee for a Photo ID from \$10 to \$20 for a 5-year Photo ID, and to authorize a new 10-year Photo ID for a fee of \$35.

⁹ See *Common Cause v. Billups*, 439 F.Supp 2d 1294, 1304 (N.D. Ga. 2005); 406 F. Supp 2d 1326, 1333-1334 (N.D. Ga. 2006).

On October 18, 2005, United States Federal District Court Judge Harold Murphy granted a preliminary injunction prohibiting the enforcement of the 2005 Photo ID statute on the ground that the “Plaintiffs have a substantial likelihood of success on the merits of their claim that the [2005] Photo ID requirement unduly burdens the right to vote and a substantial likelihood of success on the merits of their claim that the Photo ID requirement constitutes a poll tax.”¹⁰

The decision of the federal court to enjoin the enforcement of the 2005 Photo ID Act as an undue burden on the right to vote was based on the factual finding that “the State’s interest in preventing voter fraud [did not] make[] it necessary to burden the right to vote.” The federal court found that the evidence showed:

... 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. Secretary of State Cox testified that her office has not received even one complaint of in-person voter fraud over the past eight years and that the possibility of someone voting under the name of a deceased person has been addressed by her Office’s monthly removal of recently deceased persons from the voter roles. Further, the Photo ID requirement does absolutely nothing to preclude or reduce the possibility for the particular type of voting fraud that are indicated by the evidence: voter fraud in absentee voting, and fraudulent voter registrations. The State imposes no requirement for registering to vote, and has removed the conditions for obtaining an absentee ballot imposed by the previous

¹⁰ 406 F. Supp 2d at 1376.

law. In short, HB 244 opened the door wide to fraudulent voting via absentee ballots. Under those circumstances, the State Defendants' proffered interest simply does not justify the severe burden that the Photo ID requirement places on the right to vote.¹¹

4. The 2006 Photo ID Act

Although none of the facts identified by U.S. District Judge Murphy in the above quoted excerpt from the federal court order had changed at the time the General Assembly convened in January 2006, or at the time the 2006 Photo ID Act was signed by the Governor on January 26, 2006, the General Assembly adopted Senate Bill 84 (SB 84") which repealed the 2005 Photo ID Amendment, and replaced it with the 2006 Photo ID Act, requiring the board of elections in each county to issue a "Georgia voter identification card," containing a photograph of the voter, without charge to voters residing in the county, upon presentation of identifying documents that are only vaguely described.

The 2006 Photo ID Act, like the 2005 Photo ID Act that preceded it, applies only to the hundreds of thousands of Georgia citizens who, by definition, do not have a Georgia driver's license, a passport or other form of government-issued Photo ID.

The effect of the 2006 Photo ID Act is to require every voter who does not have a Georgia driver's license or a passport, to go back to the registrar or board of

¹¹ 406 F. Supp 2d at 1366.

elections (or to a Department of Drivers Services office) and essentially re-register to vote, and to provide, as a condition of such re-registration and issuance of a Georgia voter identification card. This constitutes more documentation than is required by Georgia law either to register to vote in the first instance, or to obtain an absentee ballot.

On January 28, 2006, the 2006 Photo ID Act was signed into law by Governor Sonny Perdue. To obtain a Georgia voter identification card, a voter is required by the new provision in O.C.G.A. § 21-2-417.1(e) to provide county officials with more documentation than is required by Georgia law to register to vote or to obtain an absentee ballot.¹²

The 2006 Photo ID Act, like the 2005 Photo ID Act, creates a conclusive presumption that any person who does not have a government-issued Photo ID of the type described in the 2006 version of O.C.G.A. § 21-2-417 is not registered and is not lawfully entitled to vote in person in Georgia.

C. Only voters who vote in person are required to have a Photo ID – people who vote by mail are not

The new Photo ID requirement applies only to registered voters who vote in person. Simultaneously with the adoption of a mandatory Photo ID requirement for in-person voters, the General Assembly voted to eliminate the restrictions on absentee voting. Although the only reported cases of voter fraud have occurred in

¹² O.C.G.A. § 21-2-417.1(e).

absentee voting and in registration, the General Assembly refused to impose any identification requirements on absentee voters or to make identification a condition of registration.¹³

Appellants argue that although absentee voters do not have to show photo ID as do those who vote in person, the General Assembly did act, “to protect against voter fraud” in absentee voting.¹⁴ To wit, election officials must determine if the person casting an absentee ballot is registered and duly qualified to vote by comparing the person’s name, address, and date of birth with the registration records.¹⁵ The elector signs an oath swearing that he or she possesses “the qualifications of an elector as required by the laws of the State of Georgia.”¹⁶ Using this information, the election officials determine whether or not a person can cast an absentee ballot. These “controls,” Appellants contend, are what prevent voter fraud in the absentee balloting process.

However, these “controls” are the very same controls used currently with respect to absentee ballot voting, and prior to passage of the 2006 Photo ID Act, were the same “controls” used to prevent voter fraud for *in-person* voting. When

¹³ O.C.G.A. § 21-2-417.

¹⁴ Appellants’ Brief at 7.

¹⁵ *See* O.C.G.A. § 21-2-384.

¹⁶ *Id.*

an elector presents him or herself to vote *in person*, the elector must fill out a “Voter’s Certificate.” On the “Voter’s Certificate,” the elector is required to provide his or her signature, current address, and date of birth.¹⁷ Just like the information accompanying the oath on an absentee ballot provided by an absentee voter, the election official compares the information on the “Voter’s Certificate” with that on file with the Secretary of State’s office to determine if the elector is able to cast a ballot in person. The only difference after the 2006 Photo ID Act, with respect to in-person voting, is that those persons who vote in person must also provide a government issued photo identification card.

In an effort to make it seem that absentee ballots are somehow afforded another level protection that is not afforded to those ballots that are cast in person, Appellants wrongly assert that an election official must also compare “the signature of the voter’s certification [that is sent in with a voted absentee ballot] with the signature on the voter’s registration [the document completed when an elector registered to vote].”¹⁸ This, they contend, is what will ensure that an absentee ballot is being cast by a properly registered voter without need of a photo identification requirement.

¹⁷ O.C.G.A. § 21-2-402.

¹⁸ Appellants’ Brief at 8.

This is a misstatement of the law. O.C.G.A. § 21-2-386(1)(B) directs an election official only to “compare the signature on the oath [i.e, the certification that is sent in with a voted absentee ballot] ...with the signature or mark on the absentee elector’s *application for absentee ballot.*” There is no comparison to the original registration application, or the original signature on this document to determine if the signature of the person casting an absentee ballot is the same as the signature of the duly qualified elector. Rather the comparison is between, the signature of the person requesting the absentee ballot, and the person actually voting the absentee ballot, which does little to prevent fraud. Thus, the identifying information provided by absentee ballot voters, that person's name, address and date of birth, is the same information supplied by in-person voters, but without any verification in the way of supporting documentation.

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 unconstitutional pursuant to Article I, Section 1, Paragraphs 2 and 3 of the Georgia Constitution.¹⁹

¹⁹ (R-886.)

V. Argument and Citation of Authority

A. The Photo ID Requirement Imposes An Unauthorized Condition on the Fundamental Right to Vote Endowed by Art. II, § I, ¶ II of the Georgia Constitution.

Relying on the express language of the State Constitution, widely recognized canons of constitutional construction, and the precedent of this Court, the Trial Court correctly held the 2006 Photo ID Act unconstitutional pursuant to Article II, Section 1, Paragraphs 2 and 3 of the Georgia Constitution.

1. The State Constitution Enumerates the Qualifications that a Georgia Citizen Must Have to Vote and Limits the General Assembly's Role in our State's Electoral Process.

As correctly held by the Trial Court, Article II, Section I, Paragraph II of the Georgia Constitution extends the right to vote to all residents of Georgia who are citizens of the United States, at least 18 years of age, who meet the minimum residency requirements prescribed by the General Assembly, and who have 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.²⁰

²⁰ Georgia Const., Art. II, § I, ¶ II (emphasis added).

In this constitutional language we find the role of the General Assembly expressly **defined** and **limited** by Article II, Section I, Paragraph II to two specific functions: (1) establishing “minimum residency requirements;” and (2) providing for the registration of electors. Where the State Constitution “undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot thereafter enlarge the list.”²¹ The 2006 Photo ID Act impermissibly reaches beyond the limits of this language because the photo identification requirement is neither a residency requirement nor a condition of registration.²²

2. Only Persons Who Have Been Convicted of a Felony or Have Been Determined to Be Incompetent May Be Denied the Right to Vote.

Not only are the qualifications for voting enumerated in the Constitution, but the grounds on which a Georgia citizen may be denied the franchise are also express. Article II, Section II, Paragraph II limits the grounds on which a Georgia citizen who is registered may be denied the right to vote to: those who have been (1) convicted of a felony involving moral turpitude, or (2) judicially determined to

²¹ *Stewart v. State*, 98 Ga. 202, 205, 25 S.E. 424, 425 (1896).

²² *See Franklin v. Harper*, 205 Ga. 779, 790, 55 S.E.2d 221, 229-30 (1949) (“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).

be mentally incompetent to vote.²³ Nowhere in the State Constitution is the General Assembly authorized to deny a registered voter the right to vote on any other ground, including possession of a government issued photo identification card of the type required by the 2006 Act.

3. Long-Standing Constitutional Canons of Construction Support the Trial Court's Interpretation of the State Constitution.

In two analogous cases dealing with how express constitutional language is to be construed, the United States Supreme Court held the power of Congress and the states to be similarly limited. First, in *Powell v. McCormack*, the Supreme Court held that although Congress is expressly authorized by Art. I, § IV of the Constitution to judge the qualifications of its members, Congress was not authorized to use its power to refuse to seat a member of the House for reasons other than those expressly set forth in Art. I, § II of the United States Constitution.²⁴

In its subsequent opinion in the *Term Limits Case*, the United States 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

²³ Georgia Const., Art. II, § I, ¶ III.

²⁴ 395 U.S. 486 (1969).

‘fixed’ at least in the sense that they may not be supplemented by Congress.”²⁵

The Supreme 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.²⁶

The constitutional canons of construction illustrated by both *Powell* and the *Term Limits Case* find universal accord. To that end, the trial court correctly relied upon and cited not only Georgia law, but also that of other states to hold that the General Assembly cannot enact measures that are prohibited by the State Constitution.²⁷

²⁵ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995).

²⁶ *Id.* at 793 n. 9 (internal citations and quotations omitted).

²⁷ *Stewart v. State*, 98 Ga. 202, 205, 25 S.E. 424, 425 (1896)(where the State Constitution “undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot thereafter enlarge the list”); *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

B. General Assembly’s Limited Power to Reasonably Regulate “Time, Place, and Manner” of Elections Is Not Implicated Because Photo ID Requirement Is Not “Manner” Restriction.

Relying on Article II, Section 1, Paragraph 1, Appellants conflate the General Assembly’s power to enact reasonable “time, place, and manner restrictions” and the General Assembly’s power to provide for the “registration of electors” *with* the General Assembly’s inability to impose a condition, or further qualification, on the fundamental right to vote. By combining areas of the electoral process where the General Assembly has limited power to act *with* an area where the General Assembly is not authorized to act, Appellants claim for the General Assembly unfettered, plenary power over elections and the right of suffrage. Yet, the General Assembly’s plenary power is not absolute and must yield when our state and federal constitutions so demand.²⁸ “The legislative branch of our government is charged with the duty of providing the manner of holding elections

to or changed by legislative enactment.”); *Koy v. Schneider*, 110 Tex. 369, 377-78, 218 S.W. 479, 480 (1920) (“All 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.’”).

²⁸ See generally *Sears v. State of Georgia*, 232 Ga. 547, 553, 208 S.E.2d 93 (1974)(General Assembly’s plenary power cannot be used “to enact measures prohibited by the State or Federal Constitution.”).

and providing for the ballot, and what shall go on the ballot -- of course *subject to the limitations contained in the constitution.*”²⁹

Still, Appellants’ attempt to cast the Photo ID Requirement as a “manner” restriction is specious. Manner has to do with the *method of voting*:³⁰ hours of operation of the polls, whether the voter uses a paper ballot, a voting machine, or a touch screen machine. Possession of a Photo ID is a *condition of voting*, which if not met becomes a ground for refusing to let a person vote who is lawfully registered and otherwise fully qualified. The “time, place, and manner” paragraph in the State Constitution must be interpreted to mean something other than, or separate from, the provision in the next paragraph of the Constitution which specify the qualifications that are conditions of both registration and voting, and the grounds on which someone can be denied the right to register and to vote. To hold otherwise would violate the rules of construction that require courts to give full effect to every word, much less every section, of the Constitution and which forbid courts from treating an entire provision of the Constitution as if it were redundant of the previous provision.

²⁹ *Wheeler v. Board of Trustees of Fargo Consol. School Dist.*, 200 Ga. 323, 334, 37 S.E.2d 322, 329 (Ga.1946)(emphasis added).

³⁰ And indeed, Article II, Section 1, Paragraph 1 is titled as such: “Method of Voting.” The Section reads: “Elections by the people shall be by secret ballot and shall be conducted in accordance with procedures provided by law.”

Interpreting Article II, Section 1, Paragraph 1 to mean that the General Assembly has plenary power, in the guise of regulating the “manner of elections,” to add new conditions on voting, that are not among the conditions specified in the constitution, means that the detailed explication of conditions or disqualifications for voting in the next section is meaningless. If the General Assembly has the power to condition the right to vote, why would the Constitution need to? As held by this Court and the Trial Court, the purpose of an express constitutional provision is to limit the authority of the General Assembly to provide to the contrary by statute.³¹ Thus, the 2006 Photo ID Act may not properly be read to override the clear mandate of the Constitution.³²

Even if the Photo ID requirement were held to be a “manner” restriction, the General Assembly’s power to provide for such is not unfettered. The right to vote

³¹ *Jones v. Fortson*, 223 Ga. 7, 152 S.E.2d 847 (1967); (R-884.).

³² In support of their position that the 2006 Photo ID Act is authorized by Article II, Section 1, Paragraph 1 (“Method of Voting” paragraph), Appellants cite this Court to *AFL-CIO v. Hood*, 885 So.2d 373 (Fla. 2004) decided under the Florida constitution. Apart from the fact that this case arises in the voting context, it offers little support to Appellants. In *Hood*, the Florida court was presented with a Florida law that required that provisional ballots, *like regular ballots*, had to be cast in an elector’s precinct. Recognizing the widely accepted principle that legislators can reasonably restrict the place of elections, the court upheld the restriction as authorized under Florida’s time, place, and manner paragraph of the Florida Constitution. Appellants’ reliance on *Hood* is misplaced in that the *Hood* regulation is a “time, place, manner” restriction properly analyzed under a constitutional section that allows for such.

expressed in the State Constitution is inviolate and cannot be impeded by any such regulation or restriction, even where the regulation is as seemingly innocuous as one regulating the form of a ballot.

In *Griffin v. Trapp*,³³ the “regulation” was one purportedly requiring an elector to cast two votes where three candidates were listed on the ballot. There, this Court held that even though the law allowed for an elector to vote for two constable candidates out of a field of three candidates, the fact that an elector casts only one vote, and not two as provided by law, does not render his vote void.

One of the most important and sacred rights possessed by an American citizen is to vote for whom he pleased, and to have that vote counted. It is so important and sacred that it is written into the fundamental law of our State in article II, section I, paragraph II of the constitution, Code Ann. § 2-702, that ‘Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people.’

In referring to this provision of the constitution, this court, in *Stewart v. Cartwright*, 156 Ga. 192, 197, 118 S.E. 859, 861, said: ‘The words ‘shall be an elector and entitled to register and vote at any election by the people’ are unequivocal, and the entire provision amounts to a constitutional guaranty of the right of suffrage, which, though subject to reasonable regulation, cannot be absolutely denied or taken away by legislative enactment. There cannot be any doubt that a statute providing for an

³³ *Griffin v. Trapp*, 205 Ga. 176, 181-82, 53 S.E.2d 92 (1949).

official ballot for use at a general public election, which prescribes the form to be of such character as will deny the voter his right to vote for whomsoever he pleases, would be violative of the above provision of the Constitution.' And in that case and in *Adair v. McElreath*, 167 Ga. 294, 314, 145 S.E. 841, 850, this court has approved the doctrine that 'the Legislature cannot * * * restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases, and the Constitution has guaranteed to him this right.'

The requirements that the ballot carry the information "Vote for one," "Vote for two," and the like," are for the information and benefit of the elector in exercising his free choice, and the right of the voter or elector to erase, mark out, or cancel the name or names of the candidates for whom he does not wish to vote is there recognized. The right to vote against some one is held as sacred by some as the right to vote for another, and the fact that an elector exercise both rights at the same time, where the opportunity to do so is afforded, would not render his ballot illegal, and prevent it from being counted.

205 Ga. 176, 181-82 (1949).

Likewise, in *Stewart v. Cartwright*,³⁴ the "regulation" passed by the General Assembly affected what form the official ballot could take. There, this Court held that even though the General Assembly had provided by law that an official ballot be used for elections, if an elector chooses to scratch through the name of the candidate or candidates listed on the official ballot and then writes in the name of a different person as the voter's choice, the vote is still lawful and must be counted.

³⁴ *Stewart v. Cartwright*, 156 Ga. 192, 197, 118 S.E. 859 (1923)

In both *Griffin v. Trapp* and *Stewart v. Cartwright*, the regulations that the General Assembly claimed were within their power to regulate the “method of voting” were held to yield to the constitutionally guaranteed right of suffrage. To put it differently, an elector’s failure to follow legislative enactments “regulating” the electoral process cannot trump that elector’s right to vote.

C. *Franklin v. Harper* Does Not Recognize that the General Assembly Has the Power to Require a Photo ID as a Further Condition of Voting.

Appellants repeatedly cite to a portion of this Court’s opinion in *Franklin v. Harper* that reads: “the legislature has a wide latitude in determining how the qualifications required by the Constitution may be determined...”³⁵ Appellants use the word “qualifications” loosely to mean any and all legislative enactments that may touch upon registration, the actual conducting of elections (i.e. time, place, and manner restrictions), and the right of suffrage. Appellants combine these to assert that the General Assembly has some kind of all encompassing power.

Yet, *Franklin* teaches that the power of the General Assembly to set up a system to determine if a person meets the constitutional qualifications, as set forth in the State Constitution, is limited to the registration process. To wit, the General Assembly has the ability to require a person to show that they are qualified to vote by showing a photo ID as a condition of *registration*. After all, it is the very point of registration to discern whether or not a person who wishes to vote meets the

³⁵ *Id.* at 790.

constitutional qualifications of residency and age (and likewise is not disqualified). The General Assembly is empowered with how to do this. This power, however, does not extend beyond registration. Once an elector has proven by complying with the registration process enacted by the General Assembly that she is constitutionally qualified to vote, that elector “shall” be entitled to vote.

Other cases dealing with the power of the General Assembly with respect to registration confirms this reading of *Franklin*. Of particular note is *Johnson v. Byrd*,³⁶ which arose out of an election challenge filed in Talbot County. In *Byrd*, in a runoff election for probate judge, the winning candidate received only 41 more votes than the losing candidate. The loser of the race challenged the election based on the fact that (1) eight convicted felons were allowed to vote; and (2) 43 persons who had not taken the oath as required by law *to register* were allowed to vote. The trial court held the votes, of the felons and those not properly registered, void. On appeal, the winning candidate argued that these votes should not have been voided. The Supreme Court disagreed and affirmed the trial court.

The Supreme Court first acknowledged that the State Constitution clearly provides that a person who has been convicted of a felony cannot vote.³⁷ Thus, the votes cast by the felons were properly voided by the trial court.³⁸

³⁶ 263 Ga. 173, 429 S.E.2d 923 (1993).

³⁷ *Id.* at 174.

As to the second enumeration of error, this Court discussed the power of the General Assembly *to provide by law for the registration of electors*.³⁹ Being properly registered, this Court reasoned, is a condition to be authorized to cast a ballot, thus, if an elector is not properly registered because he or she has not taken the oath as provided by law, then that voter cannot properly cast a ballot.⁴⁰ At the point of registration is where the General Assembly has the power “to insure and sustain the integrity of public elections...”⁴¹

Just as insightful as the majority opinion in *Byrd*, is Chief Justice Leah Ward Sears’s dissent. Chief Justice Sears dissented from the majority’s holding that the voters who did not take an oath as required by the registration statute were not qualified to cast a ballot. Relying on the change in the constitutional language, Chief Justice Sears asserted that the 1983 Constitution does not make registration a qualification to being able to vote, thus any irregularity in registration should not disenfranchise an otherwise qualified elector.⁴²

³⁸ *Id.*

³⁹ The power of the General Assembly to provide for the registration of electors is express and unquestioned.

⁴⁰ 263 Ga. at 175.

⁴¹ *Id.* at 174.

⁴² The Dissent reads in part:

The majority has mistakenly relied on *Stephens v. Ball Ground School Dist.*, 153 Ga. 690, 694(2), 113 S.E. 85 (1922), for the proposition that voters who did not sign the oath on their registration cards are not entitled to have their votes counted. The case of *Cole v. McClendon*, 109 Ga. 183(3), 34 S.E. 384 (1899), actually controls the issue now before us.

In *Cole* the contention was made that the votes of certain individuals were not entitled to be counted because the voters in question had not signed the oath prescribed by law. *Id.* at 189, 34 S.E. 384. At that time the Georgia Constitution set the qualifications necessary to vote and provided that the General Assembly may provide for the “registration of all electors.” Notably, registration according to the law was not set out as a qualification to vote. We rejected the challenge to the votes in question, holding, in summary, that the failure to sign the oath was an irregularity in registration that would not disenfranchise the voters and that instead there had to be some allegation that the voters, if regularly registered to vote, would not be qualified to do so. *Id.* at 189-190, 34 S.E. 384.

In *Stephens* the same issue that was raised in *Cole* was again presented. At the time *Stephens* was decided, the applicable constitutional provision had been rewritten so as to make registration in accordance with the law a qualification to vote. *Stephens* at 692. For that reason, we did not follow *Cole* and instead held that the votes cast by persons who did not sign their registration cards were not entitled to be counted. *Id.* 153 Ga. at 694, 113 S.E. 85.

The same constitutional language that the Court found controlling in *Stephens* was present in the 1976 Georgia Constitution, see Art. 2, Sec. 1, Para. 1, but was deleted from the 1983 Georgia Constitution, see Art. 2, Sec. 1, Paras. 1 & 2. Our present Constitution now reads like the Constitution in existence at the time *Cole* was decided, in that Art. 2, Sec. 1, Para. 2 sets forth the qualification of

D. The Law Prior to the 2005 and 2006 Photo ID Acts Allowed for an Elector’s Identity to be Confirmed Without Imposing A Further Condition on the Right to Vote.

Appellants blithely assert that “[o]nce 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.”⁴³ Yet, this statement overlooks the current, and constitutional, requirement that if an elector does not have one of 17 forms of identification, then she can swear an oath affirming her identity. Current law already provides for a means to confirm the identity of a voter.⁴⁴ Moreover, an elector is also required to provide identifying information (date of birth, full legal name, residence) that was given to the State when that elector registered. This is a “reasonable” manner in which the identification of a voter can be established without running afoul of the State Constitution.⁴⁵

electors and then states that the General Assembly “shall provide by law for the registration of electors.”

Because of this change in the 1983 Constitution, I find that *Stephens* is inapplicable and that *Cole* is controlling.

Johnson v. Byrd, 263 Ga. 173, 177, 429 S.E.2d 923, 926-927 (1993).

⁴³ Appellants’ Brief at 19.

⁴⁴ See former O.C.G.A. § 21-2-417.

⁴⁵ This type of “self-identifying” process has been upheld in other cases. In *Perez v. Rhiddlehoover*, 186 So.2d 686 (La. Ct. App. (4th Cir. 1966), the Louisiana court of appeals held that requiring a voter to confirm descriptive information (i.e., age,

Being required to do and possess something in particular (here a government issued photo identification card) in order to be *qualified* to vote is altogether different from supplying identifying information and verifying under oath that an elector is the person on the list who has previously been determined to satisfy all of the qualifications for voting. The latter imposes no additional qualification. Put differently, providing identifying information and swearing a statement under oath cannot possibly exclude anyone who is qualified to vote and shows up at the polls from voting (because everyone is capable of both and they impose no burden at the polls), and therefore it cannot be termed an additional "qualification," but rather is simply part of the procedure of voting.

E. Allowing an Elector to Cast a Provisional Ballot Does Not Remedy the 2006 Act's Constitutional Infirmities.

Under the 2006 Act, if an otherwise qualified elector does not have a photo ID, that elector is allowed to cast a provisional ballot that will only be counted if that elector presents an acceptable photo ID to her county registrar within two days.⁴⁶ In holding the 2006 Act unconstitutional, the Trial Court correctly focused on *the last act* that would serve to disenfranchise an otherwise qualified elector,

place of birth, mother's maiden name) *that was given to the state when that voter registered* did not violate the Voting Rights Act of 1965. Appellant posits that if the General Assembly had adopted the identification verification process used in *Perez*, she would not be here today.

⁴⁶ O.C.G.A. § 21-2-417(b).

that is when a provisional ballot is voted but not counted because an elector has not returned to her county registrar's office to present acceptable identification within two days.⁴⁷ "The 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."⁴⁸

F. Affirming the Trial Court's Interpretation of the State Constitution Would Not Invalidate Existing Election Laws.

Finally, Appellants' "sky is falling" argument is without merit. At page 28 of their brief, Appellants declare that "if the superior court's restrictive interpretation of Article II, Section 1, Paragraph 3 were adopted...a plethora of

⁴⁷ It is of no moment that an elector would be allowed to vote a provisional ballot and then have 48 hours to obtain the required state issued photo identification. To illustrate the absurdity of the photo ID requirements consider the following hypothetical. A duly qualified elector with no photo ID arrives at the polls with her precinct card and birth certificate, just as she has for the last five elections. The poll worker would then inform the elector that she has to fill out a provisional ballot because she did not possess the necessary photo ID. How then does the elector obtain the necessary photo identification? The answer is that the elector takes that very same documentation she just provided to the poll worker (the birth certificate and the precinct card), travels to her county registrar's office, and provides it to the registrar, who then gives her the appropriate state, issued photo identification card. The elector then has to show the registrar her new photo identification, obtained by showing her birth certificate and precinct card, to have her ballot counted. What rational justification could there possibly be to require an extra trip to the registrar's office? Significantly, if the elector does not make the extra trip to obtain the photo identification to "prove" who she is (with the very same documents that she brought to the polls originally), her provisional ballot will not be counted.

⁴⁸ (R-881.)

Georgia laws could be successfully challenged as unconstitutional.” Appellants go on to list multiple code sections that they assert would be subject to challenge if Plaintiffs’ challenge prevails. This assertion is utterly without merit because each of the code sections cited fall within the proper scope of power given to the General Assembly, either by the General Assembly’s limited to provide for the registration of electors or it’s limited power to regulate the “time, place, and manner’ of elections. These regulations do not impose a further qualification on the right to vote, and would not be endangered by affirmance of the Trial Court’s Order.

VI. CONCLUSION

The 2006 Photo ID Act violates not only the language of our State Constitution but the spirit of our democracy. However one characterizes the photo ID requirement, it prevents *duly qualified* electors of our state from voting. Because the Photo ID Act places an unauthorized condition on the right to vote, because the Act cannot be properly characterized as a restriction regulating the method of voting, and because the General Assembly cannot claim plenary power where the Constitution has expressly limited its power, the 2006 Photo ID Act cannot withstand constitutional scrutiny. Accordingly, based on the foregoing, Appellee respectfully requests that this Court affirm the Trial Court’s Order

declaring the 2006 Photo ID Act unconstitutional and enjoin any further enforcement of the Act.

Respectfully submitted this 29th day of January, 2007.

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