

**IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

MS. ROSALIND LAKE and )  
MR. MATTHEW L. HESS )  
qualified and registered voters )  
under Georgia law, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
HON. SONNY PERDUE, in his )  
official capacity as Governor; )  
 )  
STATE ELECTION BOARD; and, )  
 )  
MS. GLORIA CHAMPION, Superintendent )  
of Elections for Fulton County, Georgia )  
MS. JUANITA MARSHALL EBER, )  
Chair of the Fulton County Board of )  
Registration and Elections; MRS. )  
CYNTHIA J. WILLIAMS, MR. HARRY )  
W. MCDONALD, MR. FRANK B. )  
STRICKLAND, and MR. SAMUEL P. )  
WESTMORELAND, )  
 )  
Defendants. )

CIVIL ACTION  
FILE NO. \_\_\_\_\_

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A  
TEMPORARY RESTRAINING ORDER**

Plaintiffs file this, their Motion and Memorandum in Support of Their Motion for a Temporary Restraining Order, contemporaneously with their action for declaratory and injunctive relief seeking to have declared unconstitutional, and to enjoin the enforcement of, the 2006 amendment to O.C.G.A. § 21-2-417 (“the 2006 Photo ID Act”), which

imposes an unauthorized condition and qualification on the fundamental right to vote of registered Georgia voters in violation of Art. II, § I, ¶ II of the Georgia Constitution.<sup>1</sup>

Plaintiffs seek a temporary restraining order due to the fact that Georgia is scheduled to conduct a primary election on July 18, 2006, a general election in November 7, 2006, for Governor, Lieutenant Governor, Secretary of State, Attorney General, and other state-wide constitutional offices, for members of the General Assembly, for members of Congress, and a non-partisan general election for members of the Georgia Supreme Court, Court of Appeals, Superior and State Courts also on November 7, 2006.

Plaintiffs have moved for a declaration that the 2006 Photo ID Act is unconstitutional because it violates Art. II, § I, ¶ II of the Georgia Constitution. The Georgia Constitution is explicit in that it does not endow the General Assembly with the power to impose an absolute condition or qualification of voting. A Georgia resident has an **absolute right** to vote if she meets the five qualifications expressed in the Constitution. The 2006 Photo ID Act violates this precept.

In support of Plaintiffs' request for a temporary restraining order, Plaintiffs show the Court as follows:

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<sup>1</sup> A copy of Plaintiffs' Verified Complaint is attached hereto as Exhibit A. The allegations and arguments in Plaintiffs' Complaint are incorporated herein.

## STATEMENT OF FACTS

### **I. Voter Identification Requirements in Georgia**

#### **A. 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.

#### **B. 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. 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,<sup>2</sup> 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. See former O.C.G.A. § 21-2-417(a)(10), (11), (14), (15), (16).

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<sup>2</sup> 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 ("SB 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.

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 on the elector's certificate. Former O.C.G.A. § 21-2-417(b).

**C. There was no evidence of widespread or significant voter fraud by in-person voters prior to the enactment of the new Photo ID requirement.**

The Secretary of State is the Chief Election Officer in Georgia. See O.C.G.A. § 21-2-30(d); O.C.G.A. § 21-2-50.2; and O.C.G.A. § 21-2-210. The Secretary of State has stated publicly in letters to the General Assembly before the passage of the 2005 Photo ID Act (attached hereto as Exhibit B), and to the Governor (attached hereto as Exhibit C) before he signed the bill into law, that **there have been no documented cases of fraudulent in-person voting by persons who obtained ballots unlawfully by misrepresenting their identities as registered voters to poll workers reported to the Secretary of State during her nine years in office.**<sup>3</sup>

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. As a result of the adoption by the General Assembly of O.C.G.A. § 21-2-417 in

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<sup>3</sup> See Testimony of Cathy Cox, Preliminary Injunction Hearing("Hearing Transcript"). Exhibit D.

1997, registered voters in Georgia were required for the first time to identify themselves by presenting one of seventeen forms of identification to election officials as a condition of being admitted to, and allowed to vote at the polls (former O.C.G.A. § 21-2-417), or by signing an Elector's Certificate under oath affirming the correctness of the voter's name and address. O.C.G.A. § 21-2-417(b).

The 1997 voter identification statute also had a "fail safe provision" (O.C.G.A. § 21-2-417(b)), that 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). If a person did not have one of the 17 forms of identification, that person could sign a statement under oath swearing or affirming that he or she is the person identified on the elector's certificate. O.C.G.A. § 21-2-417(b). 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.

According to an August 25, 2005 "Section 5 Recommendation Memorandum" of the Voting Rights Section of the Department of Justice career staff (Exhibit E), the 1997 Georgia voter identification statute was granted pre-clearance under Section 5 of the Voting Rights Act "based on two main factors: (1) the fail-safe procedure ensured that voters were not turned away for lack of authorized identification, and (2) minority

contacts [i.e. African-Americans in Georgia] did not urge an objection primarily because no voters would be turned away if they did not have proper identification.”

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”).

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 (attached hereto as Exhibit B), and also informed the Governor in a letter (attached hereto as Exhibit C) 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. 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. The 2005 Photo ID Act (HB 244 (Act No. 53)) was approved in the House.

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.

On August 25, 2005, the career staff in the Voting Rights Section recommended that the mandatory Photo ID requirement in Section 59 of Act 53 be denied pre-clearance under the Voting Rights Act (Exhibit E), but their recommendation was overruled the next day by the Republican political appointees in the 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 Republican majority in both Houses of the 2005 General Assembly also voted (a) 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 also authorizing a new 10-year Photo ID for a fee of \$35. Ga. Laws 2005, p. 334 (Act No. 68) § 17-24(a), and (b) to amend O.C.G.A. § 21-2-380 and § 21-2-381 to make it easier for voters to obtain absentee ballots.

As a result of the adoption of the 2005 Photo ID Act, Georgia became the first of only two states that requires registered voters to present a photo identification as an **absolute** condition of being admitted to the polls and of being allowed to cast a ballot in federal, state, and local elections, the Georgia statute is the most restrictive voter identification statute in the nation. Voting Rights Section Memorandum (Exhibit E, p. 42). A majority of states (30) do not require registered voters to present any form of identification as a condition of admission to the polls or casting a ballot, while a minority of states (18) requires voters to present some form of identification at the polls, but also have a fail-safe alternative.

Simultaneously with the adoption of a mandatory Photo ID requirement for in-person voters, the Republican Majority also voted to eliminate the restrictions on absentee voting and ignored the advice from the Secretary of State who informed the

members of the General Assembly and the Governor that adopting the provision of HB 244 that proposed to make it easier for voters to cast absentee ballots, “You would be opening a gaping opportunity for fraud.” She explained the basis for her opposition as follows:

At virtually every meeting of the State Elections Board during the past 10 years, we have dealt with cases involving fraud or election law violations in handling or voting absentee ballots. HB 244 removes all restrictions on voting by mail, and thus makes it quite simple for someone inclined to commit fraud to do so.

Exhibit B.

The Republican Majority in the General Assembly again ignored the information from the Secretary of State that they would be opening a gaping opportunity for fraud by making it easier for voters to vote absentee by removing the restrictions on absentee voting, and arbitrarily choosing to make presentation of a Photo ID a mandatory condition of voting only for those registered voters who vote in person, and deliberately refusing to impose any identification requirements either on absentee voters or to make identification a condition of registration. O.C.G.A. § 21-2-417.

The 2005 Photo ID Act became effective upon pre-clearance by the Justice Department, on August 26, 2005.

On October 18, 2005, the Federal District Court 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.” Federal District Court Order, p. 120 (Oct. 18, 2005)(attached to Plaintiffs’ complaint at Exhibit G).

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 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.

Order, pp. 95-96 (Oct. 18, 2005).

Although none of the facts identified by Judge Harold 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 majority in both the House and Senate adopted SB 84 which repealed the 2005 Photo ID Amendment, and replaced it with a new code (O.C.G.A. § 21-2-417.1), 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. Section 3 of SB 84 also amended O.C.G.A. § 40-5-103 by striking the previous subsection (d) in the 2005 Photo ID Act, which had required a voter to execute an affidavit of poverty to obtain a Photo ID without charge from the DDS and substituted in its place a requirement that the voter swear “that he or she desires an identification card in order to vote . . . and that he or she does not have any other form of identification that is acceptable under Code § 21-2-417” and to “produce evidence that he or she is registered to vote in Georgia.”

SB 84, as amended, 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, and imposes a very severe burden on the right to vote of the poor, elderly or infirm, who are the least mobile members of the electorate who will have the greatest difficulty in complying with the requirements of the statute and do not own, cannot drive, or have access to a car.

The effect of SB 84 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 elections (or to go to a DDS 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, SB 84 was signed into law by Georgia’s Republican Governor, Sonny Perdue. A true and correct copy of SB 84 “as passed” by the General Assembly and signed by the Governor is attached hereto as Exhibit F. 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.

(e) The board of registrars shall require presentation and verification of the following information before issuing a Georgia voter identification card to a person:

- (1) A photo identity document, except that a nonphoto identity document is acceptable if it includes both the person's full legal name and date of birth;
- (2) Documentation showing the person's date of birth;
- (3) Evidence that the person is registered to vote in this state; and
- (4) Documentation showing the person's name and address of principal residence.

O.C.G.A. § 21-2-417.1(e)

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, and that violates both Article II, § I, ¶ II of the Georgia Constitution.

**D. 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*. Strangely, the General Assembly did not impose a similar Photo ID requirement on absentee voters, even though the Secretary of State informed the members of the General Assembly and the Governor that her office had received many complaints of

voter fraud involving absentee ballots and no documented complaints involving ballots that were cast in person. See O.C.G.A. § 21-2-417.

Again, there is overwhelming evidence that the claim that the statute was necessary to prevent fraudulent in-person voting by imposters is itself fraud and a pretext.

- First, the risk of significant fraudulent voting by imposters is very small. If an imposter arrived at a poll and was successful in fraudulently obtaining a ballot before the registered voter arrived at the poll, a registered voter, who having taken the time to go to the polls to vote, would undoubtedly complain to elections officials if he or she were refused a ballot and not allowed to vote because his or her name had already been checked off the list of registered voters as having voted. Likewise, if an imposter arrived at the polls after the registered voter had voted and attempted to pass himself off as someone he was not, the election official would instantly know of the attempted fraud, would not issue the imposter a ballot or allow him to vote, and presumably would have the imposter arrested or at least investigate the attempted fraud and report the attempt to the Secretary of State as Superintendent of Elections. Thus, fraudulent in-person voting is unlikely, would be easily detected if it had occurred in significant numbers, and would not be likely to have a substantial impact on the outcome of an election.
- Fraudulent voting was already prohibited as a crime under O.C.G.A. §§ 21-2-561, 21-2-562, 21-2-566, 21-2-571, 21-2-572 and 21-2-600, punishable by a fine of up to \$10,000 or imprisonment for up to ten years, or both. There is no evidence that the existing criminal sanctions have not been effective in deterring the kind of fraudulent voting that the new Photo ID requirement would address.
- Voter registration records are automatically updated periodically by the Secretary of State and local election officials to eliminate people who have died, have moved, or are no longer eligible to vote in Georgia for some other reason.
- Existing Georgia law also requires election officials in each precinct to maintain an up-to-date list of names and addresses of registered voters residing in that precinct, and to check off the names of each person from that official list as they cast their ballots.
- Since 1998, voters have been required by existing Georgia law to provide one of the seventeen means of identification to election officials, or to swear under penalty of perjury to their identity. Election officials were required to match the name and address shown on the document to the

name and address on the official roll of registered voters residing in the particular precinct before issuing the voter a ballot. See former O.C.G.A. § 21-2-417.

- Before being issued a ballot, voters are also required to sign an “Election Certificate” certifying to the accuracy of their names and current address. If the General Assembly were genuinely concerned about the risk of fraudulent voting by someone posing as a registered voter, the General Assembly could have required poll workers to compare the signature on the voter registration cards on file in the office of the local registrar with the signature on the “Election Certificate” – which is exactly the procedure which is required in the case of absentee ballots. O.C.G.A. §§ 21-2-384 & 386.

If the true intention of the General Assembly had been to prevent fraudulent voting by imposters, the General Assembly would have imposed at least the same, if not greater, restrictions on the casting of absentee ballots – especially after the Secretary of State had called to their attention the fact that there had been many documented instances of fraudulent casting of absentee ballots reported to her office. The fact that the General Assembly went in the opposite direction and expanded the opportunities for fraud in absentee voting is further evidence of the pretextual nature of justification for the statute.

### ARGUMENT

Plaintiffs satisfy all the necessary elements to warrant a temporary restraining order/preliminary injunction. To obtain a preliminary injunction, movants must demonstrate: (1) a substantial likelihood that they will ultimately prevail on the merits; (2) that they will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to them outweighs any damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not disserve the public interest. See Gold Coast Publications, Inc. v. Corrigan, 42 F.3d 1336, 1343 (11<sup>th</sup> Cir. 1994). The same standards apply to the issuance of a temporary restraining order.

Ingram v. Ault, 50 F.3d 898, 900 (11<sup>th</sup> Cir. 1995). "None of the four prerequisites has a fixed quantitative value[;] [r]ather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus." Unisource Worldwide, Inc. v. South Central Alabama Supply, LLC, 199 F. Supp. 2d 1194, 1199 (M.D. Ala. 2001) (citations omitted). Moreover, in its evaluation, the court "may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction." Levi Strauss & Co. v. Sunrise Int'l. Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995). See also State Highway Bd. of Ga. v. City of Baxley, 190 Ga. 292 (1940). The decision to grant a preliminary injunction is within the sound discretion of the Court and will not be disturbed unless there is a clear abuse of discretion. Harris Corp. v. Nat'l Iranian Radio and Television, 691 F.2d 1344, 1354(11th Cir. 1982); Wallace v. Lewis, 253 Ga. App. 268 (2002)(appellate courts are not at liberty to disturb trial court's grant of interlocutory injunction on appeal in the absence of a manifest abuse of discretion).

This Court should grant Plaintiffs' Motion for Temporary Restraining Order because they have demonstrated: (1) a substantial likelihood of prevailing on the merits of their claim; (2) that Plaintiffs and other Georgia voters will suffer irreparable harm to their rights has voters unless injunctive relief is granted; (3) that the threatened injury to the rights of Plaintiff and other Georgia voters unless injunctive relief is granted; (3) that the threatened injury to the rights of Plaintiffs and other Georgia voters outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the grant of an injunction would not adversely affect the public interest.

**A. Plaintiffs Are Likely to Succeed On The Merits Of Their Claim Because the New Photo ID Requirement Imposes An Unauthorized Absolute Condition on the Fundamental Right to Vote Endowed by Art. II, § I, ¶ II of the Georgia Constitution.**

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.

Georgia Const., Art. II, § I, ¶ II (emphasis added).<sup>4</sup>

There is nothing equivocal about the words “**shall be entitled to vote at any election by the people.**” Equally clear is the principle that where the Georgia Constitution “undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot thereafter enlarge the list.” Stewart v. State, 98 Ga. 202, 205, 25 S.E. 424, 425 (1896); see also Morris v. Powell, 25 N.E. 221, 223 (Ind. 1890) (“That when the people by the adoption of the Constitution have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote,

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<sup>4</sup> Plaintiffs assert a facial **and** as applied challenge to the 2006 Photo ID Act. A facial challenge is appropriate here because the statute **always prohibits** a duly-qualified elector from casting a ballot, *in person*, if he or she does not present the required photo identification. See State v. Jackson, 269 Ga. 308, 312, 496 S.E.2d 912, 916 (1998). See generally Hubbard v. State, 256 Ga. 637, 638-39, 352 S.E.2d 383 (1987)(explaining that facial challenge is inappropriate where the question is one of construction, that is, a question of whether the statute can be construed in a constitutional manner). There is no ambiguity, this statute mandates that state issued photo identification must be shown to cast a ballot in person.

the legislature can not add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities. The principle is elementary that when the Constitution defines the qualification of voters, that qualification can not be added to or changed by legislative enactment.”); Koy v. Schneider, 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.’”).

The role of the legislature is both 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. The new Photo ID requirement is *ultra vires* because it is neither a residency requirement nor is it a condition of registration. 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). The General Assembly, 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 General Assembly cannot take from or add to the qualification unless the power is granted expressly or by necessary implication. Tolbert v. Long, 134 Ga. 298,

67 S.E. 828 (1910). The right of every Georgia citizen to vote is enshrined in our State Constitution. This right to vote is a fundamental right of every Georgia citizen.

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.

Stewart v. Cartwright, 118 S.E. 859, 861 (Ga. 1923).

The new Photo ID requirement is also prohibited by Article II, Section II, Paragraph II because the Georgia Constitution limits the grounds on which a Georgia citizen who is registered may be denied the right to vote: those who have been (1) convicted of a felony involving moral turpitude, or (2) judicially determined to be mentally incompetent to vote.<sup>5</sup> Nowhere in the Georgia Constitution is the legislature authorized to deny a registered voter the right to vote on any other ground, including possession of a Photo ID of the type required by the 2006 Photo ID Act.

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<sup>5</sup> The Georgia Constitution includes only the following exceptions:

Exceptions to the right to register and vote:

- (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.

In two analogous cases, the Supreme Court held the power of Congress and the states to be similarly limited.<sup>6</sup> 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. 395 U.S. 486 (1969). In its subsequent opinion in the Term Limits case, the Supreme Court struck down a provision in the Arkansas Constitution imposing term limits on its U.S. Senators and Congressmen on the ground that, “the qualifications for service in Congress set forth in the text of the Constitution are ‘fixed’ at least in the sense that they may not be supplemented by Congress.” U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 798 (1995). The Court explained its earlier decision in Powell based on the text of the Qualifications Clause:

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

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

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

The evolution of the constitutional language supports Plaintiff’s reasoning that the right to vote cannot be absolutely conditioned by legislative enactment. In the 1877

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<sup>6</sup> While Powell and the Term Limits Case do not directly deal with the right to vote, they do provide authority as to how express constitutional language is to be construed.

Georgia Constitution, the 1945 Georgia Constitution, and the 1976 Georgia Constitution, the relevant constitutional language *seemingly* extended not only *the right to vote* to all residents (who met the constitutional requirements) but also *the right to register*. See Exhibit G for expanded chart of Evolution of Georgia Constitutional Language.

<b>Georgia Constitution of 1877</b> <b>Article II. Election Franchise</b> <b>Section I</b> <b>Paragraph II</b>	<b>Georgia Constitution of 1945</b> <b>Article II. Elective Franchise</b> <b>Section I</b> <b>Paragraph II</b>	<b>Georgia Constitution of 1976</b> <b>Article II. Elective Franchise</b> <b>Section I</b> <b>Paragraph II</b>
<p><b>Par. II.</b> Every male citizen of the United States, (except as hereinafter provided) twenty-one years of age, who shall have resided in this State one year next preceding the election, and shall have resided six months in the county in which he offers to vote, and shall have paid all taxes which may hereafter be required of him, and which he may have had an opportunity of paying, agreeably to law, except for the year of the election, <u>shall be deemed an elector...</u></p>	<p><b>Paragraph II. Who Shall Be An Elector Entitled to Register and Vote.</b> 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 <u>possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people...</u></p>	<p><b>Paragraph II. Who Shall Be An Elector Entitled to Register and Vote.</b> 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, <u>shall be an elector and entitled to register and vote at any election by the people...</u></p>

However, further study of Article II reveals that the General Assembly *was endowed* with the power to regulate the registration of electors. The relevant language used in the 1877, 1945, and 1976 Georgia Constitutions is found in Paragraph 1 of Section II of Article II: “The General Assembly may provide, from time to time, for the registration of electors.”

This long standing language was changed, however, when the Georgia Constitution was amended in 1983.

In 1983, the language was changed from:

**Paragraph II. Who Shall Be An Elector Entitled to Register and Vote.** 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...*

**Paragraph I, Section II of Article II.**

The General Assembly may provide, from time to time, for the registration of electors...

to

**Paragraph II. Right to register and 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.*

The above-cited changes provide the Court with further evidence that the right to vote cannot be conditioned by the General Assembly. This change in language is significant in that it shows that the General Assembly understood when the Constitution was amended in 1983, and later ratified by the voters, it had the power to regulate voter registration, but not the power to add absolute conditions on the right to vote. Because

the General Assembly's power was not similarly extended to condition the right to vote, the clear implication is that the General Assembly *has no such power*.<sup>7</sup>

As the Supreme Court reiterated last year, “[t]he rules of statutory interpretation demand that we attach significance to the Legislature’s action in removing [certain] language.” Cox v. Fowler, 279 Ga. 501, 502 (2005) (quotation marks and citation omitted). See also, Transp. Ins. Co. v. El Chico Restaurants, Inc., 271 Ga. 774, 776 (1999) (“We must presume that the Legislature’s failure to include [certain] language was a matter of considered choice. Further, under the rules of statutory construction, the omitted language cannot be deemed a redundancy or meaningless surplusage.”) (citations omitted); Miller v. Southwestern R.R. Co., 55 Ga. 143 (1875) (cause of action was eliminated where certain words were deleted from the code section because the Court was “bound to presume that such words were *intentionally* omitted”) (emphasis in original); 73 Am. Jur. 2d Statutes § 106 (“when a legislature amends a statute by omitting words, it is to be presumed that the legislature intended the statute to have a different meaning than that accorded it before the amendment”).

The State has asserted that Article II, Section 1, Paragraph 1, endows the General Assembly with the ability to condition a duly qualified electors right to vote. Yet, this constitutional provision merely allows the General Assembly to to enact appropriate statutes to put into place reasonable **time, place, and manner restrictions** regarding the

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<sup>7</sup> See generally Jones v. Fortson, 223 Ga. 7, 13 (1967): “A [constitutional] provision which expressly prescribes the manner of doing a particular thing is exclusive in that regard and impliedly prohibits performance in a substantially different manner. Thus, where the manner in which, or the means by which, a power granted shall be exercised are specified, such manner or means are exclusive of all others. . . .” Id. (quotation marks and citation omitted).

manner of how elections are conducted.<sup>8</sup> **The new photo ID requirement is not a time, place, or manner restriction.**

The 2006 Photo ID Act is obviously not a time or place restriction; nor should it be interpreted as a manner restriction. Manner has to do with the **method of voting**:<sup>9</sup> 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 either a **condition of voting** or 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 Georgia 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 or surplusage.

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<sup>8</sup> Article II, Section 1, Paragraph 1 reads:

Paragraph I. **Method of voting.** Elections by the people shall be by secret ballot and shall be conducted in accordance with procedures provided by law.

This interpretation of Article II, Section 1, Paragraph 1 is supported by this provision's previous language. In the 1945 and 1976 Georgia Constitutions the language read:

Paragraph I. **Elections By Ballot; Registration of Voters.** Elections by the people shall be by ballot, and only those persons shall be allowed to vote who have been first registered in accordance with the requirements of law.

<sup>9</sup> And indeed, this provision is titled as such: "Method of Voting."

An interpretation of Article II, Section 1, Paragraph 1 that the legislature 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 it was pointless to spell out in detail either the conditions or disqualifications for voting in the next section. This is contrary to the basic canons of constitutional and statutory construction.

As held by our Supreme Court, the purpose of an express constitutional provision is to limit the authority of the General Assembly to provide to the contrary by statute. Jones v. Fortson, 223 Ga. 7, 12-13, 152 S.E.2d 847 (1967). Thus, the 2006 Photo ID Act may not properly be read to override the clear mandate of the Constitution. Further, when construing constitutional provisions, just like statutes, a provision of the Georgia Constitution which expressly prescribes the manner of doing a particular thing and is exclusive in this regard, implicitly prohibits performance of the same thing in a substantially different manner. Thus, if the manner in which, or the means by which, a power granted shall be exercised is specific, such manner or means is exclusive of all others, and the right or power to use other means does not arise by implication, even though considered more convenient or effective. Id. What does this mean? Simply if a Georgia resident meets the minimum qualifications expressly denoted in the constitution and meets the registration requirements provided by the General Assembly, the General Assembly does not have the power to enact a statute that would change the minimum qualifications to vote. Requiring an official state-issued identification card as an absolute condition of the right to vote does just that.

In summary, the Georgia Constitution enumerates in clear and unmistakable terms the two areas in which the General Assembly is authorized to regulate by statute and also limits the grounds on which citizens of Georgia who meet both the residency and registration requirements may be denied the right to vote. See also Franklin, 205 Ga. at 790 (noting that the legislature may not deny the right of franchise by “making the exercise of such right so difficult or inconvenient as to amount to a denial of the right to vote.”) Accordingly, any attempt by the General Assembly to require more than what is required by the express language of our Constitution cannot withstand judicial scrutiny.

**B. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.**

“Voting is of the most fundamental significance under our constitutional structure.” Burdick v. Takushi, 504 U.S. 428, 434 (1992). Because of the preferred place it occupies in our constitutional scheme, “any illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury.” Harris v. Graddick, 593 F.Supp. 128, 135 (M.D. Ala 1984). See also Elrod v. Burns, 427 U.S. 347, 373 (1976)(the loss of constitutionally protected freedoms “for even minimal periods of time, unquestionably, constitutes irreparable injury”).

Plaintiffs are duly qualified and registered voters residing in the City of Atlanta and Fulton County, Georgia. They are both citizens of the State of Georgia and are legally registered and duly qualified to vote in local, state, and national elections in Georgia, but do not possess a Georgia driver’s license, passport or other form of photographic identification specified in the 2006 amendment to O.C.G.A. § 21-2-417, issued by the State of Georgia or one of its political subdivisions, one of its sister states, by the United States or by an Indian tribe. Accordingly, Plaintiffs would be

disenfranchised when they appeared at the polls without the necessary state issued photo identification. As such, Plaintiffs will suffer irreparable harm, the loss of a constitutionally granted right, if the 2006 Photo ID Act is not enjoined.<sup>10</sup>

**C. The Harm Caused To Plaintiffs Clearly Outweighs Any Harm That May Be Suffered By Defendants As A Result Of This Equitable Relief.**

Absent the imposition of equitable relief, Plaintiffs will likely be disenfranchised, along with the hundreds of thousands of other Georgians without the requisite state issued photo identification card. However, Defendants would not be harmed at all. As noted by Secretary of State Cathy Cox, in her letters to the General Assembly and to Governor Perdue, there have been no reports of in person voting fraud in her two terms as the state of Georgia's chief election officer. See Exhibits B & C. Thus, the balance of equities clearly tips in favor of Plaintiffs and the issuance of the equitable relief requested.

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<sup>10</sup> It is of no moment that Plaintiffs would be allowed to vote a provisional ballot and then have 48 hours then to obtain the required state issued photo identification. To illustrate the absurdity of the photo ID requirements (and how it does not battle fraud) 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 would have 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 showed to the poll worker (the birth certificate and the precinct card), goes down to the registrar's office, and shows 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.**

**D. The Court's Issuance Of A Preliminary Injunction Would Serve The Public Interest.**

Far from adversely affecting the public interest, the Court's issuance of the requested relief would wholly serve the public interest. First, it would give the State time to ensure that as many people as necessary would be cognizant of the state issued photo identification requirement **before showing up the polls**. Right now, the main tool that the State Election Board is using to "educate" voters of the new requirement (that could result in massive disenfranchisement) is a "flier" that will be distributed to those voting **ON THE DAY OF THE PRIMARY**. Plaintiffs assert this is too little, too late. Second, if the statute did eventually pass constitutional muster which is doubtful, an injunction for the July 18 Primary would ensure that those who do not have photo identifications would be given enough time to actually obtain the necessary state issued photo identification card required by the statute. And in fact, the registrars in each of the 159 counties were only authorized as of June 29, 2006, to begin issuing Voter ID Cards. Between June 30 and July 18, there are only **12 BUSINESS DAYS** on which a registrar's office will be offering the cards (and this is during business hours). Significantly, in each registrar's office there is only one machine that can produce the Voter ID. If Secretary Cox's estimates are even close to being correct, there is no possible way for the 600,000 registered Georgia voters without a DDS issued photo identification card to obtain a Georgia Voter ID Card in such a limited period of time.<sup>11</sup>

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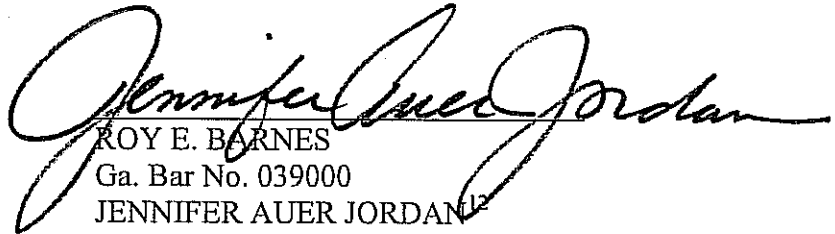
<sup>11</sup> This fact is supported by numbers released by the Secretary of State on June 19, 2006, which show that out of Georgia's over 4 million voters, approximately 600,000 do not have Georgia drivers licenses or state identification cards. This number was reached after the Secretary of State compared the statewide voter registration roles, as of 6/7/2006, with DDS's database of Georgia residents holding drivers licenses and state

## CONCLUSION

For the foregoing reasons, the 2006 Photo ID Act should be enjoined from taking effect for the July 18, 2006, Primary.

Respectfully submitted this 3<sup>rd</sup> day of July 2006.

THE BARNES LAW GROUP, L.L.C.

  
ROY E. BARNES  
Ga. Bar No. 039000  
JENNIFER AUER JORDAN<sup>12</sup>  
Ga. Bar No. 027857

The Barnes Law Group, LLC  
P.O. Box 489  
Marietta, Georgia 30061  
Telephone: 770-419-8505  
Facsimile: 770-590-8958

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identification cards. While it is true that some of the 600,000+ voters without photo identification may hold some other appropriate government issued photo identification (e.g., a passport). Drivers licenses and state identification cards are the most commonly used forms of identification. See Exhibit H (breakdown of statewide voter registration numbers submitted to DDS); Exhibit I (breakdown of 600,000+ voters by county who do not have a DDS issued photo id). Significantly, the Secretary of States' numbers show that approximately 87,000 duly registered voters in Fulton County do not have DDS issued identification. Id. Out of this 87,000, 46,000 are African-American voters.

<sup>12</sup> The undersigned certify that efforts have been made to give Defendants notice by providing a copy of the complaint and motion to Defendants' counsel of record via electronic mail.