

IN THE SUPREME COURT OF GEORGIA

SONNY PERDUE, in his official
capacity as Governor; and

STATE ELECTION BOARD,

CASE NO. S06M1856

Movants-Defendants,

v.

MS. ROSALIND LAKE and MR.
MATTHEW L. HESS qualified and
registered voters under Georgia law,

Respondents-Plaintiffs.

**PLAINTIFFS' RESPONSE TO MOVANTS' EMERGENCY MOTION
TO STAY TEMPORARY RESTRAINING ORDER ENTERED BY
THE SUPERIOR COURT FULTON COUNTY**

Although framed as an “Emergency Motion to Stay,” the filing by Governor Sonny Perdue and the State Election Board (collectively “State Defendants”) is an unauthorized attempt to secure direct review of the trial court’s entry of a TRO without following the required discretionary appeal process. It is nothing more than a wolf in sheep’s clothing.

The State Defendants improperly attempt to draw this Court into the merits of Plaintiffs’ case, a case that has not been fully adjudicated in the trial court. Yet, even if this Court were to consider the merits of State

Defendants' motion, it would fail because the TRO Order was not erroneously entered. Plaintiffs demonstrated below: (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 as 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.

Accordingly, Defendants' assertion that the TRO represents "an attempt by the judicial branch to usurp the presumptive constitutional authority of the legislative branch" is utterly without merit. As Presiding Judge Westmoreland noted: "The general assembly has wide latitude to legislate unless it undertakes to act where the Georgia Constitution enumerates a clear and unmistakable right to Georgia's citizens." The right of suffrage under Georgia's Constitution is such a right.

The TRO, at issue in this appeal, simply holds the photo identification requirements in abeyance until the merits of the challenge can be ruled upon by the trial court. It does nothing more. Defendants' asserted harm that their "procedures" may be temporarily affected for the primary election is a small price compared to the very real danger of disenfranchising anyone

who is a duly qualified, registered voter under Georgia law. The balance of the equities is clearly in Plaintiffs' favor.¹

Because:

- (1) Judge Westmoreland's July 7, 2006th was a Temporary Restraining Order **in name and substance**;
- (2) Temporary restraining orders **are not directly appealable** under Georgia law and are subject to the discretionary appeals process;
- (3) The discretionary appeals process **was not followed** by Defendants;
- (4) The discretionary appeals process **is a jurisdictional prerequisite** to review by the appellate courts of this state; and
- (5) Plaintiffs demonstrated that a **temporary restraining order is necessary** as dictated by Georgia law;

Defendants' appeal should be dismissed.

¹ If this Court were to "stay" the "stay" of the 2006 Photo ID Act, there would be the potential for numerous equal protection challenges. How? Advanced voting has already begun. Georgians who have voted since Monday, July 10, 2006, have not been required to show photographic identification. If this Court were to cede to State Defendants' wishes, thereby effectively reversing Judge Westmoreland's issuance of the TRO, Georgia voters would be subjected to two different standards under law.

ARGUMENT²

I. THIS IS AN IMPROPER ATTEMPT TO SECURE A DIRECT APPEAL

A. Judge Westmoreland's July 7, 2006th was a Temporary Restraining Order in name and substance

This Court need only look at the language of Defendants' motion to determine that it is an attempt to directly appeal Judge Westmoreland's TRO. To wit, "it is imperative that the Court consider this Motion immediately and *reverse* the TRO erroneously entered." Defendants' Emergency Motion at 2 (emphasis added). Simply, State Defendants want this Court to make a determination as to the merits of Plaintiffs' case before a trial court can fully adjudicate the matter. State Defendants cloak their direct appeal in the language of an "emergency motion," but there is no way to construe it but as an attempt to appeal directly what cannot be appealed directly.

At page 19 of their "Emergency Motion," the State Defendants recognize that "the grant of a temporary restraining order is not normally appealable." Defendants then proceed, however, to characterize the TRO as a "preliminary injunction." Citing to Judge Westmoreland's TRO Order,

² A complete background of the law and this challenge is outlined in Plaintiffs' Verified Complaint and Memorandum in Support of TRO. Tab 2 and 4 of Movants' Exhibits.

Defendants state that the judge referred to the hearing as one on a “preliminary injunction,” ergo, State Defendants assert, it is directly appealable.³ This line of reasoning ignores every other reference in the order to the hearing, and indeed the very designation of the order as a “Temporary Restraining Order,” as one for a temporary restraining order. State Defendants further argue that the order must be characterized as preliminary injunction because it gives plaintiffs “all of the relief that they sought.” Id. This assertion is patently false. The first sentence of Plaintiffs’ Verified Complaint for Declaratory and Injunctive Relief spells out in no uncertain terms what Plaintiffs seek:

This is an action to have declared unconstitutional, both on its face and as applied, and to enjoin the enforcement of the 2006 amendment to O.C.G.A. § 21-2-417 (SB 84, as amended) (“the 2006 Photo ID Act”) that imposes an unauthorized condition on the fundamental right to vote of hundreds of thousands of registered Georgia voters in violation of Art. II, § I, ¶ II of the Georgia Constitution.

Plaintiffs’ Verified Complaint at 1. All that Judge Westmoreland’s Temporary Restraining Order held was that the 2005 and 2006 Photo ID Acts would be held in abeyance **for a period of 30 days** and that the law, that has been in effect and operational since 1997, would remain in effect

³ This arguments State Defendants’ own which states that “nomenclature” does not always control.

and operational until a full and final hearing on the merits by the trial judge of record. Order at 4 (“the action is referred back to the judge to whom the case is assigned, the Honorable T. Jackson Bedford, Jr., for a hearing of the requested declaratory judgment and permanent injunction.”) The fact that Presiding Judge Westmoreland referred it back to the assigned trial judge proves that there has not been a full adjudication of Plaintiffs’ cause. By operation of law, the temporary restraining order is only binding for 30 days.

Plaintiffs’ claim, and corresponding request for relief, goes beyond just the impending primary, and beyond the 30-day safe harbor provided by the TRO; indeed, it is more significant that the merits of the case be determined by the trial court, and ultimately the Georgia Supreme Court if called upon, before the general election in November of this year when duly qualified voters of this state will choose their next governor.

B. Temporary restraining orders are not directly appealable under Georgia law and are subject to the discretionary appeals process

Even these Defendants are not above the law.⁴ “A temporary restraining order is not directly appealable”. Dolinger v. Driver, 269 Ga. 141, 142 (1998) (citing O.C.G.A. § 5-6-35(a)(9)). While not directly

⁴ Nor are these Defendants exempted from the rules of this Court including Rule 26 (motions allowed when case is pending before court) and 33 (requiring adherence to discretionary appeal process).

appealable, a discretionary appeal of a TRO may be sought under O.C.G.A. § 5-6-35. Any appeal sought under O.C.G.A. § 5-6-35 must be dismissed for failure to strictly comply with discretionary appeal procedure. See, e.g., Jordan v. State, 247 Ga. App. 551 (2001) (failure to follow discretionary appeal procedure deprives appellate court jurisdiction over appeal); Wells v. State, 236 Ga. App. 607 (1999) (discretionary application procedure must be followed even when party is appealing order procedurally subject to direct appeal); Smoak v. Dep't of Human Resources, 221 Ga. App. 257 (1996)(when appeal made under O.C.G.A. § 5-6-35, compliance with discretionary appeals procedure is jurisdictional); Rolleston v. Rolleston, 249 Ga. 208 (1982); Rebich v. Miles, 264 Ga. 467 (1994).

The requirements of filing a discretionary appeal (such as an appeal of an order “not otherwise subject to direct appeal”) are explicitly listed in O.C.G.A. § 5-6-34(b). The Supreme Court may permit an appeal *only after* the trial judge certifies within ten (10) days of the trial judge’s order that the order is “of such importance to the case that immediate review should be had,” and if application for appeal is made within ten (10) days after certification by the trial judge is granted. O.C.G.A. § 5-6-34(b). State Defendants failed to obtain a certification from the trial judge that the order was significant enough to require immediate review. Because State

Defendants failed to comply with the strict requirements of filing a discretionary appeal under O.C.G.A. § 5-6-35, this Court is without jurisdiction to hear their appeal.

II. STATE DEFENDANTS MISREPRESENT THE LAW AND THE HOLDING OF JUDGE WESTMORELAND'S TRO

State Defendants have misrepresented the language and the holding of certain cases to this Court. Specifically, they quote the language from the United State Supreme Court's decision in Rizzo v. Goode as follows:

"...the Government has traditionally been granted the widest latitude in the dispatch of its own affairs." 423 U.S. 362, 96 S.Ct. 598 (1976).

Significantly, State Defendants leave out the word "internal." The correct quotation of this passage from Rizzo is "...the Government has traditionally been granted the widest latitude in the dispatch of its own *internal* affairs."

The addition of this word is significant in that Rizzo dealt with a Section 1983 challenge where the district court's injunctive order revised *the internal procedures of the Philadelphia police department*. Without the word "internal," a different picture is painted of what kind of "latitude" should be afforded to the General Assembly in this case.

Further, throughout their briefing here and below, State Defendants have consistently cited this Court in Franklin v. Harper, as follows "the

legislature has a wide latitude in determining how the [voting] qualifications required by the Constitution may be determined...” 205 Ga. 779, 790 (1949). However, the word “voting” has been inserted in this citation to give the impression that conditioning the right to vote with “qualifications” (as the photo identification requirement is described) is clearly within the province of the General Assembly. Yet, even a cursory reading of Franklin shows that the “qualifications” that the General Assembly is allowed to determine is for the **REGISTRATION** of electors— a power enumerated by the Constitution itself. State Defendants 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. The State Defendants ball all of these together to assert that the General Assembly has some kind of all encompassing power. The express language of our Constitution demands otherwise.

State Defendants also misrepresent the holding of Judge Westmoreland’s TRO. State Defendants attempt to characterize the TRO as rejecting Plaintiffs’ challenge based on Georgia’s Constitution. Again, this is patently untrue. The Order clearly holds that “[w]here the right of suffrage is fixed in the Constitution it cannot be restricted by the legislature,

but only by the people through an amendment to the Constitution.” Order at 3. The Order continues, “the 2006 amendment surpasses the defined role given to the legislature by the Constitution when it violates the Constitution by placing a restrictive condition on the right of the citizen to vote.” Id.

Any utilization of the “unduly burdens” language is a product of State Defendants’ briefing in opposition. They cited to the trial court language that indicated that the General Assembly has the power to regulate elections unless and if those regulations unduly burden the franchise. See Franklin, 205 Ga. at 790 (noting that the legislature may not deny the right of franchise by “making the exercise of such right so difficult or inconvenient as to amount to a denial of the right to vote.”) The trial court obviously found that these restrictions, even if characterized as regulations, could not withstand constitutional scrutiny.

III. PLAINTIFFS SATISFIED ALL THE NECESSARY ELEMENTS TO WARRANT THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER

Plaintiffs demonstrated below: (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.

A. Plaintiffs Showed that They 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).

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, 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.⁵ 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.

In two analogous cases, the United States Supreme Court held the power of Congress and the states to be similarly limited. 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

⁵ 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.

Georgia Const., Art. II, § I, ¶ III.

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 Plaintiffs’ reasoning that the right to vote cannot be absolutely conditioned by legislative enactment. In the 1877 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*.

Georgia Constitution of 1877 Article II. Election Franchise Section I Paragraph II	Georgia Constitution of 1945 Article II. Elective Franchise Section I Paragraph II	Georgia Constitution of 1976 Article II. Elective Franchise Section I Paragraph II
<p>Par. II. 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>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 <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>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, <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*.⁶

As this 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

⁶ 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).

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”).

State Defendants have 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 enact appropriate statutes to put into place reasonable time, place, and manner restrictions regarding the manner of how elections are conducted.⁷ The new photo ID requirement is not a time, place, or manner restriction.

⁷ 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 is 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

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.⁸ 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.

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

who have been first registered in accordance with the requirements of law.

⁸ And indeed, this provision is titled as such: "Method of Voting."

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 this 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 (if that voter is duly registered). 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.⁹

⁹ 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. The following hypothetical illustrate the absurdity of the photo ID requirements (and how it does not battle fraud). 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

State Defendants attempted to thwart Plaintiffs' efforts to have this case heard on its merits by making unmeritorious challenges to the standing of both plaintiffs. In the case of Plaintiff Rosalind Lake, she has in her possession a student identification card from a decade ago when she attended Florida International University. Per the mandatory language of the statute, this type of photo identification must be VALID.¹⁰ Plaintiff Lake's student identification card is not valid. Plaintiffs submitted the affidavit of Ms. Lake swearing to this fact. Tab 2 of Movants' Exhibits 9. As for Plaintiff Matthew Hess, he is the party plaintiff that verified the complaint, Tab 2 of Movants' Exhibits at Exhibit A, that he would be irreparably harmed if the photo identification requirement were in place for the primary

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.

¹⁰ State Defendants assert in their motion that "a government issued ID which on its face has no expiration date is a valid form of photo id for voting in person." This is not what the statute says. Indeed, it requires that said ID be "valid." Plaintiffs were the only party below to submit evidence to its invalidity.

because he did not, and would not, have any of the requisite forms of identification on July 18, 2006. State Defendants have only offered supposition as to Plaintiff Hess's ability to obtain the necessary between now and then. Supposition is not evidence. In fact, Plaintiff Hess was present at the hearing, and Plaintiffs offered to have him testify; State Defendants declined the opportunity to have him testify regarding what he had already sworn in his verification.

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 by the trial court, Plaintiffs would 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, Tab 2 of Movants' Exhibits at Exhibits B & C, there have been no reports of in person voting fraud in her two terms as the state of Georgia's chief election officer. State Defendants cite to "extensive" training and voter education efforts that will be wasted as their "harm" if the equitable relief is allowed to stand. However, these efforts will not be a "waste" if the 2006 Photo ID Act is ultimately held constitutional. It will only gird State

Defendants' efforts to require state issued photo identification as an absolute condition of casting a ballot. Most obvious elections will continue to function effectively, without a photo identification requirement, as they have since the very first election of this State. However, if Plaintiffs and other Georgia voters are disenfranchised there is no remedy; there is no second chance. Thus, the balance of equities clearly tips in favor of Plaintiffs and the issuance of the equitable relief requested.

D. The Trial Court's Issuance Of The TRO Will Serve The Public Interest.

Far from adversely affecting the public interest, the court's issuance of the TRO wholly serves the public interest. First, it gives 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, 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 will have been **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.¹¹

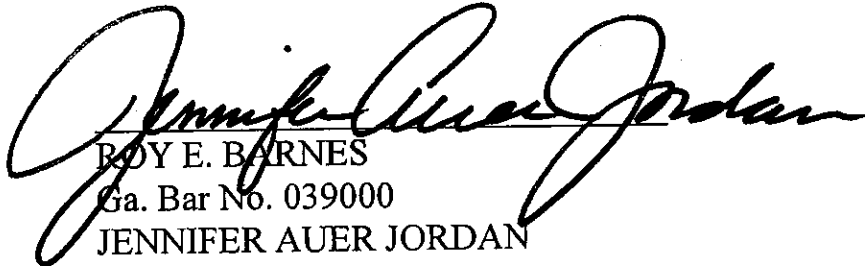
¹¹ This fact is supported by numbers released by the Secretary of State on June 19, 2006, which show that out of Georgia's over 4 million voters, approximately 600,000 do not have Georgia drivers licenses or state identification cards. This number was reached after the Secretary of State compared the statewide voter registration roles, as of 6/7/2006, with DDS's database of Georgia residents holding drivers licenses and state 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 Tab 2 of Movants' Exhibits at Exhibit H (breakdown of statewide voter registration numbers submitted to DDS); Tab 2 of Movants' Exhibits at 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.

CONCLUSION

For the foregoing reasons, this Court should dismiss the State Defendants improper attempt to secure direct review of a temporary restraining order without following the procedures mandated for such review by law.

Respectfully submitted this 11th day of July, 2006.

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CERTIFICATE OF SERVICE

This is to certify that on this day, I hereby certify that I have served a true and exact copy of the above-referenced **PLAINTIFFS' RESPONSE TO MOVANTS' EMERGENCY MOTION TO STAY TEMPORARY RESTRAINING ORDER ENTERED BY THE SUPERIOR COURT OF FULTON COUNTY** to the below listed counsel via US First Class Mail addressed as follows:

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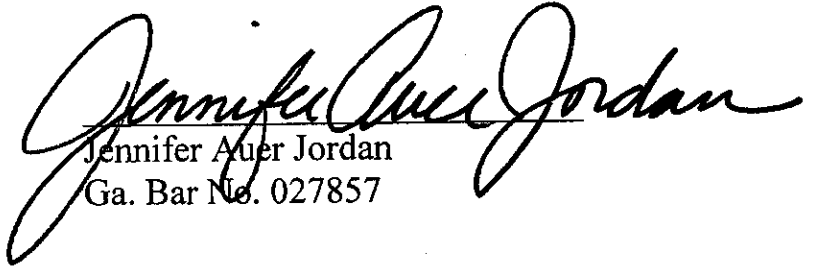
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This 11th day of July, 2006.


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