IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

COMMON CAUSE / GEORGIA, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. 4:05-CV-201-HLM
v.	)	
MS. EVON BILLUPS, Superintendent of Elections for the Board of Elections and Voter Registration for Floyd County and the City of Rome, Georgia, et al.,	)	
Defendants,	)	
and	)	
STATE ELECTION BOARD,	)	
Defendant-Intervenor.	)	

STATE DEFENDANTS' INITIAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Defendant Cathy Cox, Secretary of State of Georgia, and Defendant-Intervenor State Election Board (collectively "State Defendants"), by and through their counsel, the Attorney General of Georgia, hereby submit their Initial Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction.[1]

INTRODUCTION

Registered voters in Georgia have a right to vote. Nothing in the 2005 amendments to O.C.G.A. § 21-2-417 denies a single registered Georgia voter that right. Plaintiffs concoct a claim for alleged denial of the right to vote by focusing on one amendment to the statute (the requirement of a photo identification card for in-person voting) and completely ignoring another (the availability of absentee ballots to every registered voter).

Based on that singular focus, Plaintiffs' Complaint is cast as a challenge to a law that absolutely prohibits certain registered voters from voting in a primary or

[1] State Defendants received copies of Plaintiffs' 74-page brief and supporting materials late afternoon on October 6, 2005. Due to the state holiday on October 10, counsel for State Defendants have had less than two business days since Plaintiffs' filing to obtain responsive material from state officials to prepare and file their brief prior to the October 12 hearing set by the Court. In denying State Defendants' oral motion for continuance of the hearing, the Court indicated that it would leave the record open for a reasonable time after the hearing to permit State Defendants to supplement the record with additional materials in support of their position. If the Court does not deny Plaintiffs' request for preliminary injunctive relief on October 12, State Defendants respectfully request that the Court allow them through October 19 to file additional materials.

general election in Georgia. In reality, however, Plaintiffs' action claims a constitutional right to vote in person, and that such right is superior to the State's ability to verify with precision the identity of the in-person voter.[2] Plaintiffs ask the Court to enjoin the State of Georgia from requiring that registered voters who vote in person present a photographic identification ("photo ID") to local election officials because some registered voters may find it difficult to obtain a photo ID. Refusing to acknowledge that the 2005 amendments to O.C.G.A. § 21-2-417 afford all registered voters the right to vote, either through in-person voting (with a photo ID) or by voting an absentee ballot by mail (without a photo ID), Plaintiffs assert, incorrectly, that Georgia's revised election law imposes an impossible obstacle to voting upon selected Georgia voters, constitutes the imposition of a "poll tax," and fails to pass the "strict scrutiny" standard of review.

This case does not concern any act by the State of Georgia that places a bar upon any individual's right to vote. Nonetheless, Plaintiffs seek to have this Court declare, for the first time ever, that an individual has a constitutional right to vote

[2] The identity of absentee voters continues to be verified by signature matching, a process with which Plaintiffs have no dispute, having suggested it as a means of in-person identification as well. (See Pls.' Br. Supp. Mot. Prelim. Inj. at 52.) However, state and local election officials concur that signature matching at the polls is not currently possible and, even if it were, would be an unreasonable manner of identification at the polls because of time constraints and technical issues. (Shea Hicks Decl. ¶ 8; Bailey Decl. ¶ 10; Ledford Decl. ¶ 10; Smith Decl ¶ 5.)

in a certain manner. Because there is no bar to voting imposed by the challenged photo ID requirement, the standard of review that must be imposed is the "rational basis" test, and the State's interests in preventing voter fraud by in-person voters and restoring voter confidence in the electoral system fulfill that requirement. In addition, because the State does not condition the right to vote upon payment of a fee, the fee charged for a photo ID is related to the administrative cost of producing such card, and any person may obtain a photo ID free of charge by completing an affidavit of indigency (regardless of whether the person can "afford" to pay the fee or not), the requirement of a photo ID for in-person voting does not constitute a "poll tax."

Plaintiffs, therefore, cannot establish a substantial likelihood of success on the merits or that Georgia voters will suffer irreparable harm if this Court fails to enjoin the challenged act. On the other hand, State Defendants can and have shown harm to the State and local election officials. Significant state and local resources already have been used to train local election officials concerning the requirements of the new law, which has been applied already in more than thirty county or municipal elections since the photo ID requirement went into effect. There is no possibility of retraining election officials and poll workers in preparation for the more than 350 county and municipal elections scheduled for

November 8, 2005. Finally, all the supplies for the upcoming elections, which include the poll workers' forms for complying with the requirements of the new law, have been ordered and have been or are being delivered to local election officials now. An injunction at this late date, within weeks of these elections, would cause significant confusion among both election officials and voters at the polls and would adversely affect the public interest, thus outweighing any potential harm to Plaintiffs. Accordingly, Plaintiffs cannot meet any of the four prerequisites for the granting of a preliminary injunction.

STATEMENT OF FACTS

I. Absentee Ballot and In-Person Voting Prior to the Enactment of HB 244.

Prior to the enactment of HB 244, there were two options for a registered voter to exercise his or her right to vote. First, a voter who met the requirements for absentee voting could vote by mail or could vote in person at the registrar's or absentee ballot clerk's office. See O.C.G.A. § 21-2-380(b) (2003). In order to cast an absentee ballot by mail, a voter would have to claim one of a series of reasons why he or she could not vote in person, such as being seventy-five years of age or older, being absent from the precinct during the time of the primary or election, being physically disabled or having to care for someone who is physically disabled, having the election fall on a religious holiday observed by the voter, or

being required to remain on the job for the protection of the public health and safety. See O.C.G.A. § 21-2-380(a) (2003). The application to vote by absentee ballot had to contain "sufficient information for proper identification of the elector." O.C.G.A. § 21-2-381(a)(1) (2003).

As a second option, prior to the enactment of HB 244, a registered voter could vote in person by presenting a "proper identification to a poll worker" prior to voting. Proper identification included the presentation of one of seventeen possible documents:

1. A valid Georgia driver's license;
2. A valid identification card issued by any agency or branch of the United States or any state government agency;
3. A valid U.S. passport;
4. A valid photographic employee identification card issued by the United States or a Georgia state or county government agency;
5. A valid photographic employee identification card issued by the voter's employer;
6. A valid photographic student identification card issued by a Georgia college or technical institute;
7. A valid Georgia license to carry a pistol or revolver;
8. A valid pilot's license issued by the FAA or other U.S. agency;
9. A valid U.S. military identification card;
10. A certified copy of the voter's birth certificate;
11. A valid Social Security card;
12. Certified naturalization documentation;

13. A certified copy of court records showing adoption, name, or sex change;
14. A current utility bill showing the voter's name and address;
15. A bank statement showing the voter's name and address;
16. A government check or paycheck showing the voter's name and address; or
17. A government document showing the voter's name and address.

O.C.G.A. § 21-2-417(a) (2003).

Therefore, under the pre-2005 law, while there were a number of documents that could be presented to verify identification for in-person voting, the ability to vote by mail was limited to those registered voters who claimed a specific statutory excuse for not being able to vote in person. All other voters were required to vote at the polls for any primary, general, run-off, or special elections in order for their votes to be counted.

II. Absentee and In-Person Voting After the Enactment of HB 244.

HB 244 was enacted by the Georgia General Assembly to make a wide variety of changes in the Georgia Election Code. See HB 244 (attached hereto as Exhibit 1). In the context of this case, one significant change was to provide any registered voter the ability to vote absentee by mail without claiming any excuse for choosing not to vote in person. The amendment expanding the ability to vote by mail is contained in O.C.G.A. § 21-2-380(b) (HB 244, § 50):

> *An elector who requests an absentee ballot by mail* or who during the period of Monday through Friday of the week immediately preceding the date of a primary, election, or run-off primary or election, casts an absentee ballot in person at the registrar's office or absentee ballot clerk's office *shall not be required to provide a reason as identified in subsection (a) of this Code section in order to cast an absentee ballot* in such primary, election, or run-off primary or election.

O.C.G.A. § 21-2-380(b) (emphasis added).

In expanding the opportunity for registered voters to vote by mail in Georgia, the Georgia General Assembly maintained the means upon which an absentee voter may provide documentation to obtain an absentee ballot. O.C.G.A. § 21-2-381(a)(1)(C) (2005) ("The application shall be in writing and shall contain sufficient information for proper identification of the elector . . . ."). There is *no* requirement for *any* registered voter who votes by mail to present a photo ID prior to being permitted to cast his or her vote. Plaintiffs are in error when they claim "[v]oters who vote absentee by mail, are not subject to the Photo ID requirement, unless they are registering to vote absentee or voting absentee for the first time." (Pls.' Br. Supp. Mot. Prelim. Inj. at 56.) No such requirement exists under Georgia law. Instead, the law specifically allows those voting by mail and those registered for the first time in Georgia to provide other forms of identification:

> An elector who registered to vote by mail, but did not comply with subsection (c) of Code Section 21-2-220,[3] and who votes for the first time in this state by absentee ballot shall include with his or her application for an absentee ballot or in the outer oath envelope of his or her absentee ballot *either* one of the forms of identification listed for subsection (a) of Code Section 21-2-417 *or a copy of a current utility bill, bank statement, government check, paycheck, or other government document which shows the name and address of such elector*.

O.C.G.A. § 21-2-386(a)(1)(D) (emphasis added).

Anyone who votes by mail the first time after having registered and fails to present one of the acceptable forms of identification (which can be a photo ID or an acceptable non-photographic document showing name and address) will be deemed to have voted a provisional ballot which can be counted if the registrar is able to verify current and valid identification of the registered voter no later than two days after the polls close. Id.; see also O.C.G.A. § 21-2-419(c). Georgia's law for absentee voting was developed in part to meet the requirements of the federal Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 et seq., which permits

[3] Voters who register by mail for the first time in Georgia must present "current and valid identification either when registering to vote by mail or when voting for the first time after registering to vote by mail." O.C.G.A. § 21-2-220(c). Acceptable "current and valid identification" shall be "one of those forms of identification provided in subsection (c) of Code Section 21-2-417 or a legible copy thereof." (HB 244, § 24.) Under O.C.G.A. § 21-2-417(c), those forms of identification can be *either* a photo ID *or* a copy of a current utility bill, bank statement, government check, paycheck, or other government document which shows the name and address of such elector. (HB 244, § 59.)

voting by mail with the option of submitting a copy of a photo ID or current utility bill, bank statement, government check, paycheck, or other government document that shows the voter's name and address. 42 U.S.C. § 15483(b)(2)(A); see also Deposition of Cathy Cox ("Cox Dep.") at 26-27 (excerpts attached hereto as Exhibit 2).

In addition to expanding the ability of registered voters to vote by mail, the General Assembly amended the manner in which registered voters who vote in person can verify their identity, so as to further protect against in-person voter fraud.[4] A registered voter who chooses to vote in person must now present one of the following forms of identification at the polling place:

1. A Georgia driver's license issued by the appropriate state agency;[5]
2. A valid photographic identification card issued by any agency, department, branch, or entity of the State of Georgia, the United States government, or any other state;

[4] This is not the first time the General Assembly has modified the Georgia Election Code in an effort to prevent in-person voter fraud. Following press accounts of more than 5,400 ballots possibly cast by deceased persons over prior years and more than 15,000 deceased persons on active voter rolls (see Cox Dep. Ex. 13), in 2001 the General Assembly enacted revisions to O.C.G.A. § 21-2-231(d) and (e) to provide additional authority for the Secretary of State to address this specific type of in-person voter fraud and remove deceased voters from the registration lists (see Cox Dep. at 44). 2001 Ga. Laws 269.

[5] This provision expanded the potential forms of identification by allowing any Georgia driver's license, whether current or expired, whereas the former law only authorized the acceptance of a "valid" Georgia driver's license. See HB 244, § 59.

3. A valid U.S. passport;
4. A valid employee photo ID card issued by any federal agency or entity, any state agency or entity, or any county, municipality, board, authority, or other entity of the state;
5. A valid photographic U.S. military identification card; or
6. A valid tribal photographic identification card.

O.C.G.A. § 21-2-417(a) (HB 244, § 59). An in-person voter who is unable to produce any of the various photo IDs is permitted to vote a provisional ballot, which can then be counted if the registrar is able to verify current and valid identification of the registered voter no later than two days after the polls close, the same provisional ballot allowance as for absentee voting by mail. O.C.G.A. § 21-2-417(b).

Plaintiffs attempt to denigrate the State of Georgia's efforts to combat in-person voter fraud by contending that no photo ID requirement has been imposed for registered voters choosing to vote by mail and suggesting that there is more opportunity for fraud through absentee voting than by in-person voting. In fact, prior to the requirement for photo IDs for in-person voters, there was more opportunity to ensure the identity of an absentee voter than that of a person who voted in person.

When an application for an absentee ballot is made, a registrar or absentee ballot clerk must enter the date received and determine if the applicant is eligible to

vote in the primary or election involved. O.C.G.A. § 21-2-381(a)(3)(b)(1). There are specific means upon which the registrar or clerk declares the potential absentee voter eligible or ineligible, or requests additional information prior to the primary or election to confirm the voter's identity. O.C.G.A. § 21-2-381(a)(3)(b)(2)-(4). Absentee ballots are mailed only to eligible applicants. O.C.G.A. § 21-2-384(a)(2). The absentee voter is required to sign an oath verifying eligibility. O.C.G.A. § 21-2-384(c)(1). The registrar or clerk is then required to compare the identification and signature of the voter on the absentee ballot with the identifying information on the voter registration and absentee ballot application:

> Upon receipt of each [absentee] ballot, a registrar or clerk shall write the day and hour of the receipt of the ballot on its envelope. The registrar or clerk shall then compare the identifying information on the oath with the information on file in his or her office, shall compare the signature or mark on the oath with the signature or mark on the absentee elector's application for absentee ballot or a facsimile of said signature or mark taken from said application, and shall, if the information and signature appear to be valid, so certify by signing or initialing his or her name below the voter's oath. Each elector's name so certified shall be listed by the registrar or clerk on the numbered list of absentee voters prepared for his or her precinct.

O.C.G.A. § 21-2-386(a)(1)(B).

In contrast, when a registered voter appears in person to vote at the polls, the voter executes a voter's certificate, and the poll officer checks the name of the certificate against the elector's list present in the precinct. O.C.G.A. § 21-2-

431(a). Unlike the registrar or clerk who is able to compare the signature on the absentee ballot with the signature on the registration card, the poll worker has no such ability on primary or election day. The Secretary of State has testified that this is why the signature is more acceptable for identification purposes on an absentee ballot than in the case of in-person voting:

> Q. In absentee voting is it correct that one of the procedures that the election officials are to follow is to compare the signature on both the application itself and on the envelope which encloses the ballot with the signature on file on the voter registration card for purposes of determining identity?
>
> A. Yes, that is the procedure.
>
> Q. When a person votes in person in Georgia, is it correct they're required to fill out and sign a voter certificate?
>
> A. Yes.
>
> Q. And the voter certificate says Georgia blank county and this is a special election or a general election or runoff election and has an oath and a signature?
>
> A. That's right.
>
> Q. And the oath is an oath that the voter is duly registered and qualified and that the information about name and address is accurate?
>
> A. I think that's the essence of it, yes.

* * *

Q. But the same signature on an absentee application and an absentee ballot carrying essentially the same oath is acceptable for an absentee voter?

A. Yes.

Q. *Can you explain why such a signature is more acceptable in the case of absentee ballots but never acceptable in the case of in-person voters?*

A. *Well, they were set up for different purposes. I mean, when you're voting at the polling place, the poll workers don't have any means of accessing your original voter registration file to compare those signatures.*

We have certainly used that voter certificate down the road, you know, in contest issues or other election complaints to look at the person's signature. *But there's no practical way to compare the signatures at the polling place with our current lack of technology.*

(Cox Dep. at 35-37 (emphasis added).)

Consequently, signature comparison by poll workers of a voter registration card with the voter's certificate when the voter presents himself or herself in person is not a feasible identification mechanism. (Bailey Decl. ¶ 10; Smith Decl. ¶ 5; Shea Hicks Decl. ¶ 8; Ledford Decl. ¶ 10.) Implementing such a procedure not only would be costly, but would be time-consuming and create long lines at each polling place. (Bailey Decl. ¶ 10; Smith Decl. ¶ 5; Shea Hicks Decl. ¶ 8; Ledford Decl. ¶ 10; see also Cox Dep. at 37.) Requiring a photo ID for in-person voting provides assurance that the person appearing before the poll worker is in

fact the person who is registered to vote, especially when there is no ability to make the same signature comparison that the registrar or clerk makes with the submission of an absentee ballot.

III. The Availability of Photo IDs for In-Person Voters.

Plaintiffs allege that a significant number of people who do not already possess a photo ID will be unable to obtain one because the IDs are either not readily available, the lines at facilities which produce the photo IDs are too long, or the IDs cost too much for some people to afford them. Aside from the fact that no person is required to obtain a photo ID in order to vote (as referenced above, a photo ID is not required for voter registration or for absentee voting by mail), none of these allegations are accurate.

First, an overwhelming majority of registered voters already possess a photo ID. As of July 31, 2005, there were 5,674,478 unexpired driver's licenses and an additional 731,560 unexpired photo IDs issued by the Georgia Department of Driver Services ("DDS"). (Watson Decl. ¶ 13.) These figures do not take into account other forms of photo IDs in the possession of registered voters that have been issued by government agencies, government employers, or the military, or expired driver's licenses held by Georgia registered voters, all of which can be used to satisfy the photo ID requirement for in-person voting. As of August 1,

2005, there were 4,816,964 registered voters in Georgia (Ann Hicks Decl. ¶ 15), so there are more photo IDs which have been issued than there are Georgia voters. While it is impossible to correlate the specific number of Georgia registered voters who currently possess a photo ID, the numbers certainly suggest that most do.[6]

There are currently fifty-six full-time and two part-time customer service centers operated by DDS in the State of Georgia. (Watson Decl. ¶ 7.) Although Plaintiffs are correct that there are none within the city limits of Atlanta, there are four in Fulton and DeKalb Counties, including one in South DeKalb at 2801 Candler Road. (Id. ¶ 8.) There is also one just outside the city limits of Rome at 3386 Martha Berry Highway. (Id. ¶ 9.) Both driver's licenses and photo ID cards are available at each facility. (Id. ¶ 7.)

The cost of both a driver's license and a photo ID card for voting purposes issued by DDS is $20 for a five-year card and $35 for a ten-year card. See O.C.G.A. §§ 40-5-25(a)(2), (2.1) & -103(a). These fees are directly related to the

[6] DDS will not have a complete list of persons with Social Security numbers in its database until the end of 2006 because it has been required to collect that information for only the past three years (licenses are renewed on a four-year cycle). There are also privacy considerations that preclude the use of the driver's license database for other purposes. (Watson Decl. ¶ 19.)

administrative costs of producing the cards.[7] (Watson Decl. ¶¶ 15-16.) However, *any* applicant for a photo ID card for voting purposes may obtain one *for free* by completing the Affidavit for Identification Card for Voting Purposes. (Watson Decl. ¶¶ 4-6.) The DDS makes no effort to verify the provisions of the completed affidavits relating to the applicant's eligibility to obtain a free voter photo ID card; every person who completes the affidavit will receive a free photo ID card from DDS. (Watson Decl. ¶ 5.)

In addition, in an effort to make driver's licenses and photo ID cards (both purchased and free) more easily available to Georgia voters, DDS has traveled to numerous locations around the State of Georgia in a mobile issuance bus known as the "Georgia Licensing on Wheels" or "GLOW" bus. (Id. ¶ 10.) As of October 1, 2005, the GLOW bus has visited twenty-five locations. (Id.) During those visits, DDS has issued a total of 122 free identification cards for voting purposes, 91 five-year cards, 13 ten-year cards, 61 five-year driver's licenses, 9 ten-year driver's licenses, and 9 veteran's driver's licenses. (Id.) Any group may sponsor the GLOW bus for an appearance in a particular location or community by making

[7] Under the 2005 amendments to Title 40 of the Georgia Code, a class A, B, C, and M non-commercial driver's license is valid for either a five or ten-year interval, amending the former law which required $15 to renew that driver's license every four years. Compare O.C.G.A. § 40-5-25(a)(2) (2004) with § 40-5-25(a)(2) (2005). The fee increase for a driver's license (while also increasing its term of validity) is the first increase in 13 years. (Watson Decl. ¶ 15.)

arrangements with DDS. The Richmond County Board of Elections reserved the GLOW bus for two days prior to the special election conducted in Augusta-Richmond County on September 20, 2005. (Bailey Decl. ¶ 5.) In fact, one of the Plaintiffs in this case, the Georgia Legislative Black Caucus, recently sponsored the GLOW bus for three days in downtown Atlanta between September 29 and October 1, 2005. (Watson Decl. ¶ 11.)

Thus, after the enactment of HB 244, persons who desire to vote, but who do not possess and do not obtain a photo ID, may vote by mail in any primary or election. Persons who choose to vote in person must present one of the required photo IDs, and those who do not have one may obtain one free of charge from DDS.[8] No person is deprived of the right to vote by the photo ID requirement for in-person voting contained in O.C.G.A. § 21-2-417.

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[8] Plaintiffs present a large number of declarations complaining about the lines at DDS offices and equating having to stand in line with showing an unconstitutional burden upon the right to vote. As a matter of law, the inconvenience of standing in line does not raise a constitutional issue. See Jacksonville Coalition for Voter Protection v. Hood, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) ("While it may be true that having . . . to wait in line may cause people to be inconvenienced, inconvenience does not result in a denial of 'meaningful access to the political process.'') (quoting Osburn v. Cox, 369 F.3d 1283, 1289 (11th Cir. 2004)). As a matter of fact, not one person has to stand in a DDS line in order to obtain a photo ID in order to vote in person because there are no longer any conditions imposed upon absentee voting by mail. Voting by mail also saves voters from having to stand in line at the polls, presuming that the difficulty associated with waiting for some of Plaintiffs' declarants would be the same as waiting in line at a DDS office.

IV. O.C.G.A. § 21-2-417 Has Been Precleared Under Section 5 of the Voting Rights Act and Implemented Without Incident in 34 Separate Elections Already Conducted in Counties and Municipalities in Georgia.

On August 26, 2005, HB 244 (Act No. 53, as signed by the Governor) was precleared by the United States Department of Justice in accordance with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. (See Exhibit 3 attached hereto.) Since the photo ID requirement of HB 244 became enforceable, it has been applied in one special election held in Gwinnett County on August 30, 2005, to fill a vacancy in the Georgia House of Representatives, over 30 county and municipal elections held on September 20, 2005 (including a special election to fill a vacancy in the Georgia State Senate in Augusta-Richmond County), and a run-off election held on September 27, 2005 to fill the Georgia House vacancy in Gwinnett County. (Ann Hicks Decl. ¶ 9; Bailey Decl. ¶¶ 3-4; Ledford Decl. ¶ 4.)

The changes required by HB 244 caused no reported significant problems in those elections. (Shea Hicks Decl. ¶ 3; Ledford Decl. ¶ 5.) For example, according to the Executive Director of the Richmond County Board of Elections, despite her prior concern that confusion might arise due to changes in the law, the changes resulting from HB 244 were a "nonissue." (Bailey Decl. ¶ 3.) Of the 12,813 people who voted in person in the September 20, 2005 special election in Richmond County, 12,800 produced acceptable forms of identification. (Id. ¶ 4.)

The 13 in-person voters who did not produce an acceptable form of identification were allowed to vote provisional ballots and, of those 13 voters, two returned with proper identification and their votes were counted. (Id.) No other contact was made by the 11 persons who did not return (who comprised only 0.08% of those voting in the special election). (Id.)

V. Significant Training of Election Officials Has Taken Place Since the Enactment of O.C.G.A. § 21-2-417 To Prepare For Its Implementation; Consequently, an Injunction Would Cause Mass Confusion Among Election Officials, Poll Workers, and Voters on November 8, 2005.

Following the passage of HB 244, staff from the Elections Division of the Secretary of State's office began conducting training sessions for local officials throughout Georgia on the new provisions of the Election Code so that poll workers could be properly trained prior to county and municipal elections scheduled for August 30, 2005, September 20, 2005, September 27, 2005, and November 8, 2005. (Cox Decl. ¶ 7; Ann Hicks Decl. ¶ 7.) The training that already has been conducted includes training for county election officials between May 1-4, 2005 (which included nearly 400 participants); training for municipal election officials at four sites around the state in June and July 2005 (which included nearly 600 participants), and at the University of Georgia on September 20, 2005; training for voter registrars on August 7-10, 2005 (which included over 400 participants); and training for newly created boards of election in September

2005. (Ann Hicks Decl. ¶ 8; Shea Hicks Decl. ¶ 4; Bailey Decl. ¶ 5.) Over 2,000 persons have received this training over the past four months. (Ann Hicks Decl. ¶ 8.) Moreover, most of these same election officials train their poll workers during the several weeks prior to the actual election. (Ann Hicks Decl. ¶¶ 6-7; Ledford Decl. ¶ 8; Bailey Decl. ¶ 5.) Therefore, poll workers have been trained in those counties and municipalities that have conducted elections since the enactment of HB 244, and many have already undergone training for the November 8, 2005 elections.

Additionally, many local election officials have already ordered and received election day supplies from the Secretary of State's office. Those supplies include voter identification certificates and posters for the polls, both of which contain the forms of identification acceptable for in-person voting. (Bailey Decl. ¶ 5; Shea Hicks Decl. ¶ 6.) There is no time now for new supplies to be ordered and received by local election officials prior to November 8. (Ann Hicks Decl. ¶ 13; Smith Decl. ¶ 10; Ledford Decl. ¶ 9.)

There are at least 350 Georgia counties and municipalities holding elections on November 8, 2005. (Ann Hicks Decl. ¶ 11.) Municipal elections are only held primarily in odd-numbered years and typically comprise a large number of elections in those years. (Id.) If the Court granted the preliminary injunction

requested by Plaintiffs, mass confusion would result for election officials, poll workers, and voters. New training of election officials could not occur in time for them to in turn train their poll workers on the revised status of the identification requirement for in-person voting. (Ann Hicks Decl. ¶ 12; Bailey Decl. ¶ 8; Smith Decl. ¶ 10; Ledford Decl. ¶ 9; Shea Hicks Decl. ¶ 7.) There would be insufficient time to send out new voter certificates and accurate poll posters to all of the local election officials for use at the November 8, 2005 elections. (Ann Hicks Decl. ¶¶ 13-14; Bailey Decl. ¶ 8; Smith Decl. ¶ 10; Shea Hicks Decl. ¶ 7.) Local election officials do not have a sufficient supply of the old voter certificates on hand. (Bailey Decl. ¶ 8; Ledford Decl. ¶ 9; Shea Hicks Decl. ¶ 7.) Furthermore, because Plaintiffs deliberately chose not to name all local election officials so that they would have notice of any action by this Court, many might not know of an action taken by this Court.[9] Ann Hicks, an Assistant Director in the Elections Division and a 26-year employee of the office, who the Secretary of State calls one of the most experienced people in her office (Cox Decl. ¶ 3), states as follows:

[9] The Secretary of State's office does not have contact with all municipalities regarding the latter's elections and has no existing legal duty to inform any local election officials of any ruling by the Court. In addition, State Defendants do not believe that the local election officials individually named in this action are proper defendants or proper class representatives, or that they have a legal duty to notify the hundreds of other election officials in the state of any action by this Court.

> Without the benefit of proper supplies and training, confusion is simply unavoidable. If the Court were to issue a preliminary injunction against the voter identification provisions for the November 8, 2005 elections, there would be confusion among election officials, poll workers, and voters. The voters would be confused, a problem that would be exacerbated by the unavailability of correct materials and poll worker training and the lack of time to educate the public about an injunction. The confusion may be even greater in jurisdictions which have already held elections under the new law, such as Richmond County.

(Ann Hicks Decl. ¶ 14.) The Secretary of State agrees. (Cox Decl. ¶ 8.)

For all of these reasons, it is possible that inconsistent application of the photo ID requirement could occur in many counties and municipalities if an injunction is issued at this late date, resulting in some localities applying the photo ID requirement in HB 244 and some not. (Cox Decl. ¶ 8.)

VI. Neither the Letters Sent by the Secretary of State Objecting to the Photo ID Requirement in HB 244 Nor the Declarations Signed by Objecting Potential Voters Provide an Adequate Basis for the Issuance of a Preliminary Injunction in this Case.

Plaintiffs place great factual reliance upon letters sent by the Secretary of State to the Georgia State Senate and the Governor during the General Assembly's consideration of HB 244, expressing her personal opposition to the photo ID requirement for in-person voters. These letters merely stating that the Secretary of State herself is unaware of any instances of in-person voter fraud during her tenure underlie Plaintiffs' claims that the photo ID requirement is unconstitutional. Under

Plaintiffs' theory, the General Assembly would have no authority to enact laws designed to maintain voting integrity, unless and until the Secretary of State agreed that the laws were necessary or became personally aware of incidents supporting the legislature's actions. Such a theory has no legal or logical support and would amount to a legislative veto by the Secretary of State.

There are 159 counties and an even larger number of municipalities in Georgia that conduct elections. Neither the Secretary of State nor her staff can be physically present at the polling places for those elections and therefore could not possibly be aware of all in-person voter fraud that might occur. (Cox Decl. ¶ 6.) Under the prior law before enactment of HB 244, it is beyond argument that in-person voter fraud could have taken place. (Id. ¶ 5.)

The Secretary of State's view of the scenario in which voter fraud would occur is when an imposter votes at the polling place and the actual voter shows up later and is unable to cast a ballot. (Id. ¶ 5.) However, the Secretary of State agrees that the scenario she describes is only one instance of potential voter fraud, and both her scenario and others were possible under the law as it existed prior to the enactment of HB 244. (Id.) As stated by the Director of Elections for the Forsyth County Board of Elections, the typical case of in-person voter fraud would be committed by identifying persons who do not typically vote and then having

other individuals vote as those persons. (Smith Decl. ¶ 4.) Without any form of photo identification or any reasonable method of comparing signatures on registration cards to those on voter certificates, there is never a real opportunity to prevent such fraud, absent a photo ID. (Id.) The Executive Director of the Richmond County Board of Elections has been aware of such complaints, but has been unable to gather evidence to prove the violations because the nature of the conduct makes such evidence hard to develop. (Bailey Decl. ¶ 9.) Indeed, past incidents of fraudulent registrations in Forsyth County and Fulton County were reported to the District Attorneys' offices in those respective counties. (Smith Decl. ¶ 6; MacDougald Decl. ¶ 4.) In Fulton County, the fraudulent registrations were also reported to the United States Attorney for the Northern District of Georgia, and he has opened an investigation of the fraudulent registrations. (MacDougald Decl. ¶ 4.)[10]

The numerous declarations presented by Plaintiffs by persons claiming to be concerned about their inability to vote given the photo ID requirement for in-

[10] Fraudulent registrations are relevant because, as explained by a member of the Fulton County Board of Registration and Election, "[t]he systematic attempt to stuff the voter registration rolls with suspect applications is an obvious prelude to stuffing the ballot box with votes and fraudulently registered voters. It is an urgent threat to the integrity of voter rolls and therefore to the integrity of the elections and requires action from responsible government officials." (MacDougald Decl. ¶ 10.)

person voting can be separated as follows: (1) persons who say they are physically unable to stand in line to get a photo ID; (2) persons who have no access to transportation to get a photo ID; (3) persons who cannot afford or do not want to pay the $20 for a photo ID; and (4) persons who have had difficulty obtaining a photo ID because of the lack of necessary documents to establish their identity.

Those persons who have physical infirmities that prevent them from either driving to a DDS office or standing in line can, of course, vote by mail without a photo ID. Indeed, many of these potential voters are over seventy-five years of age and physically disabled, and would have qualified to vote by absentee ballot even before HB 244's change allowing any registered voter to vote by mail; in fact, many of those people may have done so. Anyone who would have difficulty driving to a DDS office or standing in line awaiting a photo ID would likely have the same difficulty driving to the polls and voting.

Likewise, persons who claim that they have no transportation to get a photo ID would also appear to have the same transportation issue related to in-person voting. Assuming that is not the case, persons who lack transportation to get to a DDS office could obtain a photo ID when the GLOW mobile issuance bus visits their area. Furthermore, those people can vote by absentee ballot, which would alleviate transportation problems.

For those persons who cannot afford or object to paying the $20 for the photo ID, as stated above, they only have to complete the affidavit provided by DDS in order to receive a free photo ID. No one is denied a photo ID based on either inability or unwillingness to pay a fee. The DDS's unequivocal policy is that anyone who requests a free photo ID for voting purposes and completes the application and affidavit for the same will be given one. (Watson Decl. ¶ 5.) In addition, any of these individuals can vote by mail without obtaining a photo ID.

Finally, for those people who have difficulty in obtaining a photo ID because of the lack of documents to verify their identity, that problem does not prohibit them from voting while they correct their identification documents. They can certainly obtain an absentee ballot and vote by mail. The fact that several registered voters, in a pool of 4.5 million registered voters, have identification problems peculiar to them, does not make the statute unconstitutional, particularly when they can vote by mail.

ARGUMENT AND CITATION OF AUTHORITY

I. PLAINTIFFS LACK STANDING TO BRING THIS ACTION CHALLENGING GEORGIA'S VOTER IDENTIFICATION LAW.

At the outset, State Defendants must assert that Plaintiffs do not even have standing to bring this suit. Standing focuses on whether a litigant is the proper party to bring the lawsuit. The doctrine derives from the separation of powers on which our government is founded. See Allen v. Wright, 468 U.S. 737, 750 (1984). The Supreme Court has set forth an analytical framework for resolving standing issues that comprises both "constitutional" and "prudential" considerations. See Warth v. Seldin, 422 U.S. 490, 498-99 (1975); Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir. 1994); Saladin v. City of Milledgeville, 812 F.2d 687, 690 (11th Cir. 1987). The constitutional requirements derive from Article III's limitation of federal jurisdiction to those situations where a justiciable "case or controversy" exists between the litigants. Warth, 422 U.S. at 498. In order to satisfy this "'irreducible' constitutional minimum," the plaintiff must show that (1) he or she has suffered an actual or threatened injury (often termed an "injury in fact"), (2) the injury is fairly traceable to the challenged conduct of the defendant, and (3) the injury is likely to be redressed by a favorable ruling. See Saladin, 812 F.2d at 690; accord Warth, 422 U.S. at 498-99.

In addition to these constitutional requirements, the Supreme Court has fashioned three principles of judicial restraint, which have become known as "prudential" considerations. These self-imposed constraints are intended to ensure the proper role of the courts in our tripartite system of government in order to avoid judicial resolution of abstract questions that are more appropriately addressed by the other branches of government or by the states. See Warth, 422 U.S. at 500. The three prudential considerations are (1) whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue, (2) whether the complaint raises abstract questions amounting to generalized grievances that are more appropriately resolved by the legislative branches, and (3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties. See Harris, 20 F.3d at 1121; Saladin, 812 F.2d at 690. The Eleventh Circuit has emphasized that, amid consideration of these factors, the central purpose of the standing requirement is "to ensure that the parties before the court have a concrete interest in the outcome of the proceedings such that they can be expected to frame the issues properly." Harris, 20 F.3d at 1121. Similarly, the Supreme Court has articulated the issue as follows:

> Determining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Allen, 468 U.S. at 752. The basic question in this case is whether Plaintiffs are harmed by a method the Georgia General Assembly has set forth for voting in this state.

In this case, the individual Plaintiffs are clearly not aggrieved by the voter identification law. Mr. Tony Watkins has been dismissed as a named Plaintiff, and the other individual Plaintiff, Mrs. Clara Williams, is not adversely affected by the law. Mrs. Williams has testified that she holds a photographic identification card issued by the Metropolitan Atlanta Rapid Transit Authority ("MARTA"). (Deposition of Clara Williams ("Williams Dep.") at 14 (transcript attached hereto as Exhibit 4).) MARTA is a state-created authority pursuant to the Metropolitan Atlanta Rapid Transit Authority Act of 1965, with continuing oversight by the Georgia General Assembly and ex-officio board membership by the State Revenue Commissioner, Commissioner of the Department of Transportation, the Executive Director of the State Properties Commission, and the Executive Director of the

Georgia Regional Transportation Authority. See, e.g., 1985 Ga. Laws 3609; 1965 Ga. Laws 2243; see also Whatley v. Metro. Atlanta Rapid Transit Auth., 632 F.2d 1325, 1326 (5th Cir. 1980); Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99, 103 (N.D. Ga. 1975) ("MARTA is a public authority created and existing under the laws of the State of Georgia . . . ."). The challenged statute, O.C.G.A. § 21-2-417, expressly provides that proper identification may consist of "[a] valid identification card issued by a branch, department, agency, or entity of the State of Georgia, any other state, or the United States authorized by law to issue personal identification, provided that such identification card contains a photograph of the elector." O.C.G.A. § 21-2-417(a)(2).

Not only does Mrs. Williams hold a MARTA photo identification card, she testified that she knew a photo ID was not required to vote by absentee ballot, and admitted there is no reason she could not vote by mail but just "prefer[s]" not to vote by mail unless she is out of the state." (Williams Dep. at 34.) Simply because she prefers not to vote in another manner does not mean that Mrs. Williams is denied the right to vote while she is correcting her identification issue.

Mr. Watkins has dropped out of the litigation, and Mrs. Williams has not suffered any injury in fact. Therefore, neither of the two individual Plaintiffs has standing to bring this action.

The only other Plaintiffs in this action are various organizations. For an organization to have standing, it must show that (1) its members would have standing to sue individually, (2) the interests that the organization is seeking to protect through the lawsuit are "germane to [its] purpose," and (3) neither the claim nor the relief requested requires individual participation by the members of the organization. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 181 (2000) (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342-43 (1977)); Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1084 (11th Cir. 2004); Nat'l Alliance for the Mentally Ill v. Bd. of County Comm'rs, 376 F.3d 1292, 1296 (11th Cir. 2004).

In this case, the Plaintiff organizations have failed to allege that any of their members have been injured such that he or she would have standing to bring this action individually. As explained above, for members to have standing individually, they must have suffered an injury in fact that is traceable to the defendant's conduct, and that will likely be redressed by a favorable decision by the court. See Warth, 422 U.S. at 498-99. "The party invoking federal jurisdiction bears the burden of proving standing." Bischoff v. Osceola County, 222 F.3d 874, 878 (11th Cir. 2000). "Each element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with

the manner and degree of evidence required at the successive stages of the litigation.'" Id. at 878 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

The courts in some circuits have held that when a plaintiff's complaint sets forth only general allegations of harm and fails to identify with sufficient particularity specific named members of the plaintiff organization who have suffered injury, plaintiffs cannot satisfy the first element of organizational standing and accordingly cannot survive a motion to dismiss. See, e.g., U.S. v. AVX Corp., 962 F.2d 108, 117 (1st Cir. 1992) ("The averment has no substance: the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of the affected resources is left open to surmise."); Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, N.Y., 250 F. Supp. 2d 48, 55-56 (N.D.N.Y. 2003) ("Neither in the entire complaint in general, nor perhaps more importantly, in the paragraphs containing the substantive allegations of non-compliance with federal law and regulations, is the name of any of plaintiff's members mentioned. Nowhere in the complaint is there even an allegation that any specific member of plaintiff had lead-based paint abatement work performed. In short, the individual standing analysis, with respect to the members of plaintiff, cannot be performed."); Citizens for a Better Env't v.

Caterpillar, Inc., 30 F. Supp. 2d 1053, 1061 (C.D. Ill. 1998) ("Those unidentified CBE members who, in the future, plan to live, work, stay, swim, etc., in the vicinity of the levee site do not help establish CBE's standing to sue either.").

Although the Eleventh Circuit has not been as stringent as some other courts in requiring an organization to provide the names and addresses of particular members who have been harmed, see Doe v. Stincher, 175 F.3d 879, 882 (1999), this does not relieve an organization of its obligation to show that one of its existing members has standing to sue. See Nat'l Alliance for the Mentally Ill, 376 F.3d at 1296 (citing Doe, 175 F.3d at 886). The Plaintiff organizations in this case have failed to satisfy this requirement.

The Complaint fails to state in even the most conclusory fashion – much less in more detail – that on the date this case was filed the Plaintiff organizations included any members who have been adversely affected by O.C.G.A. § 21-2-417. Similarly, none of the thirty-one individuals who have filed declarations on behalf of Plaintiffs has stated that he or she is a member of any of the Plaintiff organizations and is personally injured by O.C.G.A. § 21-2-417. The only declarant who raises possible membership in any of the organizations is Ms. Margaret S. Smothers, who states that she is the former Executive Director of the League of Women Voters of Georgia, but Ms. Smothers does not allege any injury

to herself. (Smothers Decl. ¶ 2.) She simply states her lobbying involvement with the Georgia General Assembly regarding the challenged law. (Id. ¶¶ 3-5.) Viewed together, the declarations and pages three through six of the Complaint clearly reveal that the Plaintiff organizations are no different than those in Sierra Club v. Morton, in which the Supreme Court emphasized that "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . . ." 405 U.S. 727, 739 (1972).

"[Article III] standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy," Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485-86 (1982), and every "roving . . . ombudsman seeking to right . . . wrongs wherever he might find them" is not automatically entitled to relief. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 157 (4th Cir. 2000). Because the Plaintiff organizations can show only an *interest* in this litigation, but no *injury* to any of their members, no Article III "case or controversy" exists between the litigants, and Plaintiffs' preliminary injunction motion should be denied.

II. PLAINTIFFS HAVE FAILED TO SATISFY THE PREREQUISITES FOR OBTAINING THE "EXTRAORDINARY AND DRASTIC REMEDY" OF PRELIMINARY INJUNCTIVE RELIEF, ESPECIALLY AS ASSERTED AGAINST THE STATE.

To obtain a preliminary injunction, the movant must demonstrate "(1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest." Zardui-Quitana v. Richard, 768 F.2d 1213, 1216 (11th Cir. 1985). Eleventh Circuit law is clear that injunctive relief is an extraordinary remedy, and a litigant is not entitled to a preliminary injunction unless he has proven all four prerequisites. See Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1240 (11th Cir. 2005); Cafe 207, Inc. v. St. Johns County, 989 F.2d 1136, 1137 (11th Cir. 1993); Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) ("A preliminary injunction is an extraordinary and drastic remedy not to be granted until the movant clearly carries the burden of persuasion as to the four prerequisites."); United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983) ("The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the

movant 'clearly carries the burden of persuasion' as to the four prerequisites.") (quoting Canal Auth. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)).

Plaintiffs have a particularly heavy burden in this case because they seek to enjoin enforcement of a state statute. "[P]reliminary injunctions of legislative enactments – because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits – must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." Ne. Fla. Chapter, 896 F.2d at 1285. When a movant seeks to enjoin a government agency, "his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own affairs." Rizzo v. Goode, 423 U.S. 362, 378-79 (1976). "This 'well-established' rule bars federal courts from interfering with non-federal government operations in the absence of facts showing an immediate threat of substantial injury." Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362, 1372 (N.D. Ga. 2002) (quoting Midgett v. Tri-County Metro. Dist. of Or., 74 F. Supp. 2d 1008, 1012 (D. Or. 1999)). As the Supreme Court of the United States has instructed:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. *State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality*. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (emphasis added).

A. Plaintiffs Are Not Substantially Likely To Succeed on the Merits.

Plaintiffs are not entitled to a preliminary injunction because they cannot prove a substantial likelihood of success on the merits of any of the claims raised in the Complaint.

1. O.C.G.A. § 21-2-417 Does Not Violate Equal Protection.

a. Rational Basis Review, Not Strict Scrutiny, Should Be Applied in Assessing the Constitutionality of O.C.G.A. § 21-2-417.

Plaintiffs "proceed[] from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. [The Supreme Court's] cases do not so hold." Burdick v. Takushi, 504 U.S. 428, 432 (1992); see also League of Women Voters v. Blackwell, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004) ("State election laws are, generally, not subject to strict scrutiny review.") (citing Burdick, 504 U.S. at 433).

Without question, the right to vote is fundamental to our constitutional structure. See Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). This right, however, "is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways." Id.; see also Colo. Common Cause v. Davidson, 2004 WL 2360485, at *2 (D. Colo. Oct. 18, 2004) (stating that "the right to vote, unlike some other individual rights that are exercised in essential opposition to the state, is a right that has meaning only in a highly regulated social context").

The authority to regulate elections, and "the initial task of determining the qualifications of voters," is given to the States. Storer v. Brown, 415 U.S. 724, 729-30 (1974) (citing U.S. Const. art. I, § 2, cl. 1). Having States take an active role in structuring elections makes sense, because "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Id. at 730. "Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state

interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." Burdick, 504 U.S. at 433.

In deciding the level of scrutiny with which to regard a challenged state election law, the Supreme Court has prescribed a balancing test where "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" are weighed against "the precise interests put forward by the State as justifications for the burden imposed by its rule." Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). Under this balancing test, when the restrictions placed on voting rights are "severe," the regulation is subjected to strict scrutiny. Burdick, 504 U.S. at 434. "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," the rational basis test is applied, and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." Id. (quoting Anderson, 460 U.S. at 788).

As the Supreme Court has often recognized, States have a vital interest in maintaining the integrity of the election process and minimizing voter fraud. See Burdick, 504 U.S. at 441 (stating that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."); League of Women Voters, 340 F. Supp. 2d at 829 ("Few can

doubt that deterrence, detection, and avoidance of election fraud are fundamentally important state and public concerns and interests."); Colo. Common Cause, 2004 WL 2360485, at *3 ("Preventing voters from voting more than once, preventing otherwise ineligible voters from voting, and preventing other kinds of election fraud, is part and parcel of this same compelling state interest.").

The counter-balance to weigh against the State's interests in maintaining integrity in the election process and minimizing voter fraud, then, is the impact that O.C.G.A. § 21-2-417 has on Plaintiffs' right to vote. If O.C.G.A. § 21-2-417 granted the right to vote to only some Georgians and denied it to others, as was the case with the durational residency requirements challenged in Dunn v. Blumstein, heightened scrutiny might be appropriate to prove that O.C.G.A. § 21-2-417 "is necessary to promote a compelling state interest." Dunn, 405 U.S. at 337.

This case, however, does not involve a denial of anyone's right to vote. As stated earlier, the photo ID requirement in HB 244 applies only to registered voters who vote in person. HB 244 denies no registered voter the right to vote because all registered voters may vote by mail without presenting a photo ID, and any registered voter who does not possess a photo ID can obtain one free of charge. Because the photo ID requirement does not impose a "severe" restriction on voting rights, the state must show only that the requirement bears a rational relationship to

a legitimate state interest to pass muster under Plaintiffs' challenge. See Colo. Common Cause, 2004 WL 2360485, at *3 ("Despite the fact that these sorts of election regulations [requiring voter identification] necessarily operate to 'disenfranchise' or chill some voters, the state's important interest in holding structured elections will generally trigger only a rational relationship kind of review. . . . [A]s long as state election regulations are not too 'severe' or discriminatory, they will be upheld.") (citing Burdick, 504 U.S. at 434).

b. O.C.G.A. § 21-2-417 Is Rationally Related to a Legitimate State Interest.

In arguing for strict scrutiny, Plaintiffs overstate the impact of the photo ID requirement and, in so doing, make a fatal error in their reasoning. Plaintiffs claim "[t]he Photo ID requirement prevents otherwise eligible voters, some of whom have voted for decades, from exercising their constitutional right to vote because they are unable to afford or to obtain a government-issued photographic identification card." (Pls.' Br. Supp. Mot. Prelim. Inj. at 41; see also id. at 45 (asserting those without photo IDs "may have to choose between voting and eating or paying a utility bill").) Simply put, Plaintiffs are wrong.

The photo ID requirement prevents *no one* from voting. At most, it prevents some individuals who wish to vote *in person* from doing until they have proper identification. O.C.G.A. § 21-2-417 does not prevent anyone from voting, because

he or she can vote by absentee ballot or in person by obtaining a photo ID free of charge. In fact, the 2005 Amendment made it much *easier* to vote by absentee ballot and repealed the previous requirement regarding excuses one had to claim for not being able to vote in person. O.C.G.A. § 21-2-380(b) (HB 244, § 50).

The Supreme Court has considered this case in an analogous context. In McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969), inmates of a county jail sought to enjoin enforcement of statutes which denied them access to absentee ballots. The Supreme Court distinguished the challenge in McDonald from cases in which individuals were excluded from being allowed to vote:

> [T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. *Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise.*

Id. at 807 (emphasis added). Because there was no absolute bar to appellants' right to vote, the Court applied the rational relationship test and held the Illinois statute did not violate equal protection:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons

> totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. With this much discretion, a legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind, and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

Id. at 809 (internal citations and quotations omitted).

This distinction between the right to vote and the right to vote *in a preferred manner* was emphasized by the Supreme Court in another voting rights case decided less than two months after McDonald:

> This case presents an issue different from the one we faced in McDonald v. Board of Election Comm'rs of Chicago. The present appeal involves an absolute denial of the franchise. In McDonald, on the other hand, we were reviewing a statute which made casting a ballot easier for some who were unable to come to the polls. As we noted, there was no evidence that the statute absolutely prohibited anyone from exercising the franchise; *at issue was not a claimed right to vote but a claimed right to an absentee ballot*.

Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 n.6 (1969) (internal citations omitted) (emphasis added).

Despite their rhetoric, Plaintiffs' challenge to O.C.G.A. § 2-2-417 does not seek to protect the fundamental right to vote, but rather an asserted right to vote *in*

person. There exists no such fundamental right,[11] and the State has a legitimate interest in minimizing voter fraud. Because O.C.G.A. § 21-2-417 bears a rational relationship to the State's legitimate interest, Plaintiffs' equal protection claim must fail.

c. No Court Has Struck Down a Photo Identification Statute, and At Least One Court Has Found the Requirement To Be Constitutional.

In fact, no court has invalidated any similar photo ID requirement, and at least one court has specifically held that the photo ID requirement comports with the Constitution. The State of Michigan requires first time voters who register by mail to present photo identification when voting in person to verify their identity. Bay County Democratic Party v. Land, 347 F. Supp. 2d 404, 414-16 (E.D. Mich. 2004) (providing in detail the steps required for election inspectors to verify voters' identity). To prove their identity, first time voters are required to show "a Michigan Driver License, Michigan Personal Identification Card, other government issued photo identification card or a photo identification card issued by a Michigan university or college." Id. at 414-15. If the voter is unable to produce one of the required forms of photo ID, they are issued a provisional

[11] The State of Oregon now provides that primary and general elections shall be conducted by mail, and voters' signatures on ballot envelopes are checked against the registration signatures for identity purposes. See Or. Rev. Stat. §§ 254.465 & .470(10).

"Envelope Ballot." Id. at 415. The voter then has six days to produce the required photo identification to have his or her ballot counted. Id. at 416. If the voter is unable to provide the required photo ID, "the clerk may not count [the] 'envelope' ballot." Id.

Several parties challenged the Michigan voter identification process, including one of the Plaintiffs in this action, the NAACP. Id. at 411. In considering the voter identification process, the court noted that "[a]ny sensible laws regulating the time, place and manner of voting in a democracy ought to focus on two goals: maximizing the participation of eligible voters and eliminating fraud." Id. The court found "the defendants' directives concerning proof of identity of first-time voters who registered by mail are consistent with federal and State law," id., and held that:

> [t]he State has an important interest in regulating elections to prevent fraud, and the rudimentary requirements of identifying voters who have never been to the polls or appeared in-person before an election official or registrar are reasonable. . . . The plaintiffs have not shown that the regulations are discriminatory or are likely to be applied unevenly.

Id. at 435.

O.C.G.A. § 21-2-417, like Michigan's voter identification requirements, is "consistent with federal and State law" and "[P]laintiffs have not shown that the regulations are discriminatory or are likely to be applied unevenly." Id. at 411,

435. As such, Plaintiffs have not and cannot show a likelihood of success on the merits of their equal protection claim, and Plaintiffs' request for preliminary injunction should be denied.

2. The Non-Driver Photo ID Card Fee Is Not a Poll Tax and Does Not Condition the Right To Vote on Payment of the Fee.

Plaintiffs mischaracterize the $20 fee for non-driver identification cards as "a poll tax on the right to vote." (Compl. ¶ 61.) The fee for non-driver photo ID cards is not a discriminatory measure, however, and does not violate the Fourteenth or Twenty-Fourth Amendments, because payment of the fee is not a precondition to voting. Moreover, the payment of such fee is not absolutely required for obtaining a non-driver photo ID card.

The Twenty-Fourth Amendment provides that the fundamental right to vote cannot be conditioned on the payment of any fee:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV, § 1.

In Harper v. Virginia State Board of Elections, the Supreme Court struck down the Virginia poll tax, the payment of which was "a condition of obtaining a

ballot" to vote. 383 U.S. 663, 668 (1966). The Court recognized, however, that "a State may exact fees from citizens for many different kinds of licenses," and notably did not pass judgment on the imposition of poll taxes so long as they are not made a prerequisite for voting. Id. (explaining the poll tax "is an old familiar form of taxation;[12] and *we say nothing to impair its validity so long as it is not made a condition to the exercise of the franchise*.") (emphasis added).

The fee imposed by O.C.G.A. § 40-5-103 is not a prerequisite for voting; it is a prerequisite for obtaining a non-driver photo ID card. See Harper, 383 U.S. at 668 (noting that "Maine has a poll tax which is not made a condition of voting; its payment is a condition of obtaining a motor vehicle license or a motor vehicle operator's license") (internal citations omitted). In addition, a non-driver photo ID card is but one form of acceptable identification that can be used to vote in person under O.C.G.A. § 21-2-417. Should registered voters choose to vote in person, they can display any number of government-issued photo IDs. See O.C.G.A. § 21-2-417(a) (listing acceptable forms of identification). While Plaintiffs choose to

[12] Despite the obvious confusion it may cause, a "poll tax" does not necessarily refer to a tax on voting. Rather, a poll tax is a "capitation tax; a tax of a specific sum levied upon each person within the jurisdiction of the taxing power." Black's Law Dictionary 1159 (6th ed. 1990); see also United States v. Texas, 252 F. Supp. 234, 238 (W.D. Tex. 1966) ("Although frequently thought of as a tax on the privilege of voting, the poll tax is actually a head tax. In this context, 'poll' means 'head' rather than the term customarily used to describe a place of voting.").

ignore the fact totally, voters who choose to vote by absentee ballot are not required to present any photo ID. O.C.G.A. § 21-2-380(b). Moreover, payment of the non-driver photo ID card fee is not an absolute requirement. O.C.G.A. § 21-2-417(d) provides that the State "shall not be authorized to collect a fee for an identification card from any person" who lacks other valid photo identification, needs a card to vote in an election, and "swears under oath that he or she is indigent and cannot pay the fee." As indicated in the Declaration of Alan Watson, anyone who desires a non-driver photo ID card for voting purposes may complete an Affidavit for Identification Card for Voting Purposes and will receive a free photo ID card. (Watson Decl. ¶ 5.)

The fee for an identification card is not a fee to vote, but an ancillary expense to a voter who wishes to vote in person (and chooses not to obtain a free photo ID for voting), just as that voter must pay the cost of transportation to the polls and the absentee voter must pay the cost of postage. Because payment of the fee is not a precondition to voting and can be waived, it is not an unconstitutional poll tax on the right to vote. Therefore, Plaintiffs have not demonstrated a substantial likelihood of success on their claim that any fee associated with one form of voting is a poll tax, even when the fee will be waived or the voter can decide to vote by mail.

3. Plaintiffs' Civil Rights Act Claims Fail Because 42 U.S.C. § 1971 Does Not Give Rise to a Private Right of Action and O.C.G.A. § 21-2-417 Does Not Discriminate.

Plaintiffs assert a claim for relief under "the Civil Rights Act of 1964, codified at 42 U.S.C. § 1971." (Pls.' Br. Supp. Mot. Prelim. Inj. at 55; see also Compl. ¶¶ 64-68.) Plaintiffs' claims under 42 U.S.C. §§ 1971(a)(2)(A) and 1971(a)(2)(B) each fail as a matter of law because 42 U.S.C. § 1971 does not furnish a private right of action:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, *the Attorney General may institute for the United States, or in the name of the United States*, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.

42 U.S.C. § 1971(c) (emphasis added); see also Willing v. Lake Orion Cmty. Sch. Bd. of Trustees, 924 F. Supp. 815, 820 (E.D. Mich. 1996) (holding that "section 1971 does not afford [plaintiff] a private right of action. . . . Section 1971 is intended to prevent racial discrimination at the polls and is enforceable by the Attorney General, not by private citizens") (citing 42 U.S.C. § 1971; Good v. Roy, 459 F. Supp. 403, 405 (D. Kan. 1978)).

Because 42 U.S.C. § 1971 does not afford Plaintiffs a private right of action, Plaintiffs' Civil Rights Act claims must fail. But, even if 42 U.S.C. § 1971

provided for private rights of action, Plaintiffs' claims would still fail because O.C.G.A. § 21-2-417 does not discriminate on the basis of "[r]ace, color, or previous condition." 42 U.S.C. § 1971(a), and Plaintiffs have not demonstrated a substantial likelihood that they can show such discrimination. O.C.G.A. § 21-2-417 does not violate 42 U.S.C. § 1971(a)(2)(A) because it does not apply different standards in "determining whether any individual is qualified under State law or laws to vote in any election." 42 U.S.C. § 1971(a)(2)(A). Individuals who choose to vote in person are all held to the same standard, whether they are Caucasian, African-American, Hispanic, Asian-American, or otherwise. Likewise, individuals who choose to vote by absentee ballot are all held to the same standard regardless of their race or color. O.C.G.A. § 21-2-417 does not determine who is qualified to vote; it merely provides the mechanisms by which to verify the identities of voters, depending on which method they choose to cast their ballot.

Nor does O.C.G.A. § 21-2-417 violate 42 U.S.C. § 1971(a)(2)(B). The photo ID requirement does not add any condition on voter qualifications, and there is no "error or omission on any record" being used to disqualify any potential elector. 42 U.S.C. § 1971(a)(2)(B). Georgia has a "fundamental" and "compelling" interest in minimizing voter fraud by verifying the identity of voters. See League of Women Voters, 340 F. Supp. 2d at 829 ("Few can doubt that

deterrence, detection, and avoidance of election fraud are *fundamentally* important state and public concerns and interests." (emphasis added)); Colo. Common Cause, 2004 WL 2360485, at *3 ("Preventing voters from voting more than once, preventing otherwise ineligible voters from voting, and preventing other kinds of election fraud, is part and parcel of this same *compelling* state interest." (emphasis added)). Even if O.C.G.A. § 21-2-417 does not eliminate all potential voter fraud, that does not justify declaring the statute unconstitutional:

> a legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind, and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

McDonald, 394 U.S. 809 (internal citations and quotations omitted).

Because 42 U.S.C. § 1971 does not give rise to a private right of action, and because O.C.G.A. § 21-2-417 does not discriminate on the basis of race or color, Plaintiffs' claims under the Civil Rights Act of 1964 fail as a matter of law. As Plaintiffs cannot prevail on this claim, Plaintiffs' motion for preliminary injunction should be denied.

4. O.C.G.A. § 21-2-417 Does Not Violate Section 2 of the Voting Rights Act of 1965.

Plaintiffs' claim under the Voting Rights Act is asserted on behalf of the individual Plaintiffs only. The individual Plaintiffs assert a claim of vote denial, as opposed to vote dilution, under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. (Pls.' Br. Supp. Mot. Prelim. Inj. at 59.) Plaintiffs' claim under the Voting Rights Act is asserted on behalf of the individual Plaintiffs only. As a threshold matter, then, this claim fails because Plaintiff Watkins has withdrawn from this case, and Plaintiff Williams lacks standing to pursue these claims. (See supra Part I.) As such, the Court need not reach Plaintiffs' Voting Rights Act claim.

However, if the Court were to consider the claim, it must be denied. "Vote denial occurs when a state . . . employs a 'standard, practice, or procedure' that results in the denial of the right to vote on account of race." Burton v. Belle Glade, 178 F.3d 1175, 1197-98 (11th Cir. 1999) (quoting 42 U.S.C. § 1973(a)). The Eleventh Circuit instructs that

> a plaintiff must prove invidious discrimination in order to establish a violation of Section 2 of the Voting Rights Act. Specifically, the plaintiff may prove either: (1) discriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; or (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from

> meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme.

Osburn v. Cox, 369 F.3d 1283, 1289 (11th Cir. 2004) (quoting Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994)).

"It is Plaintiffs' burden to show . . . either a discriminatory purpose or effect." Id. Plaintiffs have put forth no evidence, nor can they, that O.C.G.A. § 21-2-417 has any discriminatory intent. Rather, Plaintiffs claim the photo ID requirement has a discriminatory effect on minorities through "direct and indirect financial costs." (Pls.' Br. Supp. Mot. Prelim. Inj. at 61.) However, "[a] violation of Section 2 is established only if, based on the totality of the circumstances, minority plaintiffs can prove that they 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" Osburn, 369 F.3d at 1289 (quoting 42 U.S.C. § 1973(b)). "In making this determination, 'a court must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors.'" Burton, 178 F.3d at 1198 (quoting Thornburg v. Gingles, 478 U.S. 30, 44 (1986)).

Fatal to Plaintiffs' argument is the absence of any causal connection between the 2005 Amendment to O.C.G.A. § 21-2-417 and a monetary barrier to voting. Plaintiffs vastly overstate the provisions of the 2005 Amendment. It is simply not

true, as Plaintiffs' assert, "that Act 53 prohibits voting by legal, registered voters who do not possess and cannot or will not pay for a state issued Photo ID." (Pls.' Br. Supp. Mot. Prelim. Inj. at 65.) For Plaintiffs' assertion to carry any weight, two assumptions would have to be true: (1) voters may only vote in person; and (2) voters must pay for a photo ID. Neither assumption is correct.

As discussed at length above, a photo ID is not required when voting by absentee ballot. Thus, to the extent a voter does not already have the proper photo ID and cannot (or chooses not to) obtain one because of the fee imposed by O.C.G.A. § 40-5-103, that voter may cast his or her vote by absentee ballot. Moreover, the fee for the non-driver photo ID card is not mandatory. (Watson Decl. ¶ 5.) O.C.G.A. § 21-2-417(d) provides that the State "shall not be authorized to collect a fee for an identification card from any person" who lacks other valid photo identification, needs a card to vote in an election, and "swears under oath that he or she is indigent and cannot pay the fee." Thus, even if a voter chooses to vote in person, rather than absentee, the photo ID requirement does not impose a monetary burden on such individual because the required photo ID can be obtained for free.

Plaintiffs' failure to establish a causal connection between the 2005 Amendment to O.C.G.A. § 21-2-417 and a monetary barrier to voting is fatal to

their claim under Section 2 of the Voting Rights Act.[13] Therefore, injunctive relief should be denied as there is no substantial likelihood that Plaintiffs will prevail on their Section 2 claim.[14]

5. Plaintiffs' State Law Claims Are Barred by the Eleventh Amendment, and the 2005 Amendment to O.C.G.A. § 21-2-417 Does Not Violate the Georgia Constitution.

Finally, Plaintiffs claim that even if Defendants are not violating the U.S. Constitution, they nevertheless are violating the Georgia Constitution. First, any claim that State Defendants are violating Georgia law is barred by the Eleventh Amendment pursuant to the Supreme Court's decision in Pennhurst State School &

[13] Plaintiffs' citation to socio-economic data from the 2000 Census does not save their claim under the Voting Rights Act, as the Court cannot "extrapolate from these findings a discriminatory intent." Jacksonville Coalition for Voter Protection v. Hood, 351 F. Supp. 2d 1326, 1333 (M.D. Fla. 2004) (addressing plaintiffs' contention that "the findings of the Commission on Civil Rights that a disproportionate percentage of African-American voters were disenfranchised during the 2000 election" through a higher rate of rejection of their votes). Moreover, the 2000 Census data does nothing to establish a causal connection between the 2005 Amendment and monetary barriers to voting.

[14] Even if the Court were to consider Plaintiffs' Section 2 claim, the Court could not presently conclude that Plaintiffs have a substantial likelihood of prevailing on the merits, as Section 2 cases require the development of an extensive record, Nipper v. Smith, 39 F.3d 1494, 1498 (11th Cir. 1994) ("Voting rights cases are inherently fact-intensive, particularly those section 2 vote dilution claims alleging that, due to the operation of a challenged voting scheme, minority voters are denied an equal protection to participate in the political process and to elect representatives of their choice.")

Hospital v. Halderman, 465 U.S. 89 (1984). In Pennhurst, the plaintiff attempted to enforce a state's mental health law in federal court. The Supreme Court held that the Eleventh Amendment bars federal courts from enforcing state law either prospectively or retroactively. In writing for the majority, Justice Powell emphasized that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." Id. at 106. Given that Georgia state courts are the correct arbiters on the meaning of state law, it would be a "gross intrusion" for this Court to grant a preliminary injunction on the basis of Plaintiffs' Georgia constitutional claim.[15] Abate of Ga., Inc. v. Ga. Dep't of Pub. Safety, 137 F. Supp.

[15] State Defendants note that the Georgia Code expressly provides for this Court to certify state law questions to the Supreme Court of Georgia:

> The Supreme Court of this state, by rule of court, may provide that when it shall appear to . . . any circuit court of appeals or district court of the United States . . . that there are involved in any proceeding before it questions of the laws of this state which are determinative of the case and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal court may certify the questions of the laws of this state to the Supreme Court of this state for answers to the questions of state law, which certificate the Supreme Court of this state may answer by written opinion.

O.C.G.A. § 15-2-9.

2d 1349, 1359 (N.D. Ga. 2001); see Golden Rule Ins. Co. v. Stephens, 1995 U.S. Dist. LEXIS 20625, at *12 (E.D. Ky. Jan. 5, 1995).

Even if Eleventh Amendment immunity did not exist here, Plaintiffs' arguments on Georgia law still would not succeed. The constitutionality of a Georgia statute is presumed, and "all doubts must be resolved in favor of its validity." Albany Surgical, P.C. v. Ga. Dep't of Cmty. Health, 278 Ga. 366, 368 (2004); see Wickham v. State, 273 Ga. 563, 566 (2001) ("This Court will not presume that the General Assembly intended to enact an unconstitutional law."). Courts cannot strike down legislation "unless it plainly and palpably violates some provision of the Federal or State Constitution." City of Atlanta v. Associated Builders & Contractors of Ga., Inc., 240 Ga. 655, 657 (1978).

Plaintiffs argue that the photo ID requirement contained in the 2005 Amendment to O.C.G.A. § 21-2-417 violates the Georgia Constitution because it is neither a residency requirement nor a condition of registration and because it purportedly denies registered voters the right to vote. (Pls.' Br. Supp. Prelim. Inj. at 30-31.) Plaintiffs' arguments, however, are factually inaccurate and rest upon a fundamentally flawed interpretation of Georgia law.

The Georgia Constitution provides that

> Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not

> disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people. ***The General Assembly shall provide by law for the registration of electors***.

Ga. Const. art. II, § 1, ¶ 2 (emphasis added).

The Georgia Constitution, in setting up requirements for the qualification of electors, "contemplates enactment of laws to determine these qualifications." Franklin v. Harper, 205 Ga. 779, 790 (1949). The legislature has wide latitude in determining how voting qualifications required by the Georgia Constitution may be determined, provided it does not make the exercise of such right "so difficult or inconvenient as to amount to a denial of the right to vote." Id. at 790 (citation omitted). The voter must "comply with such requirements of law as may be imposed upon him as a matter of policing the process by which he is authorized to cast his vote at a place and within the time, and subject to the regulations, provided by law to govern the elections themselves." AFL-CIO. v. Hood, 885 So. 2d 373, 375 (Fla. 2004) (internal quotes and citation omitted).

Plaintiffs urge an interpretation of the Georgia Constitution that would effectively deny the legislature any power or authority to regulate the time, place, or manner of voting if the effect of such regulation was to cause any inconvenience to a citizen who desired to vote in person. This is not the law of Georgia. The Georgia Constitution protects the right of qualified citizens to vote, but it does not

require that citizens be permitted to vote in person, nor does it state that citizens have an absolute constitutional right to be free from any regulation of in-person voting.

The Georgia Supreme Court and other state high courts have consistently recognized the legislature's power to regulate the time, place, and manner of establishing voter qualifications and voting, and have held that such regulations do not impose additional qualifications on the right to vote. See, e.g., Johnson, 263 Ga. at 173 (holding that votes cast by persons whose registration cards had not been signed were void, even if names appeared on list of electors); AFL-CIO, 885 So. 2d at 373 (holding that Florida legislation allowing voters to cast provisional ballots, which required that voter be eligible to vote at the precinct where the ballot was cast, did not impose an additional qualification on the right of suffrage, was not an unnecessary restriction on the right to vote, and therefore did not violate the Florida Constitution).

The legislature's power to regulate the time, place, and manner of establishing voter qualifications and voting includes the power to enact such measures that the legislature deems sufficient to confirm the identity of a registered voter. See, e.g., Perez v. Rhiddlehoover, 186 So. 2d 686, 691 (La. App. 1966) (holding that Louisiana requirement that voting registrant give information

sufficient to identify himself when he appears at the polling booth does not conflict with the prohibition in the Voting Rights Act against "tests or devices" or the federal constitutional provision that the right to vote shall not be denied on account of race, color or previous condition of servitude).

Plaintiffs' attempt to analogize to federal cases concerning attempts to impose term limitations and exclude otherwise qualified persons from becoming members of Congress misses the point entirely. In fact, the U.S. Supreme Court and other federal courts have specifically approved of laws that regulate the time, place, and manner of elections. See, e.g., Storer, 415 U.S. at 728-73 (holding that provision of California Election Code forbidding ballot position to independent candidate for elective public office who had registered affiliation with qualified political party at any time within one year prior to immediately preceding primary election was not unconstitutional as infringing on rights guaranteed by First and Fourteenth Amendments or as adding qualifications for office of United States Congressman, as statute involved no discrimination against independents and protected compelling state interest in furthering stability of political system by guarding against splintered parties and unrestrained factionalism); Williams v. Tucker, 382 F. Supp. 381, 388 (D.C. Pa. 1974) (holding that Pennsylvania statute, which had effect of (1) preventing candidate defeated in primary from obtaining

position on general election ballot as candidate of political party, (2) preventing candidate from having his name appear more than once on general election ballot, and (3) permitting a candidate to be nominee of only one political group, merely regulated the manner of holding elections and did not add qualifications for office of United States Congressman in violation of Federal Constitution).

Because Plaintiffs cannot demonstrate that the voter ID requirement imposes additional qualifications on the right to vote or makes it "so difficult or inconvenient as to amount to a denial of the right to vote," see Franklin, 205 Ga. at 790, Plaintiffs cannot prevail on their claim that the photo ID requirement violates the Georgia Constitution, and injunctive relief should be denied.

B. Plaintiffs Have Not Shown They Will Be Irreparably Harmed Without the Requested Injunctive Relief.

A showing of irreparable injury is "the *sine qua non* of injunctive relief." Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (quoting Ne. Fla. Chapter, 896 F.2d at 1285). It cannot be presumed, even when there is a violation of constitutional rights. See id. at 1177 ("Plaintiffs also contend that a violation of constitutional rights always constitutes irreparable harm. Our case law has not gone that far, however."). In all cases, a movant for a preliminary injunction against a state or local government must present facts that show a "real and immediate" threat of substantial, irreparable harm before a federal court will

intervene. O'Shea v. Littleton, 414 U.S. 488, 494 (1974); see also Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994) ("[A] party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury").

Plaintiffs' only threatened injury in this case is the inability of individuals without valid photo ID to vote in person. Such harm is not irreparable because there is no similar restriction on the ability to vote by absentee ballot. Thus, any individual without photo identification (and who cannot obtain such identification by November 8) can vote by absentee ballot. Plaintiffs admit this fact (Williams Dep. at 34) and are fully aware that enforcement of the photo ID requirement for the November 8 elections causes no one irreparable harm. Moreover, there has been no allegation or showing that individuals who desire a photo ID for voting cannot obtain one for free.

Plaintiffs' failure to show they will be irreparably harmed absent the granting of the injunction, and indeed their admission that no such harm will occur, requires denial of Plaintiffs' motion for preliminary injunction.

C. The Harm to the State of Georgia from Enjoining Its Duty and Obligation To Guard Against Voter Fraud Outweighs the Inconvenience to Plaintiffs.

Plaintiffs in this case are not simply seeking to maintain the status quo. They are seeking to turn back the clock and force election officials to stop using a system that is already established and operating and apply the former law. "Only in rare instances is the issuance of a mandatory preliminary injunction proper." Harris v. Wilters, 596 F.2d 678, 680 (5th Cir. 1979).[16] "Mandatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite* is particularly disfavored, and should not be used unless the facts and law clearly favor the moving party." Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976). Even "[g]reater caution" must be exercised where a government is involved, because "the Government has traditionally been granted the widest latitude in the dispatch of its own affairs," and it is "well-established" that federal courts generally should not "interfer[e] with non-federal government operations." Martin, 225 F. Supp. 2d at 1373 (quoting Brown v. Bd. of Trustees, 187 F.2d 20, 24 (5th Cir. 1951)). As the Supreme Court of the United States has cautioned,

[16] In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

> Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law" . . . . When the frame of reference moves from a unitary court system . . . to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief."

Rizzo, 423 U.S. at 378-79 (citations omitted). "[T]hese principles [ ] have applicability where injunctive relief is sought, not against the judicial branch of a state government, but against those in charge of an executive branch of an agency of state or local governments . . . ." Id. at 380.

The Court should not compel the State of Georgia to return to the prior law. As previously explained, since the photo ID requirement became effective, it has been enforced by local elections officials in thirty-four county and municipal elections. (Ann Hicks Decl. ¶ 9.) Furthermore, significant training of local election officials has occurred since the enactment of O.C.G.A. § 21-2-417, and an injunction entered at this late date would cause massive confusion among election officials, poll workers, and voters on November 8, 2005. (Ann Hicks Decl. ¶ 14; Cox Decl. ¶ 8; Bailey Decl. ¶ 8; Shea Hicks Decl. ¶ 7; Ledford Decl. ¶ 9; Smith Decl. ¶ 10.) New training of election officials could not occur in time for them to in turn train their poll workers on the revised status of the identification

requirement for in-person voting. (Ann Hicks Decl. ¶ 12; Cox Decl. ¶ 8; Bailey Decl. ¶ 8; Shea Hicks Decl. ¶ 7; Ledford Decl. ¶ 9; Smith Decl. ¶ 10.) Local election officials do not have an adequate supply of the old materials (Bailey Decl. ¶ 8; Shea Hicks Decl. ¶ 7; Ledford Decl. ¶ 9), and there would be insufficient time to send out new voter certificates and poll posters to all of the local election officials for use at the November 8, 2005 elections. (Ann Hicks Decl. ¶ 13; Shea Hicks Decl. ¶ 7; Ledford Decl. ¶ 9.) It is possible that inconsistent application of the identification requirement could occur in many counties and municipalities if an injunction is issued at this late date, resulting in some localities applying the photo ID requirement in HB 244 and some not. (Cox Decl. ¶ 8.)

In contrast, Plaintiffs' only threatened injury in this case is the inability of individuals without government-issued photo identification to vote in a preferred manner claimed by only one, Mrs. Williams.[17] These circumstances can be remedied easily. Any individual currently without the required photo ID may obtain one (free of charge, if necessary) before the November 8 election. If they prefer, registered individuals may vote by absentee ballot. Either way, any inconvenience suffered by Plaintiffs is far outweighed by the severe effects a preliminary injunction at this late date would have on our State's election process.

[17] The other declarations filed by Plaintiffs do not reference the Declarants' preferred method of voting, which may indeed be absentee voting.

D. The Public Interest Would Not Be Served By Granting the Requested Injunctive Relief.

It is in the public interest that the State of Georgia should not be enjoined from applying its duly enacted and federally precleared photo ID requirement in the November 8, 2005 election. A federal court "should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws" when deciding whether a preliminary injunction is appropriate. Miller v. Bd. of Comm'rs, 45 F. Supp. 2d 1369, 1372 (M.D. Ga. 1998) (quoting Reynolds v. Sims, 377 U.S. 533, 585 (1964)). Nowhere in their brief do Plaintiffs even attempt to demonstrate how enjoining the application of the photo ID requirement for in-person voting would not adversely affect the public interest. In contrast, there is a strong public interest in applying the State of Georgia's photo ID requirement to the upcoming elections.

First, Georgia has a legitimate interest in maintaining the integrity of the election process and minimizing voter fraud. See League of Women Voters, 340 F. Supp. 2d at 829 ("Few can doubt that deterrence, detection, and avoidance of election fraud are fundamentally important state and public concerns and interests."); Colo. Common Cause, 2004 WL 2360485, at *3 ("Preventing voters from voting more than once, preventing otherwise ineligible voters from voting, and preventing other kinds of election fraud, is part and parcel of this same

compelling state interest."). The public interest in combating voter fraud with better voter identification requirements "is to be given weight in deciding whether restraining a state statute would harm the public interest." BankWest, Inc. v. Baker, 324 F. Supp. 2d 1333, 1357 (N.D. Ga. 2004) (citing Premium Tobacco Stores, Inc. v. Fisher, 51 F. Supp. 2d 1099, 1108 (D. Colo. 1999)). As Judge Shoob recently explained in a challenge to another Georgia statute:

> It is not the province of this Court to resolve the debate as to whether [a duly enacted state law] is good or bad for Georgia citizens. That is a matter for the legislature to decide. Absent a showing by [P]laintiffs that the Act is unconstitutional, which they have failed to do, *the Court must defer to the legislature's determination that enforcement of the Act will serve the public interest.*

Id. at 1357-58 (emphasis added); see also McDonald, 394 U.S. at 809 ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent . . . ."); Ne. Fla. Chapter, 896 F.2d at 1285 ("When a federal court before trial enjoins the enforcement of a municipal ordinance adopted by a duly elected city council, the court overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government.").

Second, Plaintiffs' challenge to the photo ID requirement for in-person voting comes too late and would impermissibly disturb the status quo. Since the enactment of O.C.G.A. § 21-2-417, significant resources have been used to train

local elections officials regarding the new law's requirements and to prepare officials for implementation of the new law. (Ann Hicks Decl. ¶ 8.) The photo ID requirement for in-person voting has already been successfully implemented in thirty-four elections conducted since the U.S. Department of Justice precleared the new law in August, and another 350 more county and municipal elections are scheduled to occur on November 8, 2005, less than four weeks away. (Ann Hicks Decl. ¶¶ 9, 11.) Disruption of the law at this late date, within weeks of the next series of elections, would disserve the public interest because it would disturb the status quo and would cause significant election official and voter confusion at the polls. The relief that Plaintiffs request would contravene the chief function of a preliminary injunction, which is "to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." Ne. Fla. Chapter, 896 F.2d at 1284; see also R.R. Comm'n of Ala. v. Cent. of Ga. Ry. Co., 170 F. 225, 233 (5th Cir. 1909) ("The public has an interest in the enforcement of every law until it is repealed or judicially annulled, which should be taken into consideration before granting a preliminary injunction restraining its enforcement where questions of fact are involved."). While Plaintiffs could have brought their action sooner and avoided the harm that would now result, Plaintiffs chose to wait.

Finally, it should be noted that the Georgia General Assembly's remedy need not be perfect in order to serve the public interest. The Supreme Court of the United States has emphasized,

> A legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind; and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

McDonald, 394 U.S. at 809 (internal quotations and citations omitted). Federal courts "must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" Rizzo, 423 U.S. at 378 (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951)).

Because Plaintiffs have not carried their burden of showing that the extraordinary relief sought would aid public interest, and because strong public interest instead exists for applying the photo ID requirement in the upcoming elections, the Court should deny Plaintiffs' motion for preliminary injunction.

CONCLUSION

For the foregoing reasons, State Defendants respectfully request that Plaintiffs' request for preliminary injunction be denied.

This 11th day of October, 2005.

Respectfully submitted,

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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the within and foregoing ***State Defendants' Initial Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction*** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to counsel of record for Plaintiffs. The undersigned also certifies that the foregoing document was delivered via email to the following non-CM/ECF participants:

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