

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

COMMON CAUSE, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	FILE NO. 4:05-CV-201-HLM
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,	)	
	)	
Intervenor.	)	

**MEMORANDUM OF LAW IN SUPPORT OF**  
**PLAINTIFFS’ RENEWED MOTION**  
**FOR A PRELIMINARY INJUNCTION**

**Introduction**

The Georgia legislature has once again adopted by party-line votes a Photo ID Act that applies exclusively to traditional voters who vote in person. Act 432 (SB 84) 2006 Ga. Laws, p. \_\_\_\_, codified as O.C.G.A. §§ 21-2-417 and 21-2-417.1 (“the 2006 Act”). The 2006 Photo ID Act and its implementing regulations are

infected by many of the same fatal constitutional defects as its 2005 predecessor (“the 2005 Act”). The 2006 Act prohibits every registered voter who does not have a Georgia driver’s license, passport or other form of government-issued Photo ID from voting in person. The 2006 Act imposes a severe burden on the poor, the elderly, the infirm and the less literate who either cannot afford a car, or are no longer able to drive, and who are, therefore, the least mobile of our citizens and least able to make a special trip to the county registrar’s office to obtain a “Georgia voter identification card” or to navigate the requirements of voting absentee.

The imposition of a Photo ID requirement solely on voters who vote in person is inconsistent with the failure of the Act to impose a similar Photo ID requirement either as a condition of being allowed to register to vote or of being allowed to cast an absentee ballot, even though there continues to be abundant evidence of fraud involving both voter registration and absentee voting, and *no new evidence* of fraud in in-person voting since this Court’s October 18, 2005 Order. *See* Deposition of Cathy Cox, dated May 5, 2006 (“Cox Dep. II”), pp. 5, 7, 42-43; Deposition of Kathy Rogers, dated May 8, 2006 (“Rogers Dep.”), p. 24.

The regulations issued by the State Election Board (“SEB”) (Exhibit A)<sup>1</sup> show that the entire Photo ID procedure is a sham and will do nothing to prevent

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<sup>1</sup> A copy of the regulations adopted by the State Election Board are attached hereto as Exhibit A.

fraud. The regulations provide that the new “Georgia voter identification card” will be issued to anyone who fills out a Voter Registration Application (or has an application on file with the county registrar). *See* Rogers Dep. pp. 50-52; Cox Dep. II, pp. 50-51. The fact that the State is willing to issue a Georgia voter ID card based solely on the information provided under oath in the Voter Registration Application undercuts entirely the State’s previous position that a voter’s signature under oath on the Voter Certificate (which every voter is routinely required to execute at the polls before being allowed to vote) is not sufficient proof of a voter’s identity and additional proof of identity in the form of a government-issued Photo ID is required to prevent fraud. Since no proof of identity is required to obtain a voter ID card, other than the person’s signature under oath on the Voter Registration Application, the regulations do nothing to prevent an imposter from obtaining a Georgia voter ID card by misrepresenting his identity when he completes the Voter Registration Application. The new Georgia voter ID provides no added protection against fraud that would not be equally accomplished by accepting the identical oath on the Voter Certificate at the precinct on election day.<sup>2</sup> Thus, the only effect of the 2006 Act is to force voters who do not own cars

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<sup>2</sup> *See* Cox Dep. II, p. 54 (“Q: You don’t know of any fraud that would be prevented by making them go get a photo ID using the same identification they could use to go vote? A: No, I don’t.”).

or have passports to make an inconvenient and unnecessary trip the registrar's office to have their pictures taken if they want to be allowed to vote in person on election day.

Defendants' cynical claim that no one will be denied the right to vote because any voter who does not have a Georgia voter ID card can still vote by casting an absentee ballot ignores the problems inherent with absentee voting and the fact that a significant percentage of Georgia's adults of voting age do not read well enough to be able to navigate the application procedures for voting by mail. *See e.g.*, Cox Dep. II, Exh. 9 – National Institute for Literacy, *The State of Literacy in America* (1998) reporting that 23% of Georgia's adults cannot read above Level 1. (Level 1 means that a person can sign his name, but cannot read well enough to “locate eligibility from a table of employee benefits” or “identify and enter background information on a social security card application.” *Id.*, p. 4).

The legal standards that apply to challenges to state election laws under the Fourteenth Amendment are set forth in a series of Supreme Court decisions<sup>3</sup> culminating with *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) in which the Court held:

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<sup>3</sup> *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

A court considering a challenge to a state election law must weigh the *character and magnitude of the asserted injury* to the rights [of the voters] . . . against the *precise interests* put forward by the State as justification for the burden . . . taking into consideration the extent to which [the State's] interests make it *necessary* to burden the plaintiff's rights.

*Id.* (emphasis added, internal quotation marks omitted).

*Burdick* also held that a statute that imposes a “severe” restriction on the right to vote is subject to strict scrutiny, and “must be ‘*narrowly drawn* to advance a state interest of compelling importance.’” *Id.* at 434 (emphasis added); *see Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). In addition, *Burdick* also held that even “the State’s most important regulatory interests are . . . [in]sufficient to justify’ the restriction” on the right to vote *if* the restrictions are not both “*reasonable [and] non-discriminatory.*” *Id.* at 434 (emphasis added); *see Wexler v. Anderson*, \_\_\_\_ F.3d \_\_\_\_, 2006 WL 1685802 (11<sup>th</sup> Cir. June 20, 2006) (quoting *Burdick*).

The evidence shows conclusively that the 2006 Act, like its predecessor, fails each of the requirements set forth in *Burdick*. **First**, the character and magnitude of the injury to the right to vote is severe. According to the Secretary of State, over 675,000 Georgia voters may not have Georgia driver’s licenses or Georgia ID cards, the most commonly-used form of Photo ID. *See* Press Release of Secretary of State, dated June 19, 2006, attached hereto as Exhibit B.

**Second**, the precise interest put forward by the legislature to justify the statute (the prevention of fraud), while substantial in theory, is itself a *fraud* and a *pretext*. This conclusion follows from (a) the total absence of evidence of fraud involving in-person voting in Georgia for at least the past nine years, (b) the refusal of the legislature at both its 2005 and 2006 sessions to address the areas in which there is abundant evidence of fraud: fraudulent registration and fraudulent absentee voting, (c) the demonstrably partisan nature of the statute, which discourages voting by groups more likely to be Democrats, to the benefit of the Republican-dominated legislature, and (d) the regulations of the State Election Board (“SEB”), which provide for the issuance of a Georgia voter ID based solely on the information contained in the voter registration application.

**Third**, it was not “**necessary** to burden the . . . rights” (*Burdick*, 504 U.S. at 433) of Georgia voters in order to prevent fraud involving in-person voting, because (a) the State has already adopted numerous other measures to prevent, deter, detect and punish fraudulent in-person voting, and (b) these measures have in fact been shown to be effective as evidenced by the fact that there has not been a single instance of fraud involving in-person voting in more than nine years. *See Burdick*, 504 U.S. at 434; *Dunn*, 405 U.S. at 343 (“It is not sufficient for the State to show . . . a very substantial state interest. . . . In pursuing that important interest,

the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity.”).

**Fourth**, because the burden imposed by the 2006 Act on the right to vote of hundreds of thousands of poor, elderly and African-American voters is severe, the 2006 Act is invalid because it is not “*narrowly drawn* to advance a state interest of compelling importance,” as required by *Burdick*. *Id.* at 434 (emphasis added). The record demonstrates that the state’s interest in preventing fraud, not only can be, *but has been accomplished* by other less restrictive means. The requirement that registered voters present a government-issued Photo ID before being allowed to vote in person is, therefore, invalid. *See Dunn*, 405 U.S. at 353 (holding that Tennessee’s waiting period for voters was not “the least restrictive means necessary for preventing fraud [because] . . . Tennessee has at its disposal a variety of criminal laws . . . to detect and deter whatever fraud may be feared”).

**Fifth**, the Photo ID requirement is demonstrably “*unreasonable*” for at least two reasons: (1) there is a *total absence of evidence of fraud* involving in-person voting that would make it necessary to impose a Photo ID requirement on in-person voting, and (2) the 2006 Act, as implemented by the SEB regulations, will do nothing to prevent fraud involving in-person voting. Cox Dep. II, p. 54; Rogers Dep., pp. 52-53, 54-55.

**Sixth**, the 2006 Act is *discriminatory* because it adversely affects African-American voters and elderly voters far more than it affects white voters and younger voters. According to a June 19, 2006 Press Release issued by the Secretary of State, an “Analysis of State Databases Reveals Nearly 700,000 Registered Voters Lack Valid Driver’s License or State-Issued Georgia ID,” and will, therefore, be adversely impacted by the 2006 Act. (Exhibit B). These numbers were derived by matching the names on the Secretary of State’s state-wide list of registered voters against the names, dates of birth, and social security numbers shown on the Department of Driver Services’ list of people having Georgia driver’s licenses and Georgia ID cards. *Id.* Ms. Kathy Rogers, the Director of Elections, stated that she “was asked by Mr. Dunn and . . . by Mr. McIver [Vice Chair of the State Election Board] to reconsider matching the data in that the results of it could potentially be damaging to the *Common Cause* case.” Declaration of Ron Hockensmith, Exh. 9 (Transcript of SEB Meeting, p. 27 (June 22, 2006)).

The Secretary of State’s analysis of the data shows that the 2006 Act could have a direct impact on 675,000 voters who represent 13% of all registered voters in Georgia, and that the Act discriminates in particular against African-American voters, as compared to voters who are white, and against voters who are over 65, as

compared to voters who are younger. According to a June 23, 2006 Press Release by the Secretary of State (Exhibit C): “African-American registrants . . . are more likely to lack a license or Georgia ID card than white voters. While African-Americans currently comprise 27.8% of the voter roll, they represent 35.6% of those who lack a driver’s license or Georgia ID.” The Secretary of State also reported that “[n]early one quarter of all registered voters age 65 or older do not have a driver’s license or Georgia ID. For elderly African-Americans, the numbers are even more dramatic – 33.2% of African-American registrants age 65-plus do not have a license or Georgia ID.” *Id.*

Plaintiffs are, therefore, entitled to a preliminary injunction prohibiting defendants from enforcing or applying the 2006 Act because they have established (1) a substantial likelihood of success on the merits; (2) that a preliminary injunction is necessary to prevent irreparable harm to the fundamental constitutional right to vote of hundreds of thousands of Georgians who are lawfully registered and entitled to vote, but who do not have a government-issued Photo ID; (3) the injury to the constitutional rights of the plaintiffs’ members, and the hundreds of thousands of other Georgia voters who do not have a government-issued Photo ID from the denial of preliminary injunctive relief outweighs by far any injury to the defendants from the grant of such relief; and (4) the grant of a

preliminary injunction would serve the public interest. *Common Cause v. Billups* (Order of October 18, 2005 (“Order”), pp. 70, 71, 119-120).

### **Statement of Facts**

In the time since this Court enjoined the 2005 Act, five facts have become apparent: (1) the 2006 Act continues the imposition of a significant burden on those without photo IDs, who are the least mobile members of our society, because it only adds *a single additional location* at which each voter may obtain a photo ID card for voting, and all of the attendant (and significant) costs such as taking time off work, traveling to this location, and standing in line remain; (2) a comprehensive study by the Secretary of State shows that approximately 675,000 registered voters in Georgia lack the most common type of state-issued photo ID (a driver’s license or ID card issued by the state Department of Driver Services (“DDS”)), which means that the number of voters targeted and burdened by *any* photo ID requirement is enormous; (3) in passing the 2006 Act, the Georgia Legislature made no effort to determine the number of people that would need Photo IDs, and as evidenced by its allocation of funds to purchase *a maximum of 10,000 voter ID cards*, it did not plan properly to avoid disenfranchising virtually every person in Georgia who does not currently have a Photo ID; (4) there is still absolutely no evidence of in-person voter fraud that would necessitate any action

on the part of the State to “deter” this hypothetical fraud without addressing the voter fraud known to exist in absentee balloting and voter registration; and (5) pursuant to the recently enacted SEB regulations, a qualified voter (or a scam artist) will be issued a Photo ID based on filling out a Voter Registration Application already on file. Because Georgia does not require any documentation to register in person, issuing a Photo ID based on a person’s oath that he is who he says he is does not provide any additional proof of identity. It merely adds a trip to the registrar’s office.

Based upon these developments, and the well-established law relied upon by the Court in its October 18, 2005 Order, the Court should enjoin the 2006 Photo ID Act because it imposes an undue, improper and completely pointless burden on the right to vote only of those individuals least able to bear it.

**I. This Court Enjoined the 2005 Act, Finding No Evidence of In-Person Voter Fraud in Georgia, and Finding that the Act Unduly Burdened the Right to Vote**

In October 2005, after an evidentiary hearing, this Court entered a preliminary injunction prohibiting the defendants from enforcing the 2005 Act, which amended Section 21-2-417 of the Georgia Election Code (Ga. Laws 2005, p. 253; O.C.G.A. § 21-2-417) to require Georgia registered voters to present an

official picture ID issued by the State of Georgia, the federal government, or an Indian tribe before they could be admitted to the polls to vote in person.

This Court enjoined the 2005 Act because the evidentiary record showed, among other things, that:

- the Photo ID requirement imposes “severe” restrictions on the right to vote (Order, p. 94);
- absentee voting simply is not a realistic alternative to voting in person because it is not reasonably available for most voters who lack photo ID (Order, p. 92);
- existing Georgia law already requires Georgia voters to identify themselves at the polls either (a) by presenting one of seventeen forms of identification or (b) by signing an affidavit swearing under oath that they are the person named and that they live at the address reflected on the official voter registration list, Transcript, pp. 40-41 (*see* Order, p. 9);
- Georgia already has sufficient procedures in place to detect voter fraud (Order, pp. 56-57);
- most violations of Georgia’s election laws are felonies, and no evidence indicates that these criminal penalties have insufficiently deterred in-person voter fraud (Order, pp. 56-57 & 83);<sup>4</sup>
- in the nine years prior to the October 2005 hearing in this action, not a single instance of fraud involving in-person voting (as opposed to fraudulent voter registration or fraudulent use of absentee ballots) was

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<sup>4</sup> *See also* Cox Dep. II, p. 46 (Secretary of State Cox has no evidence that Georgia’s criminal penalties have been insufficient in eliminating voter impersonation).

reported to the Secretary of State or the State Election Board (Order, p. 56; Transcript PX1 & 2; *see also* Order, pp. 55, 95); and

- fraudulent in-person voting has not been a problem in Georgia.<sup>5</sup>

In addition, the Court found that the Photo ID requirement is likely not rationally related to the interest proffered by the State in support of its enactment, fraud prevention, and that this proffered State interest was likely pretextual. The Court found that the Photo ID requirement “likely is not rationally based on [the state’s alleged] interest [in preventing voter fraud]” because the 2005 Act did nothing to combat the fraud known to exist in absentee balloting and voter registration, while addressing non-existent in-person voter fraud at great expense to taxpayers. *See* Order, p. 84 (“[T]he Photo ID law thus does nothing to address the voter fraud issues that conceivably exist in Georgia.”).

These and other facts led this Court to rule that the plaintiffs were likely to prevail on their claims that the 2005 Photo ID requirements would place an unconstitutional, undue burden on the right to vote and would impose a poll tax. Order, p. 120.

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<sup>5</sup> *See* Order, p. 83. At the October 2005 hearing on the Plaintiffs’ Motion for Preliminary Injunction, the Secretary of State testified that while many complaints of voter fraud concerning *absentee* ballots had been brought to her attention, she is not aware of a single case of alleged voting fraud concerning *in-person* voting. Transcript, pp. 14-15.

## **II. The General Assembly Enacted A Second Version of the Photo ID Requirement**

After this Court enjoined implementation of the 2005 Act, the State of Georgia repealed the statute and replaced it with nearly identical Photo ID requirements for in-person voting. The 2006 Act was passed by the Senate on Tuesday, January 24, and by the House on Wednesday, January 25, and was signed by the Governor on Thursday, January 26. A copy of the 2006 Act “as passed” by the General Assembly and signed by the Governor, is attached hereto as Exhibit C.<sup>6</sup>

The 2006 Act retains several unconstitutional aspects of the 2005 Act.<sup>7</sup> The two Acts are identical in at least two key respects. First, both Acts do away with prior Georgia law that allowed voters to affirm their identity under oath when

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<sup>6</sup> The State of Georgia did not submit its application for pre-clearance of the 2006 Act until almost a month later on February 21, 2006, and pre-clearance was granted by the United States Department of Justice on April 21, 2006. Cox Dep. II, pp. 11-12. Significantly, the notice of pre-clearance specifically noted that regulations implementing the Act and governing the state’s issuance of voter IDs would themselves also have to be pre-cleared. *See* April 21, 2006 letter from DOJ to the Attorney General attached hereto as Exhibit E. These regulations were first proposed on May 2, 2006, revised on May 18, 2006, and finally approved on June 19, 2006. The regulations were pre-cleared on June 27, 2006, three weeks before the July 18, 2006 primary election. *See* Cox Dep. II, pp. 12-13.

<sup>7</sup> For the Court’s convenience, a red-lined comparison of the alterations of the 2005 Act by the 2006 Act is attached hereto as Exhibit F.

voting in person. Under both the 2005 and 2006 Acts, if a person cannot present a Photo ID, he or she will not be issued a ballot or allowed to vote. *See* Transcript, pp. 40-41; Exhibit D. Although the 2006 Act, like the 2005 Act, allows for provisional ballots for those without a Photo ID, such ballots will only be counted if the voter travels to the county registrar's office (not their local precinct) and presents a Photo ID within two days of the election. *See* O.C.G.A. § 21-2-417(b) and O.C.G.A. § 21-2-419.<sup>8</sup>

Second, like the 2005 Act, the 2006 Act applies these burdens solely to registered voters who vote **in person**.<sup>9</sup> In neither statute did the General Assembly impose a Photo ID requirement or any other identification requirement on (a) absentee voters or (b) as a condition of registering to vote. By retaining the unnecessary burden of a Photo ID to vote in person, the 2006 Act fails to cure the constitutional infirmities of the 2005 Act.

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<sup>8</sup> In discussing this provision in the 2005 Act, the Court concluded: "The ability to vote a provisional ballot thus is an illusion." Order. p. 93.

<sup>9</sup> According to the official records of the Secretary of State, approximately 90% of all Georgians who voted in the November 2004 general election did so in person at the polls, rather than by casting absentee ballots. Transcript of Hearing on Plaintiffs' Motion for a Preliminary Injunction, October 12, 2005 ("Transcript"), pp. 37-39 & PX4. The same data shows that white voters are roughly twice as likely to use absentee ballots as African-American voters. *Id.*

The 2006 Act contains three primary changes from the 2005 Act: (1) it eliminates the direct fees for obtaining a Photo ID for voting purposes; (2) it provides an additional location at which each voter may obtain a suitable Photo ID card for voting (his or her county registrar's office); and (3) along with SEB regulations, it altered the documentation required to obtain a suitable Photo ID for voting.

The 2006 Act amends O.C.G.A. § 40-5-103 by striking the previous subsection (d) in the 2005 Act, which had required a voter to execute an affidavit of poverty to obtain a Photo ID without charge from the DDS. Now, to obtain a free Photo ID, the 2006 Act instead requires the voter to “produce evidence that he or she is registered to vote in Georgia” and swear “that he or she desires an identification card in order to vote . . . and that he or she does not have any other form of identification that is acceptable under Code § 21-2-417.”

The 2006 Act also adds a new code section (O.C.G.A. § 21-2-417.1) that requires each county's board of elections to issue a “Georgia voter identification card,” which contains a photograph of the voter, upon presentation of certain types of identifying documents that are only vaguely described in the statute. The new section further specifies that the county boards must issue this card without charge

to voters residing in the county. Other details concerning the new voter ID card were left for the SEB to establish through regulations.<sup>10</sup>

The SEB's regulations state that an individual who requests a Georgia Voter ID must provide the following information before being issued a card: (1) a "nonphoto identity document" that includes the applicants full name and date of birth; (2) documentation showing the applicant's date of birth; (3) evidence that the applicant is registered to vote in the state of Georgia; and (4) documentation showing the applicants' name and principal residence address. SEB Rule 183-1-20.01 (4)(a).

The regulations further provide that an applicant may establish each of the required characteristics by using, among other things, a Voter Registration Application. *See id.* at (4)(a)(3) & (4)(b)(4) (application may be used to establish registration); *id.* at (4)(b)(2)(iii) & (4)(b)(3) (may be used to establish date of birth); *id.* at (4)(b)(5) (may be used to establish address); *see also* Rogers Dep., pp. 33-34.

Thus, the regulations expressly require the issuance of a Photo ID even when a prospective voter does not bring any documentation to the registrar's office. Upon arrival, one would need only to fill out new voter registration application *in*

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<sup>10</sup> *See* Exhibit A.

*the office*, and then use that application to obtain a Georgia Voter ID Card. Both the Secretary of State, and the Director of Elections confirmed that this was the case. *See Id.* § 183-1-20-.01(4)(a)(3), (b)(2)(iii) & (b)(4); *see also* Cox Dep. II, p. 50; Rogers Dep., pp. 50-52. Thus, under the 2006 Act a voter ID card can be obtained with no documentation.

### **III. The 2006 Act Imposes a Severe Burden on the Right to Vote on Those Voters Least Able to Bear It.**

The 2006 Act, like the 2005 Act that preceded it, applies only to the hundreds of thousands of Georgia citizens who do not have an approved form of Photo ID, and thus imposes a severe burden on the right to vote of the poor, elderly and infirm, who are the least mobile members of the electorate, who will have the greatest difficulty in complying with the requirements of the statute and who do not own, cannot drive or do not have access to a car. While the 2006 Act provides an additional location for a voter to obtain a voter ID within his or her home county, and eliminates some, but not all, of the fees and costs associated with obtaining a Photo ID, the burden placed on Georgia voters without a Photo ID remains severe.

**A. The 2006 Act Requires Voters Without a Photo ID to Make an Additional (Unnecessary) Trip to a DDS Office or Their County Registrar's Office as a Prerequisite to Voting**

The effect of the 2006 Photo ID Act is to require every registered voter who wishes to vote in person and who does not have an approved form of Photo ID to go to the registrar (or to go to a DDS office) to get a Photo ID. This Court chronicled the burdens of obtaining a Photo ID from a DDS office in its October 18, 2005 Order. *See* Order, pp. 86-87, 94. Despite allowing voters to obtain a Georgia voter ID at their county registrar's office, the 2006 Act still imposes a severe burden.

The SEB's regulations concerning the issuance of Georgia Voter Identification Cards require each county to provide a place within the registrar's main office location to process applications and distribute voter ID cards. Rules of State Elections Board, Georgia Election Code § 183-1-20-.01(3)(a). However, these offices are only required to be open a minimum of eight hours per day "***on Monday through Friday of the week before the final primary, election, or run-off election day.***" *Id.*, § 183-1-20-.01(3)(c). Thus, many voters are required to miss work or ask friends or relatives to miss work in order to drive them to the

Registrar's office to obtain a Photo ID – something many Georgians cannot afford.<sup>11</sup>

Just as with the 2005 Act, the special trip required to comply with the Photo ID requirements in the 2006 Act presents an especially high obstacle for registered voters who are (a) **poor**, do not own a car or truck, and do not have a passport because they cannot afford to travel outside the United States;<sup>12</sup> (b) **elderly** and no longer drive and do not have a valid passport;<sup>13</sup> (c) **visually impaired** and are unable to drive or travel on a passport;<sup>14</sup> (d) **physically impaired** and are unable to

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<sup>11</sup> See e.g., Declaration of Larry Dewberry, dated September 27, 2005, ¶ 5 (not able to take time off from work to obtain Photo ID); Cox Dep. II, Exh. 8 (census data).

<sup>12</sup> See e.g. Declaration of Eva Jeffrey, dated September 29, 2005, ¶ 4 (cannot afford a car); Declaration of Cheryl D. Simmons, dated September 28, 2005, ¶ 5 (same); Declaration of Larry Dewberry, dated September 27, 2005, ¶ 5 (cannot afford car or to take time off from work to obtain Photo ID); Declaration of Ronnie Gibson, dated September 26, 2005, ¶ 5 (cannot afford car); Declaration of Willie Boyer, dated September 26, 2005, ¶ 5 (same); Declaration of Katherine Jackson, dated September 26, 2005, ¶ 5 (same).

<sup>13</sup> See Declaration of Ruth Butler, dated September 28, 2005 (89 year old with no car); Declaration of Rosa Brown, dated April 30, 2006 (94 year old with physical impairment and limited means).

<sup>14</sup> See e.g. Second Declaration of Eleanor Whittenburg, dated June 28, 2006, ¶¶ 2, 4 & 5 (legally blind); Declaration of Rosa Brown, dated April 30, 2006, ¶¶ 7 & 8 (legally blind); Declaration of Pearl Kramer, dated May 1, 2006, ¶¶ 6 & 7 (visual impairment); Declaration of Luanna Miller, dated September 28, 2005, ¶ 5 (legally blind); Declaration of Minnie Bridges, dated September 26, 2005, ¶¶ 5, 6

drive or travel on a passport;<sup>15</sup> and (e) **residents of retirement or nursing homes** who, by choice or necessity, do not have driver's licenses or passports.<sup>16</sup>

The time, inconvenience, and expense of traveling to a DDS office or registrar's office to obtain a Photo ID card presents a significant hardship and burden on those referenced above and the hundreds of thousands of other registered voters who do not approved forms of Photo IDs. For example, Irene Laster is 88 years old, and has lived in Plains, Georgia since 1925.<sup>17</sup> While she is a diligent, registered voter, she has no photo ID, and has no use for one in her daily life.<sup>18</sup> She has arthritis, and she neither has a car, nor access to public transportation. Under the 2006 Act, before she may vote in any future election,

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(physical and visual impairments create logistical problems for obtaining a Photo ID).

<sup>15</sup> See e.g. Second Declaration of Eleanor Whittenburg, ¶ 2 (requires a walker); Declaration of George Cliatt, dated April 30, 2006, ¶¶ 7-9 (poor health makes it difficult to take bus or walk long distances and would need to travel almost 10-miles farther from his home to obtain a voter ID than to vote in person); Declaration of Annie Johnson, dated April 30, 2006, ¶¶ 7 & 8 (anemic and his high blood pressure).

<sup>16</sup> See e.g. Declaration of Pearl Kramer, dated May 1, 2006, ¶¶ 2, 4, 6 & 7 (81 year old resident of assisted living facility with physical impairment that makes travel to a DDS office or county registrar's office hardship).

<sup>17</sup> Declaration of Irene Laster, dated April 30, 2006, ¶¶ 1-2.

<sup>18</sup> *Id.*, ¶¶ 3, 4, & 7.

Ms. Laster must travel to her county's registration office, which is located in Americus, Georgia, approximately eleven miles from her residence. She cannot make this trip without incurring a significant cost in terms of fuel, time and other hardship. By contrast, her voting precinct is only a half-mile from her home, and she makes this trek willingly.<sup>19</sup> Of course, Irene Laster is not alone, even in the small town of Plains, Georgia. *See* Declaration of Annie Johnson, dated April 30, 2006, ¶¶ 1, 2 & 7 (76-year-old voter who resides in Plains but has no Photo ID and no access to transportation); Declaration of George Cliatt, dated April 30, 2006, ¶¶ 1, 2 & 7 (74-year-old Plains voter in similar circumstances); Declaration of Minnie Bridges, dated April 30, 2006, ¶¶ 1, 2 & 7 (86-year-old Plains voter in similar circumstances); Declaration of Rosa Brown, dated April 30, 2006 (94 year old Plains voter in similar circumstances).

While these voters residing in rural Plains, Georgia face a significant burden, the burden is also significant for those voters who reside in counties with larger populations. *See e.g.*, Declaration of Pearl Kramer, dated May 1, 2006 (Atlanta resident); Second Declaration of Eleanor Whittenburg, dated June 28, 2006, ¶¶ 4 & 5 (85 year old resident of Floyd County who can get to the polls with the assistance of personnel in her assisted living facility, but would be required to rely on a

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<sup>19</sup> *Id.*, ¶¶ 7, 10.

relative or pay a taxi to take her to the registrar's office to obtain a voter ID). In addition to forcing voters to travel potentially long distances to the county registration office, the provisions of the 2006 Act would likely force these voters to stand in long lines. For example, in Fulton County, the data from the Secretary of State indicates that there are 87,906 voters who do not have a DDS-issued ID card. *See* Declaration of Ron Hockensmith, dated July 4, 2006, Exh. 7. Under the 2006 Act and its regulations, Fulton County receives one machine for issuing Voter ID Cards. *See* Rogers Dep., p. 17. When compared to 269 voters in Echols County without a DDS-issued ID, the lines at the registration office in Fulton County will be especially long, particularly if the voters learn of the requirement for the first time at the polls and are required to obtain a Photo ID within forty-eight hours in order to have their provisional ballot counted. *See* Declaration of Ron Hockensmith, dated July 4, 2006, Exh. 7; Exhibit I; *see also* Order, p. 86 ("It is beyond dispute that the DDS service centers, particularly those in suburban areas near Atlanta, frequently have lengthy lines, and that obtaining a driver's license or Photo ID at a DDS service center often may require several hours of one's time.").

Thus, offering Photo IDs in one location in each county does nothing to address the underlying issue: that requiring a voter to make an additional (and unnecessary) trip to a government office to obtain a Photo ID creates a burden on

the poorest and least mobile voters that is not imposed on the rest of the voting population that already have a Photo ID.<sup>20</sup> The 2006 Act's removal of the obviously unconstitutional \$20 fee for a Photo ID does not relieve a registered voter who does not have an approved form of Photo ID of the burden, inconvenience, and expense of having to spend the time and incur the cost of traveling by bus or taxi to an office that may be located in another city, miles from their homes or places of work to obtain a Photo ID in order to vote in person.<sup>21</sup> For many Georgia voters, the burden imposed by the 2006 Act is severe.

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<sup>20</sup> Order, pp. 22-23; *see e.g.*, Declaration of Ruth White, October 3, 2005, ¶ 9.

<sup>21</sup> In its Order, this Court correctly concluded that the GLOW Bus did not alter its conclusion that the Photo ID requirement imposes a significant impact on the right to vote. Order, pp. 87-88. There is only one such bus for the entire state. *See* Order, p. 87. The court concluded that unless some effort is made to notify the public that the GLOW Bus will be in a particular area on a particular date, many voters simply would not know of the GLOW Bus alternative or would not be able to make arrangements for transportation to take them to the GLOW Bus. Order, p. 87. Furthermore, voters have had difficulty in ascertaining the GLOW Bus' schedule and have been provided inconsistent information by DDS regarding the schedule. *See* Declaration of Martina Robinson, dated November 2, 2005, ¶¶ 8, 9 & 10 (explaining circumstances in which certain Georgia voters were denied access to the GLOW bus); Order, p. 87. The GLOW Bus is not accessible for those who cannot climb steps. Order, pp. 87-88.

**B. A Comprehensive Study Conducted by the Secretary of State Shows that the Number of Potentially Disenfranchised Voters is Enormous**

Based upon the best evidence available, more than 675,000 registered voters lack the most common type of Photo ID. Specifically, in preparation for a possible voter education initiative with regard to the Photo ID legislation, the Secretary of State's office conducted a study comparing the list of registered voters to the DDS data file of persons issued driver's licenses or state ID cards, using the person's name, date of birth, and social security number.<sup>22</sup> This study found that 675,684 voters did not have a valid driver's license or a state ID card that matched their voter registration information—representing 13.6% of all voters. Of these 675,000 voters who lack a state issued Photo ID, 502,910 of them, or nearly 75%, are on the “active” voter rolls, which means that they voted in at least one of the last two election cycles.<sup>23</sup>

The study also confirmed that the burden of obtaining a Photo ID will fall disproportionately on elderly and minority voters. In fact, the study found that

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<sup>22</sup> June 23, 2006 Press Release by Secretary of State Cathy Cox, “Demographic Analysis Shows That Registered Voters Lacking a Driver's License or State-Issued Georgia ID Card Are Disproportionately Elderly and Minority”. Attached as Exhibit C, available at <http://www.sos.state.ga.us/pressrel/062306.htm>.

<sup>23</sup> *Id.* at 2.

22.8% of all voters over the age of 65 lack a DDS-issued ID card.<sup>24</sup> Among African-Americans, the numbers are even more dramatic, as 33.2% of all African-American voters over the age of 65 are without Photo IDs, and African-American voters, in general, are more likely to be without a Photo ID.<sup>25</sup> In the words of the Defendant, Secretary of State Cox: “There can be no more striking evidence of the flawed public policy behind Georgia’s current photo ID requirement than the fact that nearly a quarter of our state’s elderly voters, and fully a third of older African-American voters, lack the most common form of Photo ID now required by Georgia Law [in order to vote]. . . . It is not surprising to me, but it should shock the conscience of those who wrote, and voted for, and signed this ill-advised legislation . . . .”<sup>26</sup>

At its meeting on May 2, 2006, the SEB requested the Secretary of State’s office to conduct the study comparing the voter registration list to those people with DDS ID cards. But, after the SEB’s request, a member of the SEB and the SEB’s attorney approached Ms. Rogers and *specifically asked her to reconsider*

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (stating that 17% of African-American voters lack IDs, while only 12% of white voters lack IDs).

<sup>26</sup> *Id.* at 1-2.

*doing the data match* because “the results of it could be potentially damaging to the Common Cause case.”<sup>27</sup> Thus, members of the SEB specifically asked the Secretary of State’s office to avoid learning (and disclosing) the number of voters affected by the 2006 Act because it would negatively impact this very litigation.

While the Secretary of State’s estimate may include some registered voters with a Photo ID, including persons with passports and other acceptable Photo ID, it demonstrates that the number of voters affected is quite large. Indeed, in addition to this concrete evidence that at least half a million voters could be disenfranchised, other estimates also place the number of disenfranchised voters in the hundreds of thousands. Governor Perdue estimated that 300,000 Georgians do not have a driver’s license or other acceptable photo identification that could be used at the polls.<sup>28</sup> According to the U.S. Census Bureau, 142,171 African-American households are without access to a car, as compared to 89,000 white households. *See Cox Dep. II, Exh. 8, U.S. Census Source Data for Chart 14.* Also, AARP and the League of Women Voters have estimated that over 152,000

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<sup>27</sup> Declaration of Ron Hockensmith, dated July 4, 2006, Exh. 9 (SEB Meeting Transcript, p. 27).

<sup>28</sup> *See Cox Dep. II, Exh. 7 (Jim Tharpe & Nancy Badertscher – “Voter ID Bill Likely To Be Law” (Atlanta Journal Constitution) (April 2, 2005), attached hereto as Exhibit G).*

Georgians who actually voted in the 2004 general election were over 60 and did not have a Georgia driver's license.<sup>29</sup>

In spite of estimates that those affected by the Photo ID Act numbered in the hundreds of thousands, the General Assembly did not study the potential impact of the 2006 Act prior to its passage. Moreover, the SEB refused to delay the effective date of the 2006 Act until after the 2006 primary and general elections, even after the study was conducted.

**C. The Number of Affected Voters Makes it Virtually Impossible to Issue Enough Photo IDs Before the November Election, or the July Primary to Avoid Disenfranchising Voters**

As noted above, the formal regulations concerning voter IDs were not adopted by the SEB until June 19, and only became effective on June 27, 2006, when they were pre-cleared by the Justice Department less than three weeks (thirteen business days) before the July 18 primary election.<sup>30</sup>

The State has contracted with a vendor to provide the equipment and the voter ID cards. The contract with the vendor provides for a maximum of 10,000

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<sup>29</sup> See Transcript, PX 2 (Cox letter to Governor). This is consistent with the Secretary of State's study, which found that 165,458 voters over the age of 65 did not have DDS-issued IDs. See also Cox Dep. II, p. 35. Spreadsheet "Not Matched Results From DDS Matching", Declaration of Ron Hockensmith, dated July 4, 2006, Exh. 7.

<sup>30</sup> See June 27, 2006 letter from DOJ to Attorney General, attached hereto as Exhibit H.

voter ID cards in the first year. Any additional cards will cost the State \$7.00 per card. *See* Declaration of Ron Hockensmith, Exh. 3 (contract with vendor which provides that “[a]ny cards procured and used over the estimated maximum 10,000 in Year One will have a per unit cost of \$7.00”). There has been no money allocated for these additional IDs. Therefore, the State is not prepared to provide voter IDs to the hundreds of thousands of Georgia voters who need them. Without these free IDs being available through county registrars, the 2006 Act differs very little from the 2005 Act that was enjoined by this Court.

Further, even after the Secretary of State announced the results of her study and identified the voters that do not have DDS-issued ID cards, the SEB refused to notify these voters by mail of the requirements of the new regulations or that they would not be allowed to vote at the July 18 primary without a Photo ID. *See* Exhibit I. These voters, if not already deterred from voting by the Photo ID requirement, will be required to vote by provisional ballot and to return to the registrar’s office within two days to obtain a Photo ID and validate their ballots. The number of affected Georgians is so large as to make compliance with the 2006

Act prior to the 2006 primary and general election a physical impossibility for many of those voters and for election officials.<sup>31</sup>

**D. The 2006 Act, Like Its Predecessor, Has a Disparate Impact on African-American Voters**

The new Photo ID requirement will also have a disparate impact on the right to vote of registered voters who are African-Americans, as compared to voters who are white, because, according to recent data published by the U.S. Census Bureau, African-American voters in Georgia, as a group, (a) have only half the per capita income of whites, (b) are almost three times as likely to live in poverty as whites, (c) are three times less likely to own or have access to a motor vehicle than are whites, and (d) are half as likely to vote absentee as white citizens of this country. Cox Dep. II, Exh. 8 (Census Survey File 3 (SF3) HCT33B). As discussed above, this fact is also reflected by the study conducted by the Secretary of State, which showed that African-American voters were more likely than white voters to be without a DDS-issued Photo ID card.

The Voting Section staff of the United States Department of Justice prepared a memorandum analyzing the 2005 Act and concluding that it would have a

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<sup>31</sup> Cathy Cox wrote that the Photo ID requirement is “(1) unnecessary, and (2) creates a very significant obstacle to voting on the part of hundreds of thousands of Georgians...” Transcript, p. 21 & PX2; *see also* Transcript, pp. 44-45; Cox Dep. I, pp. 22-23.

discriminatory effect on minority voters. While the conclusion drawn by the staff was overridden by the Section Chief in what was apparently a political decision, the analysis of that memo, which is attached hereto as Exhibit J, is informative in evaluating the 2006 Act.

**E. The Ability to Vote Absentee is Not an Adequate Substitute for In-Person Voting.**

The Court correctly concluded under the 2005 Act that voting by absentee ballot is not an adequate alternative for many voters who lack Photo ID. *See* Order, pp. 61-64; 89-92. To vote absentee by mail, a voter must first obtain an absentee ballot, in which a voter relies upon the registrar's office to promptly verify the information on the application for a ballot and mail the ballot to the voter. Transcript, pp. 46-47. The ballot must be hand delivered to the registrar's office, not the voter's local precinct, or the ballot must be mailed sufficiently early that it arrives before 7:00 p.m. on election day. Transcript, pp. 47-48. Significantly, if the ballot arrives late, the vote (of a voter who is not in the military and does not reside overseas) will not be counted even if it is postmarked prior to election day. Transcript, pp. 47, 52.

Should information be disclosed in the course of campaigning leading up to election day that changes a voter's mind as to who should receive his or her vote, a voter has the right to cancel the absentee ballot and vote in person (which would

require a photo ID), but a voter may not simply change an absentee ballot.

Transcript, p. 50.

Secretary of State Cox testified concerning several issues that demonstrate that absentee voting is not the equivalent of voting in person. She described her experience over the years as follows:

We've had incidences of absentee ballots being taken out of mailboxes. We have incidents of people picking up ballots, and they may or may not actually get mailed or get returned to the election office. There are just a variety of problems that we have encountered in the handling of absentee ballots...

Transcript, pp. 16-18. Experiences like these cause Georgia voters to view absentee ballots as an unacceptable alternative.

For example, Plaintiff Clara Williams cannot confidently vote absentee because of problems she has had with that manner of voting in the past. *See* Declaration of Clara Williams, ¶ 5, dated July 3, 2006. In the past, Ms. Williams attempted to assist some of her neighbors in completing applications for absentee ballots. Although the ballots were mailed well in advance of the deadline listed on the application, only two of the ten or eleven applicants actually received absentee ballots. *Id.* Ms. Williams' inquiries to elections officials did not resolve the problem and she eventually had to arrange for transportation to allow the applicants who did not receive absentee ballots to vote in person. *Id.* at ¶ 6. Of

course, under the 2006 Act, those without a Photo ID would not have that option. *Id.* Other voters face the same problems. *See* Declaration of Tyrone Brooks, Sr., dated June 28, 2006, ¶¶ 2-3 (stating that voters distrust absentee ballots because of concern that their ballots may not be counted and that their ballots may not be handled in a way that will protect the secrecy of their votes).

The Court considered additional evidence that illustrates the burden many Georgians face if they are denied the traditional means of voting in Georgia, at the polls, and must vote absentee, which requires voters to complete forms and comply with several procedural requirements. Order, pp. 34-35. In Georgia, 18.5% of African-Americans and 11.8% of Caucasian, non-Hispanic individuals have no high school diploma. *Id.* 9% of African-Americans and 5.5% of Caucasian, non-Hispanic individuals in Georgia who are at least twenty-five years of age have less than a ninth grade education. *Id.* Further, 23% of Georgians are at or below Level I Literacy, which means that they would probably not be able to complete the application required for an absentee ballot. Cox Dep. II, Exh. 9; *see* Cox Dep. II, pp. 37-38 (voting absentee requires following detailed instructions).

In addition, requiring voters without Photo ID to vote absentee will negatively impact African-American voters who are less inclined to vote absentee. In the November 2004 general election, approximately ten percent of Georgia's

voters voted by absentee ballot. Order, p. 63. Of African-American female voters, approximately 7% (46,734) voted by absentee ballot, compared to approximately 12% (189,143) of Caucasian female voters. *Id.* Of African-American male voters, approximately 6% (26,144) voted by absentee ballot, while approximately 11% (150,722) of Caucasian male voters voted absentee. *Id.*

**IV. The Precise Interest Put Forth by the State Does Not Make it Necessary to Burden the Right to Vote in the Manner Discussed Above.**

The 2006 Act, adopted after and in response to the Court's October 18 Order, strengthens the Court's conclusion that the Photo ID requirement "likely is not rationally based on [the state's alleged] interest [in preventing voter fraud]." Order, p. 95.

**A. The 2006 Act and Its Accompanying Regulations Ensure that the Scheme Cannot Prevent Fraud**

The few changes included in the 2006 Act and its accompanying regulations underscore the inability of the Photo ID requirement to prevent in-person voting fraud. First, the 2006 Act did nothing to combat the fraud known to exist in absentee balloting and voter registration, while addressing non-existent in-person voter fraud. Second, the implementing regulations promulgated by the SEB remove any fraud prevention possibility. *See* Section II, *supra*. This scheme provides that an applicant may obtain a Photo ID by either completing a Voter

Registration Application or relying on a Voter Registration Application already on file with the registrar. *Id.*

Thus, the 2006 Act requires *no more documentation* (1) than is required by Georgia law to register to vote in the first instance or (2) that would have been required under the pre-photo ID regime. *See Rogers Dep.*, pp. 50-52; prior O.C.G.A. § 21-2-417.

When these facts are combined with the large number of documented cases of voter registration fraud, it is clear that obtaining a Georgia Voter ID card does nothing to increase the reliability of a potential voter's identification. Requiring a voter to go through this process does not do anything to combat the alleged (although non-existent) potential for imposter voting. *See Cox Dep. II*, pp. 50-51.

**B. The Evidence of Voter Fraud in Georgia Has Not Changed Since the Court's October 18 Order, and There Is Still No Evidence of In-Person Voter Fraud**

From the time of this Court's order enjoining the 2005 Photo ID Act to the time of enactment of the 2006 Act, the Secretary of State did not waver from her opinions with regard to in-person voter fraud. Prior to this Court's October 18, 2005 Order, the Secretary of State testified that she had not heard of any complaints about voter impersonation in the previous nine years. *Cox Dep. II*, pp. 42-43. It has now been ten years, and Secretary of State Cox has still heard of no

complaints to her office, to any of her assistants or to the SEB involving fraud and in-person voting. *Id.*, p. 43; *see also Id.*, pp. 5, 7. Moreover, the state has offered no more than mere speculation that in-person voter fraud actually occurs in Georgia. *See Id.*; Order, pp. 41, 83.

In contrast, Secretary of State Cox and her office have received numerous complaints regarding fraudulent absentee balloting since this Court's October Order. *See Cox Dep. II*, pp. 5-7 (noting several complaints regarding absentee ballots).

**C. The General Assembly Ignored the Facts Regarding Voter Fraud in Georgia in Enacting the 2006 Act**

While the 2005 Photo ID requirement was under consideration, the Secretary of State advised members of the General Assembly and the Governor that in-person voter fraud is not a problem in Georgia:

In the past 9 years, neither my staff nor I can recall a single case or complaint of a voter impersonating another voter at the polls—the issue sought to be corrected by mandatory photo identification. And had this been occurring, some voter surely would have complained upon finding that someone else had voted under their name. It hasn't happened.

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The [Photo ID requirement] attempts to solve a problem that does not exist....

Transcript, PX1; *see also* Transcript, PX2 (Cox Letter to Governor Perdue expressing her strong belief that the Photo ID requirement is “unnecessary”).<sup>32</sup>

Secretary of State Cox also explained to the Governor that several measures were in place to prevent such in-person voting fraud. These measures include “a list of registered voters at each polling place that is checked off as each person votes” and “severe criminal sanctions for the type of voter impersonation that is purportedly of concern.” Transcript, PX2. She added that “it is evident that such penalties have been a sufficient deterrent.” *Id.*

As the Court is aware, Secretary of State Cox’s numerous admonitions about the lack of in-person voter fraud, and the real problems of fraud in absentee balloting and voter registration, fell upon deaf ears in the Republican-dominated General Assembly when it enacted the 2005 Act. Even if members of the General Assembly believed wrongly that in-person voter fraud was a real problem, and therefore voted to pass the 2005 Act in a sincere (though misguided) attempt to

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<sup>32</sup> The Secretary of State also testified that there have been no reports of ballots having been cast in the name of a voter who had died since Georgia law was amended in 2001, to give the Secretary of State the power to remove the names of deceased voters from the rolls. Order, p. 58; *see, e.g.* Order, p. 33. In fact one of the Declarations provided by the defendants in opposition to the plaintiffs’ initial motion for preliminary injunction states: “I am aware of speculation that people voted as other people under the old law, **but no evidence to support that speculation has ever been substantiated in Richmond County.**” Order, p. 41 (emphasis added).

address a hypothetical problem, there is simply no way that members of the General Assembly could have still believed that by the time they voted on the 2006 Act, given the attention to the issue in the last year.<sup>33</sup>

By the time they voted on the 2006 Act, members of the General Assembly were certainly aware of this Court's Order enjoining the 2005 Act holding, *inter alia*, that:

- “[n]o evidence indicates that [Georgia’s] criminal penalties do not sufficiently deter in-person voter fraud” (Order, p. 83);
- the 2005 Act did nothing to address fraud known to exist in absentee voting and registration (Order, p. 95);
- “[a]lthough defendants have presented evidence from elections officials of fraud in the area of voting, all of that evidence addresses fraud in the areas of voter registration, rather than in-person voting” (Order, p. 83); and

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<sup>33</sup> Media in the state’s capital, and around the state, had several prominent articles discussing the real issues of voter fraud in Georgia. For example, the day after introduction of SB 84, the *Atlanta Journal Constitution* published a front-page article entitled, “REGISTRATION in GEORGIA: Bogus Addresses Clutter Voter Registration Rolls,” Alan Judd, *Atlanta Journal Constitution* (Jan. 10, 2006). *See* Cox Dep. II, pp. 7-8 & Exh. 4. Media attention continued after SB 84 was signed by the Governor. For example, on January 29, 2006, the *Atlanta Journal Constitution* published a front-page article entitled, “Absentee Voter Fraud Untouched by ID Law. Most Frequent Form of Cheating May be Eased by Recent Rules.” *See* Cox Dep. II, pp. 10-11 & Exh. 11. In addition to this media attention, Secretary of State Cox advocated that the General Assembly attempt to prevent fraud in absentee balloting. Cox Dep. II, p. 11; *see also* Cox Dep. II, pp. 43-44 (Since October 12, the Secretary of State’s office and the SEB has continued to receive complaints regarding fraud in absentee balloting).

- “[t]he Photo ID law . . . does nothing to address the voter fraud issues that conceivably exist in Georgia.” Order, p. 84.

Nevertheless, when SB 84 came up for a vote by the full House, the sponsors of the bill refused to address the known instances of fraud in voter registration and in absentee voting. *See* Declaration of Representative Dubose Porter, dated July 3, 2006, ¶ 5. Furthermore, the General Assembly took no action in its 2006 session to address the most prevalent forms of voting fraud. *See* Cox Dep. II, p. 8 (Secretary of State Cox is not aware of any legislation that was introduced to address the problem of fraudulent registration in Georgia); Cox Dep. II, p. 11 (General Assembly did not enact any legislation in the 2006 session that addressed or tried to prevent voter fraud in absentee voting). The General Assembly did not impose a Photo ID requirement on absentee voters. *See* O.C.G.A. § 21-2-417. Instead, despite Secretary of State Cox’s admonition that such a measure would create “staggering opportunities for voter fraud” (*see* Transcript, p. 54, PX1, p. 1), Georgia maintained the unconditional absentee voting allowed by the prior law. *See* O.C.G.A. § 21-2-380(b); Order, p. 95.<sup>34</sup>

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<sup>34</sup> With regard to the 2005 Act, this Court concluded that through these changes in the law, “the State, in theory, left the field wide open for voter fraud by absentee voting.” Order, p. 84; *see* Transcript, pp. 16-18; *see also* Transcript, PX2 (observing that at virtually every meeting of the State Election Board during the past 10 years, the Board has dealt with cases involving fraud or election law violations in the handling of voting absentee ballots.); *Id.*, Transcript, PX1, p. 1,

**D. The 2006 Photo ID Act Was a Purely Partisan Action Concerned Not with the Facts Regarding Fraudulent Voting, but with Partisan Political Gain**

The partisan nature of the passage of the 2006 Act suggests that Republican legislators were in fact motivated to discourage the votes of those most likely to vote against them.<sup>35</sup> On January 9, the *first* day of the 2006 legislative session, the House Committee on Governmental Affairs of the Georgia House of Representatives approved a new Photo ID Requirement, an amendment to O.C.G.A. § 21-2-417 (SB 84, as amended) by a straight party-line vote (7-3) and sent the bill to the floor of the House.

The manner in which SB 84 was passed by the Georgia General Assembly illustrates the purely partisan motivation behind the bill:

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PX2, p. 2 (“The bill attempts to solve a problem that does not exist while expanding the opportunity for fraud in the area that has long been the most vulnerable to this type of abuse—the mailed absentee ballot.”). Order, pp. 12-13. Indeed, since the Court’s October 18 Order, there have been numerous complaints regarding **absentee** voter fraud. *See* Cox Dep. II, pp. 5, 7, 42-45, Kathy Rogers Dep. II, pp. 24-46 (discussing, *e.g.*, absentee voter fraud in Americus Georgia’s November 2005 mayoral election).

<sup>35</sup> *See* Posner, Mark A., “The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do,” pp. 14-15 (January 2006) (American Constitution Society White Paper), available at <http://www.acslaw.org/node/2176>.

- (a) The full House approved the Bill without amendment on January 12, 2006 with complete Republican support, as not a single Republican voted against the bill and only eleven of the eighty-one Democrats supported it.<sup>36</sup>
- (b) The Republican dominated Georgia Senate also passed the bill, voting almost entirely on partisan lines with thirty-two Republicans and no Democrats voting in support of the bill, and all twenty-one Democrats and one Republican voting against it.<sup>37</sup>
- (c) During the Senate's debate, the Republican Senate parliamentarian ruled "out-of-order" six proposed amendments that would have mitigated the effects of SB84, and that ruling, which prevented debate on the amendments, was sustained by a strict party-line vote of thirty-three Republicans to twenty-one Democrats. *See* Declaration of Senator Sam Zamarripa, dated July 5, 2006.
- (d) The only two amendments that were allowed to come to a vote in the Senate, each of which attempted to make photo IDs accessible to

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<sup>36</sup> Of the thirty-nine African-American members of the House, only two, both Republicans, voted in favor of the bill. *See* Declaration of Representative Dubose Porter, ¶ 6.

<sup>37</sup> Every African-American in the Georgia Senate voted against the bill. *See* Declaration of Senator Sam Zamarripa, dated July 5, 2006.

handicapped and elderly voters, were defeated by the same partisan split as the bill itself with thirty-two Republicans voting down the amendments and all of the Democrats and a single Republican supporting them. *See* Declaration of Senator Sam Zamarripa, dated July 5, 2006.

- (e) Because of an amendment in a Senate Committee, SB 84 returned to the House where it was again approved without a single Republican dissenter, and with only thirteen of the eight-one Democrats in the House supporting it. Again, only two of the thirty-nine African-American representatives, both Republicans, supported the bill. *See* Declaration of Representative Dubose Porter, ¶ 7.

As discussed above, SB 84 raced through the legislative process at terminal velocity: it was passed by the Senate on Tuesday, January 24, and the House on Wednesday, January 25, and was signed by Georgia's Republican Governor, Sonny Perdue, on Thursday, January 26.

The potential electoral benefit would accrue to the Republican party in two ways. First, Republican voters tend to vote absentee far more often than Democratic voters,<sup>38</sup> and thus, making it easier for people to vote absentee would

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<sup>38</sup> *See* Cox Dep. II, p. 40.

disproportionately help Republican candidates. Second, suppressing the vote of those without Photo IDs, which has a disproportionate impact on African-Americans and the elderly, would tend to affect Democratic voters more than Republicans.<sup>39</sup> This motivation thus explains the Republican-dominated General Assembly's decision to attack the non-existent problem of "in-person voter fraud," and its refusal to address the known problems of absentee voter fraud.

### **ARGUMENT AND CITATION OF AUTHORITY**

"[V]oting is of the most fundamental significance under our constitutional structure." *Burdick*, 504 U.S. at 433; *Reynolds v. Sims*, 377 U.S. 533, 554, 562 (1964); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government....

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<sup>39</sup> See Posner, Mark A., "The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do," pp. 14-15 (January 2006) (American Constitution Society White Paper), available at <http://www.acslaw.org/node/2176> (The 2005 Act "is one of the leading examples of legislation advocated by a number of Republicans across the country that takes aim at alleged problems of fraudulent voting on election day but which would erect barriers to voting that have a disparate impact on groups that typically vote Democratic, including minority voters.").

[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.

*Reynolds*, 377 U.S. at 555, 562. *Accord, Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”).

Recognizing that the right to vote is a “delicate franchise” (Order, p. 94), the Court entered a preliminary injunction enjoining the application of the 2005 Photo ID Act to Georgia elections during the pendency of this action. Because the fundamental problems with requiring a Photo ID to vote remain in the 2006 Photo ID Act, it should be similarly enjoined.

## **I. The Plaintiffs are Likely to Succeed on Their Equal Protection Claim.**

### **A. The Legal Standard.**

When an election law is challenged as placing an undue burden on the right of legal voters to vote:

[A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the **character** and **magnitude** of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and **evaluate the precise interests** put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the **legitimacy** and **strength** of each of those interests, it also must consider the extent to which those interests make it **necessary** to burden the plaintiff’s rights....

*Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (emphasis added); see *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789 and *Tashjian v. Republican Party*, 479 U.S. 208, 213-14 (1986)).

Though *Anderson v. Celebrezze* explained that the Court was drawing its structure for analyzing election laws from the analytical process of ordinary litigation, 460 U.S. at 789, the Court made one significant change in the process. In other constitutional litigation, the sliding scale of constitutional scrutiny runs from strict scrutiny under which the government must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end,<sup>40</sup> to the most deferential level of review under which regulations are sustained if they could be “rationally” thought to further a legitimate governmental goal without reference to whether it does so at an inordinate cost.<sup>41</sup> Though on the restrictive end of the scale, the review applied to acts significantly burdening the right to vote is closely parallel or identical to strict scrutiny, the Court has held that the level of review at the lower end of the scale requires at least “reasonableness.” *Burdick*, 504 U.S. at 434. Thus the standard applied to voting cases does not

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<sup>40</sup> *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

<sup>41</sup> *FCC v. Beach Comms., Inc.*, 508 U.S. 307 (1993); *Bd. of Trustees of SUNY v. Fox*, 492 U.S. 469, 480 (1989).

continue down to approving regulations that impose a burden merely because the regulation is “rational.”<sup>42</sup> For any statute affecting the right to vote, the Court must analyze “the legitimacy and strength” of the state’s asserted interests, find that the state’s interests are at least “important,” and find that the severity of the burden imposed by the statute is narrowly tailored to the state’s interests, reasonable and nondiscriminatory. *Wexler v. Anderson*, \_\_ F.3d \_\_, 2006 WL 1685802, at \*5-6 (11<sup>th</sup> Cir. June 20, 2006).

In its Order of October 18, 2005, this Court first analyzed the plaintiffs’ undue burden claim under the strict scrutiny applied in *Dunn*, holding that the plaintiffs’ claims were likely to succeed under this standard.<sup>43</sup> As this Court went on to find, the Photo ID requirement also fails under the more general *Burdick* analysis as well as the strict scrutiny application in *Dunn*. *See* Order, p. 85.

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<sup>42</sup> Judicial review of election regulations that are on the less burdensome side may perhaps best be described as closest to part of the review of commercial speech regulation. There the Supreme Court requires a “reasonable fit” between the governmental interest and the means chosen to accomplish that interest. *Bd. of Trustees of SUNY*, 492 U.S. at 469.

<sup>43</sup> *Dunn* is simply a specific instance of what was later fleshed out as the *Anderson-Burdick* sliding scale analysis, in which the character and magnitude of the asserted injury was great, placing it at the top end of the sliding scale. *See Wexler*, 2006 WL 1685802, at \*4-5 (citing *Dunn*, *Burdick*, and *Anderson* as precedents).

Likewise, the 2006 Act is also invalid under either analysis. Under the 2006 Act and implementing regulations, voters may obtain a Photo ID at their own county registrar's offices in addition to the DDS offices, but this requirement still places an undue burden on the right to vote. Because the character and magnitude of the injury caused by the 2006 Act is substantial, the state's actual interest could not have been prevention of voter fraud, and because, in any event, neither version of the law was tailored to that interest, nor reasonable and nondiscriminatory, the 2006 Act should also be enjoined.

**B. The 2006 Act Unduly Burdens the Right to Vote and Should Be Enjoined.**

***1. The Character and Magnitude of the Asserted Injury are Significant.***

***a. The burdens on registered voters who are poor and elderly to obtain a Photo ID are still significant.***

This Court previously found that the character and magnitude of the asserted injury caused by the 2005 Photo ID Act was "significant." Order, p. 86. Rejecting the defendants' contention that the Photo ID requirement prevents no one from voting,<sup>44</sup> the Court concluded that the character and magnitude of the burden on the right to vote is extreme, as follows:

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<sup>44</sup> See Order, p. 81 ("According to Defendants, the Photo ID requirement is not a severe restriction on voting because it prevents no one from voting.").

In particular, the Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID would be a hardship. Unfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting. For those citizens, the character and magnitude of their injury—the loss of their right to vote—is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.

Order, p. 94.

Data recently released by the Secretary of State further supports the Court's finding, demonstrating that the magnitude of the burden, in terms of the number of people it will affect, is great. *See* Statement of Facts section III B, *supra*.

Additionally, the data show that the burden is disproportionately borne by those over 65, as well as African-Americans, with one-third of African-American voters over age 65 being without drivers' licenses or state-issued Photo IDs.

Although under the 2006 Act and implementing regulations, voters need not pay the \$20 fee imposed by the 2005 Act, they still must travel to their respective county registration offices during business hours in order to obtain the ID. The voters required to obtain a Photo ID in this manner are still those least able to do so—they are predominantly poor, elderly, minority, and they have limited access to transportation. *See* Order, p. 94; Statement of Facts section III, *supra*; Cox Dep. II, Exh. 8 (Census Data). For these voters, the burden of the identification

requirement is still substantial and effectively denies them the right to vote. *See* Statement of Facts section III, *supra*.

Notably, when the Supreme Court invalidated Virginia's poll tax for federal elections under the 24th Amendment, it rejected Virginia's alternative to requiring payment of the poll tax because of the burden of the otherwise unnecessary trip to the courthouse. *Harman v. Forssenius*, 380 U.S. 528, 541 (1965). The Court termed the alternative certificate, which could be provided at the county courthouse in advance of the election, "a real obstacle." *Id.* The burden was invalid because it compelled a completely unnecessary trip that served no legitimate function.

The Constitution prevents Georgia from imposing a direct poll tax in the form of the \$20 fee for the Photo ID in the 2005 legislation. The 2006 legislation (along with the implementing regulations) is a poll tax in another guise. Whether the voters must travel to a DDS office or even to their county registration office, the law and regulations still seek to impose an unnecessary burden on identifiable segments of voters least likely to be able to meet the requirement. It is "a real obstacle" to the voters to whom it applies – an unnecessary burden that serves no legitimate purpose. Thus, even though the 2006 Photo ID Act no longer imposes a direct cost in order to vote, having to travel to a government office in order to

obtain an ID creates a burden on voters just as severe as the burden in past cases where the Supreme Court has required strict scrutiny – for example, a \$1.50 annual poll tax in 1966 (*Harper*), a ninety day county and one year state residency requirement (*Dunn*), and a residency and parenthood condition for voting (*Kramer*).

Moreover, requiring voters to go to their county registration offices reimposes a barrier that Congress sought to eliminate in the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg, (known as “Motor Voter” or the NVRA, which applies to those elections where federal offices are on the ballot). In enacting the NVRA, Congress sought to remove the burden on individuals of having to go to a particular office to register to vote. Congress specifically found that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation for Federal office and ***disproportionately harm voter participation by various groups, including racial minorities.***” Public Law 103–31, sec. 2, 107 Stat. 77 (1993) (emphasis added). Congress sought to expand access to voter registration by mandating registration by mail, at driver’s license offices, at all state offices that provide public assistance and services to persons with disabilities, as well as other offices such as libraries, marriage license bureaus and fishing and hunting license bureaus. 42 U.S.C. §§

1973gg–3, 4 and 5. Seeking to remove existing barriers to voter registration, Congress recognized that the practice of compelling citizens to make a trip to the county registration office was one of those barriers. It eliminated that barrier for voter registration by replacing it with broad access. Georgia seeks to reimpose that burden – *only* for those least able to shoulder the burden – at a later point in the voting process.

Both the Supreme Court and Congress have recognized the costs and burdens of traveling to an office to obtain a document allowing a citizen to vote. Accordingly, the magnitude of the asserted injury remains “substantial,” if not “severe.”

***b. Absentee voting remains an inadequate alternative.***

Although the State claims that no one is prevented from voting because persons without Photo IDs may vote absentee, this Court has already found that absentee voting is an inadequate alternative to in-person voting. Order, pp. 89-92. The State has still failed to publicize its changes to the absentee voting law that permit anyone to vote absentee without providing a reason so long as they request the ballot by mail. *See* Order, p. 90. Absentee ballots must be received by 7:00 pm on election day in order to be counted, regardless of when they are postmarked, so the only way to ensure a vote is cast is to either vote in person or hand-deliver

the absentee ballot to the registrar (not the voter's precinct) on the day of election.

*See* Order, p. 91.

Additionally, voting absentee requires significant advance planning, which, as this Court found, can be a deterrent to absentee voting. *Id.* Specifically, the exceptions to the specific qualifications for absentee voting require that the voter request the absentee ballot by mail. Moreover, and as particularly relevant to the present situation, ***voters have had less than three weeks to request an absentee ballot by mail*** for the upcoming July 18 primary. It is significantly likely that any voter who does not have (and cannot, in the time before the primary, obtain) a Photo ID – for example because she is elderly or disabled and is only able to get a ride to the polls on election day -- will be unable to obtain an absentee ballot in enough time to mail it back and ensure the vote is counted.

Finally, some voters without Photo IDs will have difficulty completing the application for absentee ballot. *See* Statement of Facts section III E, *supra*. Thus, there will be at least some segment of the population – and a segment more likely not to have a driver's license or other acceptable form of Photo ID – that is unable to vote absentee. So, for most of the people who do not already have a Photo ID, absentee voting is an even more burdensome method of voting, and for a

significant portion of those people, it will be not merely more burdensome, but impossible to navigate the absentee voting system.

**2. *The Photo ID requirement does not advance the state's asserted interest in preventing voter fraud***

With respect to the 2005 Act, this Court correctly concluded that “the Photo ID requirement is ... **likely is not rationally based on [the state's proffered] interest [in preventing voter fraud].**” Order, p. 95 (emphasis added). The passage of the 2006 Act changes nothing to alter the Court's analysis, and indeed strengthens it.

As an initial matter, as this Court found, Secretary of State Cox repeatedly attempted to inform the legislature and the Governor that there is no evidence that in-person voter fraud is even a problem; the examples of fraud cited by the defendants related to voter registration, not in-person voting. Order, at 83. Since the 2005 Act was enjoined, the Secretary of State has still not received any complaints of in-person voter fraud. Cox Dep. II, pp. 42-43.

On the other hand, in her letter to Governor Perdue, Secretary of State Cox observed that “the State Election Board has reviewed numerous cases of voter fraud relating to the use of absentee ballots.” See Transcript, PX2, p.2; see also *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999) (describing vote buying schemes conducted by means of absentee ballots). Complaints of fraud in absentee

voting have continued since this Court's October 18, 2005 Order. Cox Dep. II, pp. 43-44. Yet despite its purported interest in preventing voter fraud, the General Assembly did not attempt to reduce fraud conducted by means of absentee ballots. In fact, it did just the opposite: it greatly expanded the opportunities for fraudulent absentee voting while at the same time exempting absentee ballots from Photo ID requirements, and in so doing, “left the field wide open for voter fraud in absentee voting.” Order, p. 84. As this Court has already found, it is impossible to square the legislators' purported concern about voter fraud with the requirements of the statute. *Id.*

Instead, the party-line vote to pass the 2006 Act, like the 2005 Act, combined with the statistics regarding the groups who are most significantly affected, suggest that Republican members of the legislature were simply hoping to preserve their incumbency by making it more difficult to vote for the groups most likely to vote Democrat. *See* Statement of Facts sections III D & IV D. The partisan nature of the Act combined with its tremendous effect on precisely the voters not likely to vote for the party controlling the legislature supports what logic already suggests – that preventing voting fraud was not the legislature's true motivation in passing the Photo ID law, either in 2005 or in 2006.

3. ***The Photo ID requirement is not tailored to that which is necessary to advance the state's asserted interests in preventing voter fraud***
  - a. ***Existing State laws and procedures have been effective in preventing fraudulent in-person voting, and make the new Photo ID requirement an overbroad and unnecessary burden on the right to vote.***

There is no evidence that the system for in-person voting (including criminal penalties for fraud) in place prior to the adoption of the Photo ID requirement were not effective. The *Dunn* Court considered the existence of other means for state law to prevent nonresidents from voting. In particular, the Court noted that Tennessee had six separate criminal statutes dealing with voter fraud and concluded they were “more than adequate to detect and deter whatever fraud may be feared,” including registering to vote without legal qualification. 405 U.S. at 353. In Georgia, the statutory scheme that existed prior to the Photo ID requirement provided sufficient protection against in-person voter fraud without the burden to voters. *See* Transcript, PX2. These included the identification requirement of former O.C.G.A. § 21-2-417 (2004), a list of registered voters at each polling place to be checked off as each person votes, periodic updates of registration lists, and severe criminal sanctions. *See* Transcript, pp. 62-63 & PX2; O.C.G.A. §§ 21-2-561, 21-2-562, 21-2-571, 21-2-572 and 21-2-600.

In *Dunn*, the Court concluded that it was “unlikely that would-be fraudulent voters would remain in a false locale” or “collect such objective indicia” of legitimacy as a residence, car registration, etc. 405 U.S. at 352. Similarly, the proponents of the Photo ID requirement were unable to document that voter impersonation justified the Photo ID requirement because voter impersonation is a high-risk crime that is similarly unlikely. Not only does voter impersonation involve multiple felonies, but an impersonator would need to know the name of a registered voter, that the voter’s name was still on the voter list, that the voter had not voted by absentee ballot, or by early voting, or earlier in the day, and that the real voter and the impersonator would not be known to an election worker. In Georgia, the Secretary of State testified that she has never seen a documented case of voter fraud that related to the impersonation of a registered voter at voting polls. Transcript, p. 15; *see also* Transcript, PX2; Cox Dep. II, pp. 42-43.

Simply put, Georgia’s existing protections against in-person voter fraud have already eliminated the threat of in-person voter fraud. *See* Transcript, pp. 62-63 & PX1 & 2. Additional safeguards are not necessary and in any event cannot be so out of proportion as to create an unreasonable burden on registered voters’ right to vote.

In addition, the 2006 Act creates a conclusive unconstitutional presumption that the voter who does not have a Photo ID is an impostor who is not entitled to vote. The Court in *Dunn* rejected Tennessee's conclusive presumption that a person newly arrived to the state was not a resident. 405 U.S. at 351-52. This prevented an individual from demonstrating to the election officials other indicia of *bona fide* residence, such as buying a house. *Id.* The Court found the conclusive presumption unacceptable:

[S]ince Tennessee's presumption from failure to meet the durational residence requirements is conclusive, a showing of actual bona fide residence is irrelevant, even though such a showing would fully serve the State's purposes embodied in the presumption and would achieve those purposes with far less drastic impact on constitutionally protected interests. The Equal Protection Clause places a limit on government by classification, and that limited has been exceeded here.

*Id.* at 352 (citation omitted).

Under Georgia's new Photo ID requirement, possession of a Photo ID is the only acceptable proof of identity for in-person voting. The Act renders all other proof, even where no doubt about the voter's real identity exists, completely irrelevant. The law thus imposes a conclusive presumption that the voter without a Photo ID is not who he claims to be, despite the fact that election officials are capable of making individual determinations about identity.

***b. This Court found no relation between the fraud that purportedly exists and the Photo ID requirement.***

The fact that the statute is not tailored to the State's asserted interest is most significantly highlighted by the State's treatment of absentee voting. As this Court observed with respect to the 2005 Act, voters who vote absentee are not required to have a Photo ID, and are no longer even required to have a reason to vote absentee. *See* Order, p. 95. The only proof of their identity that is required is their signature on a written request for an absentee ballot, and their address, date and place of birth, which must be provided with their ballot. The only safeguard against fraud in absentee voting is a requirement that registrars verify that information and match the signature against the signature on the voter's registration card before a vote can be counted. O.C.G.A. §§ 21-2-384 and 386. This is still true under the 2006 Act.

Since each person who votes in person is required to complete and sign a Voter Certificate before being issued a ballot, if the legislature was genuinely concerned about preventing fraudulent voting, it could have required election officials to verify the identity of voters (or at least those without other identification) by comparing the signature on the Voter Certificate with the signature of the voter on the voter registration application - just as is required with absentee ballots - and without imposing an unnecessary burden on the rights of voters to vote. *See Dunn*, 405 U.S. at 343 (“[I]f there are other, reasonable ways to

achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference....it must choose ‘less drastic means’”). Such a system for in-person voting is possible. *See Order*, pp. 56-57 & 83; *see also Transcript*, pp. 88, 89. This more permissive standard applied to absentee voters is particularly difficult to justify given that most of the voter fraud occurring in Georgia has involved absentee ballots. *See Order*, p. 83.

To the extent the State argues that it is *not* possible to compare large numbers of voters’ signatures at the polls, this also suggests a major flaw in the plan to let all the voters without Photo ID vote absentee. Such a system would not only not *prevent* fraud, but, based on the figures released by the Secretary of State, it would burden the absentee voting system, which relies on the physical comparison of signatures, to the point where the existing potential for fraud would actually be magnified. If the State’s argument were true, then, the end result would be an absentee voting system that becomes consistently less reliable than the existing system – and an even less adequate alternative to in-person voting for those without Photo IDs.

Because most absentee voters are not required to show any photographic identification, this alone presents an unequal application of voting requirements. However, additional inequalities arise when a voter’s identity is challenged. An

in-person voter without Photo ID is entitled to cast a provisional ballot, which is a form of challenged ballot. O.C.G.A. § 21-2-419(a). But while an in-person voter must produce a Photo ID within 48 hours to have his ballot counted, *id.*, an absentee voter whose identity is challenged need only produce one of any number of other types of evidence, including “books, papers and other material.” *See* O.C.G.A. § 21-2-228(b).

*Dunn* noted:

[T]he State is faced with the fact that it must defend two separate waiting periods of different lengths. It is impossible to see how both could be ‘necessary’ to fulfill the pertinent state objective. If the State itself has determined that a three-month period is enough time in which to confirm bona fide residence in the State and county [for persons moving from other counties], obviously a one-year period cannot also be justified as ‘necessary’ to achieve the same purpose [for persons moving from other states].

405 U.S. at 347. The Photo ID requirement creates a similar incongruity inconsistent with “necessity.” Georgia has determined that comparing an absentee voter’s signature to that on her registration card is sufficient protection against fraud. The imposition of a Photo ID requirement on some voters but not others falls far short of establishing that Photo IDs are “necessary to burden the plaintiff’s rights.” *Burdick*, 504 U.S. at 434.

**4. *The 2006 Act is not reasonable.***

The 2006 Act is no more reasonable a response to the alleged problem of in-person voter fraud than the 2005 Act. As discussed above, Statement of Facts section IV B, *supra*, and in this Court's prior Order, at 85, there is no evidence of in-person voter fraud, and yet the law leaves the absentee voter system "wide open" for fraud. Additionally, the Photo ID card obtained pursuant to the regulations from the county registrar does nothing to actually verify the identity of its bearer, but merely creates an additional hurdle for the few would-be imposters that might exist – along with the hundreds of thousands of legitimately registered voters. Burdening the fundamental right of so many legitimate voters is not reasonably justified by the need to deter a few hypothetical imposters.

**5. *The 2006 Act is discriminatory.***

Further information released by the Secretary of State's office further supports the anecdotal evidence and logical inference that the Photo ID requirement disproportionately burdens the poor, African-Americans, and the elderly. *See* Statement of Facts section III, *supra*. Thus, not only does the Photo ID requirement burden the right to vote of identifiable groups of people, those identifiable groups of people are already historically marginalized in the political process, and most deserving of the Court's protection, especially when it comes to

the right to vote. The Act thus has the effect (if not the intent) of discriminating against the poor, African-Americans and the elderly.

**C. Other Cases upholding a Photo ID requirement are distinguishable.**

The state defendants have asserted that this Court is the first court in the United States to enjoin the enforcement of a state statute requiring registered voters to present a photographic identification in order to vote in person at the polls. This assertion is misleading for at least two reasons: First, Georgia is one of only two states in the nation to impose an exclusive Photo ID requirement as a condition to in-person voting. *See* Order, p. 22. Second, other courts have enjoined Photo ID requirements. *See e.g. Democratic Party of Virginia v. State Bd. of Elections*, 1999 No. HK-1788, 1999 WL 1318834 (Va. Cir. Ct. Oct. 19, 1999) (enjoining pilot program for voter identification that required, in some areas, voters to present certain identification at the polls).

More importantly, as this Court correctly noted in footnote 10 of its Order, (*see* Order, pp. 121-22, n.10), the district court opinions previously relied upon by the defendants are easily distinguishable from the instant action. Significantly, all of the laws under consideration in those cases allowed affected voters to present means of identification other than Photo IDs at the polls. *See e.g. League of Women Voters v. Blackwell*, 340 F. Supp.2d 823, 826 (N.D. Ohio 2004) (law

provided that acceptable documentary proof could include “[a] copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows [the voter’s] name and address.”); *Bay County Democratic Party v. Blackwell*, 347 F. Supp.2d 404, 434 (E.D. Mich. 2004) (directive required identification required by the Help America Vote Act, which includes non-photographic forms of identification, *see* 42 U.S.C. §15483); *Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at \*6 (D. Colo. Oct. 18, 2004) (permitted forms of identification other than a Photo ID, including a copy of a current utility bill, or a government document showing the voter’s name and address).

The only case that upholds a Photo ID law remotely as restrictive as Georgia’s, *Indiana Democratic Party v. Rokita*, No. 1:05-CV-0634, 2006 WL 1005037 (S.D. Ind. Apr. 14, 2006), is distinguishable from this case, and the district court in that case expressly distinguished it.

The Indiana court found that there were no plaintiffs who demonstrated that they both did not qualify for an absentee ballot and did not have a Photo ID, and that the Plaintiffs had not demonstrated that absentee balloting was a burden or an inadequate alternative. *Id.* at \*35 & n. 71. Accordingly, because the court assumed that absentee balloting was an adequate alternative to in-person voting, the court

found that there was no evidence that the Photo ID law prevented anyone from voting (either in-person with an ID or absentee without). *Id.* at 34. This Court has already found that absentee balloting is not an adequate alternative, Order, p. 92, and no facts have changed that should cause the Court to modify that ruling.

Notably, the Indiana case expressly distinguishes itself from this Court's prior ruling.

The *Common Cause* decision ... is not only not controlling precedent here; the decision's analysis is not even relevant to the case at bar for the following reasons: (1) The *Common Cause* decision involves an analysis of *Georgia's* absentee voter laws and Plaintiffs have not troubled themselves to establish that *Indiana's* absentee voter laws are comparable to *Georgia's*; (2) The *Common Cause* decision was a ruling on a preliminary injunction, which, of course, presents different evidentiary standards than those on summary judgment;<sup>[45]</sup> (3) The Court, in *Common Cause*, expressly based its ruling on several factual findings and assumptions for which there is no evidentiary basis *in this case*; (4) One of the concerns expressed in the *Common Cause* decision was that *Georgia* had recently changed its absentee voter requirements but had not publicized the change, and there is no evidence in this case that such circumstance pertains here. ***The Common Cause decision well illustrates the types of evidence and arguments that Plaintiffs in the case at bar could have presented concerning Indiana's absentee voter requirements but regrettably failed to adduce.***

*Id.* at \*41 (original footnotes omitted). Because the Indiana court did not have sufficient evidence in its evidentiary record to conclude that absentee balloting was

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<sup>45</sup> Of course, this case is still in the preliminary injunction phase.

not an adequate alternative to in-person voting, its holding is inapposite in light of the facts presented in this case.

Here, as this Court has found, there is sufficient evidence to conclude that absentee balloting is *not* an adequate alternative to in-person voting. *See* Statement of Facts section III E; Order, p. 92. That being the case, voters without Photo IDs, who are the least mobile members of our society, are faced with burdens no matter what they do: either they must go through the trouble of obtaining a Photo ID, or they must vote in an admittedly more fraud-prone, more complex, and less reliable system that this Court has already found to be an inadequate substitute for voting in person. Further, as noted above, Argument section I B 3, *supra*, given the numbers of registered voters without Photo ID, requiring everyone without Photo ID to vote absentee could actually magnify the problems with the absentee voting system by overloading it.

In addition, the Indiana court gave the Plaintiffs' statistical expert "zero weight" because of serious methodological problems with his report regarding the number and demographic characteristics of individuals affected by the Photo ID law. *Id.* at \*20. By contrast, as discussed above, much of the data on which the Plaintiffs in this case rely comes directly from the Secretary of State's office.

In addition, because the Indiana court apparently found a dearth of reliable statistical evidence showing the total numbers of individuals affected by the law, it did not appreciate the possibility that the increased risk of fraud and other problems already inherent in the absentee balloting system could be magnified by forcing a large number of voters without IDs into that system, rendering it even *less* of an alternative to in-person voting.

The Indiana case's Equal Protection ruling is distinguishable in one additional respect that is particularly pertinent to the State's attempt to enforce this rule for the July primary. Apparently the State intends to inform persons voting at the primary about the law and the availability of Photo IDs at the county registrar's office by passing out fliers – along with provisional ballots for those without IDs – to voters *at the polls*.<sup>46</sup> The Indiana court found, with respect to individuals who simply failed to bring a Photo ID to the polls, that those individuals were not burdened because they could vote a provisional ballot. But under Indiana law, voters had two weeks to obtain a new ID and return to present it and have the provisional ballot counted. *Id.* at \*5. Under Georgia law, voters have only *two days* to obtain a Photo ID and they must go all the way to their county registrar's office to show the ID in order to have the provisional ballot counted. O.C.G.A.

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<sup>46</sup> See Carlos Campos – “Voter ID cards can be issued” (*Atlanta Journal-Constitution*) June 30, 2006, attached hereto as Exhibit I.

§ 21-2-419(c)(1). Although the Plaintiffs maintain that having to return to the registrar's office at all to prove their identity is itself a burden that likely discourages most provisional voters from verifying their ballots, two days is a wholly unrealistic period of time in which to expect an individual to find time to return to the county registrar's office, either with a replacement Photo ID in hand or to obtain a voting ID there. Indeed, it was for this reason that this Court previously found that the ability to vote a provisional ballot is an "illusion" under Georgia law. Order, pp. 91-92. This is especially the case now, when the State expects to implement this new requirement on short notice and with little advance public education, which could dramatically increase the numbers of provisional ballots cast, as well as the number of persons hoping to obtain a Photo ID from the county registrar within the two days after the election.<sup>47</sup>

As this Court has previously held, absentee balloting is simply not the same as in-person balloting. It requires significant advance planning, which is especially

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<sup>47</sup> The provisional balloting requirement also illustrates the utter absurdity of the photo ID requirement. A voter who arrives at the polls with documentation of his or her identity but no Photo ID may file a provisional ballot. In order to have that vote counted, he or she could then go to the Registrar's office, show that exact same documentation to the registrar – or *none at all* – to obtain a Photo ID, and then present that ID to the registrar. See Rogers Dep., pp. 50-52. The provisional ballot would then be counted. Of course, there is no reason that the identity of the voter is any more reliably shown just because he or she presented the documentation to the registrar, than it would be had the voter presented that same documentation at the polls.

a problem where voters may (still) not be aware that they are eligible for absentee balloting under the new law. And absentee voting prevents many voters from being able to vote on Election Day, because the absentee ballot must be received in the registrar's office by the close of Election Day, so absentee voters do not have access to the same information about the candidates as the voters who vote in person on election day. The Indiana court recognized that this Court's prior ruling had evidentiary support relating to Georgia's absentee voting system that was not in that court's record, and distinguished its ruling. Nothing has changed that should change this Court's findings regarding absentee voting, so the Indiana case, as well as all of the cases previously cited by the Defendants, are inapposite.

**II. Section 1971(a)(2)(A) and (B) Prevent Georgia From Denying the Right to Cast Ballots and Have Them Counted for Failure to Present a Photo ID.**

This Court previously applied *Schwier v. Cox*, 340 F.3d 1284 (11<sup>th</sup> Cir. 2003) and ruled that plaintiffs may assert a private cause of action under 42 U.S.C. § 1971. This Court reserved ruling on the merits of plaintiffs' claims under Section 1971,<sup>48</sup> noting that plaintiffs had cited no case law and provided limited

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<sup>48</sup> The description of plaintiffs' claims is set out in plaintiffs' brief in support of their first motion, and that discussion is incorporated herein by reference. DE 23, pp. 55-59.

information on these claims at the first motion for preliminary injunction. Order, pp. 105-111.

As *Schwier v. Cox* noted, the original version of § 1971 had been utilized by private litigants since 1871. 340 F.3d at 1295.<sup>49</sup> The original statute protected the right to vote only against discrimination based on race, color or previous condition of servitude. The statute thus did little more than intone the language of the Fifteenth Amendment. The statute was repeatedly amended between 1957 and 1965 to expand its coverage, essentially codifying the “freezing principle,” the doctrine developed in the Former Fifth Circuit to prohibit unequal application of voting requirements. *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964).

Although there have been fewer reported cases on § 1971 since the 1960s, the chronology of amendments reveals Congress’ intent to expand the law to assure full protection of the right to vote in a manner that extends to plaintiffs’ claims here.

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<sup>49</sup> As *Schwier v. Cox* discussed, private litigants had enforced § 1971 through suits authorized by 42 U.S.C. § 1983 since the latter was enacted in 1871. The first part of § 1971, now codified as § 1971(a)(1), was Section 1 of the Enforcement Act of 1870, ch. 113, 16 Stat. 140. Section 1983 came from the Civil Rights Act of 1871, 17 Stat. 13, § 1 (1871). See *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971). Sections 1971 and 1983 were used as the basis for striking down the white primary, nationally and in Georgia. See *Smith v. Allwright*, 321 U.S. 649, 651, n. 1 (1944)(quoting text of the two statutes then codified as 8 U.S.C. §§ 31 and 43); *Chapman v. King*, 62 F. Supp. 639, and n. 1 (M.D.Ga. 1945), *aff’d*, 154 F.2d 460 (5th Cir. 1946).

### **A. The History of Section 1971.**

The original statute, 42 U.S.C. § 1971, now § 1971(a)(1), declares that citizens who are otherwise qualified to vote in any state “shall be entitled and allowed to vote ... without distinction of race, color, or previous condition of servitude.” The Voting Rights Act of 1957, the first civil rights statute enacted since the end of Reconstruction, Pub. L. 85-315, 71 Stat. 634 (1957), added sections (b), (c) and (d) to § 1971. Section (b) protected citizens from intimidation, threats or coercion under color of law or otherwise which would interfere with their right to vote in federal elections.<sup>50</sup> Section (c) gave the Attorney General the authority to file civil suits for injunctive relief to enforce sections (a) and (b). And section (d) gave authority to hear private suits instituted under section 1971 to federal district courts and authorized federal courts to exercise authority “without regard to whether the party aggrieved shall have exhausted any administrative or

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<sup>50</sup> Notably, Congress did not make racial discrimination an element of § 1971(b). A plaintiff had to prove only that a defendant had an intent to interfere with his right to vote, not that the intent was specifically to discriminate on the basis of race. Sections 1971(a)(2)(A) and (B) likewise are not limited to racial discrimination. See Argument section II B, *infra*.

other remedies that may be provided by law.”<sup>51</sup> The 1957 amendments thus changed the substantive protections of § 1971, expanded the ability to enforce it,<sup>52</sup> and the remedies available to private citizens.<sup>53</sup>

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<sup>51</sup> 42 U.S.C. § 1971(d); *Schwier v. Cox*, 340 F.3d at 1296. The removal of the administrative exhaustion barrier was a significant expansion for enforcement of the statute. The committee report explains that insofar as state judicial remedies, this language was declaratory of existing law because *Lane v. Wilson*, 307 U.S. 268, 274 (1939), had settled there was no need to exhaust judicial remedies. But the committee report noted that the language dispensing with exhaustion of state administrative remedies was necessary because some courts had enforced such a requirement. H.Rep. No. 291, 85th Cong., 1st Sess, reprinted in 1957 USCCAN, 1966, 1975.

<sup>52</sup> As *Schwier v. Cox*, 340 F.3d at 1295, noted, the Attorney General did not have authority to sue under § 1971 until the 1957 amendments. Previously, the Attorney General could only proceed through criminal prosecution. See Attorney General Herbert Brownwell, Jr., letter of April 9, 1956 to the Speaker of the House of Representatives, published as part of House Report No. 291 on The Civil Rights Act of 1957, 1957 USCCAN 1966, at 1978-79. Brownwell sought authority to file civil suits in part because, in his words, “[criminal cases in a field charged with emotion are extraordinarily difficult for all concerned.” *Id.*

<sup>53</sup> One of the debates in 1957 was whether the Attorney General should also be authorized to file suits for damages. 1957 USCCAN 1969. The final version limited suits by the Attorney General to seeking injunctive relief. See § 1971(c). But the 1957 Act also amended 28 U.S.C. § 1343 to add what is now § 1343(a)(4), giving federal district courts jurisdiction to hear civil actions “by any person” “[to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*” (Emphasis added.) See sec. 121 of Public Law 85-315, 71 Stat. 637.

The Civil Rights Act of 1960, Pub. L. 86-449, Title VI, 74 Stat. 86 (1960), further strengthened § 1971 by providing an expansive definition of the word “vote.” It added a new paragraph (e) which reads in part:

When used in the subsection, the word “vote” includes all action necessary to make a vote effective *including, but not limited to, registration or other action required by State law* prerequisite to voting, *casting a ballot, and having such ballot counted* and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election...

42 U.S.C. § 1971(e) (emphasis added).

The paragraphs under which this suit was brought, §§ 1971(a)(2)(A) and (B), were added in the Civil Rights Act of 1964, Pub. L. 88-352, Sec. 101, 78 Stat. 241 (1964). These sections read in their entirety as follows:

(2) No person acting under color of law shall—

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election;...

It is significant that, in the 1964 amendments, Congress included 42 U.S.C. § 1971(a)(3)(A) specifically providing that the broad definition of “vote” quoted above from § 1971(e) applies to these additions to § 1971(a).<sup>54</sup>

Sec. 1971(a)(2)(A) covers unequal application of voting standards whether imposed by state law or local enforcement such as through unequal application of voting and registration standards by county or municipal officials. In enacting various voting rights statutes, Congress was concerned both with changes in implementation by local officials, regardless of what state law required, and with states adopting new discriminatory legislation when facing a court decision invalidating an existing practice. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). As with the Voting Rights Act of 1965, the clear language of § 1971 is liberally construed. *United States v. McLeod*, 385 F.2d 734, 748 (5th Cir. 1967) (§ 1971 should be construed liberally “to fulfill the protective aspect of American

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<sup>54</sup> The Southern District of Florida’s finding in *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D.Fla. 2004) that § 1971(a)(2)(B) was not “intended to apply to the counting of ballots by individuals already deemed qualified to vote,” *id.* at 1371, cannot be squared with the statutory language of this section, combined with the broad definition of “vote” in § 1971(e). It also cannot be squared with the intent of the statute, as such a narrow reading would enable a state to impose, for instance, a post-registration literacy test at the polls, which clearly was intended to be illegal. Section 1971 was amended one more time in Section 15 of the Voting Rights Act of 1965. Pub. L. 89-110, 79 Stat. 445 (1964), by deleting the word “Federal” wherever it appeared in subsections (a) and (c). Accordingly, this change expanded the reach of § 1971 to state and local elections.

Federalism”); *United States v. Mississippi*, 380 U.S. 128, 137-38 (1965) (relying on the language of the statute to reject defense argument that “otherwise qualified by law” could include laws “even though those laws were unconstitutional”); *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (construing various sections of the Voting Rights Act of 1965, noting that “compatible with the decisions of this Court the Act gives a broad interpretation to the right to vote, recognizing that voting includes ‘all action necessary to make a vote effective,’”<sup>55</sup> and concluding with other indicia that Congress intended “to give the Act the broadest possible scope.”) With paragraphs (A) and (B) of § 1971(a)(2), Congress sought to place all registration applicants on an equal footing and to remove the unequal and/or pretextual excuses for denial of the right to vote.

**B. Application to the 2006 Act.**

The Photo ID requirement violates both sections of § 1971(a)(2). First, by requiring a Photo ID in order to vote, the state has applied a different standard to those with Photo IDs than it applies to those without, when both were found to be qualified to vote when they registered, in violation of § 1971(a)(2)(A). Those who have a Photo ID may vote any way they want, while those who do not have an ID

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<sup>55</sup> *Allen v. State Bd. of Elections* construed the definition of “vote” found in 42 U.S.C. § 1973(l)(c)(1). The definition of “vote” in § 1971(e) is not different in any relevant respect. Both sections include the phrase “all action necessary to make a vote effective.”

are limited to the absentee balloting procedure, even though all voters, with or without Photo ID, are otherwise qualified to vote. Because this Court has found absentee voting to be an inadequate alternative, the State is not only applying different practices or procedures to the group of voters who do not possess Photo IDs (and who are disproportionately African-American, poor, and/or elderly), but the State is forcing them to vote in a demonstrably less desirable way.

Second, under the 2006 Act, obtaining or failure to obtain an ID is an additional “act requisite to voting,” the omission of which is not “material” to determining whether the voter is qualified to vote. In fact, prior to 2005, Georgia voters were *never required* to show identification of any form: a voter could simply swear and affirm that he or she was the person shown on the voter rolls. Order, p. 9. Even under the 2006 Act, a voter may still cast an absentee ballot without a Photo ID. Thus, the Photo ID itself cannot be “material” to determining whether the person is qualified to vote, yet it results in denial of a voter’s right to vote, and this violates § 1971(a)(2)(B).<sup>56</sup>

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<sup>56</sup> The *Indiana Democratic Party* case, which ruled against the plaintiffs on their § 1971 claims, is applicable here. First, the Indiana court found that absentee voting was an adequate alternative to voting in person, and distinguished its holding from the contrary holding of this Court. Thus, with respect to the § 1971(a)(2)(A) claim, the plaintiffs could only argue that there were different standards applied to those who voted in person (who were required to present an ID) as opposed to those who voted absentee (who were not). The argument here is

**C. The Statute Does Not Require Proof of Racially Discriminatory Intent or Effect.**

These sections do not call for proof of racial discrimination or allow for inquiry into fault. The language of § 1971(a)(2)(A) and (B) is clear. Motive or fault is not part of the required proof. Indeed, if intent were an element of a claim under § 1971(a)(2)(A) or (B), these paragraphs would be redundant because all denials of the right to vote based on provable racial discrimination had already been banned by § 1971(a)(1).

In addition to the clear language of the statute, the law in this Circuit, as established in *Schwier v. Cox*, is that intent and fault is not relevant. *Schwier v. Cox* included a § 1971(a)(2)(B) claim (regarding omission of nonmaterial information) brought by plaintiffs who intentionally refused to comply with a request that they disclose their social security numbers in order to register to vote. They were asserting a right of privacy, not of discrimination. (Indeed, plaintiffs did not even plead their race.) The defendant in *Schwier v. Cox* argued that plaintiffs' § 1971 claim should be dismissed because they had not asserted a claim of racial discrimination. Brief on Behalf of Defendant/Appellee Secretary of State Cox, p.

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very different. With respect to the § 1971(a)(2)(B) claim, the Indiana case is also distinct from this case in a key respect: the plaintiffs there conceded that "some form of identification is material" to voting and the court concluded that the State could then necessarily establish certain standards for *what* form of identification would be accepted. *Indiana Demo. Pty*, 2006 WL 1005037, at \*48.

27 (11th Cir. No. 02-13214-II). Although not explicitly ruling on this issue, the Court of Appeals reversed the district court's determination that § 1971 could not be enforced via a private right of action, and remanded the case to the district court for determination on the merits of the statutory claims, including, *inter alia*, whether denying a voter's registration application for failing to provide a social security number on the voter registration form violated § 1971(a)(2)(B). 340 F.3d 1284 (11<sup>th</sup> Cir. 2003).

The district court granted summary judgment in favor of the plaintiffs and against the defendants on the merits of the statutory claims, including the § 1971 claim, and the Court of Appeals not only affirmed but adopted the district court's opinion granting summary judgment in that case. *Schwier v. Cox II*, 412 F. Supp. 2d 1266 (N.D.Ga. 2005), *aff'd*, 439 F.3d 1285, 1286 (11th Cir. 2006) (affirming the district court's judgment "for the reasons stated in the district court's opinion"). Thus, under binding 11<sup>th</sup> Circuit law, race cannot be an element of a § 1971 claim. This is consistent with the clear statutory language of § 1971. Different treatment regardless of reason, fault or disparate impact based on race, age or poverty violates § 1971.



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**CERTIFICATE OF SERVICE**

This is to certify that I have this day caused a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR A PRELIMINARY INJUNCTION** to be served on all counsel of record as follows:

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