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

COMMON CAUSE / GEORGIA, 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.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs have moved for the entry of a preliminary injunction pursuant to Fed.R.Civ.P. 65(a)(2) enjoining the enforcement of the 2005 amendment to O.C.G.A. § 21-2-417 (Act No. 53, 2005 Ga. Laws, p. 253) (the "new Photo ID requirement") which requires registered voters to present a Photo ID as a condition to voting in person at all federal, state and local elections in Georgia.

The new Photo ID requirement imposes an unauthorized, unnecessary and undue burden on the fundamental right to vote of hundreds of thousands of registered Georgia voters and is, therefore, unconstitutional both on its face and as applied. It violates:

- Art. II, § I, ¶ II of the Georgia Constitution;
- the First and Fourteenth Amendments to the United States Constitution;
- the Twenty-Fourth Amendment to the United States Constitution;
- the Civil Rights Act of 1964 (42 U.S.C. § 1971(a)(2)(A) and (a)(2)(B)); and
- Section 2 of the Voting Rights Act of 1965 (42 U.S.C. § 1973(a)).

"Voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The right to vote is entitled to special constitutional protection because:

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

Reynolds, 377 U.S. at 555, 562. *Accord*, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("[o]ther rights, even the most basic, are illusory if the right to vote is undermined"). Because of the preferred place it occupies in our constitutional scheme, "any illegal impediment to the right to vote, as guaranteed by the U.S.

Constitution or statute, would by its nature be an irreparable injury." *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984). *Accord*, *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) ("denial of the right to vote" constitutes irreparable injury); *Foster v. Kusper*, 587 F. Supp. 1191, 1193 (N.D. Ill. 1984) (denial of the right to vote for candidate of choice constitutes "irreparable harm"). *See also Elrod*, 427 U.S. at 373 (the loss of constitutionally protected freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury").

Preliminary injunctive relief should be granted because the plaintiffs have demonstrated: (1) a substantial likelihood of prevailing on the merits of at least one of their claims; (2) that the plaintiffs and other Georgia voters will suffer irreparable harm to their rights as voters unless injunctive relief is granted; (3) that the threatened injury to the rights of the plaintiffs and other Georgia voters outweighs whatever damage the proposed injunction may cause the opposing party (which is none); and (4) the grant of an injunction would not adversely affect the public interest. *Warren Publ'g, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1516 (11th Cir. 1997); *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983).

Statement of Facts[1]

I. Voter Identification Requirements in Georgia

A. There was no identification requirement prior to 1998

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

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

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

Under O.C.G.A. § 21-2-417 as it existed prior to its amendment by Act 53 in 2005, registered voters had the option of using a Georgia driver's license or other form of official photographic identification as a method of identification as a condition of voting. Photographic identification was not required, however.

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[1] Plaintiffs expect that most, if not all, of the facts set forth, *infra*, will not be disputed. Nevertheless, plaintiffs have included citations to supporting materials reflecting evidence that will be admissible at trial. *See Sierra Club v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence.")

Voters were free to use any of eight other methods of identification, including such commonly available documents as a social security card, a current utility bill, a government check, a payroll check, or a bank statement that showed the name and address of the voter. *See* former O.C.G.A § 21-2-417(a)(10), (11), (14), (15), (16).

Moreover, Georgia law provided for an alternative means of identification for a voter who did not have or was unable to find one of the seventeen forms of photographic or non-photographic identification specified in former O.C.G.A. § 21-2-417(a) on election day. Such a voter was entitled under Georgia law, as it existed prior to the enactment of Act 53, to be admitted to the polls, issued a ballot and allowed to vote simply by signing a statement under oath swearing or affirming that he or she is the person identified on the elector's certificate. Former O.C.G.A. § 21-2-417(b).

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

The Secretary of State is the Chief Election Officer in Georgia. *See* O.C.G.A. § 21-2-30(d); O.C.G.A. § 21-2-50.2; and O.C.G.A. § 21-2-210. The Secretary of State has stated publicly in letters to the General Assembly before the passage of Act 53 (attached hereto as Exhibit A), and to the Governor (attached hereto as Exhibit B) before he signed the bill into law, that **there have been no**

documented cases of fraudulent in-person voting by persons who obtained ballots unlawfully by misrepresenting their identities as registered voters to poll workers reported to the Secretary of State during her nine years in office.[2]

D. The new Photo ID requirement

Despite having been advised by the Secretary of State that there is a total absence of evidence of voter fraud involving in-person voting in Georgia during her nine years in office, in 2005, the Republican dominated General Assembly of Georgia[3] adopted Act 53, which amended O.C.G.A. § 21-2-417, to require all registered voters in Georgia who vote *in person* in all primary, special or general elections for state, national and local offices held on or after July 1, 2005, to present a government-issued photographic identification card ("Photo ID") to

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[2] *See* Deposition of Cathy Cox, dated October 4, 2005 ("Cox Dep.") at 14.

[3] Act 53 was adopted by party-line vote of all but a handful of Republicans who control both the Georgia House and Senate. The Conference Committee Report on Act 53 was approved in the House by a vote of 89 Republicans and only 2 Democrats, while 72 Democrats and only 3 Republicans in the House voted against the bill. Declaration of Ron D. Hockensmith, dated October 5, 2005, ¶ 5. The Conference Committee Report on Act 53 was also adopted in the Senate by a vote of 31 Republican Senators and no Democrats voting in favor of the bill, while 18 Democratic Senators and only 2 Republicans voted against the bill. Declaration of Ron D. Hockensmith, dated October 5, 2005, ¶ 5. All but one of the 44 African-American legislators in both houses of the General Assembly voted in favor of the bill.

election officials as a pre-condition to being admitted to the polls, issued a ballot, and allowed to vote.

Georgia's newly enacted Photo ID requirement (O.C.G.A. § 21-2-417, as amended by Act No. 53) provides:

> (a) Except as provided in subsection (c) of this Code section, **each elector shall present proper identification** to a poll worker at or prior to completion of a voter's certificate at any polling place and prior to such person's admission to the enclosed space at such polling place. Proper identification shall consist of any one of the following:
>
> (1) A **Georgia driver's license** which was properly issued by the appropriate state agency;
>
> (2) A **valid identification** card **issued by a branch, department, agency, or entity of the State of Georgia**, any **other state, or the United States** authorized by law to issue personal identification, provided that such identification card contains a photograph of the elector;
>
> (3) A **valid** United States **passport**;
>
> (4) A **valid employee identification** card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, this state, or any county, municipality, board, authority, or other entity of this state;
>
> (5) A **valid United States military identification** card, provided that such identification card contains a photograph of the elector; or
>
> (6) A **valid tribal identification** card containing a photograph of the elector.

(b) Except as provided in subsection (c) of this Code section, if an elector is unable to produce any of the items of identification listed in subsection (a) of this Code section, he or she shall be allowed to vote a provisional ballot pursuant to *Code Section 21-2-418* upon swearing or affirming that the elector is the person identified in the elector's voter certificate. **Such provisional ballot shall only be counted if the registrars are able to verify current and valid identification of the elector** [*i.e.* a Photo ID] as provided in subsection (a) of this Code section **within the time period for verifying provisional ballots pursuant to *Code Section 21-2-419*.** Falsely swearing or affirming such statement under oath shall be punishable as a felony, and the penalty shall be distinctly set forth on the face of the statement.

(c) **An elector who registered to vote by mail**, but did not comply with subsection (c) of *Code Section 21-2-220*, and **who votes for the first time in this state** shall present to the poll workers either one of the forms of identification listed in subsection (a) of this Code section **or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of such elector**. If such elector does not have any of the forms of identification listed in this subsection, such elector may vote a provisional ballot pursuant to *Code Section 21-2-418* upon swearing or affirming that the elector is the person identified in the elector's voter certificate. Such provisional ballot shall only be counted if the registrars are able to verify current and valid identification of the elector as provided in this subsection within the time period for verifying provisional ballots pursuant to *Code Section 21-2-419*. Falsely swearing or affirming such statement under oath shall be punishable as a felony, and the penalty shall be distinctly set forth on the face of the statement.

O.C.G.A. § 21-2-417 (emphasis added).

While the General Assembly chose to amend the requirements for in-person voting, it chose to ignore the Secretary of State's concern for the significant opportunity for fraudulent voting by absentee ballots.

Act 53 was signed by Governor Sonny Perdue on April 22, 2005, and the Photo ID requirements in the bill became effective on July 1, 2005, subject to pre-clearance by the United States Department of Justice, which was granted on August 26, 2005.

As a result of the adoption of Act 53, Georgia became one (1) of only two (2) states that makes a Photo ID an **absolute** condition of in-person voting.[4] A majority of states (28) do not require registered voters to present any form of identification as a condition of voting.[5] A minority of states (22) require voters to present some form of identification at the polls.[6] Of these, only *two* states (Georgia and Indiana) require voters to present a Photo ID as the sole method of identification for in-person voting.[7]

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[4] Georgia and Indiana are the only two (2) states that require registered voters to present a Photo ID as an absolute condition of being admitted to the polls and allowed to cast a ballot in federal, state and local elections. *See* Ind. Code §§ 3-11-8-25.1 and 3-5-2-40.5.

[5] *See* National Conference of State Legislatures website: www.ncsl.org/programs/legman/elect/taskfc/voteridreq.htm.

[6] *See Id.*

[7] *See Id.* (Of 7 states listed as "requesting Photo ID" only Georgia's new Photo ID requirement and Indiana's voting statute do not provide an alternative verification of the identity of a voter without the required identification).

Significantly, after the 2005 amendment, voters are no longer permitted to vote by affirming their identity under oath as was formerly allowed by Georgia law. If a voter cannot present an ID card, he or she will not be issued a ballot or allowed to vote.[8]

E. The Georgia Legislature also doubled the fee for a Georgia Photo ID to $20

At the same time that it voted to require a Photo ID for in-person voting, the General Assembly also amended O.C.G.A. § 40-5-103(a), **by doubling the minimum fee for a Photo ID** from $10 to $20 for a 5-year Photo ID. The General Assembly also authorized the DDS to issue a new 10-year Photo ID for a fee of $35. 2005 Ga. Laws, p. 334 (Act No. 68) § 17-24(a).

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

The new Photo ID requirement in Act 53 applies only to registered voters who vote *in person.* Strangely, the General Assembly did not impose a similar Photo ID requirement on absentee voters, even though the Secretary of State informed the members of the General Assembly and the Governor that her office had received many complaints of voter fraud involving absentee ballots and no

[8] Although provisional ballots will be permitted, such ballots will be counted only if the voter returns to the county registrar's office and presents a valid 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.

documented complaints involving ballots that were cast in person. *See* O.C.G.A. § 21-2-417; Exhibits A & B.

II. The Photo ID Requirement Imposes An Undue Burden On The Right To Vote

AARP and the League have estimated that 152,000 of those who voted in the general election in Georgia in 2004 were over 60 years of age and did not have Georgia driver's licenses.[9] The new Photo ID requirement imposes an unnecessary and undue burden on the exercise of the fundamental right to vote of hundreds of thousands of fully eligible, registered and qualified Georgia voters who do not have Georgia driver's licenses, passports, or some other form of official Photo ID issued by the state government.

The new Photo ID requirement 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;[10] (b)

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[9] Cox Dep. at 22-23 (Secretary of State Cox testified that she was satisfied with the accuracy of this estimate).

[10] *See e.g.* Declaration of Eva Jeffrey, dated September 29, 2005, ¶ 4 (cannot afford a car and does not have means to spend $20.00 for a Photo ID); 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 (economic circumstances prevent him from obtaining Photo ID without great personal and economic hardship); Declaration of Willie Boyer, dated

elderly and no longer drive and do not have a valid passport; [11] (c) **visually impaired** and are unable to drive or travel on a passport;[12] (d) **physically impaired** and are unable to drive or travel on a passport;[13] and (e) **residents of retirement or nursing homes** who, by choice or necessity, do not have driver's licenses or passports.[14]

September 26, 2005, ¶ 5 (same); Declaration of Katherine Jackson, dated September 26, 2005, ¶ 5 (same).

[11] *See* Declaration of Ruth L. Butler, dated September 28, 2005, ¶¶ 1& 5 (89 year old with no car and lacking means to pay $20.00 for Photo ID); Declaration of Willie Boyer, dated September 26, 2005, ¶ 5 (same); Declaration of Rosa Brown, dated October 3, 2005 ¶¶ 1-7 & 8 (93 year old with physical impairment and limited means).

[12] *See e.g.* Declaration of Luanna S. Miller, dated September 28, 2005, ¶ 5 (legally blind and lacks means to pay $20.00 for Photo ID); Declaration of Minnie Bridges, dated September 26, 2005, ¶ 5 (physical and visual impairments create logistical problems for obtaining a Photo ID).

[13] *See e.g.* Declaration of Annie Johnson, dated September 29, 2005, ¶ 6 (physical disability which makes it difficult to obtain Georgia Photo ID); Declaration of George Cliatt, dated September 29, 2005, ¶ 6; Declaration of Mary Cliatt, dated September 29, 2005, ¶ 6 (confined to a wheelchair which makes it difficult to obtain Photo ID); Declaration of Troymaine Johnson, dated September 28, 2005, ¶ 5 (requires wheelchair and, therefore, would have difficulty getting to DDS office).

[14] *See e.g.* Declaration of Betty Kooper, dated September 26, 2005, ¶¶ 1&5 (90 year old resident of assisted/independent living facility who lacks economic means to sacrifice $20.00 for a Photo ID); Declaration of Norma Pechman, dated September 26, 2005, ¶¶ 1&5 (84 year old resident of independent living facility who lacks the means to sacrifice $20.00 for a Photo ID); Declaration of Pearl

A. It is impossible for some voters to obtain a Photo ID

The Georgia Department of Driver Services requires an applicant to present an *"original or a certified copy"* of a birth certificate issued by an official state agency as a condition of obtaining a Photo ID, and will not accept "Hospital birth certificates." Exhibit C, Georgia Department of Driver Services "Applying for a Georgia ID Card" (www.dds.ga.gov).

To obtain a certified copy of a birth certificate, a registered voter who was born in Georgia must apply to the Georgia Division of Public Health and (according to that Division's website) pay a search fee of $10. Exhibit D (www.health.state.ga.us/programs/vitalrecords/birth.asp).

It is impossible for registered voters who were born in Georgia before 1919 to obtain a certified copy of their birth certificates because the Georgia Division of Public Health does not maintain a record of births prior to 1919. *Id.*

It is also impossible for a registered voter who was born in Georgia in 1919 or thereafter to obtain a certified copy of his or her birth certificate because the rules of the Georgia Division of Public Health, published in its website, require a person to present a Photo ID in order to get a certified copy of the birth certificate:

Kramer, dated September 26, 2005, ¶¶ 1&5 (80 year old resident of assisted living facility with physical impairment that makes travel to a DDS office a hardship).

Required Information

> **The person requesting a certified copy of a birth record must provide** . . . a signed request form, and a **photocopy of your valid photo ID, such as a driver's license, state-issued ID card, or employer issued photo ID.**[15]

Moreover, there are tens of thousands of registered voters who live in Georgia, but were born in other states. These voters face similar obstacles in obtaining certified copies of their birth certificates from the states in which they were born. Finally, many older and less affluent registered voters cannot obtain a Photo ID because they do not have birth certificates on file with the departments of vital statistics in Georgia or other states for a variety of reasons, for example: (a) because they were born before such records were recorded and maintained;[16] (b) because they were born at home and no official records of their births were filed; or (c) because they were informally adopted and have lived for years under the name of their adoptive parents, rather than the name under which they were born.[17]

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15 (www.health.state.ga.us/programs/ vitalrecords/birth.asp). Exhibit D.

16 *See e.g.*, Declaration of Irene Laster, dated September 29, 2005, ¶ 6 ("I was born in 1917 and at such time it was not customary to deliver a birth certificate in the community in which I was born.")

17 *See, e.g.*, Declaration of Clara Williams, dated September 25, 2005.

For example, Plaintiff Clara Williams was informally adopted and has never used the surname on her birth certificate. Declaration of Clara Williams, dated September 25, 2005. This has prevented her from obtaining a Georgia Photo ID in her name as it appears on her voter registration. *Id.* Ms. Ruth White's birth state of North Carolina has not been able to locate her birth certificate. Declaration of Ruth White, dated October 3, 2005. Ms. White has recently moved to Georgia, but because she does not have a certified copy of her birth certificate and her Pennsylvania driver's license has expired, she is unable to obtain a Georgia Photo ID. *Id.*[18] Further, Amanda Clifton has encountered extreme difficulty securing a Georgia Driver's license in her maiden name following her divorce simply because her divorce decree did not specify her desire to return to her maiden name. *See* Declaration of Amanda Clifton, dated October 3, 2005.

B. Obtaining a Photo ID is neither easy cheap or convenient

It is neither easy, cheap nor convenient for a voter to obtain a Photo ID.[19]

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[18] Under Georgia's new Photo ID requirement, Ms. White fears that she will not be able to vote in the upcoming city of Atlanta election in which her daughter is a candidate. *Id.*

[19] This brief focuses on Georgia's legislative scheme, including the Georgia Photo ID. Obtaining other forms of Photo ID involves costs as well. *See* http://www.usps.com/passport/ (obtaining a U.S. Passport would cost at least $97.00).

(1) There are only 57 DDS Offices in Georgia

The Department of Driver Services ("DDS") is the only state agency in Georgia from which a registered voter may obtain an official Photo ID. To obtain a Photo ID card from the DDS, a registered voter must travel to a DDS office. There are currently, however, only 57 DDS offices in the entire State of Georgia. *See* www.dds.ga.gov/locations/LocationList.aspx. This means that tens of thousands of registered voters who live in at least 103 of Georgia's 159 counties must travel outside their home counties to a DDS office located in another county to obtain a Photo ID.

(2) There are no DDS Offices in Atlanta or Rome

There is not a single DDS office located within the City of Atlanta, Georgia's largest city, or in the City of Rome. *See* www.dds.ga.gov/locations/LocationList.aspx and www.dds.ga.gov/locations/dllocations.aspx?csc=38. Registered voters who are residents of those cities, therefore, must travel outside the city limits to obtain the required Photo ID.

(3) A Photo ID is neither free, nor cheap

A Voter must pay $20 for a Georgia Photo ID, exactly double the price prior to July 1, 2005, when the new Photo ID requirement went into effect. *See*

O.C.G.A. § 40-5-103 and notes to 2005 amendment. Moreover, a voter has to pay to obtain a certified copy of a birth certificate, which costs another $10. *See* Exhibit D.

(4) The DDS offices are not open evenings or on Sundays

The DDS offices are only open from 9:00 a.m. to 5:00 p.m. Tuesdays through Saturdays, and are closed on Sundays, Mondays and evenings. *See* www.dds.ga.gov. While Saturdays are not usually work days for office, clerical, government and other white collar workers, blue collar workers and clerical workers employed in retail establishments like grocery and department stores, or in the construction industry are frequently required to work on Saturdays, and sometimes on Sundays. The only times when many voters might be able to obtain a Photo ID without having to take time off from work would be evenings when DDS offices are closed.

(5) DDS offices often have long lines and 3-4 hour waits

As attested to by the Declarations of Justice George H. Carley and Judge Henry Newkirk, the DDS offices typically have long lines and it is often necessary for a person to stand in line 3 or 4 hours to renew a Georgia driver's license or obtain a Photo ID. *See* Declaration of Henry M. Newkirk, dated September 29, 2005 (3 ½ hour wait at DDS office); Declaration of George H. Carley, dated

September 28, 2005 (over 3 hour wait). It is very difficult, if not physically impossible for many other voters to stand in line for 3 or 4 hours to obtain a Photo ID. *See* Declaration of Henry M. Newkirk (describing Judge Newkirk's "grueling" experience taking his parents to obtain a Georgia license and Photo ID, which Judge Newkirk does not believe his parents could have completed without his assistance).

The time, inconvenience, and expense of having to travel to a DDS office to obtain a Photo ID card, are all significant obstacles the collective effect of which is to make it much more difficult for hundreds of thousands of registered voters to vote in Georgia, and will discourage many registered voters from voting.[20] No similar obstacles exist for voters who have Georgia driver's licenses, passports, or state or federal employee ID cards.

C. The $20 Fee for a Photo ID is a poll tax on the right to vote

The $20 fee for a 5-year Photo ID (or the $35 fee for a 10-year Photo ID) is a poll tax on the right to vote because (1) a voter must purchase a Photo ID from the State as a condition of voting, and (2) the $20 fee far exceeds the cost to the State of producing a Photo ID as underscored by the fact that it is double the

[20] *See e.g.*, Declaration of Ruth White, dated October 3, 2005; Declaration of Amanda Clifton, dated October 3, 2005.

amount that the State charged for the same Photo ID before the Act went into effect and is four times the fee that may be charged to individuals referred by non-profit organizations as "indigent." *See* O.C.G.A. § 40-5-103. By law, the revenue collected by the DDS from the fees for a Photo ID card is deposited in the general treasury of the State (O.C.G.A. § 40-5-103(a)), where it is commingled with, and is indistinguishable from, the revenue generated by other State taxes, including the State income or sales taxes.

D. The $20 fee is also discriminatory

The $20 fee is discriminatory because the fee is not required to be paid by all voters. Only voters who vote in person are required to pay a $20 fee for the privilege of voting (or $30 if the cost of obtaining a certified copy of a birth certificate is taken into account). Absentee voters (other than first time voters) do not have to pay a fee for the right to vote. Voters who have a Georgia driver's license, a passport, or a government-issued Photo ID are also not required to pay a $20 fee for the right to vote.

E. The $20 fee is not a one time expense

The $20 fee for a Photo ID is not a one-time expense for voters (nor is the time, inconvenience and expense and lost wages involved to travel to a DDS office). Unlike voter registration cards which are issued free of charge and never

expire, a $20 Photo ID card is valid only for *five* years. O.C.G.A. §§ 40-5-100(b) & 40-5-103(a). Although a voter can use an expired Georgia driver's license to vote, a voter cannot use an expired Photo ID because Act 53 expressly requires that a voter must present a "*valid* [Photo ID] identification card," to be admitted to the polls and issued a ballot. O.C.G.A. § 21-2-417(a)(2). This inconsistency was deliberate, not the result of oversight. The General Assembly eliminated the previous requirement of Georgia law that a driver's license used for voter identification purposes must be "valid" (*i.e.*, unexpired) with the same section of Act 53 in which it required voters to present a **valid** Photo ID card in order to vote. *See* O.C.G.A. § 21-2-417(a)(1) and notes regarding 2005 amendment. The practical effect of the 5-year limitation on the life of a Photo ID card is that voters who must rely on Photo ID cards in order to vote, are required to pay $20 to obtain a *new* Photo ID card from a DDS office *every five years* (or $35 every 10 years) in order to continue voting.[21] A 5-year Photo ID card is essentially a $20 "ticket" that is good for admission to the polls for only one (or at most two), gubernatorial elections and one (or at most two) presidential elections before the Photo ID expires.

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[21] This is one of many examples of the arbitrariness of the statute: an old picture on an **expired** Georgia driver's license is good enough for identification purposes, but a picture on an expired Photo ID card that is more than 5 years old is not.

F. The objections to the $20 fee are not eliminated by the so-called waiver provision

Some will claim that the $20 fee is irrelevant because the DDS is allowed by an amendment to O.C.G.A. § 40-5-103 (Act 53, § 66), to issue a Photo ID without payment of the $20 fee for a registered voter who:

> swears under oath that he or she is [1] *indigent and* [2] *cannot pay* the fee for the identification card, that he or she desires an identification card in order to vote in a primary or election in Georgia and that he or she does not have any other form of identification that is acceptable at the polls under Code Section 21-2-417 for identification at the polls in order to vote.

The existence of a comparable waiver provision in the Virginia poll tax statute did not prevent the Supreme Court from declaring the statute unconstitutional. *See Harman*, 380 U.S. at 328 and discussion in Argument section II, *infra*. Moreover, this waiver provision is unconstitutionally vague and does not eliminate the objections to the $20 fee for voting for other reasons:

(1) The waiver is not available to a voter who has at least $20

The requirements of the statute are written in the conjunctive – "indigent **and** cannot pay the fee." If the statute is read literally, a registered voter who is "indigent" (a vague term that is not defined in the Act) but who has $20 cannot qualify for the waiver of the $20 fee under the first requirement of the statute

because the voter cannot swear truthfully that he or she "*cannot pay the fee*" as required by the plain wording of the statute.

(2) "Indigent" is not defined and is unconstitutionally vague

There is also great uncertainty as to which voters will be deemed by the clerical personnel in the DDS offices to be "indigent" and therefore eligible for a waiver under the second requirement of the statute. The term "indigent" in the 2005 amendment to O.C.G.A. § 40-5-103 is not defined in the statute and is so vague that a person of ordinary intelligence can only guess at the meaning of the term "indigent" in this context.[22] It is unclear for example, whether a single person who earns only $5.15 per hour minimum wage is "indigent" within the meaning of the statute and would qualify for a waiver of the $20 fee as a result. Is a retired or disabled person receiving Social Security "indigent," if he or she has no other source of income? The statute leaves individual clerical personnel in each of the 57 DDS offices (and local district attorneys) free to apply their own subjective interpretations of the term "indigent" in determining whether a particular individual is (or was) eligible for a waiver of the $20 fee.

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[22] The vagueness of the waiver provision and the likelihood that applicants will ask DDS staff for guidance makes the statute subject to the same constitutional infirmities as the statutes that delegated authority to local election officials the powers to determine whether an applicant was sufficiently literate to be allow to vote. *See Louisiana v. United States*, 380 U.S. 145 (1965).

(3) The $20 fee is still a poll tax on the right to vote of voters who are not indigent

Even if the term "indigent" in O.C.G.A. § 40-5-103 were interpreted broadly, the $20 fee would still constitute an unconstitutional poll tax on the right to vote of thousands of *other* registered voters who are not indigent, but who do not have driver's licenses, passports, or government issued Photo ID cards.

(4) The $20 fee is discriminatory because it does not apply to absentee voters

Moreover, the $20 poll tax is also arbitrarily discriminatory because it does not have to be paid by absentee voters (or voters who have one of the permitted forms of government issued Photo ID).

(5) The waiver of the $20 fee also does not relieve voters of the other costs and inconvenience of compliance, which are greater than the fee

Finally, a waiver of the $20 fee for registered voters who are "indigent" and "cannot pay the fee," does not relieve registered voters who do not have valid Georgia driver's licenses, passports, or other forms of official Photo ID of the inconvenience or the expense of having to travel by bus or taxi from their homes or places of work to a DDS office that may be located in another city or county, miles away, to obtain a Photo ID in order to vote.[23] The costs and inconvenience in

[23] *See e.g.*, Declaration of Ruth White.

terms of lost wages and travel constitute a far greater and more significant obstacle to voting than the $20 fee, and fall almost exclusively and most heavily on the poor, the infirm, and the elderly, and not on the more affluent individuals who own cars, have driver's licenses and/or passports, and are more likely to be able to take time off from work.

III. The new Photo ID Requirement Will Have 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 African-American voters in Georgia, as a group, are (a) less affluent than whites, and (b) are three times less likely to own or have access to a motor vehicle than are whites, according to recent data published by the U.S. Census Bureau. Census Survey File 3 (SF3) HCT33B.[24]

IV. The Stated Purpose of the New Photo ID Requirement (Preventing Voter Fraud) is a Pretext

According to a presentation prepared by the Communications Office of the Georgia House of Representatives, the purpose of Act 53 is:

> . . . to address the issue of voter fraud by placing tighter restrictions on voter identification procedures. Those casting ballots will now be

[24] A copy of relevant tables of United States Census data are attached hereto as Exhibit E.

> required to bring a photo ID with them before they will be allowed to vote.[25]

The claim that the Photo ID requirement was enacted to prevent "voter fraud" is a pretext that is intended to conceal the true purpose of the amendment, which was, and is to suppress voting by the poor, the elderly, the infirm, African-American, Hispanic and other minority voters. As Al Marks, Vice Chairman for Public Affairs and Communication of the Hall County GOP, admitted to the *Gainesville Times*:

> I don't think we need it for voting, **because I don't think there's a voter fraud problem**.

Gainesville Times, "States Voters Must Present Picture IDs" (September 15, 2005) (www.gainesvilletimes.com) (emphasis added).

The only kind of fraudulent voting that might be prevented by the Photo ID requirement would be fraudulent in-person voting by impersonators. There is no evidence that the existing Georgia law has not been effective in deterring or preventing fraudulent in-person voting by impersonators. There have been no documented cases of fraudulent in-person voting by imposters reported to the Secretary of State during her nine years in office. Exhibits A & B.

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[25] Exhibit F.

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

- First, the risk of significant fraudulent voting by imposters is very small. If an imposter arrived at a poll and was successful in fraudulently obtaining a ballot before the registered voter arrived at the poll, a registered voter, who having taken the time to go to the polls to vote, would undoubtedly complain to elections officials if he or she were refused a ballot and not allowed to vote because his or her name had already been checked off the list of registered voters as having voted. Likewise, if an imposter arrived at the polls after the registered voter had voted and attempted to pass himself off as someone he was not, the election official would instantly know of the attempted fraud, would not issue the imposter a ballot or allow him to vote, and presumably would have the imposter arrested or at least investigate the attempted fraud and report the attempt to the Secretary of State as Superintendent of Elections. Thus, fraudulent in-person voting is unlikely, would be easily detected if it had occurred in significant numbers, and would not be likely to have a substantial impact on the outcome of an election.[26]

- Fraudulent voting was already prohibited as a crime under O.C.G.A. §§ 21-2-561, 21-2-562, 21-2-566, 21-2-571, 21-2-572 and 21-2-600, punishable by a fine of up to $10,000 or imprisonment for up to ten years, or both. There is no evidence that the existing criminal sanctions have not been effective in deterring the kind of fraudulent voting that the new Photo ID requirement would address.[27]

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[26] *See* Cox Dep. at 16-17.

[27] *See Id.* at 46-47.

- Voter registration records are automatically updated periodically by the Secretary of State and local election officials to eliminate people who have died, have moved, or are no longer eligible to vote in Georgia for some other reason.[28]

- Existing Georgia law also requires election officials in each precinct to maintain an up-to-date list of names and addresses of registered voters residing in that precinct, and to check off the names of each person from that official list as they cast their ballots.

- Since 1998, voters have been required by existing Georgia law to provide one of the seventeen means of identification to election officials, or to swear under penalty of perjury to their identity. Election officials were required to match the name and address shown on the document to the name and address on the official roll of registered voters residing in the particular precinct before issuing the voter a ballot. *See* former O.C.G.A. § 21-2-417.

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

If the true intention of the General Assembly had been to prevent fraudulent voting by imposters, the General Assembly would have imposed at least the same, if not greater, restrictions on the casting of absentee ballots – especially after the Secretary of State had called to their attention the fact that there had been many

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28 *See Id.* at 44-45.

documented instances of fraudulent casting of absentee ballots reported to her office. The fact that the General Assembly went in the opposite direction and expanded the opportunities for fraud in absentee voting is further evidence of the pretextural nature of justification for the statute.

Argument

The new Photo ID requirement imposes an unauthorized, unnecessary and undue burden on the fundamental right to vote of hundreds of thousands of registered Georgia voters and is, therefore, unconstitutional both on its face and as applied under:

- Art. II, § I, ¶ II of the Georgia Constitution;
- the Fourteenth Amendment to the United States Constitution;
- the Twenty-Fourth Amendments to the United States Constitution;
- the Civil Rights Act of 1964 (42 U.S.C. § 1971(a)(2)(A) and (a)(2)(B)); and
- Section 2 of the Voting Rights Act of 1965 (42 U.S.C. § 1973(a)).

I.
Georgia's New Photo ID Requirement Violates The Georgia Constitution

Article II, Section I, Paragraph II of the Georgia Constitution extends the right to vote to all residents of Georgia who are citizens of the United States, at

least 18 years of age, and who meet the minimum residency requirements prescribed by the General Assembly, and who have registered to vote:

> Every person who is a citizen of the United States and a **resident** of Georgia as defined by law, who is at least **18 years of age** and not disenfranchised by this article, and who meets **minimum residency requirements** as provided by law **shall be entitled to vote at any election by the people**. The General Assembly shall provide by law for the registration of electors.

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

There is nothing equivocal about the words "**shall** be entitled to vote at any election by the people." Equally clear is the principal that where the Georgia Constitution "undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot thereafter enlarge the list." *Stewart v. State*, 98 Ga. 202, 205, 25 S.E. 424, 425 (1896); *see also Morris v. Powell*, 25 N.E. 221, 223 (Ind. 1890) ("That when the people by the adoption of the Constitution have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, the legislature can not add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities. The principle is elementary that when the Constitution defines the qualification of voters, that qualification can not be added to or changed by legislative enactment."); *Koy v. Schneider*, 110 Tex. 369, 377-78, 218 S.W. 479, 480 (1920) ("All the authorities seem in accord with the statement

that 'where the right of suffrage is fixed in the Constitution of a state, as is the case in most states, it can be restricted or changed by an amendment to the Constitution or by an amendment to the federal Constitution, which, of course, is binding upon the states. But it cannot be restricted or changed in any other way. The legislature can pass no law directly or indirectly either restricting or extending the right of suffrage as fixed by the Constitution.'").

The role of the legislature is both expressly **defined** and **limited** by Article II, Section I, Paragraph II to two specific functions: (1) establishing "minimum residency requirements;" and (2) providing for the registration of electors. The new Photo ID requirement is *ultra vires* because it is neither a residency requirement nor is it a condition of registration. *See Franklin v. Harper*, 205 Ga. 779, 790, 55 S.E.2d 221, 229-30 (1949) ("Registration statutes have for their purpose the regulation of the exercise of the right of suffrage, **not** to qualify or restrict the right to vote.") (emphasis added).

The new Photo ID requirement is also prohibited by Article II, Section II, Paragraph II because the Georgia Constitution limits the grounds on which a Georgia citizen who is registered may be denied the right to vote: those who have been (1) convicted of a felony involving moral turpitude, or (2) judicially

determined to be mentally incompetent to vote.[29] Nowhere in the Georgia Constitution is the legislature authorized to deny a registered voter the right to vote on any other ground, including possession of a Photo ID of the type required by Act 53.

In two analogous cases, the Supreme Court held the power of Congress and the states to be similarly limited. In *Powell v. McCormack,* the Supreme Court held that although Congress is expressly authorized by Art. I, § IV of the Constitution to judge the qualifications of its members, Congress was not authorized to use its power to refuse to seat a member of the House for reasons other than those expressly set forth in Art. I, § II of the United States Constitution. 395 U.S. 486 (1969). In its subsequent opinion in the *Term Limits* case, the Supreme Court struck down a provision in the Arkansas Constitution imposing

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[29] The Georgia Constitution includes only the following exceptions:

> Exceptions to the right to register and vote:
>
> (a) No person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence.
>
> (b) No person who has been judicially determined to be mentally incompetent may register, remain registered, or vote unless the disability has been removed.

Georgia Const., Art. II, § I, ¶ III.

term limits on its U.S. Senators and Congressmen on the ground that, "the qualifications for service in Congress set forth in the text of the Constitution are 'fixed' at least in the sense that they may not be supplemented by Congress." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995). The Court explained its earlier decision in Powell based on the text of the Qualifications Clause:

> [T]he enumeration of a few qualifications would by implication tie up the hands of the Legislature from supplying omissions. . . .
>
> It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others.

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

In summary, the Georgia Constitution enumerates in clear and unmistakable terms the two areas in which the General Assembly is authorized to regulate by statute ("provide by law"), and also limits the grounds on which citizens of Georgia who meet both the residency and registration requirements may be denied the right to vote. *See also Franklin,* 205 Ga. at 790 (noting that the legislature may not deny the right of franchise by "making the exercise of such right so difficult or inconvenient as to amount to a denial of the right to vote.")

II.
Georgia's Photo ID Requirement
Imposes A Poll Tax On Georgia Voters

A voter who does not have a Georgia driver's license or a passport must pay a $20 fee for a Photo ID if he or she wants to vote in Georgia. [30] The $20 fee

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[30] O.C.G.A. § 40-5-103, as amended in 2005 now provides:

> (a) Except as provided in subsections (b) and (c) of this Code section, the department shall collect a **fee of $20.00 for a five-year card** and a fee of $35.00 for a ten-year card, **which fee shall be deposited in the state treasury** in the same manner as other motor vehicle driver's license fees.
>
> (b) The department shall collect a fee of $5.00 for the identification card for all persons who are referred by a nonprofit organization which organization has entered into an agreement with the department whereby such organization verifies that the individual applying for such identification card is indigent. The department shall enter into such agreements and shall adopt rules and regulations to govern such agreements.
>
> (c) The department shall not be authorized to collect a fee for an identification card from those persons who are entitled to a free veterans' driver's license under the provisions of *Code Section 40-5-36*.
>
> (d) The department shall not be authorized to collect a fee for an identification card from any person:
>
> (1) Who swears under oath that he or she is indigent and cannot pay the fee for an identification card, that he or she desires an identification card in order to vote in a primary or election in Georgia, and that he or she does not have any other form of

imposed by Georgia's new Photo ID requirement is 7½ times greater than the $1.50 tax on the right to vote in Virginia that was struck down in *Harman* and *Harper*, and is **double** the price charged by the state for the same Photo ID before it became a condition of voting on July 1, 2005 – and four times the fee that the state charges those referred by certain non-profit agencies.

In *Harman v. Forssenius*, 380 U.S. 528 (1965), the Supreme Court held Virginia's $1.50 poll tax unconstitutional under the Twenty-Fourth Amendment as applied to federal elections. A year later in *Harper v. Virginia Bd. of Elections*, the Supreme Court held the same $1.50 poll tax assessed by the State of Virginia unconstitutional as applied to state elections under the Equal Protection Clause of the Fourteenth Amendment. 383 U.S. 663 (1966). Although Georgia's new Photo ID statute assiduously avoided the use of the forbidden words "poll tax," it is a

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identification that is acceptable under *Code Section 21-2-417* for identification at the polls in order to vote; and

(2) Who produces evidence that he or she is registered to vote in Georgia.

This subsection shall not apply to a person who has been issued a driver's license in this state.

(e) The commissioner may by rule authorize incentive discounts where identification cards are renewed by Internet, telephone, or mail.

O.C.G.A. § 40-5-103 (emphasis added).

"tax" and not a user fee as a matter of Georgia law, because the $20 fee exceeds the cost to the DDS of the "service," and the revenue is deposited in the state's general fund where it is commingled with other state tax resources.[31] Even if the $20 fee were not considered a "tax" under Georgia law, the state cannot evade the requirements of the Fourteenth and Twenty-Fourth Amendments by something labeled as a "fee" that is in reality a tax on the right to vote.

A. The $20 Fee violates the Twenty-Fourth Amendment as applied to federal elections

The payment of the $20 fee for a Georgia Photo ID is an unconstitutional condition on the right to vote in federal elections that also violates the Twenty-Fourth Amendment to the United States Constitution. The Twenty-Fourth Amendment provides:

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

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[31] Where the object and purpose of a charge is to provide general revenue rather than compensation for services rendered, a charge (even when designated as a fee) is a tax under Georgia law. *See Gunby v. Yates*, 214 Ga. 17, 19, 102 S.E.2d 548, 551 (1958) ("A fee is a charge fixed by law as compensation for a public officer, while a tax is a forced contribution to the public needs of government."); *see also United States v. Butler*, 297 U.S. 1, 1 (1935) ("A tax . . . as used in the Federal Constitution, signifies an exaction for the support of the government.").

The effect of the Twenty-Fourth Amendment is to abolish "[T]he poll tax . . . absolutely as a prerequisite to voting and no equivalent or milder substitute may be imposed." *Harman*, 380 U.S. at 542. Moreover, the Twenty-Fourth Amendment "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed." *Id.* at 540-41. The fact that the $20 charge is called a "fee" and is imposed indirectly by making the purchase of a $20 Photo ID a condition of voting does not make it any less of a poll tax than the $1.50 poll tax that was declared unconstitutional in both *Harman* and *Harper*. The fact that the legislature doubled the fee for Georgia Photo IDs at the same time the legislature enacted Act 53 reveals their intent to make it more difficult for some people to vote.

B. The $20 fee also violates the Equal Protection Clause of the Fourteenth Amendment

Harman was followed a year later by *Harper*, in which the Court held invalid under the Equal Protection Clause the imposition by the State of Virginia of a $1.50 tax on the right to vote in state elections:

> It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting. **But we must remember that the interest of the state, when it comes to voting, is limited to the power to fix qualifications**…. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor, the degree of discrimination.

Harper, 383 U.S. at 668 (emphasis added).

Harper held that legislation that attempts to put a price on the right to vote can never pass the strict scrutiny test because "wealth or fee paying has . . . no relation to voting qualifications, the right to vote is too precious, too fundamental to be so burdened or conditioned."[32] *Id.* at 670; *see also Jenness v. Little*, 306 F. Supp. 925, 929 (N.D. Ga. 1969) (holding that prohibiting candidates from being listed on the ballot unless they post a certain amount of money is illegal and unconstitutional). There can be no doubt, therefore, that Georgia's new Photo ID requirement is unconstitutional under the Fourteenth Amendment. *See Hill v. Stone*, 421 U.S. 289, 303 (1975) (Noting that the Court struck down a requirement that a voter "render" even a small item such as a pair of shoes to be subject to taxation in order to vote in bond referendum) (J. Rehnquist, dissenting); *Turner v. Fouche*, 396 U.S. 346, 363 (1970) (Georgia's poverty ownership as a qualification

[32] The state's purported justification for imposing the Photo ID requirement and related fees on Georgia's voters (to prevent voter fraud) is pretextural, and for the reasons discussed in Argument section III, *infra*, do not survive any level of scrutiny in equal protection analysis. In *Harper*, however, the Court specifically ruled that any qualification to voting based on wealth or fee paying is unconstitutional, and no justification asserted by the state would be sufficient to allow such a qualification to stand. 383 U.S. at 670; *see also United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967) ("We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.")

to serve on school board was not a "rational state interest" and held to be invidious discrimination).

C. The provision for a waiver of the fee does not save the statute

The purported waiver process in O.C.G.A. § 40-5-103(d) is illusory and is not sufficient to save the constitutionality of the new Photo ID requirement. It provides no definition of "indigent" and would require the person seeking the identification card to swear that he or she does not have $5 (or the amount of the applicable fee) to his or her name. Thus very few, if any, voters attempting to obtain a Georgia Photo ID will qualify for the fee waiver. Instead, even "indigent" applicants are required to pay a fee. *See* O.C.G.A. § 40-5-103(b) ("indigent" applicants pay a $5 fee under certain circumstances).

Likewise, the possibility that a very small number of voters may avoid the Photo ID fee through the purported waiver of O.C.G.A. § 40-5-103(d) does not render Georgia's Photo ID scheme constitutionally permissible. As *Harman* made clear, the Twenty-Fourth Amendment does not merely insure that the franchise shall not be "denied" by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be "denied or abridged" for that reason. 380 U.S. at 540. In *Harman*, the Supreme Court held that a Virginia law that allowed federal voters to qualify either by paying a poll tax **or** by filing a

certificate of residence six months before the election handicapped exercise of the right to participate in federal elections free of poll taxes. 380 U.S. at 541. The Court in *Harman* found the Virginia requirement of filing a notarized or witnessed certificate of residency six months before an election to be "plainly a cumbersome procedure." 380 U.S. at 541. The purported waiver provision of the new Georgia Photo ID requirement, which requires a trip to a DDS office with certain documents, which for many voters will be difficult (if not impossible) to obtain and will cost many voters fees to obtain, is even more cumbersome. Thus, Act 53 similarly handicaps the exercise of the right to participate in federal elections, and therefore, is unconstitutional.

As the above discussion shows, the Supreme Court has held there is no legitimate state interest in imposing a poll tax or related financial burden on the right to vote including any "milder substitute." *Harman*, 380 U.S. at 542. Any election requirement or structure that is directly or indirectly a poll tax or related burden violates the Fourteenth and Twenty-Fourth Amendments. There is simply no legitimate state interest which justifies the resulting burden on the right to vote. In addition to this poll tax jurisprudence, Georgia's new Photo ID requirement is invalid under the Fourteenth Amendment case law under which restrictions on the

right to vote are subjected to a fact specific, flexible balancing assessment. This is discussed immediately below.

III.
Georgia's Photo ID Requirement Creates An Undue Burden On The Fundamental Right To Vote In Violation Of Due Process And Equal Protection Clauses Of The Law

In a democracy, the right to vote is "of the most fundamental significance under our constitutional structure" (*Burdick*, 504 U.S. at 433), which is entitled to special and heightened constitutional protection because it is both the wellspring and the protector of all other rights: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). As such, the right to vote is protected under the First Amendment and under both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Anderson v. Celebrezze*, 460 U.S. 780, 786-87 n. 7 (1983). "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The requirement in Act 53 that voters who vote in-person must produce one of six forms of government-issued Photo ID violates the fundamental right to vote of Georgia voters. The Photo ID requirement prevents otherwise eligible voters, some of whom have voted for decades, from exercising their constitutional right to vote because they are unable to afford or to obtain a government-issued photographic identification card. At the same time, defendants cannot demonstrate why this severe new requirement is needed. Although Georgia claims the government-issued Photo ID requirement was necessary to prevent voter fraud, Georgia not only enacted this onerous requirement without evidence that in-person voter fraud is a significant problem but in spite of testimony by Georgia's chief election officer that it is not. Georgia also cannot show why its pre-existing protections against fraud by in-person voters were not sufficient. Moreover, Act 53 expands the availability of absentee voting and exempts absentee voters from the Photo ID requirement despite a history of voting fraud involving absentee ballots. This overly burdensome, unnecessary, and irrational scheme fails to pass constitutional muster under any level of scrutiny.

A. The applicable legal standard

The Supreme Court has held that state statutes that significantly burden the right to vote,

> . . . must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are ***necessary*** to promote a ***compelling*** governmental interest. . .
>
> It is not sufficient for a State to show that [voting] requirements further a very substantial State interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision . . . and must be tailored to serve their legitimate objectives. . . . And if 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. If it acts at all, it must choose less drastic means.

Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972) (internal citations and quotations omitted).

In analyzing whether a state restriction violates the fundamental right to vote, the Supreme Court balances the degree to which the restriction burdens the rights of voters against both the **legitimacy** and **strength** of the state's interests, and whether "those interests make it **necessary** to burden plaintiff's rights." *Anderson*, 460 U.S. at 789. Even where the state has a legitimate interest, a statute that imposes a significant burden on the right to vote is not "necessary" if the state's interest could be achieved in another way that would impose a lesser burden on the right 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. . . .

Id. *See Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Tashjian v. Republican Party*, 479 U.S. 208, 213-14 (1986)).[33]

Consistent with long-standing Supreme Court precedents applying "strict scrutiny" analysis to circumstances where some otherwise eligible voters are fenced out by a regulation, such as an annual state poll tax of $1.50, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), a statute limiting participation in school board elections to parents and property owners, *Kramer v. Union Free School District*, 395 U.S. 621, 626-27 (1969), and durational residency requirements to voting, *Dunn*, 405 U.S. at 337, the *Burdick* court stated when the rights of voters "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*,

[33] In *Burdick*, the plaintiff asserted the right to cast a write-in ballot under both the First and Fourteenth Amendments. The standard articulated in *Burdick* for balancing voters' rights and governmental interests is taken from fundamental right to vote claims regardless of whether the First Amendment is implicated. *Anderson v. Celebreeze*, 460 U.S. 780, 786 n.7 (1983).

504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1972)). Where the burden on voters caused by a regulation is "reasonable" and "nondiscriminatory," such as not counting write-in votes where the state electoral scheme was held to provide reasonable ballot access to candidates, the state interest advanced by a regulation need not be compelling. *See Burdick*, 504 U.S. at 434. But where a state statute bars qualified voters from voting, the state must both meet the compelling state interest standard as well as establish that the requirement is necessary to achieve the stated interest. Even administrative requirements adopted by most states such as a cutoff date for voter registration – because they bar legal residents from voting – are not exempt from strict scrutiny. *Marston v. Lewis*, 410 U.S. 679, 681 (1973) (finding evidence established that a cutoff was "necessary to promote the State's important interest in accurate voter lists.").

B. The Photo ID requirement imposes a severe burden for in-person voters[34]

As stated above, for most validly registered voters who do not drive, have a passport, work for the government or the military, and are not members of an Indian tribe, the only way they can vote in person is to get a Photo ID from the Georgia DDS. To procure this identification, the voter must find a ride to and from the nearest Georgia DDS (which may be two counties away), wait in a line that

[34] *See* Statement of Facts, section II, *supra*.

may last several hours, bring a birth certificate, birth registration, court record reflecting a change of name, adoption, or change of gender, and pay $20 for a 5-year Photo ID or $35 for 10-year Photo ID. *See* 2005 Ga. Laws, p. 334 (Act No. 68) § 17-24(a). Of course, the voters required to jump through these hoops are those least able to do so – they are predominantly poor, elderly, and minority; they have limited access to transportation; and they may have to choose between voting and eating or paying a utility bill. For these voters, the burden of the identification requirement is substantial and effectively denies them the right to vote.

Other registered voters face even greater burdens. Many voting-age citizens are not eligible for an identification card because they lack a birth certificate or birth registration (if, for example, they were born before these documents were required), they do not have court records reflecting an adoption, change of name, or change of gender, they have no naturalization documents, and they do not own a passport. Such voters, who are likely to be disproportionately elderly, poor and minority, are completely barred from voting. The Photo ID requirement creates a burden on those voters 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 requiring residency and parenthood as a condition of voting (*Kramer*).

C. The Photo ID requirement is not necessary to serve a compelling state interest

The other side of the balance considers both the government's stated interest (i.e., the purported justification for the burden imposed by the challenged statute) as well as the necessity of the challenged statute to achieve that interest. The Supreme Court has made clear that courts may not simply accept a purported justification; rather, a reviewing court must "determine the legitimacy and strength of each of [the state's] interests." *Anderson v. Celebrezze*, 460 U.S. at 789. Placing the state's purported justification for the voter Photo ID requirement – prevention of voter fraud -- under the microscope reveals that no need, let alone a substantial need, exists for the statute here.

The Supreme Court's approach in analyzing the governmental need for the durational residency requirement in *Dunn* is particularly instructive because the purported justification is the same as that claimed here. The *Dunn* court stated that although "'purity of the ballot box' is a formidable-sounding state interest" and that prevention of voter fraud "is a legitimate and compelling government goal," it found the means employed too imprecise to pass constitutional muster because it excluded legitimate voters and because the state's interest in fraud prevention was protected in other ways. 405 U.S. at 345-46, 351. The fundamental flaw of Georgia's current scheme and that faced in *Dunn* is that the

legislation bars legitimate voters from voting in the name of preventing fraud committed by someone else. If voter fraud prevention were ever a justification for denying the right to vote, it would require a finely tuned-structure designed to minimize the harm to the right to vote. Act 53 does the opposite.

D. Act 53 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. The lack of an individualized inquiry prevented an individual from demonstrating to the election officials other indicia of *bona fide* residence, such as buying a house. *Id.* The Court held that "it is not very difficult for Tennessee to determine on an individualized basis whether one recently arrived in the community is in fact a resident, although of course there will always be difficult cases." *Id.* at 351. Accordingly, 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 limit has been exceeded here." *Id.* at 352 (citation omitted).

Under Act 53, 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. Absent the Photo ID, the law imposes a conclusive presumption that the voter is not who he claims to be, despite the fact that Georgia is already fully capable of making individual determinations about identity. If and when there is a question about identity, registrars may re-examine voter qualifications and any one may be challenged by another voter on election day. When challenges are made, Georgia has statutory procedures which provide for determinations with due process protections, including subpoena powers, etc., to aid in resolving identity disputes. O.C.G.A. §§ 21-2-228 to 230. Act 53 circumvents these due process protections for in-person voters without Photo ID.

That the statute further applies this conclusive presumption unevenly creates an additional equal protection violation. Because absentee voters are not required to show any identification, the Photo ID requirement for in-person voting cannot meet the standard of necessity required by the Supreme Court. This alone presents an unequal application of voting requirements, but additional inequalities arise

when a voter 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. The in-person voter is denied the individualized determination afforded the absentee voter. As in *Dunn*, the state cannot reasonably claim such conclusive presumptions are necessary for one class of voters where it simultaneously permits individualized determinations for a different class of voters. Act 53 is therefore unconstitutional because it applies a conclusive presumption that operates to deny legitimate voters the right to vote.

E. 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

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 Act 53 provided sufficient protection against

in-person voter fraud without the burden to voters. Before Act 53, validly registered Georgia voters could vote after presenting one of seventeen types of identification, including a valid birth certificate, a valid social security card, certified naturalization documentation, a current utility bill, bank statement, government check, or any government document bearing the name and address of the voter. Former O.C.G.A. § 21-2-417 (2004). If the voter did not have one of those seventeen types of identification, the voter could cast a ballot after signing an affidavit attesting to his or her identity and address. The signature on the affidavit could be compared to that on the voter's registration application form. Moreover, Georgia has several other protections against voter fraud (e.g., fraudulent voting prohibited as a crime under O.C.G.A. §§ 21-2-561, 21-2-562, 21-2-571, 21-2-572 and 21-2-600, periodic updates of voter registration records, and checking off names as voters cast their ballots).

In *Dunn*, when Tennessee argued that non-residents might enter the state just to vote, 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 Act 53 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 it 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, etc. In Georgia, the Secretary of State announced that she had never seen a documented case of voter fraud that related to the impersonation of a registered voter at voting polls. *See* Exhibit B, pp. 1-2. Georgia's existing protections against in-person voter fraud have already eliminated the threat. Additional safeguards are not necessary and in any event cannot justify denying registered voters their right to vote.

F. The Photo ID requirement discriminates without rational basis between in-person and absentee voters.

Georgia's voter identification scheme also contains a major inconsistency: voters who vote absentee are not required to have a Photo ID. 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. This demonstrates Georgia's determination that, Photo ID cards are not necessary to prevent fraud by absentee voters and allow their votes. The only safeguard against fraud 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. 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 by comparing the signature on the Voter Certificate with the signature of the voter on the voter Registration Card – 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 chose the way of greater interference. . . . it must choose less drastic means"). 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.

In her letter to Governor Perdue, Secretary Cox observed that "the State Election Board has reviewed numerous cases of voter fraud relating to the use of absentee ballots." Exhibit B, 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). Yet despite its purported interest in preventing voter fraud, Act 53 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 absentee voting while at the same time exempting absentee ballots from Photo ID requirements. It is impossible to square the legislators' purported concern about voter fraud with the statute they actually wrote.[35]

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. Act 53 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 v. Takushi*, 504 U.S. at 434.

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[35] To the extent defendants argue that Georgia voters can avoid the Photo ID requirements simply by voting absentee, they prove that the real purpose of the Photo ID requirement is not to prevent voter fraud but instead to disadvantage classes of voters who are more likely to vote in person.

Finally, the Photo ID requirement not only falls far below the "necessity" standard, it also lacks rationality. A registered voter may acquire a Photo ID from a DDS office with, *e.g.*, an original birth certificate and a rental contract. But that voter cannot take those same two documents to the polls and get a ballot from an election worker. If those documents suffice to establish one's identity to obtain a third document which in turn is used as proof of identity, the state may not rationally or legitimately deem those documents insufficient to provide access to the fundamental right to vote. The only difference between the two is the payment of a $20 fee.

This combination of factors – the scarcity of evidence of in-person voter fraud, the conclusive presumption that a voter who does not have a state-issued Photo ID is not qualified to vote, the fact that absentee voters do not have to show state-issued voter identification – demonstrates that the statute is both unnecessary and unduly broad in its scope. The entire structure of Georgia's election laws demonstrates that Act 53 unduly burdens the right to vote. It fails the balancing test and violates the fundamental right to vote.

IV.

Georgia's Photo ID Requirement Violates the Civil Rights Act of 1964

The Photo ID requirement of Act 53, on its face, violates the Civil Rights Act of 1964, codified at 42 U.S.C. § 1971 by applying different standards to absentee and in-person voters within the same county and by precluding voting due to an admission that is not material to the right to vote under Georgia law, and is therefore unconstitutional under the Tenth Amendment.

A. Georgia's new Photo ID requirement violates 42 U.S.C. § 1971(a)(2)(A)

Section 1971(a)(2)(A) precludes the application of different standards in determining whether persons within the same county or other political subdivision are qualified to vote:

> No person acting under color 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[.]

42 U.S.C. § 1971(a)(2)(A) (emphasis added).

The Photo ID requirement violates § 1971(a)(2)(A) because it applies different standards to voters who reside in the same city or county who vote absentee, than it applies to people who vote in person.. Act 53, by its express language, applies only to individuals who vote in person at the polls. *See* O.C.G.A. § 21-2-417 (requiring presentation of proper identification **at polls, to poll workers**). Voters who vote absentee by mail, are not subjected to the Photo ID requirement, unless they are registering to vote absentee or voting absentee for the first time. *See* O.C.G.A. § 21-2-220(c) (requiring only that those "who register to vote **for the first time** in this state by mail must present current and valid identification either when registering to vote by mail or when voting **for the first time** after registering to vote by mail.") (emphasis added).

In addition to violating § 1971(a)(2)(A) on its face, the more stringent requirements for in-person voting cannot be reconciled with the purported purpose of Act 53 – to address the issue of voter fraud. Absentee ballots remain the largest source of potential voter fraud. *See* Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform at § 5.2 (Sept. 2005) (available at http://www.american.edu/ia/cfer/report/report.html). *See also* James C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483 (2003) (suggesting that the

increased ease with which voters can obtain absentee ballots and vote by mail is problematic because absentee votes lack the polling place protections of a secret ballot, and are potentially subject to coercion, vote buying, and fraud). Thus, Act 53, by creating more stringent standards for in-person voting, while relaxing the standards for absentee voting, only exacerbates the opportunity for voting fraud.

This is the very concern addressed by Georgia Secretary of State, Cathy Cox, in her letters to the Georgia State Senate and to Governor Perdue. She noted that, over her tenure, "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. . . . It hasn't happened." (Exhibit A). That letter also expressed concerns that the "easiest – and most prevalent form – of election law violations [is] unregulated voting by mail." Secretary of State Cox also emphasized to Governor Perdue that the purported justification for the Photo ID requirement – the elimination of voting fraud at the polls – was unfounded. (Exhibit B, at 1). In her opinion, Act 53 "grossly expanded the opportunities for absentee voting by mail without any photographic identification requirement whatsoever, even though absentee ballots pose more of a threat of voting fraud than people voting in a polling location in their community." *See id.* at 2.

Given the plain language of Act 53, as buttressed by the evidence, it violates 42 U.S.C. § 1971(a)(2)(A)'s requirement that all voters in the same county or political subdivision be governed by the same standards.

B. Georgia's new Photo ID requirement violates 42 U.S.C. § 1971(a)(2)(B)

Likewise, Act 53, on its face, violates 42 U.S.C. § 1971(a)(2)(B). Subsection 1971(a)(2)(B) prohibits denial of the right to vote for an act or omission that is not material to determining whether the voter is qualified under state law:

> No person acting under color of law shall –
>
> (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[.]

42 U.S.C. § 1971(a)(2)(B) (emphasis added).

The only requirements to be qualified to vote in Georgia are that one be: (1) a United States citizen, (2) a legal resident of the county where seeking to register, (3) at least 18 years of age, and (4) not be serving a sentence for a felony conviction involving moral turpitude or been found mentally incompetent by a judge. Georgia Const. of 1983, art. II, § I. None of these requirements include the presentation of a Photo ID. Thus, requiring Photo ID cannot be said to be material

to "determining whether such individual is qualified under State law to vote . . . ." 42 U.S.C. § 1971(a)(2)(B).

Because a Photo ID is not required for absentee voters, it cannot be said to be "material" under § 1971. A requirement cannot be "material" for some but not all. In direct conflict with § 1971, Act 53 makes possession of a Photo ID the only document that is relevant and material to establishing a voter's identity. For the reasons discussed *supra*, Statement of Facts, Section IV, setting out the multiple ways in which voters and registration officials may establish the bona fides of a voter's identity, Act 53 cannot be reconciled with § 1971.

The plain language of Act 53 violates the federal Civil Rights Act of 1964, codified at 42 U.S.C. 42 U.S.C. § 1971(a)(2)(A) and (B). For these reasons, plaintiffs have demonstrated a substantial likelihood of success on the merits of this claim.

V.
Georgia's Photo ID Requirement Violates Section 2 Of The Voting Rights Act

I. Plaintiffs Are Likely to Prevail on Their Vote Denial Claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a).

The claim of the individual plaintiffs' under 42 U.S.C.§ 1973(a)is one of vote denial. Without a state issued Photo ID they will not be able to vote or have

their votes counted. Vote denial claims are distinct from vote dilution claims.[36] When a registered voter is denied the right to vote, his injury is personal, individual, and complete. The legal protections he is afforded by Section 2 does not depend on whether others lose their votes or are able to vote freely, or on the voting behavior of a group. Section 2 protects individuals from having their right to vote denied, which, by definition, prohibits them from equal participation in the political process.

In addition to the declarations from various individuals plaintiffs are filing with the Court, plaintiffs will support their Sec. 2 claim with socio-economic data and evidence of historical discrimination touching the right to vote. This type evidence is typically used in vote dilution claims brought under Section 2, but in a significantly different manner. In vote dilution cases such as *Thornburg v. Gingles*, 478 U.S. 30 (1986), this evidence is used as the basis from which courts infer that a racial minority as a group lacks access to the political process, has less ability to participate in the political process and to elect candidates of choice. In the vote denial claim presented here, no such inference is necessary. Being denied

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[36] *Thornburg v. Gingles*, 478 U.S. 30, 45 n. 10 (1986), recognized that "Section 2 prohibits all forms of voting discrimination, not just vote dilution." (Citing the Senate Report accompanying the 1982 amendments to the Voting Rights Act, S. Rep. No. 97-417, p. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177.)

the right to vote is total denial of access to any political participation. The role of socio-economic data and historical evidence in this case will be to remove doubt, if any there were, that Act 53's imposition of direct and indirect financial costs on the right to vote will have an impact on minority voters in violation of Section 2.

Plaintiffs' evidence includes socio-economic data from the 2000 Census. This data is contained in Summary File 3 produced by the United States Census Bureau. *See* Exhibit E. The file consists of detailed tables of social, economic and housing characteristics compiled from approximately 19 million housing units that received the Census 2000 long-form questionnaire (about 1 in 6 households). The data is reported on a statewide basis for Georgia as well as for each of Georgia's 159 counties. This data is uniformly accepted as proof of existing socio-economic conditions by courts assessing whether minorities suffer disadvantages in political participation.

This data shows that in Georgia,

- 17.3% of African-American households have an income of less than $10,000 compared to 7.4% of white households; an additional 16.0% of African-American households have incomes between $10,000 and $19,999, compared to 10.1% of whites;

- 27.5% of African-Americans age 25 years or older have less than a high school education (including GEDs), compared with 17.3% of whites age 25 or older;
- 23.1% of African-Americans of all ages live below the poverty line compared to 7.8% of whites; the disparity for those ages 65-74 is 24.7% for African-Americans, 7.8 % for whites; for those age 75 and over, 32.1% for African-Americans, 12.9% for whites;
- 17.7% of African-American households have no vehicle available compared to 4.4% of white households;
- of the eight counties in Georgia that have the highest percentage of African-American residents – 60% or above – only one is home to a DDS office. (Those counties are Taliaferro, Hancock, Talbot, Stewart, Clay, Calhoun, Terrell, and Lee with Lee being home to a DDS office).

Additionally, plaintiffs will introduce other data such as a recent report by the Kaiser Family Foundation which showed that in Georgia, only 11% of whites, but 26% and 30% of Blacks and Latinos, respectively, live below the poverty line.[37]

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[37] "Georgia Poverty by Race/Ethnicity," available at http://statehealthfacts.org/cgi-bin/healthfacts.cgi?action=profile&category=Demographics+and+the+Economy&subcategory=People+in+Poverty&topic=Pove

Gingles, quoting from the Senate Report, identified as relevant in assessing Section 2 claims: "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process" and "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." 478 U.S. at 36-37. Plaintiffs will introduce state constitutional provisions and statutes showing that Georgia's official discrimination touched every aspect of the right to vote and public education.

The facts of discrimination touching the right to vote and socio-economic disadvantages serve to establish inequality of access to the political process when the barrier to voting is monetary. Plaintiffs need not prove any additional effect on racial minorities or causal connection. In a vote dilution case decided prior to the

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1982 amendments of the Voting Rights Act, *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir. 1977)(en banc),[38] held:

> The Supreme Court and this court have recognized that disproportionate educational, employment, income level and living conditions tend to operate to deny access to political life. In this case the court held that these economic and educational factors were not proved to have "significant effect" on political access in Hinds County. It is not necessary in any case that a minority prove such a causal link. Inequality of access is an inference which flows from the existence of economic and educational inequalities.

This holding was adopted by S.Rep. 97-417, p. 29, n. 114, cited and relied on in *Gingles*.

> Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, e.g., *White v. Regester*, 412 U.S. [755], 768-769 [(1973)]; *Kirksey v. Board of Supervisors of Hinds County, Miss.*, 554 F.2d 139, 145-146 (5th Cir. 1977)(en banc).

478 U.S. at 69.[39] *See also, United States v. Dallas County Comm'n*, 739 F.2d 1529, 1537 (11th Cir. 1984)("Once lower socio-economic status of blacks has been

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[38] *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)(en banc)(cases decided by Former Fifth Circuit prior to Oct. 1, 1981 are binding precedent in the Eleventh Circuit).

[39] Justice Brennan's opinion on this point is a four member plurality. Justice White did not join in Part III-C of the opinion, but as the author of *White v. Regester* he did not disagree on this point. In any event, it is the law of this Circuit.

shown, there is no need to show the causal link of this lower status on political participation"); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984)("the burden is not on the plaintiffs to prove that this [socio-economic or political] disadvantage is causing reduced political participation"); *Cross v. Baxter*, 604 F.2d 875, 881-82 (5th Cir. 1979).

Gingles explained that these factors are probative of unequal opportunity to participate in the political process and to elect representatives because inferior education and employment opportunities work to deprive minorities of the ability to provide financial support to their candidates of choice. 478 U.S. at 69-70. That evidence is likewise probative of the far more obvious fact that Act 53 prohibits voting by legal, registered voters who do not possess and cannot or will not pay for a state issued Photo ID and will negatively affect minority voters.

In *Harman*, 380 U.S. at 539, the Court relied on the Congressional hearings on the adoption of the Twenty-Fourth Amendment, noting that Congress found "it is significant that the voting in poll tax States is relatively low as compared to the overall population which would be eligible." (Quoting H.R. Rep. No. 1821, 87th Cong., 2d Sess., p. 3.) The impact of Act 53 will fall more heavily on those with fewer economic resources, who in Georgia are disproportionately and forseeably minority citizens. The likelihood of being negatively affected increases for all

racial groups as they near retirement age but the impact on minorities will be dramatic given that the poverty level for African-Americans reaches 32.1% for those age 75 and over. Act 53 has only recently gone into effect having been implemented in a few scattered special elections. Its future impact on elections, however, is predictable. It will have the most impact on voters who are poor, who are, in Georgia and in much of the country, disproportionately African-American and Hispanic.

As Judge John Brown famously wrote for the Court in *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir.), *aff'd*, 371 U.S. 37 (1962), an early voter registration case: "In the problem of racial discrimination, statistics often tell much, and Courts listen." In view of available evidence from the Census and the historical discrimination touching education and the right to vote, plaintiffs are likely to prevail on their claim that implementation of Act 53 will result in the denial of the right to vote of minority citizens in violation of Section 2 of the Voting Rights Act.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction should be granted.

This 5th day of October 2005.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I certify that this Brief complies with the font and point selections set forth in Local Rule 5.1B. This Brief has been prepared using Times New Roman font (14 point).

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CERTIFICATE OF SERVICE

I, David G.H. Brackett, do hereby certify that I have this day electronically filed the foregoing **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to opposing counsel as follows:

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This 6th day of October 2005.

/s/ David G.H. Brackett
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