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.	)	
	)	
and	)	
	)	
STATE ELECTION BOARD,	)	
	)	
Intervenor.	)	

TRIAL BRIEF OF PLAINTIFFS

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TRIAL BRIEF OF PLAINTIFFS

Plaintiffs respectfully submit the following trial brief which outlines the legal framework in which the Court should consider the evidence in this case and highlights findings that have already been made by the Court. Significantly, the Photo ID requirement is "likely . . . not rationally based on [the State's proffered interest in preventing fraud]." October 18, 2005 Order at 95. Therefore, the State's proffered interest would not support even the slightest burden on the fundamental right to vote.

Pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure: "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." Accordingly, this brief refers to findings based on evidence already presented to the Court and the additional evidence that the plaintiffs expect to introduce at the final hearing.

Based on the evidence already presented to the Court, the Court has made findings that establish the unconstitutionality of the 2006 Photo ID Act. Indeed, at the end of the July 12, 2006 hearing the Court observed

> [i]n this case, the Court finds that the legislation passed in the 2006 Act violated the Constitution of the United States in denying equal protection of the law to the citizens entitled to vote in Georgia and

> violated the 14th Amendment and the First Amendment to the Constitution of the United States.

July 12, 2006 Hearing Tr. at 196. The plaintiffs expect that the evidence presented at the final hearing will only confirm these findings and the necessity for enjoining the 2006 Photo ID Act.

I. The 2006 Photo ID Act Violates the First and Fourteenth Amendments.

A. The Legal Standard: *Anderson* and *Burdick*

The Supreme Court established the essential elements of a claim challenging the constitutionality of state statutes regulating or conditioning the right to vote in two primary cases: *Anderson v. Celebrezze*, 460 U.S. 780,789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), which repeated and elaborated upon the *Anderson* standard.

Recognizing that because all elections must be subject to some form of state regulation, the Supreme Court acknowledged that the strict scrutiny standard that normally applies in cases involving fundamental rights like the right to vote cannot *automatically* be applied in every case involving a state statute that regulates elections. *Anderson*, 460 U.S. at 788-89. The Court instead held that a more flexible or sliding scale standard applies. Pursuant to this standard the level of scrutiny depends on the severity and extent of the burden that the statute or regulation imposes on the right to vote. If the burden on the right to vote is severe,

strict scrutiny is applicable. If the burden imposed by the statute is slight or insignificant, the statute need only be "reasonable and non-discriminatory."

Anderson provided instructions for a step-by-step analysis:

> [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 Amendment that the plaintiff seeks to vindicate. [**Second**] It must then **identify and evaluate the precise interests put forward by the** State as justification for the burden imposed by its rule. [Third] In passing judgment the Court must . . . determine the [a] **legitimacy and** [b] **strength of each of those interests, [**and **Fourth]** It must also consider the extent to which those interests make it **necessary to burden plaintiff's rights.**

Anderson, 460 U.S. at 789 (emphasis added)**.**

Following *Anderson's* holding that "a more flexible standard" applies in cases challenging the constitutionality of state statutes regulating elections, the Court in *Burdick* specified:

> A court considering a challenge to a state election law must **weigh "the character and magnitude to the asserted injury to rights protected by the First and Fourteenth Amendments** that the plaintiff seeks to vindicate" against "the **precise interests put forward by the State** as justifications **for the burden imposed by the rule**" taking into consideration "the extent to which those interests make it **necessary** to burden plaintiff's rights."

504 U.S. at 434 (citations omitted).

The Court went on in *Burdick*, to explain that:

> Under this [the *Anderson*] standard, the **rigorousness of our inquiry** into the propriety of a state election law **depends upon the extent to which the challenge regulation burdens First and Fourteenth Amendment rights.** Thus, as we have recognized when those rights are subjected to "**severe**" restrictions, [**strict scrutiny applies and] the regulation must be** "**narrowly drawn to advance a state interest of compelling importance."**

Id. (emphasis added).

Under the foregoing standard, because the Photo ID requirement codified at O.C.G.A. § 21-2-417 imposes a severe burden on the right of over 305,000 registered Georgia voters to vote, the Act is subject to heightened scrutiny under *Anderson* and *Burdick.* Accordingly, the Act must be narrowly drawn and cannot be applied if the State's alleged objective of preventing fraudulent impersonation in in-person voting either (1) has already been achieved by existing regulations, or (2) could be accomplished in some other way without burdening the right to vote of the plaintiffs and 305,000 other citizens of Georgia who do not have Georgia driver's licenses.

Notably, in reviewing election procedures, the most deferential level of review is that the challenged law must be "reasonable" and "non-discriminatory" rather than merely have a "rational basis." Thus, even if the Act at issue contained a lesser restriction that imposed only very slight burden on the right to vote, it

would still need to be **"'reasonable** [and] **non discriminatory,'"** and supported by important state regulatory interests. *Burdick*, 504 U.S. at 434.

B. As the Court Has Previously Found, the Photo ID Requirement Places a Severe Burden on the Right to Vote.

1. The Photo ID requirement imposes a severe burden on the right to vote of those Georgia citizens who are by definition the most vulnerable.

In its Order of October 18, 2005, enjoining the predecessor to the current law, the Court found that the burden a Photo ID requirement imposes on Georgia voters without an approved form of Photo ID is severe. Specifically, the Court stated:

> **The right to vote is a delicate franchise.** Indeed, the Court notes that Plaintiff Watkins declined to pursue his claim when he was informed that Defendants planned to depose him. Given the fragile nature of the right to vote, and the restrictions discussed above, **the Court finds that the Photo ID requirement imposes "severe" restrictions on the right to vote. In particular, the Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID would be a hardship. Unfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting. For those citizens, the character and magnitude of their injury – the loss of their right to vote -- is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.**

October 18, 2005 Order at 94 (emphasis added).

While the 2005 Photo ID Act and the 2006 version at issue here differ in some respects, the burden imposed by the 2006 Act remains severe. The Court recognized this in its Order of July 14, 2006:

> The right to vote is a delicate franchise. As the Court observed in its October 18, 2005, Order, a previous Plaintiff in the case, Plaintiff Tony Watkins, declined to pursue his claim concerning the 2005 Photo ID Act when he was informed that Defendants planned to depose him. **Given the fragile nature of the right to vote, and the restrictions discussion above, the Court finds that the 2006 Photo ID Act imposes "severe" restrictions on the right to vote with respect to the July 18 2006, primary elections and the corresponding primary run-off elections. In particular, the 2006 Photo ID Act's Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult** for the July 18, 2006, primary elections and the corresponding primary run-off elections for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID or a Voter ID card would be a hardship. **Unfortunately, the 2006 Photo ID Act's Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting in the July 18, 2006, primary elections and subsequent run-off elections. The Court again observes that for those citizens, the character and magnitude of their injury – the loss of their right to vote – is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.**

July 14, 2006 Order at 163-64 (emphasis added).

The Court explained the basis for its findings regarding the burden caused by the 2006 Act as follows:

> For the reasons discussed below, the **character and magnitude of the asserted injury to the right to vote is significant.** Many voters who do not have driver's licenses, passports, or other forms of

> photographic identification have no transportation to a voter registrar's office or DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain Voter ID cards or Photo ID cards, or cannot travel to a registrar's office or a DDS service center during those locations' usual hours of operation because the voters do not have transportation available. **The evidence in the record demonstrates that many voters who lack an acceptable Photo ID for in-person voting are elderly, infirm, or poor, and lack reliable transportation to a county registrar's office.** For those voters, requiring them to obtain a Voter ID card in the short period of time before the July 18, 2006, primary elections and the corresponding primary run-off elections is unduly burdensome. Indeed, those voters likely cannot obtain a Photo ID or Voter ID card before the July 18, 2006, primary elections and the corresponding run-off elections, resulting in their inability to vote in those elections.

July 14, 2006 Order at 150-51 (emphasis added).

Most recently, in its Order of September 15, 2006, the Court again found a severe burden, noting that the character and magnitude of the injury to Georgia voters without a photo ID is "undeniably demoralizing and extreme":

> **Many voters who are elderly, disabled, or have certain physical or mental problems simply cannot navigate that process [for obtaining a Photo ID] or any long waits successfully.**
>
> **Further, some of the registrar's offices, particularly in large Georgia counties, may be a lengthy drive away from many of the citizens those registrar's offices service. Most of the registrar's offices are located in largely rural areas where mass transit likely is not available, and registered voters who have no driver's licenses or access to automobiles simply may not be able to obtain transportation to a registrar's** office prior to the September 2006 special elections. . . . In particular, the 2006 Photo ID Act's Photo ID requirement makes the exercise of the fundamental right to vote

> extremely difficult for the September 2006 special elections for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID or a Voter ID card would be a hardship. Unfortunately, the 2006 Photo ID Act's Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting in the September 2006 special elections. The Court again observes that for those citizens, the character and magnitude of their injury – the loss of their right to vote – is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.

September 15, 2006 Order at 33-36 (emphasis added).

No evidence will be introduced at the final hearing to change any of these findings as to the severity of the burden imposed by the Photo ID requirement on the 305,000 registered Georgia voters who do not have DDS IDs.

2. The Photo ID Act affects a large number of Georgians.

While the State may again attempt to quibble as to the exact number of Georgians adversely affected by the Photo ID Act, the State's own admissions show that the number is in the hundreds of thousands.

The Court recognized this in its October 18, 2005 Order, finding that there are "[a] number of Georgia voters are elderly, have no driver's licenses, and have no need for a state-issued Photo ID card other than for voting purposes.... Further, a number of Georgia voters who are elderly or have low incomes do not have automobiles or use mass transit, and would have difficulty obtaining Photo ID to vote." October 18, 2005 Order at 64. At a subsequent preliminary injunction

hearing, the evidence demonstrated that approximately 305,000 registered Georgia voters lacked either a Georgia driver's license or a Georgia Photo ID card. *See* September 14, 2006 Hearing Tr. & PX2 (September 14, 2006). *See also* Minutes of State Election Board Meeting, September 13, 2006, p. 3, No. 2 ("Mr. McIver stated for the record that the mailing of the education piece to the 305,000 persons identified as not having a Photo ID for the purpose of voting….")

Plaintiffs expect the evidence at the final hearing to demonstrate that the approximately 305,000 Georgians who are registered to vote, but lack a state-issued photo ID, are disproportionately non-white and elderly.

3. As the Court has previously found, absentee voting is not a realistic alternative and does not lessen the severity of the burden imposed by the Photo ID Act.

Based on the evidence of record, the Court found in its October 18, 2005 Order that **"absentee voting simply is not a realistic alternative to voting in person that is reasonably available for most voters who lack Photo ID. The fact that voters, in theory may have the alternative of voting an absentee ballot without a Photo ID thus does not relieve the burden on the right to vote caused by the Photo ID requirement."** October 18, 2005 Order at 92 (emphasis added).

The foregoing conclusion is based on (and well-supported by) the Court's consideration of the following evidence:

> [A]s Secretary of State Cox pointed out, an absentee ballot is only counted if it is received by the registrar in the voter's jurisdiction by 7:00 p.m. the day of the elections. Even absentee ballots postmarked by that date but delivered after 7:00 p.m. on election day are not counted. The only method voters have of ensuring that their vote is counted is to show up at their polling precinct on election day and vote in person or to hand-deliver their absentee ballot to the registrar in their jurisdiction before 7:00 p.m. on election day. [Footnote: The second method assumes voters know that they may hand-deliver absentee ballots and that voters know where to deliver those ballots. Many voters simply may believe that they can hand-deliver their absentee ballots to a polling place, which is not a viable alternative. Furthermore, many absentee voters do not drive or otherwise lack transportation. Although many organizations provide free transportation to the polls on election day, the availability of free transportation to the registrar's office (even on election day) likely is limited or nonexistent.]
>
> The absentee voting process also requires that voters plan sufficiently enough ahead to request an absentee ballot, to have the ballot delivered from the registrar's office via the United States Postal Service, to complete the ballot successfully, and to mail the absentee ballot to the registrar's office sufficiently early to allow the United States Postal Service to deliver the absentee ballot to the registrar by 7:00 p.m. on election day. The majority of voters – particularly those voters who lack Photo ID – would not plan sufficiently enough ahead to vote via absentee ballot successfully. In fact, most voters likely would not be giving serious consideration to the election or to the candidates until shortly before the election itself. Under those circumstances, it simply is unrealistic to expect that most of the voters who lack Photo IDs will take advantage of the opportunity to vote an absentee ballot.

October 18, 2005 Order at 91-92. As the Court noted, nothing in the 2006 Act changed anything from the 2005 Photo ID Act with respect to absentee voting (*See* September 15, 2006 Order at 34, fn.2), and other evidence demonstrates that absentee voting is not a suitable alternative to voting in person. As Cathy Cox testified, voters have had problems with absentee ballots[1] (*See* October 12, 2005 Tr. at 16-18), and some voters are skeptical that their vote will be counted if they vote absentee. More importantly, as plaintiffs will show at trial, over half of Georgia's adult population is unable to read and comprehend the Application for an Absentee Ballot.

4. As the Court has previously found, the opportunity to vote a provisional ballot does not lessen the severity of the burden imposed by the Photo ID Act.

The Court found, based on the evidence of record, that the severity of the burden imposed on voters by the Photo ID requirement was not alleviated by the opportunity to cast a provisional ballot without a photo ID:

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[1] Secretary of State Cox testified:

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

October 12, 2005 Tr. at 17-18.

> Additionally, the State argues that voters who do not have Photo ID will not be "turned away" from the polls; rather, those voters may vote a provisional ballot and return within forty-eight hours with a Photo ID. In support of this argument, the **State points to the September 20, 2005, special election in Richmond County, where thirteen people without a Photo ID voted via provisional ballot and only two of those individuals returned with a Photo ID within the requisite forty-eight hour period to verify their identity and have their ballots counted.** Given the difficulty of obtaining a Photo ID discussed above, it is highly unlikely that many of the voters who lack Photo ID and who would vote via provisional ballots could obtain a Photo ID card within the forty-eight hour period. Indeed, although many organizations are more than happy to transport individuals to polling places on election day, it is unlikely that those organizations or any other organization or individual would be able or willing to provide transportation to DDS service centers to allow voters of provisional ballots to obtain Photo ID cards. The ability to vote a provisional ballot thus is an illusion. Further, many voters may not even attempt to vote a provisional ballot in person because they do not have a Photo ID, and they believe that they cannot make the necessary arrangements to obtain a Photo ID within forty-eight hours after casting their votes.

October 18, 2005 Order at 92-93 (emphasis added).

The Court made a similar finding with respect to the 2006 Act:

> As previously noted, given the characteristics of the Georgia voters who are most likely to need a Voter ID card, it is highly unreasonable to expect those voters to be able to go to their respective registrar's offices or DDS service centers and negotiate the process for obtaining a Voter ID card or Photo ID card within the forty-eight hour period required to have their provisional ballots counted. Faced with those circumstances, many of those voters likely will decide not to vote at all.

July 14, 2006 Order at 162-63.

C. As the Court Has Found, the Precise Interest Put Forward by the State Does Not Make It Necessary to Burden the Plaintiffs' Right to Vote

1. The state's interest in preventing in-person voter fraud is not strong or legitimate enough to justify the burden in this case.

Anderson dictates that "in passing judgment, the Court must ... **determine the legitimacy and strength** of each of [the state's] interests . . ." 460 U.S. at 789 (emphasis added). In this case, while the State's proffered fraud justification may be "legitimate" or a "compelling state interest" *in the abstract*, the same rationale is not a "legitimate" or a "strong" basis for burdening the right to vote in Georgia, because there has been ***no*** evidence of in-person voter fraud for over ten years.

In fact, the Court's finding that the Photo ID act was "likely ...not rationally based" on the state's proffered interest in preventing fraud is abundantly supported by a plethora of facts in the record from the preliminary injunction hearings.

First, in-person voter fraud has not been a problem in Georgia.

> During the nine years in which Secretary of State Cox has been affiliated with the Secretary of State's Office, that office has not received a report of voter impersonation involving a scenario in which a voter appears at the polls and votes as another person, and the actual person later appears at the polls and attempts to vote as himself. (Cox Decl. ¶ 5; Oct. 12, 2005, Hr'g Tr.; Cox Dep. at 14, 16, 47.)

October 18, 2005 Order at 55. The State has offered no new evidence of in-person voting fraud since Secretary of State Cox testified in 2005. And at the final

hearing, the plaintiffs expect that the State will, again, present no evidence of in-person voter fraud.

Second, there is no evidence that Georgia's existing statutes and procedures for detecting and preventing fraud have not been effective in both deterring and preventing fraud in in-person voting.

> According to Secretary of State Cox, Georgia has procedures and practices in place to detect voter fraud. (Oct. 12, 2005, Hr'g Tr.) Those procedures include verifying the voter's correct address, as well as the voter's name, during the check-in process for in-person voters. (Id.) Georgia also imposes criminal penalties for voter impersonation. (Id.) Most violations of Georgia election laws are punishable as felonies. (Id.) No evidence indicates that the criminal penalties do not sufficiently deter in-person voter fraud. (Id.)

October 18, 2005 Order at 56-57.

Third, neither the 2005 version of the Photo ID law, nor the 2006 Act "does [anything] to address the voter fraud abuses that conceivably exist in Georgia." *Id.* at 84. For example, prior to the enactment of the 2005 Act, Secretary of State Cathy Cox objected to the provision in the Photo ID Act that removed restrictions on absentee voting as "open[ing] a gaping opportunity for fraud."[2] *Id.* at 58. Notwithstanding these objections from the Secretary of State, the 2005 and the

[2] "The State Election Board has received a number of complaints of irregularities with respect to absentee ballots.... In fact, at most of its meetings, the State Election Board discusses complaints of fraud and irregularities in absentee voting." October 18, 2005 Order at 56.

2006 Photo ID Acts "expanded the opportunity for voters to obtain absentee ballots" without having to present a Photo ID. *Id.* at 61.

Similarly, as the Court noted, the Photo ID Acts do nothing to address fraudulent registration.

> Further, although Defendants have presented evidence from elections officials of fraud in the area of voting, all of that evidence addresses fraud in the area of voter registration, rather than in-person voting. The Photo ID requirement does not apply to voter registration, and any Georgia citizen of appropriate age may register to vote without showing a Photo ID. Indeed, individuals may register to vote by producing copies of bank statements or utility bills, or without even producing identification at all.

October 18, 2005 Order at 83-84. The Court made similar findings with respect to the 2006 Act:

> For the following reasons, the Court finds that the 2006 Photo ID Act's Photo ID requirement is not narrowly tailored to the State's proffered interest of preventing voter fraud. Secretary of State Cox testified at the previous hearing that her office has not received even one complaint of in-person voter fraud over the past nine years and that the possibility of someone voting under the name of a deceased person has been addressed by her Office's monthly removal of recently deceased persons from the voter roles. Additionally, although Defendants presented evidence from elections officials in connection with the 2005 Photo ID Act of fraud in the area of voting, all of that evidence addressed fraud in the area of voter registration and absentee voting, rather than in-person voting. The Photo ID requirement does not apply to voter registration, and any Georgia citizen of appropriate age may register to vote without showing a Photo ID. Indeed, individuals may register to vote by producing copies of bank statements or utility bills, or without even producing identification at all. The 2006 Photo ID statute, like its predecessor,

> thus does nothing to address the voter fraud issues that conceivably exist in Georgia.

July 14, 2006 Order at 165.

Fourth, the Court can also consider the utterly partisan nature of the Photo ID Act in determining the true purpose of the Act and the credibility of the justification put forward by the state for burdening the right to vote of registered voters who do not have driver's licenses or passports. In this regard, the Court found that: "**it's very clear from the evidence ... that this [Photo ID] legislation was partisan absolutely partisan**." July 12, 2006 Hearing Tr. at 195-96 (emphasis added).

Thus, the purported "interest" put forward by the State is simply not sufficient to justify any burden on the right to vote.

2. As the Court found, a Photo ID requirement is not necessary to prevent voter fraud and is "not likely rationally based" on that interest.

Burdick directs the courts to consider "the extent to which [the interests put forward by the state as justification for the burden] ... make it **necessary to burden the plaintiff's rights.**" 504 U.S. at 434 (emphasis added). A burden is not "necessary" if (1) the so-called "evil" which the statute is intended to remedy **has already been remedied by existing state laws and procedures** or (2) there are

other, reasonable ways to achieve those goals without burdening the First Amendment rights of voters. *Dunn v. Blumstein*, 405 U.S. 330, 353 (1972).

In this case, the Court has found that Georgia's existing laws and procedures aimed at preventing impersonation in in-person voting are sufficient, and that as of two years ago, there had not been a single complaint or documented case involving fraud in in-person voting in the preceding nine years. *See* October 12, 2005 Order. **Nothing has changed since that testimony was given in 2005**, and the defendants have no new evidence to change that conclusion.

The Court has also already found that the State "**has a number of significantly less burdensome alternatives available to prevent in-person voting fraud, such as the voting identification requirements it previously used and numerous criminal statutes penalizing voter fraud, to discourage voters from fraudulently casting ballots or impersonating other voters.**" October 18, 2005 Order at 84-85 (emphasis added). Election officials could, for example, use the same procedure for individuals without photo ID that the state uses to verify the authenticity of absentee ballots – that is, election officials could check the signatures on the Electors Certificate (which every person who votes in person is required to sign at the polls under threat of felony conviction before being issued a ballot) against the signatures on the voter registration cards on file in the registrars'

offices. That signature verification process has been deemed by the Republican-controlled Legislature to be a sufficient safeguard against fraud in absentee voting. There is no reason why the same procedure should not be equally sufficient to prevent whatever miniscule risk of fraud may exist in in-person voting.

Thus, as the Court has found based on the evidence of record at the first hearing, "**a number of significantly less burdensome alternatives exist to address the State's interest.**" October 18, 2005 Order at 85 (emphasis added). Nothing has happened since the hearing in 2005 to change that conclusion.

Finally, it is evident that the purported state interest does not necessitate the burden on the right to vote because there is no link between the State's alleged justification – to prevent voter fraud – and the purported remedy – the 2006 Photo ID Act. The Act does nothing to advance the State's interest in preventing fraud in in-person voting because it does nothing to prevent fraud in obtaining a Georgia Voter ID Card ("VIC"). O.C.G.A. § 21-2-417.1(e) specifically allows non-photo identity documents to suffice for issuance of a VIC, provided that the documents show the person's name, address and date of birth. Under the regulations issued by the State Elections Board to implement the 2006 Photo ID Act [183-1-20-.01(4)(a)(4)(b)(2)(i-xv)], a person can obtain a VIC by presenting a birth certificate or marriage license application with a name and address on it (documents that

would allow one to vote under the former law), without any other form of identification to show that the person applying for a Georgia Voter ID Card is the same person whose name and address appears on the birth certificate or marriage license application. The Election Board regulations also provide for the issuance of a VIC based solely on the information contained in the original Voter Registration Application that the person may have completed (without any other identification) 1, 5, 20 or even 25 years earlier. At the same time, while allowing a birth certificate, an application for a marriage license, or a Voter Registration Application in order to obtain a VIC, the 2006 Act and regulations perversely prohibit a voter from using the same identification at the polls.

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

or she presented the documentation to the registrar, than it would be had the voter presented that same documentation at the polls.

Thus, the State has failed to carry its burden of proving as required by both *Anderson and Burdick* that a legitimate state interest renecessitates the burden imposed by the Photo ID Act on the right to vote.

D. As the Court Previously Found, the Photo ID Act Fails Constitutional Muster.

1. The Photo ID requirement is not narrowly tailored, and thus cannot support the severe burden.

Burdick held that when the right to vote is "subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434. For many of the reasons discussed, *supra*, the Photo ID Act is not narrowly tailored to prevent voter fraud. As the Court found with respect to the 2005 Act:

> Finally, the Court must examine the extent to which the State's interest in preventing voter fraud makes it necessary to burden the right to vote. As discussed above, **the Photo ID requirement is not narrowly tailored to the State's proffered interest of preventing voter fraud**, and likely is not rationally based on that interest. Secretary of State Cox testified that her office has not received even one complaint of in-person voter fraud over the past eight years and that the possibility of someone voting under the name of a deceased person has been addressed by her Office's monthly removal of recently deceased persons from the voter roles. Further, **the Photo ID requirement does absolutely nothing to preclude or reduce the possibility for the particular types of voting fraud that are**

> **indicated by the evidence: voter fraud in absentee voting, and fraudulent voter registrations.** The State imposes no Photo ID requirement or absolute identification requirement for registering to vote, and has removed the conditions for obtaining an absentee ballot imposed by the previous law. In short, **HB 244 opened the door wide to fraudulent voting via absentee ballots.** Under those circumstances, **the State Defendants' proffered interest simply does not justify the severe burden that the Photo ID requirement places on the right to vote.** For those reasons, the Court concludes that the Photo ID requirement fails even the Burdick test.

October 18, 2005 Order at 95-96 (emphasis added). The evidence requires the same conclusion for the 2006 Photo ID Act.

2. The Photo ID requirement is neither non-discriminatory nor is it reasonable, and thus could not justify even a slight burden.

Even if the burden imposed by the Photo ID requirement on the poor, the elderly and physically handicapped voters without cars or Georgia driver's licenses were not "severe," but only slight, the Act would still be unconstitutional because it fails to meet the other two requirements of *Burdick,* that the statute be ***(1) non-discriminatory*** and (2) ***reasonable***. *Burdick*, 504 U.S. at 434.

The statute discriminates in that the burden of the statute falls most heavily, if not exclusively, on the poor , the elderly and the infirm, who do not own cars or are no longer are able to drive and therefore do not have a need for a Georgia driver's license. The statute also discriminates on the basis of race because a disproportionate percentage of those without automobiles or Georgia driver's

licenses are African-Americans. **In its October 2005 Order, the Court found that the "most likely" effect of the Photo Id requirement would be to "prevent Georgia's elderly, poor, and African-American voters from voting."** October 18, 2005 Order at 94 (emphasis added).

The statute is not "reasonable" because it does absolutely nothing to prevent fraud, in voter registration or in absentee voting areas in which there is concrete evidence of fraud – or in in-person voting, because a person who formerly could have used a utility bill and a birth certificate as an acceptable form of identification at the polls, can use the same documentation (and no more) to obtain a Georgia Voter's ID. The 2006 Photo ID Act, like its predecessor, is tantamount to a reregistration requirement for a whole class of registered voters of the type held unconstitutional by the former Fifth Circuit in *Beare v. Briscoe*, 498 F.2d 244, 247-48 (5th Cir. 1974).[3]

E. The Legislature's Power Is Limited Where Voting Rights Are Concerned.

Plaintiffs must respectfully take issue with two of the comments made by the Court at the conclusion of the July 12, 2006 hearing. In the first of these comments the Court said: "Just as Mr. Cohen pointed out, the legislature can pass

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), this Circuit adopted as binding all Fifth Circuit decisions issued before October 1, 1981.

laws that are not needed. Congress passes laws that are not needed. And our state legislatures can pass laws that are not needed." July 12, 2006 Hearing Tr. at 194-95. While that statement may be true of economic or regulatory legislation that does not burden a fundamental right, such as the right to vote, it is most assuredly ***not*** true in the case of legislation like the Photo ID Act, which impinges upon voting rights. In both *Anderson* and *Burdick,* the Supreme Court specifically held that one of the key factors to be considered by the court is "the extent to which those interests make it **necessary** to burden the plaintiff's rights." *Anderson,* 460 U.S. at 789 (emphasis added); *Burdick*, 504 U.S. at 434. In addition, a statute that is "unnecessary" also fails the separate requirement in *Burdick,* that statutes which impose a severe burden on the right to vote "must be '*narrowly drawn* to advance a state interest of compelling importance.'" *Id.* at 434. State legislatures are simply not granted the same deference to regulate the right to vote as they are other matters.

Burdick and *Anderson* mandate inquiry into certain facts behind legislation that would not be permitted in other contexts. The impact and need for the legislation is part of the core inquiry. *See e.g.*, *Purcell v. Gonzalez*, 127 S.Ct. 5, 8 (2006) (per curiam) ("As we have noted, the facts in these cases are hotly contested, and no bright line separates permissible election-related regulation from

unconstitutional infringements.") (internal citation omitted). Part of the facts, of course, are "the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements." *Id.*, Stevens, J. concurring.

Second, while this Court found at the July 12, 2006 hearing that "it's very clear from the evidence … that this legislation was partisan absolutely partisan," the Court said "that is permissible under the law. [There is] nothing wrong with it, **as long as you don't violate the constitutional rights of citizens by overreaching your partisanship**." July 12, 2006 Hearing Tr. at 195-96 (emphasis added). The Photo ID requirement is a classic example of "partisan overreaching" in that it singles out and imposes a severe burden on the right to vote of the poor, the elderly, the infirm and with a disproportionate impact on African-American voters, precisely because the Republican majority in the Legislature believed that these voters were more likely to vote Democratic. *See Crawford v. Marion County Election Bd.*, 472 F 3d 949, 951 (7th Cir. 2007) ("No doubt most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates [citing exit polling

data]").[4] Legislation that selectively makes it more difficult for voters of a particular party to vote based on how they are likely to exercise their First Amendment rights is not "view point neutral" and violates core First Amendment principles. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also Vieth v. Jubelirer*, 541 U.S. 267 (2004) (Kennedy, J. concurring) ("If a court were to find that a state did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the state shows some compelling state interest.")[5]

[4] At the final hearing, the plaintiffs intend to present the testimony of Dr. Trey Hood to corroborate this conclusion.

[5] This First Amendment protection, for example, forbids the government from denying governmental employment based upon a person's political party affiliation, *see Elrod v. Burns*, 427 U.S. 347, 347 (1976), and forbids conditioning of government contracts on support for certain politicians. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996). Where the First Amendment provides that government can not withhold such privileges as contracts or employment because a person espouses a particular political viewpoint, it defies belief to conclude that the government can burden the fundamental right to vote based upon the political view point of a particular voter.

F. No Educational Effort Can Cure the Unconstitutional Burden Imposed by the 2006 Photo ID Act.

In the July 14th Order at page 169, the Court stated that "if the State allows sufficient time for its education efforts with respect to the 2006 Photo ID Act and if the State undertakes sufficient steps to inform voters of the 2006 Photo ID Act's requirements before future elections, *the statute might well survive a challenge for such future [elections]*."

With all due respect to the Court, once the plaintiffs have shown that the 2006 Photo ID Act imposes a significant burden on the right to vote, the Court must declare the Act unconstitutional if it fails to comply with any of the requirements specified by the Supreme Court in *Anderson* and *Burdick*. No amount of advertising and no amount of so-called educational efforts can cure the **other** deficiencies in the statute or resurrect the 2006 Act from its well-deserved grave. To put it another way, if voters are unaware of the new requirements of an **otherwise constitutional statute**, this lack of notice may impose an **additional** burden on voters who might otherwise be able to comply with the new requirements before showing up to vote at the polls. However, no amount of education or publicity about requirements **that are themselves unconstitutional,** can make those requirements valid or immunize them from constitutional challenge under *Anderson* and *Burdick.*

At the hearing, the plaintiffs expect that the deficiencies in the State's educational plan will be readily apparent to the Court. It is doubtful that any educational plan could reach all registered voters, but even if it could, knowledge of the Photo ID requirement and the availability of free Voter Identification Cards would not relieve a registered voter of the unconstitutional burden imposed by the 2006 Photo ID Act. He or she would still need to make an extra and unnecessary trip to the DDS or County Registrar to obtain a Photo ID, and this extra trip would be utterly unnecessary to serve any State interest. This unnecessary burden alone renders the 2006 Photo ID Act unconstitutional.

II. Other Cases Involving Photo ID Requirements Demonstrate the Unconstitutionality of the 2006 Georgia Act.

A. The Missouri Supreme Court and the District of New Mexico Have Enjoined Similar Photo ID Laws.

In *ACLU of New Mexico v. Santillanes*, 2007 U.S. Dist. LEXIS 17087 (D.N.M. Feb. 12, 2007), the District of New Mexico found that an Albuquerque city ordinance requiring photo IDs for in-person voting (but allowing absentee voting without a photo ID) violated the Equal Protection Clause of the United States Constitution. *Id.* at *113. In reaching this conclusion, the Court noted:

> the *Burdick* balancing test calls for a careful and independent examination of the extent of the burdens that an election law imposes on First and Fourteenth Amendment rights in order to "smoke out" illegitimate or covert uses of such burdens. The *Burdick* balancing test also contemplates that an

> election law may impose an undue burden on a person's fundamental right to vote by means of bureaucratic hurdles which impose substantial obstacles on the exercise of that right.

Id. at *76.

Interpreting the equal protection clause of the Missouri State Constitution, the Missouri Supreme Court also enjoined a photo ID requirement in that State's election laws. *See Weinschenk v. State*, 203 S.W.3d 201, 212-15 (Mo. 2006). *See also, Democratic Party of Virginia v. State Bd. of Elections*, 1999 No. HK-1788, 1999 WL 1318834 (Va. Cir. Ct. Oct. 19, 1999) (enjoining pilot program for voter identification that required, in some areas, voters to present certain identification at the polls).

The Plaintiffs anticipate that the State will rely on other cases refusing to enjoin Photo ID requirements. Such cases are clearly distinguishable, however (*see* October 18, 2005 Order at 121-22, n.10). Significantly, all of the laws under consideration in those cases allowed affected voters to present identification other than Photo IDs at the polls. *See e.g., League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 826 (N.D. Ohio 2004) (law provided that acceptable documentary proof could include "[a] copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows [the voter's] name and address."); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 434 (E.D.

Mich. 2004) (directive required identification required by the Help America Vote Act, which includes non-photographic forms of identification, *see* 42 U.S.C. §15483); *Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *6 (D. Colo. Oct. 18, 2004) (permitted forms of identification other than a Photo ID, including a copy of a current utility bill, or a government document showing the voter's name and address).

More recent cases are similarly distinguishable. *See, e.g.*, *Gonzales v. Arizona*, 2006 U.S. Dist. LEXIS 76638, **7-8 (D. Ariz. 2006) ("A voter may present either one form of identification with her photograph, name, and address, or two forms of identification that bear her name and address"); *In Re Request For Advisory Opinion Regarding Constitutionality of 2005 PA71*, 2007 Mich. LEXIS 1582, *33 (Mich. July 18, 2002) ("the statute explicitly provides that an elector without photo identification need only sign an affidavit in the presence of an election inspector before being allowed to vote").

B. The Seventh Circuit's Opinion in *Crawford v. Marion County Election Board* Is Fundamentally Flawed.

Plaintiffs expect that the state will also rely upon the divided opinion of the Seventh Circuit in which that court ruled that Indiana's voter identification law did not unconstitutionally burden the right to vote. *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *pet'n for cert. filed*, No. 07-21, Jul. 2,

2007. The majority opinion authored by Judge Posner is unpersuasive and should not affect the Court's analysis in this action.

The majority opinion in *Crawford* indicates that to Judge Posner, the right of a individual to vote is of no real value:

> [t]he benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote), and even very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least in elections they're not much interested in.

472 F.3d at 951.

This jaundiced mind-set is in direct conflict with a long line of Supreme Court cases, including *Wesberry v. Sander*s, 376 U.S. 1, 17-18 (1964) and *Reynolds v. Sims*, 377 U.S. 533 (1964), and taints the entire majority opinion. Besides being flatly untrue as a factual matter, this cavalier attitude is in direct conflict with *Wesberry*, in which the Supreme Court emphasized that "**No right is more precious in a free country than that of having a voice in the election of those who make the laws. . . Other rights, even the most basic, are illusory** if the right to vote is undermined." 376 U.S. at 17 (emphasis added). Likewise in *Reynolds v. Sims*, the Supreme Court said that "the right of suffrage is a fundamental matter in a free and democratic society ...[and] is **preservative of other basic civil and political rights.**" 377 U.S. at 561-62 (emphasis added).

In contrast, the Court has correctly found in this case that, "[u]nfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting. For those citizens, the character and magnitude of their injury--the loss of their right to vote-- **is undeniably demoralizing and extreme**." October 18, 2005 Order at 94 (emphasis added).

Second in the callous view of the *Crawford* majority, the only voters who would be injured by Indiana' Photo ID requirement are those individuals who will forego their right to vote, rather than comply with the Photo ID requirement. Thus, the majority found it "remarkable" that "[t]here is not a single plaintiff who intends not to vote because of the new law." 472 F.3d at 951-52. Judge Posner is apparently insensitive to the fact that "**the right to vote is a delicate franchise,**" October 18, 2005 Order at 94 (emphasis added), and that something such as sitting for a deposition may be sufficient to cause someone to abandon his legal rights. *See id*. (noting that Mr. Watkins withdrew as a plaintiff "when he was informed that Defendants planned to depose him"). "Given the fragile nature of the right to vote," (*id*. at 94) the obligation of federal courts is to protect the delicate and fragile rights of poor people to vote, as it is to protect the property rights of the rich and the powerful.

The *Crawford* majority is also wrong as a matter of fact in asserting that the only people injured by an unnecessary Photo ID requirement (and especially one that serves no purpose) are the voters who intend not to vote rather than comply with the requirements of the statute. In Georgia, there are over 305,000 citizens who are lawfully registered to vote, but who will not be allowed to vote unless they make an unnecessary trip to the county registrar's office solely for the purpose of having their pictures taken so that they can continue voting in person at their neighborhood precinct, as they have always done. Every registered voter who is forced to make a special and unnecessary trip to the county registrar's office (or to a DDS office) that he or she would not otherwise have made in order to continue voting in person suffers a real and concrete injury that is personal to him or herself--and not merely those who cannot or will not make that trip as the majority held in *Crawford*. County registrar's offices are open only during business hours. The Georgia Photo ID law applies only to people who do not have Georgia driver's licenses, and who, therefore are the least mobile in our society. A working person, and especially one who is paid by the hour, and does not have a car, may not be able to take time off from work (and afford to loose his hourly wages) to make a special trip (assuming he can find someone who will drive him) to the county registrar's office to get a Photo ID. This is a real burden, and a real injury.

CONCLUSION

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

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government....
>
> [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.

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

Because it unconstitutionally burdens the fundamental right to vote and for the reasons set forth above, the Court should permanently enjoin enforcement of the 2006 Photo ID Act.

This 15th day of August, 2007.

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

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