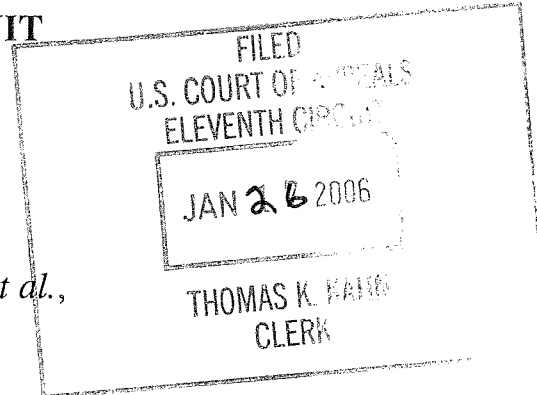


**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CASE NO. 05-15784-G



COMMON CAUSE / GEORGIA, *et al.*,
Plaintiffs-Appellees

v.

CATHY COX, individually and in her official capacities as
Secretary of State of Georgia and Chair of the Georgia Elections Board, and
STATE ELECTION BOARD,
State Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

**BRIEF OF BRENNAN CENTER FOR JUSTICE AT N.Y.U. LAW
SCHOOL AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-
APPELLEES AND AFFIRMANCE**

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TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF THE AMICUS	1
STATEMENT OF THE ISSUE.....	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT AND CITATION OF AUTHORITIES.....	3
IMPERSONATION FRAUD IS AN EXTREMELY UNLIKELY AND UNSUBSTANTIATED OCCURRENCE THAT CAN BE PREVENTED ADEQUATELY WITHOUT REQUIRING A PHOTO ID	3
A. Impersonation Fraud is Highly Unlikely and Exceedingly Rare	9
B. Georgia's Photo ID Requirement Is Not A Reasonable Or Proportional Response To Any Potential For Impersonation Fraud	18
1. HAVA Provisions That Prevent Election Fraud	21
2. Adequate Alternative Methods of Voter Identification Used In Other States	23
(a) Signature Matching.....	24
(b) Oral Confirmation of Identifying Information	25
(c) Affidavits Signed Under Penalty of Perjury	26
(d) Non-Photo ID Required	26
(e) Challenge Identity Upon Reasonable Suspicion of Fraud.....	27
(f) Flexible Photo ID Requirement.....	27
CONCLUSION.....	33
CERTIFICATE OF COMPLIANCE.....	34

APPENDIX.....	A-1
1. Official Code of Georgia Annotated, § 21-2-417 (2005).....	A-1
2. Official Code of Georgia Annotated, § 21-2-417 (2003).....	A-2
3. Official Code of Georgia Annotated, § 21-2-417 (1997).....	A-4
4. Help America Vote Act of 2002, 42 U.S.C. § 15301 <i>et seq.</i> , a. 42 U.S.C. § 15301.....	A-5
b. 42 U.S.C. § 15483(a).....	A-7
c. 42 U.S.C. § 15483(b).....	A-9
d. 42 U.S.C. § 15483(c).....	A-12
e. 42 U.S.C. § 15483(d).....	A-12

TABLE OF AUTHORITIES

United States v. Mississippi, 444 U.S. 1050 (1980)..... 7

CASES

Bay County Democratic Party v. Land,
347 F. Supp. 2d 404 (E.D. Mich. 2004)..... 31

Borders v. King County, No. 05-2-00027- 3,
(Wash. Super. Ct. Chelan County June 24, 2005).....15

Burdick v. Takushi, 504 U.S. 428 (1992) 4, 5

City of Rome v. United States, 446 U.S. 156 (1980)..... 7

Colorado Common Cause v. Davidson, No. 04CV7709,
2004 WL 2360485 (Col. Dist. Ct. Oct. 18, 2004)..... 30

Harman v. Forssenius, 380 U.S. 528 (1965)..... 7

Indiana Democratic Party v. Rokita, No. 1:05-CV-0634 SEB VSS,
(S.D. Ind. 2005).....3

League of Women Voters v. Blackwell,
340 F. Supp. 2d 823 (N.D. Ohio 2004)..... 31

McLaughlin v. North Carolina Bd. Of Elections,
65 F.3d 1215 (4th Cir. 1995)..... 6

Miller v. Johnson, 515 U.S. 900 (1995) 7

Morris v. Gressette, 432 U.S. 492 (1977)..... 7

New Alliance Party v. Hand, 933 F.2d 1568 (11th Cir. 1991)..... 6

Reno v. Boissier Parish School Board, 528 U.S. 320 (1999)..... 7, 8

South Carolina v. Katzenbach, 383 U.S. 301 (1966)..... 7

Storer v. Brown, 415 U.S. 724 (1974)..... 6

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997)..... 4, 6

STATUTES

Alabama Code § 17-7-15 (2005)..... 26

Alabama Code § 17-10-7 (2005)..... 26

Connecticut General Statutes 9-261 (2005)..... 26

Florida Statutes § 101.043(2) (2005)..... 28

Georgia Code Annotated § 21-2-31(5) (2005)..... 11

Georgia Code Annotated § 21-2-417 (2005) 2

Georgia Code Annotated § 21-2-417 (2003)..... 20

Georgia Code Annotated § 21-2-417 (1997)19, 20

Georgia Code Annotated § 21-2-571 (2005) 16

Georgia Code Annotated § 21-2-600 (2005) 17

Hawaii Revised Statutes § 11-136 (2005) 28

Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq.*
42 U.S.C. § 15301.....10, 21

42 U.S.C. § 15483(a)*passim*

42 U.S.C. § 15483(b)..... 22

Louisiana Revised Statutes Annotated § 18:562(A)(2) (2005) 28

National Voter Registration Act of 1993,
42 U.S.C. § 1973gg *et seq.*.....*passim*

N.Y. Election Law § 8-504..... 26

South Carolina Code Annotated §7-13-830 (2004) 28

National Conference of State Legislatures, <i>State Requirements for Voter Identification</i> (Oct. 11, 2005).....	passim
Press Release: Secretary of State Cathy Cox, Secretary Cox Hails Final Passage of Her Election Reform Package – Georgia First in the Nation to Mandate Uniform Voting System by 2004 (March 21, 2001)	10
Steve Schultz, “No Vote Fraud Plot Found,” Milwaukee Journal-Sentinel (Dec. 5, 2005)	14, 15
U.S. Department of Justice, <i>Section 5 Recommendation Memorandum</i> (Aug. 25, 2005).....	passim
Matt Weeks, <i>State’s Voters Must Present Picture IDs</i> , Gainesville Times (Sept. 15, 2005)	11

South Dakota Codified Laws § 12-18-6.2 (2006)	28
Washington Revised Code § 29A.44.205 (2005).....	15
42 U.S.C. § 1973c	7
42 U.S.C. § 1973i(c)	16

MISCELLANEOUS

Brennan Center and Michael McDonald, <i>Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General</i> (Dec. 2005)	9, 10
Brennan Center and Spencer Overton, <i>Response to the Report of the 2005 Commission on Federal Election Reform</i> (Sept. 19, 2005).....	11, 12
Coalition of Homelessness & Housing in Ohio and League of Women Voters Coalition, <i>Let the People Vote</i> (2005)	13, 14
Dan Eggen, “Criticism of Voting Law Was Overruled,” Washington Post (Nov. 17, 2005)	8
Electionline.org, <i>Election Reform Briefing: Securing the Vote</i> (April 2002)	passim
Electionline.org, <i>Voter ID Requirements</i>	19
Indiana Election Division, <i>2006 Indiana Voter Information Guide</i> (Nov. 2005).....	19
Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Department of Justice, to Charlie Crist, Florida Attorney General (Sept. 6, 2005), Att. A	28
Lorraine Minnite and David Callahan, <i>Securing the Vote: An Analysis of Election Fraud</i> (2003)	12, 13
Michigan Opinion of the Attorney General No. 6930, 1997 WL 37560 (Jan 29, 1997)	32

**CERTIFICATE OF INTERESTED PARTIES
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 21-1 and 26.1-1, and Fed. R.

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vii

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INTEREST OF THE AMICUS

The Brennan Center for Justice at New York University School of Law (“Brennan Center”) respectfully submits this brief as Amicus Curiae with the consent of all parties. This brief supports the position of the Appellees, Common Cause Georgia, *et al.*, and urges the Court to affirm the decision of the district court.

The Brennan Center is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. The Brennan Center unites the intellectual resources of the academy with the pragmatic expertise of the bar to assist courts and legislatures in developing practical solutions to difficult problems in areas of special concern to the late Justice William Brennan, Jr. Through its Voting & Representation project, which is part of its Democracy Program, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The project has extensively addressed issues relating to alleged voter fraud and methods for preventing it, including co-authoring two reports on the subject and participating as counsel or amicus in a number of federal and state cases involving voting and election issues.

STATEMENT OF THE ISSUE

Whether the State of Georgia’s asserted interest in preventing impersonation fraud at the polls is sufficient under the Fourteenth

Amendment to justify the requirement that voters present photo identification as a condition for in-person voting, adopted in the 2005 Amendment to Ga. Code Ann. § 21-2-417?

SUMMARY OF THE ARGUMENT

This amicus brief addresses the weight to be given the State of Georgia's asserted interest in requiring a photo identification ("photo ID") as a condition to in-person voting. We agree with the district court and Appellees that the photo ID requirement imposes a severe burden on Georgia voters, especially its most vulnerable citizens – low income voters, who are disproportionately African Americans, and the disabled and elderly. The State's interest in imposing the photo ID requirement is so insubstantial that it could not survive the Supreme Court's balancing test for evaluating restrictions on voting rights, even if the burden it imposed on voters were considered less than severe.

The State asserts that the photo ID requirement is needed to prevent a particular form of voting fraud: impersonation of a registered voter at the polls. Yet the State is unable to point to a single instance of impersonation fraud or adequately explain why other, less onerous forms of identification – which Georgia accepted until only recently – were insufficient to address this purported problem.

As of October 11, 2005, only 22 states imposed any type of identification requirement as a condition of in-person voting.¹ Aside from Georgia, only one of those states, Indiana, requires a photo ID without offering less burdensome alternatives, and even Indiana's requirement – itself under judicial challenge² – is less onerous than Georgia's. Hence, Georgia's highest election official, Cathy Cox, correctly characterized Georgia's requirement as the most restrictive in the nation. R4-54-PX2-2.

Appellees have thoroughly addressed the record before the district court as it pertains to Georgia. In this amicus brief, we focus on experience across the nation that may assist this Court in evaluating the State's interest and the need to impose any burden of the kind imposed by Georgia's photo ID requirement.

ARGUMENT AND CITATION OF AUTHORITIES

IMPERSONATION FRAUD IS AN EXTREMELY UNLIKELY AND UNSUBSTANTIATED OCCURRENCE THAT CAN BE PREVENTED ADEQUATELY WITHOUT REQUIRING A PHOTO ID

Recognizing the need to reconcile the tensions between the states' interest in a fair and efficient election process and the need to protect

¹ See National Conference of State Legislatures, *State Requirements for Voter Identification* (Oct. 11, 2005), at <http://ncsl.org/programs/legman/elect/taskfc/VoterIDReq.htm> ("NCSL Study").

² See *Indiana Democratic Party v. Rokita*, No. 1:05-CV-0634 SEB VSS (S.D. Ind. 2005).

against state regulations that may suppress the fundamental right to vote, the Supreme Court has adopted a balancing test.

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the 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 its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiffs' rights.

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quotation marks and citation omitted).

As a general rule, "[r]egulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quotation marks and citation omitted). But as the Court has made clear, "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Id.* at 359 (citation omitted).

The district court, after a thorough analysis, concluded that the photo ID requirement imposes a "severe" burden on the voting rights of Georgia's citizens, especially those most vulnerable – the poor, African

Americans, the disabled, and the elderly – which outweighs the State's interest in imposing that burden. R2-47-94. As Appellees show, these findings are amply supported by the record. Appellees' Brief at 13-20, 33-38. The burdens imposed are not limited to the \$20-35 fee charged for the photo ID, but include other obstacles such as the costs and difficulties of obtaining birth certificates that are a condition for issuance of a photo ID, and the accessibility of state offices dispensing the photo IDs. *Id.* at 17-18. The alternatives offered to those who cannot overcome these obstacles are plainly inadequate: the choice of voting by absentee ballot is not an adequate substitute for in-person voting and itself presents obstacles to voting. The option to declare oneself, under penalty of perjury, to be an "indigent" and unable to afford the \$20 fee, as a condition for obtaining a photo ID free of charge, not only is likely to have a chilling effect, but ignores the other obstacles to obtaining a photo ID. *Id.* at 19-20, 52-53.

But even if these burdens were considered less than severe, that would not relieve the state of its obligation to offer a justification for the photo ID requirement that outweighs the burden. The *Burdick* test requires a balancing of the interest of voters against the interests of the state and an evaluation of "the extent to which those interests make it necessary to burden the plaintiffs' rights." 504 U.S. at 434 (emphasis added). The test is

a pragmatic one, in which there is “no substitute for the hard judgments that must be made.” *Timmons*, 520 U.S. at 358 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Appellants, therefore, are mistaken when they argue that unless it could be shown that the burdens on voters are “severe” the Court need merely apply the extremely deferential “rational basis” test ordinarily applied to economic or social legislation. *See* Appellants’ Brief at 26-27.

As the Fourth Circuit noted, “a regulation which imposes only moderate burdens could well fail the [Supreme Court’s] balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational.” *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995). This Court explicitly recognized this principle in *New Alliance Party v. Hand*, 933 F.2d 1568 (11th Cir. 1991), where it held that “[a]lthough the Court finds that the burden imposed . . . is not insurmountable, the Court determines that plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed.” *Id.* at 1576.

Here, there is special reason to scrutinize carefully the State’s claimed interest, for the burden imposed falls most heavily on a number of vulnerable groups, including low-income voters who are disproportionately

African American and who historically have been victims of discriminatory voting restrictions in Georgia. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 175-76 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966) (describing measures enacted in Georgia and other states that “were specifically designed to prevent Negroes from voting”). Care, therefore, must be taken to assure that their hard-won right to vote is not unnecessarily suppressed. This is especially true when evaluating requirements that impose costs as a condition of voting and that have been recognized as a common device to discourage voting by African Americans. *See, e.g., United States v. Mississippi*, 444 U.S. 1050, 1055 (1980); *Harman v. Forssman*, 380 U.S. 528, 540 (1965).

The State points to the fact that the Department of Justice (“DOJ”) precleared Georgia’s photo ID requirement under section 5 of the Voting Rights Act.³ The preclearance was a controversial decision which

³ Under section 5, Georgia and certain other states with a history of discrimination must receive preclearance from DOJ or a three-judge court in the district court for the District of Columbia, to ensure that new election regulations do not result in retrogression of the voting rights of African Americans and other minorities. *See Miller v. Johnson*, 515 U.S. 900, 905 (1995). DOJ preclearance only assesses retrogression; it does not address claimed violations of the constitution or section 2 of the Voting Rights Act. *See Reno v. Boissier Parish School Board*, 528 U.S. 320, 338 (1999); 42 U.S.C. § 1973c. Although DOJ preclearance is not judicially reviewable, *Morris v. Gressette*, 432 U.S. 492, 506-07 (1977), the precleared practices may nevertheless be challenged as violating the

was issued notwithstanding the overwhelming recommendation of those staff members most expert in evaluating voting regulations that preclearance be refused. See Dan Eggen, "Criticism of Voting Law Was Overruled," Wash. Post (Nov. 17, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html>. Four of the five experts reviewing the photo ID requirement recommended denying preclearance based on a comprehensive study which concluded that the photo ID requirement adversely affected the rights of African American voters and was not justified by the state's asserted interests. See DOJ, *Section 5 Recommendation Memorandum* (Aug. 25, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/custom/2005/11/16/2005111601869.html> ("DOJ Study").

The DOJ Study supports the district court's decision here. The study concluded that the State's photo ID restriction imposes especially heavy burdens on low-income voters who are disproportionately African American and find it more difficult or impossible to surmount the costs and other obstacles imposed on in-person voting. DOJ Study at 30-31, 35-37. The study also found unexplained and unsubstantiated the need for a photo

constitution or section 2 of the Voting Rights Act. *Reno*, 528 U.S. at 335.

ID to address alleged impersonation fraud, given the many alternative forms of identification available and added by Georgia only two years earlier. *Id.* at 19, 33-35. Where the State cannot offer any evidence suggesting that impersonation fraud is a problem that requires the imposition of a photo ID requirement, or explain why other forms of identification imposing less of a burden on vulnerable groups are not fully adequate, the photo ID requirement can hardly be considered a "reasonable, non-discriminatory" regulation.

It is within this framework that we address the State's claimed interest in requiring a photo ID as a condition of voting in person.

A. Impersonation Fraud is Highly Unlikely and Exceedingly Rare

The State refers indiscriminately to "voting fraud," but the photo ID requirement adopted by Georgia addresses only a single type of alleged voting fraud: an impostor's impersonation of a registered voter at the polls. The photo ID requirement does not address other types of voter fraud, such as those involving absentee voting, voting by ineligible voters such as persons with felony convictions, or double voting at two different addresses.⁴ Georgia requires no photo ID for absentee voting. And voting

⁴ A thorough study of double voting allegations in New Jersey explains why most such claims "do not stand up to even cursory analysis." Brennan Center and Michael McDonald, *Analysis of the September 15,*

by ineligible persons with felony convictions, at multiple addresses, or in the name of deceased persons (either in person or absentee) is addressed by Georgia through the updating of its voter registration lists, in accordance with the requirements of the Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq.* (“HAVA”), and the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq.* (“NVRA”). As Secretary of State Cathy Cox, Georgia’s highest election official, stated, this effort has been highly successful in Georgia, which she characterizes as being at the forefront of the nation in maintaining accurate registration rolls. See Press Release, Georgia Secretary of State Cathy Cox, Secretary Cox Hails Final Passage of Her Election Reform Package – Georgia First in the Nation to Mandate Uniform Voting System by 2004 (March 21, 2001), available at <http://www.sos.state.ga.us/pressrel/pr032201.htm>.⁵

The record here lacks any evidence of impersonation fraud: Ms. Cox testified that in her nine-year tenure she had not heard of a single

⁵ *2005 Voter Fraud Report Submitted to the New Jersey Attorney General* (Dec. 2005), available at <http://www.brennancenter.org/programs/downloads/NJ%20Fraud%20Final%20response.pdf>.

⁵ Under the new HAVA requirements for list maintenance, effective January 1, 2006, Georgia is now required to take additional steps to ensure the accuracy of its voter list. See 42 U.S.C. § 15483(a).

instance of such fraud. R4-54-15; see also R4-54-PX2-1.⁶ While the State questions her testimony as not based on first hand knowledge, the Secretary of State is uniquely positioned to know of voting fraud, given her statutory obligations to investigate election fraud as chair of the State Election Board. See Ga. Code Ann. § 21-2-31(5). Moreover, the State itself proffered no first-hand evidence of its own, offering not a single observation of impersonation fraud by local election officials, but only references to other types of fraud or speculation or theories that impersonation fraud was possible. See R2-47-94 at 41 (citing Decl. of Lynn Bailey ¶ 9); *id.* at 42 (citing Decl. of Gary Smith ¶ 4); *id.* at 47-48 (citing Decl. of Harry MacDougald ¶ 3).

The absence of evidence of impersonation fraud in this record mirrors the experience elsewhere in the nation. Those systematic reviews that have been conducted of alleged election fraud around the country have turned up only negligible evidence of voter fraud generally.⁷

⁶ Likewise, Al Marks, Vice Chairman for Public Affairs and Communications for the Hall County G.O.P., corroborated this view, stating, “I don’t think we need [the photo ID requirement] for voting, because I don’t think there’s a voter fraud problem.” Matt Weeks, *State’s Voters Must Present Picture IDs*, Gainesville Times (Sept. 15, 2005).

⁷ See generally Brenman Center and Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* (Sept. 19,

In the most comprehensive survey of alleged election fraud to date, Professor Lorraine Mimmite of Barnard College and David Callahan of Demos led a review of news and legal databases and interviewed attorneys general and secretaries of state in 12 states⁸ about incidences of election fraud from 1992 to 2002. The study found that election fraud is “very rare,” is not more than a “minor problem” and “rarely affects election outcomes.” *Id.* at 4, 17. According to Mimmite and Callahan, even where cases of alleged election fraud have received significant attention in the news media, such as the 2000 election in St. Louis, Missouri, the allegations have proved baseless. *Id.* at 17.⁹

To the limited extent fraud has been detected, the study concludes, it generally takes the form of organized fraud such as vote buying, use of fraudulent absentee or mail-in ballots, ballot box stuffing, or

⁸ *Available at* <http://www.brennancenter.org/programs/downloads/-%20CFER%20final%20report.pdf>.

⁸ The twelve states surveyed, Alabama, California, Florida, Georgia, Illinois, Minnesota, Mississippi, New York, Oregon, Pennsylvania, Texas and Wisconsin, collectively represent about half of the national electorate. Lorraine Mimmite and David Callahan, *Securing the Vote: An Analysis of Election Fraud 15(2003)*, *available at* http://www.demos-usa.org/pubs/EDR_Securing_the_Vote.pdf.

⁹ The 2000 Election in St. Louis featured allegations of illegal voter registration, voting by deceased individuals, felons, and people whose addresses appeared to be vacant lots and multiple voting. However,

wrongful purging of registration rolls to exclude eligible voters. *Id.* at 14. Instances of these types of fraud far outweigh incidents of individual fraud such as impersonation at the polls. *Id.* Most importantly, the study concludes that the wrongful disenfranchisement of voters is a “far bigger problem” than voter fraud as a whole, including the smaller subset of impersonation fraud. *Id.* at 15.

Statewide studies of election fraud have yielded similar results. In response to allegations of widespread voter fraud in Ohio and proposals for more restrictive voter identification laws during the 2004 election, the Coalition of Homelessness and Housing in Ohio (“COHHIO”) and The League of Women Voters of Ohio undertook a joint research project to determine the actual rate of ineligible votes cast in the state’s last two general elections. For the purposes of the study, the researchers defined fraud as “an ineligible voter voting or attempting to vote.” COHHIO & League of Women Voters Coalition, *Let the People Vote 1 (2005)*, *available at* <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>. Researchers conducted telephone interviews with either the Director or Deputy Director of each of the state’s 88 county Boards of Elections during the subsequent investigations into these allegations by reporters revealed little or no actual voter fraud. *Id.* at 43.

first week of June 2005, and concluded that in-person voter fraud as a whole was an “exceedingly rare” occurrence, as evidenced by the fact that there were only four reported instances of ineligible persons voting or attempting to vote in 2002 and 2004, confined to 3 of the state’s 88 counties. *Id.* at 2. That only four incidents of voting fraud were reported is especially notable given that a total of 9,078,728 votes were cast – yielding a *de minimis* rate of reported voting fraud of 0.00004%. The COHHIO Study also noted that allegations of voter fraud pertained to “registration fraud,” not to voter impersonation fraud. *Id.*

Nor has a year-long joint federal and state investigation into an alleged conspiracy to alter the result of the 2004 election in Wisconsin yielded any evidence of widespread voting fraud. Following the 2004 election, the Milwaukee Journal-Sentinel reported significant election-related voting problems, including flawed voter counts, votes cast from invalid addresses, outdated poll lists and discrepancies between the number of ballots cast and voters listed at dozens of polling places. Steve Schultze, “No Vote Fraud Plot Found,” Milwaukee Journal-Sentinel (Dec. 5, 2005), available at <http://www.jsonline.com/news/metro/dec05/3757572.asp?format=print>. In January 2005, the United States Attorney for Wisconsin, Steve Biskupic, and Milwaukee County District Attorney, E. Michael

McCann, announced a joint investigation into the voter fraud reports. *Id.* While the investigation has turned up severe administrative and recordkeeping problems with the Milwaukee elections board, it has produced very little evidence of voter fraud. *See id.*

In the thirteen states involved in the studies described above, the frequency of substantiated voter fraud was exceedingly low and there was no indication that impersonation fraud was a problem at all.

The State of Washington’s recent experience further validates this proposition. Washington does require voters to present identification before voting in person, although it does not demand photo ID. Wash. Rev. Code § 29A.44.205 (2005). After a bitterly contested gubernatorial election, one of the most substantial investigations into voter fraud in recent history was conducted in Washington. Out of a total of 2,812,675 ballots cast, this investigation uncovered only 19 cases of alleged fraudulent voting that could possibly have been remedied by a photo ID requirement. These involved voting in the name of deceased persons. *See Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005), available at http://www.seattleweekly.com/news/0523/050608_news_electiondecision.html. Even assuming that all 19 instances involved in-person, rather than absentee, voting, this would yield a rate of ineligible voting that might have

been remedied by photo ID requirements of 0.000007%. Moreover, even these few cases could have been prevented had the state removed the names of deceased persons from its voter rolls.

In short, all the available evidence indicates that impersonation fraud rarely, if ever, occurs. There are obvious reasons why it is so unlikely. First, if the impostor is impersonating a live, properly registered voter, the risks of getting caught are substantial and the punishment can be severe. The impostor takes the chance that the real voter will show up to vote either before or after the impostor, thus exposing the fraud. Second, even if the impostor tries to impersonate a deceased person or a person who has moved out of state, he risks getting caught if the registration list has been kept up-to-date, as is now required under HAVA, 42 U.S.C. § 15483(a)(2), and the NVRA, 42 U.S.C. § 1973gg-6(a)(4). Finally, the impersonator risks exposure if any poll worker is familiar with either the impostor or the legitimate voter.

The punishment for getting caught at voter impersonation is severe. Conviction for voter impersonation in a federal election can result in imprisonment of up to five years and fines as high as \$10,000 under federal law. 42 U.S.C. § 1973i(c). Georgia law classifies impersonation fraud as a felony, Ga. Code Ann. § 21-2-571, and provides for substantial penalties,

including fines as much as \$10,000 and imprisonment from one to ten years. *Id.* § 21-2-600. In an April 8, 2005 letter to Governor Perdue, Secretary of State Cox stated that Georgia's "severe criminal sanctions for the type of voter impersonation that is purportedly of concern . . . [was] a sufficient deterrent." R4-54-PX2-2.

Moreover, to pull off the impersonation, the impostor requires a series of events to favorably align themselves. He must first gain access to an up-to-date registration list, and identify a registered voter that is unlikely to vote. Then, even under Georgia's former regime, the impostor would have to steal identification papers like a government check or bank statement and present them at the polls, or falsely affirm his identity under oath, exposing the impersonator to additional criminal penalties. The would-be impostor must undertake all these efforts, at the risk of great penalties, for what is, in the end, a very limited pay-off: it is unlikely in the great majority of cases that a single vote would decide the outcome of a race or ballot initiative. To succeed in influencing any election, then, an impostor would have to work in concert with multiple other impostors, a scenario that can only be described as far fetched given the State's failure to identify a single instance of even a lone impostor committing impersonation fraud.

In sum, the “problem” of voter impersonation is hardly a real problem; the actual experience in Georgia and the rest of the nation suggests otherwise.

Nevertheless, we do not suggest that the state may not take prophylactic measures to prevent even rare or unlikely types of fraud, provided those measures are not wholly disproportionate to the nature of the problem and do not impose unwarranted burdens on vulnerable groups of voters. We therefore examine whether the photo ID requirement is a reasonable response to the unlikely – and in Georgia wholly unproven – danger of impersonation fraud.

B. Georgia’s Photo ID Requirement Is Not A Reasonable Or Proportional Response To Any Potential For Impersonation Fraud

The State has not offered any explanation why it abandoned a series of alternatives to photo IDs used under federal and state laws and instead adopted a unique requirement more restrictive than any used elsewhere in the United States.¹⁰

As of October 11, 2005, twenty-eight states had no in-person identification requirements at the polls. See NCSL Study, *supra* note 1

¹⁰ Citations to and summaries of each of the state election laws referred to in this and succeeding sections can be found in the NCSL Study, *supra*

(citing state statutes).¹¹ See also Electionline.org, *Voter ID requirements*, at <http://www.electionline.org/Default.aspx?tabid=364> (linking to state statutes and regulations). Twenty of the remaining twenty-two permitted other forms of identification as an alternative to photo IDs, or provided an alternative mechanism for allowing a voter without photo ID to cast a “regular” non-provisional ballot without fear of challenge. See NCSL Study. And until 2005, the remaining two – Georgia and Indiana – did as well.¹²

Just as most states have seen no need for any identification requirement at the polls, Georgia had no such requirement until 1997. In that year it enacted its first identification requirement, Ga. Code Ann. § 21-2-417 (1997), which could be satisfied by presenting numerous types of identification papers, including a driver’s license, an ID card issued by the

note 1. The relevant provisions of HAVA can be found beginning at page A-5 of the Statutory Appendix to this brief.

¹¹ This has changed as states have passed laws to comply with HAVA’s requirement that first-time voters who registered by mail verify identity by providing a Social Security or driver’s license number or showing some form of identification (including various non-photo ID forms of identification documents).

¹² Moreover, the Indiana BMV provides free photo IDs to anyone over the age of 18 who lacks a driver’s license. Indiana Election Division, *2006 Indiana Voter Information Guide* (Nov. 2005), available at http://www.in.gov/sos/elections/pdfs/06_Voter_Guide.pdf. While this

state or federal government, a U.S. passport, an employee ID card issued by the state or a private employer, a student ID card issued by a public institution, a hunting, fishing, or pilot's license, a license to carry a pistol or revolver, a military ID card, a birth certificate, a social security card, naturalization documents, or a copy of court records showing adoption or change of name or sex. Moreover, if any of these were not available, the 1997 law also provided for the use of a sworn oath or affidavit affirming a voter's identity, *id.* § 21-2-417(b), an option which was specifically provided at the request of the DOJ to ensure that the 1997 law could be precleared.

R4-54-PX2-4.

In 2003, in response to HAVA, Georgia added to its list of acceptable forms of ID the following documents: utility bills, bank statements, government checks or paychecks, and other government documents, all of which were acceptable as long as they showed the name and address of the voter. Ga. Code Ann. § 21-2-417 (2003).

The state offers no evidence that these requirements were inadequate to address the supposed danger of impersonation fraud, or "that

does not address the other obstacles posed by a photo ID requirement, it makes Georgia's requirement the most restrictive in the nation.

their retention would not have reasonably allowed the state to prevent voter fraud." DOJ Study at 34.

In evaluating Georgia's claim that it needs the photo ID requirement to prevent impersonation fraud, we think it pertinent that Georgia's statute is so at odds with the approaches of the federal government under HAVA and its sister states described below.

1. HAVA Provisions That Prevent Election Fraud

HAVA was enacted in response to the deep flaws in the 2000 presidential election to improve the administration of elections. *See generally* 42 U.S.C. § 15301. Three of HAVA's requirements are especially useful to prevent voter fraud.

First, HAVA requires states to maintain complete and accurate registration lists by implementing a uniform, official, centralized, interactive and computerized statewide voter registration list that is regularly updated. The statute specifically requires states to establish a "system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* § 15483(a)(4)(B). This aspect of HAVA will eliminate most of the potential for voting by ineligible voters.

Second, HAVA requires all voter registration applicants on or after January 1, 2003, to provide their driver's license number or the last four digits of their social security number (if they have such numbers) with their applications. *Id.* § 15483(a)(5)(A). The statute further requires the state to match the numbers and other information provided by those applicants against state motor vehicle authority or Social Security Administration databases. *Id.* § 15483(a)(5)(B). HAVA exempts applicants whose information is successfully matched from the ID requirements for first-time voters who register by mail. *See id.* § 15483(b)(3)(B).

Third, if a first-time voter who registered by mail is unable to provide a numerical identifier or the state is unable to match that number, HAVA requires these voters to produce certain documentation to confirm their identities. *Id.* § 15483(b)(1). HAVA allows voters to use any of the following means of verifying identity: a current and valid photo ID, a current utility bill, bank statement, government check or paycheck, or another government document that shows the name and address of the voter. *Id.* § 15483(b)(2).

HAVA's list of acceptable identification documents, which represents Congress's reasoned view of what is necessary to combat impersonation fraud by first-time voters who have not previously appeared

in person before a state official, is considerably more flexible than Georgia's photo ID requirement. Moreover, HAVA's ID requirement is in line with the overwhelming majority of states, which allow the use of various official documents, in addition to photo IDs, to verify a voter's identity.

2. Adequate Alternative Methods of Voter Identification Used In Other States

The following description reflects other states' approaches to voter identification as of October 11, 2005, although changes may occur as states continue to revise their laws to ensure compliance with HAVA's requirements for first-time voters who registered by mail.

Forty-eight states and the District of Columbia allow individuals to vote in person without requiring a photo ID as the sole means of verifying identity. *See* NCSL Study. Only Georgia and Indiana prevent voters from casting a regular ballot if they do not present a photo ID. *Id.*

Georgia has presented no reason why the specter of impersonation fraud requires it to enforce such an atypical and burdensome regulation, given the number of alternative methods adopted in other states, which impose slighter burdens without any evidence that they are less effective. We highlight the most common of these alternative procedures.

(a) Signature Matching

Signature verification at the polls, perhaps “the most common form of verification,” has been implemented successfully by a number of states to prevent impersonation fraud without placing an undue burden on voters. See Electionline.org, *Election Reform Briefing: Securing the Vote 5* (April 2002) (“*Securing the Vote*”), available at <http://www.electiononline.org/Portals/1/Publications/Voter%20-Identification.pdf>.¹³ In most jurisdictions, an individual must sign her name when she registers, and that signature is copied for ready access at the polls, either in the poll book or in a separate compilation of registered voters. Nine states – Illinois, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, and West Virginia – require voters to sign poll sheets in order to match signatures with their registration lists, and accept that signature as a voter’s sole form of identification if the voter has no other ID. See *id.* at 10-14. Florida also accepts a signature match in lieu of ID for counting provisional ballots. See *infra* p. 28.

State election officials in states using the signature matching method have found it to be an easy and reliable form of identity verification

¹³ Some of the state election laws cited therein have changed since this 2002 study, but these changes do not affect the conclusions discussed here.

and “an effective means of preventing voter fraud.” See *Securing the Vote, supra*, at 8 (citing Telephone Interview with Tom Wilkey, then-Executive Director of the N.Y. State Board of Elections and currently Executive Director of the federal Election Assistance Commission). The ease with which other states have implemented a signature verification system at the polls belies Georgia’s assertion that signature matching is inefficient and too expensive to implement. Moreover, election officials in several states have observed that the advent of digitized signature poll books has greatly simplified the administration process. See *Securing the Vote, supra*, at 8.

(b) Oral Confirmation of Identifying Information

Rather than requiring voters to present a photo ID, nine states – Maine, Mississippi, New Hampshire, North Carolina, Rhode Island, Utah, Vermont, Wisconsin, and Wyoming – verify identity by having voters state personal information such as name and street address. Poll workers then match the voter’s responses with information from the election board’s registration file. In these states, if poll workers are not satisfied with a voter’s initial responses, they may ask for more specific personal information such as birthdates or other identifying information. See generally *Securing the Vote, supra*, at 11-14.

(c) Affidavits Signed Under Penalty of Perjury

Many states, including most of those without any ID

requirements, allow voters to verify their identity at the polls by signing an affidavit or taking an oath under penalty of perjury. *See, e.g.*, Ala. Code §§ 17-7-15, 17-10-7 (2005); Conn. Gen. Stat. 9-261 (2004); N.Y. Elec. Law § 8-504 (2005).¹⁴ Indeed, Georgia itself had such an option until 2005. *See supra* p. 20. There has been no evidence that these provisions are inadequate to deter impersonation fraud.

(d) Non-Photo ID Required

Fifteen states require all voters to present some form of non-photo ID before they are allowed to cast their ballot.¹⁵ *See* NCSL Study. The lists of acceptable forms of ID in these states vary greatly, but include numerous documents like those allowed under HAVA. *Id.* Obviously, the longer the list of acceptable identification, the more likely it is that a voter will be able to meet the requirement (and the less likely that substantial

¹⁴ Federal law also requires written affirmations on both mail voter registration forms and provisional ballots. *See* 42 U.S.C. §§ 1973gg-4(a), 1973gg-7.

¹⁵ These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, New Mexico, North Dakota, Tennessee, Virginia, and Washington.

numbers of voters will be significantly burdened). Most of these states also offer other alternatives for voters who do not have ID. *Id.*

(e) Challenge Identity Upon Reasonable Suspicion of Fraud

At least fifteen states¹⁶ and the District of Columbia have adopted procedures to verify voter identity that are invoked only after a poll worker develops a reasonable suspicion of fraud. *See Securing the Vote, supra*, at 11-14. The election codes of these jurisdictions provide specific procedures to further authenticate identification in the event that a poll worker suspects fraud. Upon such suspicion, election officials are authorized to suspend the casting and counting of a ballot unless and until certain information is confirmed to the satisfaction of the respective state's election code. *Id.*

(f) Flexible Photo ID Requirement

Even among the seven states that request a photo ID from all in-person voters, most allow for a greater number and variety of photo IDs than does Georgia, and all but Indiana are more flexible than Georgia in providing for alternative non-photo ID identification procedures, as the following examples attest.

¹⁶ These states are California, Kansas, Idaho, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Rhode Island, Utah, Vermont, and Wyoming.

In Hawaii, if a voter attempts to vote at the polls without any photo ID, she will be asked to recite her date of birth and home address to corroborate the information provided in the poll book. If the recited information is accurate, she will be allowed to vote by regular ballot, not by challenged or provisional ballot. Haw. Rev. Stat. § 11-136 (2005). In Louisiana, voters without photo IDs may sign an affidavit attesting to their identity, and then vote so long as the voter provides either a current voter registration certificate or other information requested by the election commissioners of the precinct in which the individual is voting. La. Rev. Stat. Ann. § 18:562(A)(2) (2005). South Dakota voters without personal ID can complete an affidavit in lieu of the personal identification and still cast a ballot. S.D. Codified Laws § 12-18-6.2 (2006). Voters in South Carolina may cast a ballot if they have their voter registration notification, even if they are unable to produce an acceptable photo ID. S.C. Code Ann. §7-13-830 (2004). And even Florida allows voters to use a broader range of photo IDs than Georgia, and allows voters without a photo ID to submit a provisional ballot that will be counted if the signature on the ballot matches that on the voter's registration form. Fla. Stat. § 101.043(2) (2005). See also Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. DOJ, to Charlie Crist, Florida Attorney General (Sept. 6, 2005), Att. A,

at 2 (on file with Brennan Center) (pre-clearing Florida's new photo ID law on the understanding that Florida will count provisional ballots cast by voters without ID if the voter's signature matches her registration form).

* * *

As the DOJ Study concluded after comparing Georgia's photo ID requirement with the regulations of other states:

Compared to the voter ID laws of other states, Georgia is the only state (aside from Indiana) in which voters must present photo identification as a prerequisite for voting with no fail-safe alternative. All other states allow voters to present a voter registration card or other non-photo identification as proof of identity, sign an affidavit of identity, be recognized by poll workers, or verify their personal information as proof of identity before voting. . . . These features make Georgia's voter ID law, along with Indiana's, the most restrictive in the nation.

DOJ Study at 42. Moreover, no information suggests that the methods employed by other states have failed to ensure the integrity of the election process in those states.

Because Georgia can offer no evidence that impersonation fraud represents a genuine, rather than a hypothetical or speculative problem, the onerous restriction it has adopted cannot be considered a reasonable, nondiscriminatory response to the potential for impersonation

fraud, given the variety of effective and less restrictive alternatives that prevail throughout the rest of the nation.

Although the State argues that the district court's conclusion to this effect is at odds with other decided cases, the cases the State cites are inapposite and, in fact, support the position of Appellees. While the State claims that the district court "is the only court in the United States to have invalidated a photo ID requirement for in-person voting," Appellants' Brief at 40, this is true merely because it is the *only* court to have evaluated a regulation like Georgia's, in which a photo ID is the sole means of verifying identity. The three decisions which the State characterizes as upholding photo ID requirements, *see id.* at 40-44, each dealt with voting regulations that allowed voters to verify their identities by means other than a government-issued photo ID.

The state court in *Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485 (Col. Dist. Ct. Oct. 18, 2004), stated that "the so-called identification requirement, when push comes to shove, isn't really an identification requirement at all [since] there are many forms of recognized identification that are not photo IDs," including a utility bill, bank statement, paycheck, Medicare or Medicaid card, birth certificate or naturalization document. *Id.* at *13.

Similarly, the provision challenged in *League of Women Voters v. Blacéwell* 340 F. Supp. 2d 823 (N.D. Ohio 2004), which applied only to first-time voters who registered by mail, allowed utility bills, bank statements, government checks, paychecks, or other government documents as proof in lieu of photo IDs. *Id.* at 826. Further, a voter without any of these forms of ID could cast a provisional ballot that would be counted if she orally recited a numerical identifier such as the last four digits of her Social Security number. *Id.* at 825, 828. Because the court found that the number of voters who would lack these alternative identity papers and numbers was *de minimis* and far less than those who would lack photo IDs, *see id.* at 828 n.1, the court concluded that the burden on voting rights was slight and upheld the regulation, *id.* at 831.

Finally, the regulations challenged in *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004), similarly applied only to first-time voters who registered by mail, and allowed proof of identity by means other than a photo ID, because "[t]he forms of identification [we]re precisely those required by HAVA," *id.* at 434,

including utility bills, bank statements, government checks, paychecks, or other government documents.¹⁷

In short, none of these cases involved regulations, like Georgia's, mandating a photo ID as a condition to vote. The Ohio and Michigan cases involved challenges to regulations for counting provisional ballots and addressed ID requirements that applied only to first-time voters who registered by mail and whose identifying information was not previously verified by the state. Voters without ID could avoid those requirements in a variety of ways, including by registering in person.

The federal government and the vast majority of states have determined that any potential for impersonation fraud can be controlled with measures far less onerous than the photo ID requirement at issue here. Georgia's decision to substantially burden its most vulnerable voters by requiring them to present a photo ID before voting is a wholly disproportionate and unreasonable response to the possible problem of impersonation fraud.

¹⁷ Michigan's Attorney General issued an opinion in 1997 stating that any photo ID requirement would be unconstitutional, barring enforcement of any such provision in that state. *See Mich. Op. Att'y Gen. No. 6930*, 1997 WL 37560, at *3 (Jan. 29, 1997); *see also* R4-54-PX2-2. In this opinion, the Attorney General found no evidence of a voter fraud problem in that state.

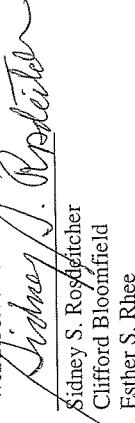
CONCLUSION

The District Court did not abuse its discretion in granting plaintiffs' motion for a preliminary injunction, and the order of the district court should be affirmed.

January 14, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure

32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in 14-point Times New Roman and complies with the type-volume limitation of the rule, containing 6,865 words, excluding those sections of the brief that do not count towards that limitation, in accordance with

Rule 32(a)(7)(B), as determined by the word processing system used to prepare this brief.


J. Adam Skaggs

STATUTORY APPENDIX

1. Georgia Code Annotated

Ga. Code Ann. § 21-2-417 (2005)

Presentation of identification to poll workers; form of proper identification; swearing of statement when unable to produce proper identification; provisional ballots for those; penalty for false statement under oath

(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 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.

Ga. Code Ann. § 21-2-417 (2003)

Presentation of identification to poll workers; form of proper identification; swearing of statement when unable to produce proper identification; provisional ballots for certain electors; penalty for false statement under oath

(a) 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 valid Georgia driver's license;
- (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;
- (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 employee identification card containing a photograph of the elector and issued by any employer of the elector in the ordinary course of such employer's business;

(6) A valid student identification card containing a photograph of the elector from any public or private college, university, or postgraduate technical or professional school located within the State of Georgia;

(7) A valid Georgia license to carry a pistol or revolver;

(8) A valid pilot's license issued by the Federal Aviation Administration or other authorized agency of the United States;

(9) A valid United States military identification card;

(10) A certified copy of the elector's birth certificate;

(11) A valid social security card;

(12) Certified naturalization documentation;

(13) A certified copy of court records showing adoption, name, or sex change;

(14) A current utility bill, or a legible copy thereof, showing the name and address of the elector;

(15) A bank statement, or a legible copy thereof, showing the name and address of the elector;

(16) A government check or paycheck, or a legible copy thereof, showing the name and address of the elector; or

(17) A government document, or a legible copy thereof, showing the name and address of the elector.

(b) 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 sign a statement under oath in a form approved by the Secretary of State, separate and distinct from the elector's voter certificate, swearing or affirming that he or she is the person identified on the elector's voter certificate. Such person shall be allowed to vote without undue delay, provided, however, that an elector who registered for the first time in this state by mail and did not provide one of the forms of identification set forth in subsection (a) of this Code section at the time of registration and who is voting for the first time 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 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.

Ga. Code Ann. § 21-2-417 (1997)

Presentation of identification to poll workers; form of proper identification; swearing of statement when unable to produce proper identification; penalty for falsely swearing or affirming statement

(a) 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 valid Georgia driver's license;
- (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;
- (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 employee identification card containing a photograph of the elector and issued by any employer of the elector in the ordinary course of such employer's business;
- (6) A valid student identification card containing a photograph of the elector from any public or private college, university, or postgraduate technical or professional school located within the State of Georgia;
- (7) A valid Georgia hunting or fishing license;
- (8) A valid Georgia license to carry a pistol or revolver;
- (9) A valid pilot's license issued by the Federal Aviation Administration or other authorized agency of the United States;
- (10) A valid United States military identification card;
- (11) A certified copy of the elector's birth certificate;
- (12) A valid social security card;

(13) Certified naturalization documentation; or

(14) A certified copy of court records showing adoption, name, or sex change.

(b) 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 sign a statement under oath in a form approved by the Secretary of State, separate and distinct from the elector's voter certificate, swearing or affirming that he or she is the person identified on the elector's voter certificate. Such person shall be allowed to vote without undue delay. 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.

2. The Help America Vote Act of 2002, 42 U.S.C. § 15301 et seq. (2002)

HAVA, 42 U.S.C. § 15301 Payments To States For Activities To Improve Administration Of Elections.

(a) **IN GENERAL.** Not later than 45 days after the date of the enactment of this Act [enacted Oct. 29, 2002], the Administrator of General Services (in this title [42 USC §§ 15301 et seq.] referred to as the "Administrator") shall establish a program under which the Administrator shall make a payment to each State in which the chief executive officer of the State, or designee, in consultation and coordination with the chief State election official, notifies the Administrator not later than 6 months after the date of the enactment of this Act [enacted Oct. 29, 2002] that the State intends to use the payment in accordance with this section.

(b) USE OF PAYMENT.

- (1) In general. A State shall use the funds provided under a payment made under this section to carry out one or more of the following activities:
 - (A) Complying with the requirements under title III [42 USC §§ 15481 et seq.].
 - (B) Improving the administration of elections for Federal office.
 - (C) Educating voters concerning voting procedures, voting rights, and voting technology.
 - (D) Training election officials, poll workers, and election volunteers.
 - (E) Developing the State plan for requirements payments to be submitted under part 1 of subtitle D of title II [42 USC §§ 15401 et seq.].
 - (F) Improving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes.
 - (G) Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, and providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to

individuals with limited proficiency in the English language.

(H) Establishing toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations, to obtain general election information, and to access detailed automated information on their own voter registration status, specific polling place locations, and other relevant information.

(2) Limitation. A State may not use the funds provided under a payment made under this section--

(A) to pay costs associated with any litigation, except to the extent that such costs otherwise constitute permitted uses of a payment under this section; or

(B) for the payment of any judgment.

(C) USE OF FUNDS TO BE CONSISTENT WITH OTHER LAWS AND REQUIREMENTS. In order to receive a payment under the program under this section, the State shall provide the Administrator with certifications that--

(1) the State will use the funds provided under the payment in a manner that is consistent with each of the laws described in section 906 [42 USCS § 15545], as such laws relate to the provisions of this Act; and

(2) the proposed uses of the funds are not inconsistent with the requirements of title III [42 USCS §§ 15481 et seq.].

(D) AMOUNT OF PAYMENT.

(1) In general. Subject to section 103(b) [42 USCS § 15303(b)], the amount of payment made to a State under this section shall be the minimum payment amount described in paragraph (2) plus the voting age population proportion amount described in paragraph (3).

(2) Minimum payment amount. The minimum payment amount described in this paragraph is--

(A) in the case of any of the several States or the District of Columbia, one-half of 1 percent of the aggregate amount made available for payments under this section; and

(B) in the case of the Commonwealth of Puerto Rico, Guam, American Samoa, or the United States Virgin Islands, one-tenth of 1 percent of such aggregate amount.

(3) Voting age population proportion amount. The voting age population proportion amount described in this paragraph is the product of--

(A) the aggregate amount made available for payments under this section minus the total of all of the minimum payment amounts determined under paragraph (2); and

(B) the voting age population proportion for the State (as defined in paragraph (4)).

(4) Voting age population proportion defined. The term "voting age population proportion" means, with respect to a State, the amount equal to the quotient of--

(A) the voting age population of the State (as reported in the most recent decennial census); and

(B) the total voting age population of all States (as reported in the most recent decennial census).

HAVA, 42 U.S.C. § 15483(a) Computerized Voter Registration List Requirements--

(I) IMPLEMENTATION.--

(A) IN GENERAL.--Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) EXCEPTION.--The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after the date of the enactment of this Act, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) COMPUTERIZED LIST MAINTENANCE.—

(A) IN GENERAL.—The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters—

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(3) TECHNOLOGICAL SECURITY OF COMPUTERIZED LIST.—The

appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) MINIMUM STANDARD FOR ACCURACY OF STATE VOTER REGISTRATION RECORDS.—The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) VERIFICATION OF VOTER REGISTRATION INFORMATION.—

(A) Requiring provision of certain information by applicants.
(i) In general. Except as provided in clause (ii), notwithstanding

any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes--

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or
(II) in the case of any other applicant (other than an applicant to whom clause (i) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number. If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided. The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials.

(i) Sharing information in databases. The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security. The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 205(t)(8) of the Social Security Act [42 USCS § 405(t)(8)] (as added by subparagraph (C)).

(C) [Omitted]

(D) Special rule for certain States. In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

HAVA, 42 U.S.C. § 15483(b) Requirements for Voters Who Register By Mail—

(I) IN GENERAL.—Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c)) and subject to paragraph

(3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if—
(A) the individual registered to vote in a jurisdiction by mail; and
(B) (i) the individual has not previously voted in an election for Federal office in the State; or
(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a).

(2) REQUIREMENTS.—

(A)
IN GENERAL.—An individual meets the requirements of this paragraph if the individual—

(i) in the case of an individual who votes in person—
(I) presents to the appropriate State or local election official a current and valid photo identification; or
(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or
(ii) in the case of an individual who votes by mail, submits with the ballot—

(I) a copy of a current and valid photo identification; or
(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) FAIL-SAFE VOTING.—

(i) **IN PERSON.**—An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 302(a).
(ii) **BY MAIL.**—An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 302(a).

(3) INAPPLICABILITY.—Paragraph (1) shall not apply in the case of a person—

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either—

(i) a copy of a current and valid photo identification; or
(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B) (i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits with such registration either—

(I) a driver's license number; or
(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause

(i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration;

(C) who is—

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff-1 et seq.);

(ii) provided the right to vote otherwise than in person under section 3(b)(2)(B)(ii) of the Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee-1(b)(2)(B)(ii)); or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) CONTENTS OF MAIL-IN REGISTRATION FORM.

(A) In general. The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form."

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms. If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

(5) CONSTRUCTION. Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) before the date of the enactment of this Act [enacted Oct. 29, 2002] to comply with such a provision after such date.

HAVA, 42 U.S.C. § 15483(c) Permitted Use of Last 4 Digits of Social Security Numbers.—

Permitted use of last 4 digits of social security numbers. The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

HAVA, 42 U.S.C. § 15483(d) Effective Date

(1) COMPUTERIZED STATEWIDE VOTER REGISTRATION LIST REQUIREMENTS.—

(A) In general. Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) on and after January 1, 2004.

(B) Waiver. If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) REQUIREMENT FOR VOTERS WHO REGISTER BY MAIL.

(A) In general. Each State and jurisdiction shall be required to comply with the requirements of subsection (b) on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals. The provisions of subsection (b) shall apply to any individual who registers to vote on or after January 1, 2003.

CERTIFICATE OF SERVICE

This is to certify that I have this day caused a true and correct copy of the foregoing **BRIEF OF BRENNAN CENTER FOR JUSTICE**

AT N.Y.U. LAW SCHOOL AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE to be served via

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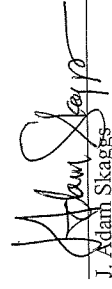
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January 14, 2006


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