

IN THE SUPREME COURT OF GEORGIA

SONNY PERDUE, in his )  
official capacity as Governor; and )

STATE ELECTION BOARD, )

Movants-Defendants, )

v. )

CASE NO. \_\_\_\_\_

MS. ROSALIND LAKE and )

MR. MATTHEW L. HESS )

qualified and registered voters )

under Georgia law, )

Respondents-Plaintiffs, )

**MOVANTS' EMERGENCY MOTION TO STAY**  
**TEMPORARY RESTRAINING ORDER ENTERED BY**  
**THE SUPERIOR COURT OF FULTON COUNTY**

COME NOW Sonny Perdue, in his official capacity as Governor of Georgia, and the State Election Board, and hereby respectfully file this emergency motion to have this Court stay the Temporary Restraining Order ("TRO") entered Friday afternoon by the Superior Court of Fulton County. (See TRO attached as Tab 1 to Movants' Appendix of Exhibits) ("TRO Order").) The TRO erroneously prohibits, during the ongoing primary election and runoff, any further enforcement of the statutory requirement that in-person voters show one of six forms of photo identification when voting. That statutory requirement, duly enacted during the

2006 Regular Session of the General Assembly (“the 2006 Photo ID Act”), is constitutional and should be enforced.

The error in the superior court’s order is apparent. Plaintiffs’ sole claim was that the Georgia Constitution provides an exclusive list of voting qualifications and the 2006 Photo ID Act is an unconstitutional attempt to add to that list. Although the superior court rejected that notion, it granted injunctive relief anyway, based upon an “undue burden” claim that Plaintiffs neither alleged nor proved. Because in-person absentee voting already began prior to the TRO (under the rules of the 2006 Photo ID Act) and advance voting starts today (with a TRO in place and therefore under a different set of rules), it is imperative that this Court consider this Motion immediately and reverse the TRO erroneously entered.

## **I. INTRODUCTION**

Although counsel for Plaintiffs previously filed a similar complaint in the Superior Court of DeKalb County asserting a number of claims, their Complaint for Declaratory and Injunctive Relief in the Superior Court of Fulton County last Monday, July 3, 2006, challenged the 2006 Photo ID Act on only one ground – that the Act violated Article II, Section 1, Paragraph 2 of the Georgia Constitution. That provision is as follows:

Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election

by the people. The General Assembly shall provide by law for the registration of electors.

Ga. Const. art. II, § 1, ¶ 2. Plaintiffs' sole ground for relief is that this constitutional provision prohibits the General Assembly from passing any law requiring proof of the identity of the registered voter when voting, or for that matter any law which imposes any other restriction on the right to vote. The Complaint raises no challenge to the 2006 Photo ID Act based upon any alleged "undue burden" on the right to vote.

After a 90-minute hearing on Thursday, July 6, the superior court issued the TRO at 3:00 p.m. on Friday, July 7. After repeating Plaintiffs' contention that the 2006 Photo ID Act violated the Georgia Constitution based upon the imposition of "an unauthorized qualification on the right to vote," the court obviously rejected that claim, concluding that "[t]he right to vote is not absolute as the State can impose voter qualifications and regulate access to voting." (TRO Order at 3 (emphasis added).) However, the court then nevertheless granted the TRO based upon a claim never alleged by Plaintiffs in their Complaint: "the Court finds the current statute unduly burdens the fundamental right to vote rather than regulate it and irreparable harm will result if the 2006 Photo ID Act is not enjoined." (*Id.* (emphasis added).)

The TRO results in an unprecedented limitation of the plenary authority of the state legislature to regulate the procedure for conducting elections in Georgia. The superior court's TRO cites no case authority to support its extraordinary

action, and constitutes an attempt by the judicial branch to usurp the presumptive constitutional authority of the legislative branch to regulate the manner in which elections may be conducted to protect against the potential for voter fraud.

While all trial court errors should be corrected, it is imperative that this Court act immediately to correct the error in this case. Significant efforts have been undertaken to prepare local election officials and the public at large concerning the requirements for in person voting under the 2006 Photo ID Act. The TRO was issued only hours before the start of today's advance voting for the July 18 statewide primary, creating additional risk of election official and voter confusion. It is critical that the Court act quickly to avoid further disruption of the primary and run-off elections. Consequently, emergency relief from this Court is necessary to stay the TRO.

## **II. STATEMENT OF FACTS**

### **A. Methods of Voting and Voter Identification in Georgia Prior to 2005**

Prior to 2005, Georgia registered voters could exercise their right to vote in one of two different ways: by absentee ballot or at the polls on Election Day. Depending upon which method the voter picked, specific rules applied. First, a voter could vote prior to Election Day by absentee ballot submitted either through the mail or in person at the registrar's or absentee ballot clerk's office. 2003 Ga. Laws 517, §§ 35, 36 (codified as O.C.G.A. §§ 21-2-380(b) & -381 (2003)). In

order to obtain an absentee ballot though the mail, a voter was, and still is, required to submit an application that contained “sufficient information for proper identification of the elector.” Id. § 36 (codified as O.C.G.A. § 21-2-381(a)(1) (2003)). Upon receipt of the ballot, the voter’s signature would be, and still is, matched with a signature on file; no other identification was or is now required.

In addition to casting an absentee ballot by mail, an absentee voter could also vote his or her ballot in person as part of the advance voting process or independent from that process. Either way, however, a voter casting an absentee ballot in person was required to present “proper identification to a poll worker.” Proper identification under law included the presentation of one of 17 possible documents specified in the law. Id. § 48 (codified as O.C.G.A. § 21-2-417(a)(2003)).

Absentee ballot voters (other than advance voters) were also subject to another important requirement. Prior to the 2005 law, in order to cast an absentee ballot by mail or in person at any time other than the advance voting period, a voter would also have to assert one of a series of reasons why he or she could not vote in person on an election day, such as being 75 years of age or older, being absent from the precinct during the time of the primary or election, being physically disabled or having to care for someone who is physically disabled, the election falling on a religious holiday observed by the voter, or being required to remain on

the job for the protection of the public health and safety. Id. § 35 (codified as O.C.G.A. § 21-2-380(a) (2003)).

In addition to absentee voting, a registered voter could vote in person by appearing at the polls on Election Day. Again, a voter would be required to present “proper identification to a poll worker” of the same type required for in-person absentee voters.

Thus, prior to 2005, there were different identification requirements imposed under Georgia law for registered voters who voted by mail-in absentee ballot or voted in person, whether via an absentee ballot or at the polls. Furthermore, only certain voters were eligible to cast absentee ballots at any time other than during the advance voting period. Under Plaintiffs’ constitutional claim, all such requirements would be unconstitutional. However, no court of this state ever held that the Georgia Constitution prevented the General Assembly either from requiring such identification or imposing different identification or eligibility requirements for in-person voting and voting by mail under that prior election scenario.

**B. Changes to Requirements for Absentee and In-Person Voting in 2005**

***1. Changes to Absentee Voting by Mail in 2005***

In its 2005 Regular Session, the General Assembly enacted a wide range of changes to the Georgia Election Code. 2005 Ga. Laws 253. One significant

change gave registered voters the ability to vote an absentee ballot by mail without having to claim any excuse for choosing not to vote in person. O.C.G.A. § 21-2-380(b). Although the General Assembly expanded the opportunity for registered voters to vote by mail in Georgia, it did not alter the means upon which an absentee voter may provide documentation to obtain an absentee ballot. “The application shall be in writing and shall contain sufficient information for proper identification of the elector . . . .” O.C.G.A. § 21-2-381(a)(1)(C). Therefore, a registered voter who votes by mail still is not required to present a photo ID prior to being permitted to cast his or her vote.<sup>1</sup>

Although there is no requirement for the presentation of a photo ID when voting by mail, to protect against voter fraud, election officials are required to ensure that the person voting by mail is the same person who registered to vote. When an application for an absentee ballot is made, a registrar or absentee ballot clerk must record the date received and determine if the applicant is eligible to vote in the primary or election involved. O.C.G.A. § 21-2-381(b)(1). There are specific means by which the registrar or clerk declares the potential absentee voter eligible or ineligible, or requests additional information prior to the primary or election to

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<sup>1</sup> The only exception to this is a person who registered to vote through the mail and then votes for the first time by absentee ballot. To identify himself or herself, the voter has a choice of including with his or her absentee ballot a photo ID or 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. O.C.G.A. § 21-2-386(a)(1)(D).

confirm the voter's identity. O.C.G.A. § 21-2-381(b)(2)-(4). Absentee ballots are mailed only to eligible applicants. O.C.G.A. § 21-2-384(a)(2). The absentee voter is required to sign an oath verifying eligibility. O.C.G.A. § 21-2-384(c)(1). When the voted ballot is returned, the registrar or clerk is required to compare the identification and signature of the voter on the absentee ballot with the identifying information on the voter registration and absentee ballot application. O.C.G.A. § 21-2-386(a)(1)(B).

In contrast, when a registered voter appears in person to vote at the polls, the voter executes a voter's certificate, and the poll officer checks the name of the certificate against the electors list present in the precinct. O.C.G.A. § 21-2-431(a). Unlike the identification requirement imposed when voting an absentee ballot by mail, there is no requirement that a poll officer check the signature on the voter's certification with the signature on the voter's registration.

## **2. Changes to In-Person Voting in 2005**

Along with expanding the ability of registered voters to cast an absentee ballot by mail, the General Assembly also revised requirements for in-person voting by amending O.C.G.A. § 21-2-417 ("the 2005 Photo ID Act"). That Act changed the manner in which registered voters who vote in person can verify their identity, in an effort to protect against in-person voter fraud by assuring that only the registered voter is casting a ballot. Registered voters who chose to vote in



person were required to present at their polling place one of the following forms of government-issued identification which carries indicia of reliability:

- A Georgia driver's license issued by the appropriate state agency,
- A valid photographic identification card issued by any agency or branch of the United States or any state government agency,
- A valid U.S. passport,
- A valid photographic employee identification card issued by the United States or a Georgia state or county government agency,
- A valid photographic U.S. military identification card, or
- A valid tribal photographic identification card.

2005 Ga. Laws 253, § 59. Under the 2005 Photo ID Act, an in-person voter who was unable to produce any of the alternative photo IDs would be permitted to vote a provisional ballot. That ballot would then be counted if the registrar was able to verify current and valid identification of the registered voter no later than two days after the polls close. Id. This same process was already in place to allow voters whose names do not appear on the list of electors to cast a provisional vote, which will be counted if the issue is resolved no later than two days after the polls close. O.C.G.A. §§ 21-2-418(a) & -419(c).

Under the 2005 Act, photo ID cards for voting purposes were available at service centers operated by the Department of Driver Services ("DDS") for a fee ranging from \$20 for a five-year card to \$35 for a ten-year card. O.C.G.A. § 40-5-103(a). The cards were free to all applicants for a DDS-issued photo ID card for voting who swore under oath they were indigent. 2005 Ga. Laws 253, § 66.

**C. The Federal Court Order Preliminarily Enjoining the 2005 Photo ID Act**

On September 19, 2005, a group of plaintiffs filed an action in the United States District Court for the Northern District of Georgia, seeking to declare the 2005 Photo ID Act unconstitutional. Common Cause/Georgia v. Billups, No. 4:05-CV-201-HLM. By Order dated October 18, 2005, the federal court granted the plaintiffs' motion for a preliminary injunction against the enforcement of the 2005 Photo ID Act. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005).

The District Court found that the plaintiffs were likely to succeed on the merits of their federal constitutional challenge on two grounds. First, the court found that the 2005 Photo ID Act imposed a significant burden on the right to vote, based principally on the conclusion that because the DDS service centers at which the photo IDs were available "are not located in every Georgia county," these centers were not readily accessible to those who may need a photo ID. Id. at 1362-63. Second, the court found that the fee for a photo ID card issued by DDS constituted a poll tax in violation of the Twenty-Fourth Amendment to the United States Constitution. Id. at 1369-70. In addition, the Court expressed concern that the public had not been sufficiently educated that there were no longer any restrictions on voting an absentee ballot by mail or that there were new requirements for the presentation of a photo ID when voting in person. Id. at 1364-65.

**D. The General Assembly Responded to the District Court's Concerns by the Enactment of the 2006 Photo ID Act.**

In direct response to the District Court order in Common Cause/Georgia, during the Regular Session of the 2006 General Assembly, the legislature enacted amendments to O.C.G.A. § 21-2-417 and an additional provision in O.C.G.A. § 21-2-417.1 (collectively, "the 2006 Photo ID Act") (attached as Tab 2, Ex. K. to Movants' Appendix of Exhibits<sup>2</sup>). While the legislature maintained the requirement for the presentation of a government-issued photo ID for in-person voting, the new legislation provides that for voters who need them, free photo ID cards are available from two sources. O.C.G.A. §§ 21-2-417 & -417.1; see also id. § 40-5-103(d).

First, voters may continue to obtain photo identification suitable for in-person voting from any of the State's 60 DDS service centers. O.C.G.A. § 40-5-103(d).

Second, each county board of registrars must provide at least one place in their respective counties where photo ID cards may be issued to registered voters who do not already have a valid license or identification card issued by the DDS. O.C.G.A. §

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<sup>2</sup> In conjunction with the filing of this Emergency Motion, Movants are also filing for the Court's consideration and convenience as an Appendix copies of the documents that were before the Superior Court of Fulton County, including the TRO entered by the superior court (Tab 1), Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief and Exhibits (Tab 2), Plaintiffs' Motion for TRO (Tab 3), Plaintiffs' Memorandum in Support of their Motion for TRO and Exhibits (Tab 4), State Defendants' Brief in Opposition to Plaintiffs' Motion for TRO (Tab 5) State Defendants' Appendix of Exhibits (Tab 6), the Amended Affidavit of Gloria W. Champion (Tab 7), the certified copy of Plaintiff Hess's motor vehicle report (Tab 8), and Movants' Notice of Appeal (Tab 9).

21-2-417.1(a). The 2006 Photo ID Act required the State Election Board to provide each county board of registrars with “the necessary equipment, forms, supplies, and training” for the production of the photo ID cards. O.C.G.A. § 21-2-417.1(g). The General Assembly appropriated \$800,000 to the State Election Board to provide for the purchase and installation of equipment to produce photo IDs in every county voter registrar’s office, the training for the registrars to operate the equipment, and voter education concerning the issuance of the photo IDs. (See Affidavit of Claud L. McIver, III, ¶ 4 (attached as Tab 6, Ex. B to Movants’ Appendix of Exhibits) (“McIver Aff.”).)

The 2006 Photo ID Act was submitted to the United States Department of Justice as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and was precleared by letter dated April 21, 2006. (A copy of this preclearance letter is attached as Tab 6, Ex. E to Movants’ Appendix of Exhibits.)

**E. The State Election Board Has Enacted Regulations Providing for the Administration of the Issuance of Free Photo IDs Under the 2006 Photo ID Act.**

The 2006 Photo ID Act also authorized the State Election Board to adopt rules and regulations for the administration of the issuance of photo ID cards. O.C.G.A. § 21-2-417.1(h). In accordance with this authority, on June 19, 2006, the State Election Board adopted regulations providing for the documentation required for the issuance of the free photo ID card to registered voters who do not already possess a

valid photo ID for in-person voting. Ga. Comp. R. & Regs. r. 183-1-20-.01 (2006) (copy attached as Tab 6, Ex. F to Movants' Appendix of Exhibits); see also McIver Aff. ¶ 6. The regulations were precleared under Section 5 by the United States Department of Justice by letter dated June 27, 2006. (A copy of this preclearance letter is attached as Tab 6, Ex. H to Movants' Appendix of Exhibits.)

**F. There Are At Least 221 Locations Statewide Where Photo ID Cards Are Available Free of Charge for Registered Voters Who Choose to Vote In Person and Do Not Currently Have a Valid Photo ID.**

The 2006 Photo ID Act provides that each registrar's office in Georgia's 159 counties will have the necessary equipment to produce a voter photo ID card free of charge to any registered voter who does not presently have a valid Georgia driver's license or state-issued ID card that would be acceptable for identification at the polls. Counties also have the ability to purchase additional equipment and add other locations where free ID cards are available. Fulton County has purchased three additional machines; two for its North and South Fulton County service centers (in addition to one in its main office in downtown Atlanta) as well as an extra unit to take to locations such as nursing homes. (See Amended Affidavit of Gloria W. Champion ¶ 7 (attached as Tab 7 to Movants' Appendix of Exhibits) ("Champion Aff.")) In addition, state photo ID cards may be obtained free of charge at any one of 60 DDS service center locations, including three service centers in Fulton County (one located within the City of Atlanta) and two service centers in DeKalb County.

(See Affidavit of Thomas Blake Ussery ¶ 7 (attached as Tab 6, Ex. C to Movants' Appendix of Exhibits).) That is a total of at least 221 locations statewide (including five DDS service centers and four county offices in Fulton and DeKalb Counties); voters also have the option of obtaining a free photo ID card at any one of the DDS service centers in the state or at any other location designated by his or her county registrar. (Id. ¶ 7 & Ex. 1; Champion Aff. ¶ 8.)

**G. The State Election Board and Others Have Undertaken Substantial Efforts to Train Local Election Officials and Educate Voters Concerning the Requirements of the 2006 Photo ID Act.**

The efforts to implement the 2006 Photo ID Act have already been substantial. Following preclearance of the 2006 Photo ID Act on April 21, 2006, the State Election Board immediately set about fulfilling its purchasing, training, and education obligations. (McIver Aff. ¶ 5.) The State Election Board first initiated and completed the equipment purchasing process, which culminated in the distribution of equipment to each county. (Id. ¶¶ 6, 7.) That equipment has been installed and is operational in all 159 county registrar's offices, and registrars have been issuing photo IDs since June 30, although demand has been exceedingly low. (Id. ¶¶ 7, 10.)

In addition, the training of all registrars has been completed. A mass training session was held at the Voter Registrars Association of Georgia on May 22-24, 2006, which was attended by representatives of 157 of the 159 county registrars. (Id. ¶ 7.) Many counties have also received on-site training from the vendor, as may have been

required by the needs of the particular county. (Id.) Fulton County also trained its workers on the operation and use of the machinery which produces the photo ID cards. (See Champion Aff. ¶ 11.)

The State Election Board has also instituted voter education efforts. The Board produced an educational piece which is to be handed out during early voting (beginning today) and at the polls on July 18, primary election day. (McIver Aff. ¶ 11, Ex. 1.) For voters who appear without a photo ID, the State Election Board's education piece tells those voters what forms of photo ID are acceptable, one of which they may already have. It also tells voters how to get a free photo ID from their county registrar or the DDS. (Id.) Finally, the educational piece advised all voters that every registered voter is permitted to vote absentee by mail without a photo ID and without an excuse. (McIver Aff. ¶ 11, Ex. 1.)

The counties have been instructed to distribute the letters during early voting and at the polls on primary election day. (Id. ¶ 12.) For smaller counties, the State Election Board provided the letter template, supplied the paper to the counties, and instructed them to print the letters for distribution during early voting and on primary election day. (Id.) The State Election Board also made public service announcements providing information about the need to bring photo IDs to the polls, the types of photo ID that are acceptable, how to get a free photo Voter Identification Card or identification card from the DDS, and the ability of all voters to vote an

absentee ballot by mail without having to provide an excuse or photo ID. (Id. ¶ 13.)

Those are already airing. (Id.)

Last week, the Fulton County Board of Registrations and Elections held a press conference regarding the availability of the free Voter Identification Cards and the ability of voters to request and cast a mail-in absentee ballot. (Champion Aff. ¶ 12.) All the major television channels attended, as did the Atlanta Journal-Constitution, the Atlanta Voice, and a number of radio stations. (Id.) Media outlets were requested to run public service announcements to provide the same information. (Id.) In addition, the county created posters and a letter explaining the photo ID requirements and absentee voting by mail, which have been and are being distributed to all county departments frequented by the public as well as community organizations. (Id. ¶ 13, Exs. 4 & 5.)

In short, the concerns of the federal court with respect to the cost and availability of the photo IDs, as well as education concerning voting by absentee ballot by mail and in person using a photo ID were heard and addressed. The machines to produce the photo IDs are up and operating; training on the issuance of the IDs has been completed; those IDs are being issued; and educational pieces have been produced and are being distributed and disseminated.

**H. Plaintiffs' Counsel's Prior Unsuccessful Effort to Halt the Enforcement of the 2006 Photo ID Act in the Superior Court of DeKalb County**



Plaintiffs' counsel first filed a Complaint for Declaratory and Injunctive Relief in the Superior Court of DeKalb County on April 12, 2006 based, in part, on the same state constitutional challenge raised below, on behalf of a registered voter who was allegedly "forced" to either obtain a photo ID or "forfeit" her rights to vote in the next election. (See Margaret Berry v. Sonny Perdue, et al., Superior Court of DeKalb County, No. 06CV4751-4, Compl. ¶ 69 (attached as Tab 6, Ex. I to Movants' Appendix of Exhibits).)<sup>3</sup> Although a final hearing on the Berry Complaint was set for July 3, 2006, the plaintiff in that case cast an absentee ballot by mail, directly affecting her standing to maintain her claim. Plaintiffs' counsel then unsuccessfully attempted to add Rosalind Lake, one of the Fulton County plaintiffs, as a party to the DeKalb litigation. After denying the motion to add Ms. Lake, Senior Superior Court Judge Mallis scheduled a hearing on State Defendants' motion to dismiss the complaint for lack of standing at the call of the case for trial. (See Order of June 29, 2006 in Berry v. Perdue (attached as Tab 6, Ex. J to Movants' Appendix of Exhibits).) Plaintiffs' counsel dismissed, rather than face that issue, which Judge Mallis acknowledged was "potentially dispositive of this matter." (See id.; see also Pl.'s Voluntary Dismissal Without Prejudice, filed June 30, 2006 (attached as Tab 6, Ex. K to Movants' Appendix of Exhibits).)

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<sup>3</sup> As previously noted, Plaintiffs' counsel in the DeKalb case also raised an equal protection challenge based on an alleged undue burden on the right to vote, a claim not raised in the Fulton case. (Compare Tab 6, Ex. I, ¶¶ 57-62 with Tab 2, ¶¶ 56-58.)

**I. Plaintiffs' Complaint in Fulton County and the Court's TRO.**

One day after the voluntary dismissal of their action in DeKalb County, and one week before the start of advance voting for the July 18 primary election, Plaintiffs' counsel filed their Complaint for Declaratory and Injunctive Relief in the Superior Court of Fulton County against Defendants Perdue and the State Election Board as well as election officials in Fulton County. Unlike their DeKalb complaint, there was no challenge to the 2006 Photo ID Act based upon an alleged "undue burden" on the right to vote. (See Tab 2, ¶¶ 56-58.) A motion for temporary restraining order was also filed, and a hearing set before Judge Melvin K. Westmoreland, the presiding judge. (See Tab 3.)

As stated on pp. 2-3, above, the superior court's order inexplicably and incorrectly rejects Plaintiffs' contention but holds the 2006 Photo ID Act unconstitutional based upon a cause of action never alleged by Plaintiffs. In so doing, the superior court is the first court in Georgia to rule, in effect, that the Georgia Constitution bars the General Assembly from enacting any law requiring that a registered voter show proof of his or her identity when voting. Movants filed their Notice of Appeal of the TRO immediately following its issuance on July 7, 2006. (See Tab 10.)

**III. ARGUMENT AND CITATION OF AUTHORITY**

**A. A TRO Order is Appealable When It Operates as an Injunction Granting Plaintiffs Their Requested Relief.**

The grant of a temporary restraining order is normally not directly appealable. O.C.G.A. § 5-6-35(a)(9). However, the superior court referred to its hearing as one on a “preliminary injunction,” (see TRO Order at 4), which is directly appealable. O.C.G.A. § 5-6-34(a)(4). Furthermore, “[a]lthough the injunction in this case is denominated as a TRO, there is no magic in nomenclature.” Dolinger v. Driver, 269 Ga. 141, 142 (1998). Where a TRO is entered by a superior court after hearing at which both sides are present, and it does not merely preserve the status quo but directs action which gives plaintiffs “all of the relief they sought,” the TRO is directly appealable and this Court has appellate jurisdiction. Id.

In this case, the TRO entered by the superior court prevents the continued operation of a presumptively valid act of the legislature and gives Plaintiffs “all the relief they sought” by enjoining the enforcement of the requirement for the presentation of a photo ID prior to casting a ballot in person; hence, it is directly appealable to this Court.

**B. The TRO is Contrary to Georgia Law.**

To obtain a TRO or interlocutory injunction, a movant must demonstrate that the balance of equities favor such drastic relief. See Garden Hills Civic Ass’n, Inc. v. Metro. Atlanta Rapid Transit Auth., 273 Ga. 280, 281 (2000). The likelihood of an applicant’s ultimate success on the merits is not by itself determinative, but it is a proper criterion for the trial court to consider in balancing

the equities. See id. (“Although the merits of the case are not controlling, they nevertheless are proper criteria for the trial court to consider in balancing the equities.”).

Although the decision whether to issue a TRO or interlocutory injunction is generally within the trial court’s discretion, “when there is no material conflict in the evidence, the applicable rules of law cannot be avoided on the basis of discretion.” Id. at 282 (quoting Am. Bldgs. Co. v. Pascoe Bldg. Sys., 260 Ga. 346, 348 (1990)); see also Zant v. Dick, 249 Ga. 799 (1982). Instead, in such cases the trial judge’s discretion is circumscribed by the applicable rules of law. See Garden Hills Civic Ass’n, 273 Ga. at 282 (quoting Zant, 249 Ga. at 799-800).

Because a TRO or interlocutory injunction of a legislative enactment will “interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits,” it “must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts.” Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. V. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990). When a movant seeks to enjoin a government agency, “his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own affairs.” Rizzo v. Goode, 423 U.S. 362, 378-79 (1976); see

also Franklin v. Harper, 205 Ga. 779, 790 (1949) (emphasizing that “the legislature has a *wide latitude* in determining how the [voting] qualifications required by the Constitution may be determined . . . .”) (emphasis added).

**1. Plaintiffs are Not Substantially Likely to Succeed on the Merits Because the 2006 Photo ID Act Does Not Violate Article II, Section 1, Paragraph 2 of the Georgia Constitution.**

In finding that the General Assembly does have authority to impose voting requirements, the court implicitly acknowledged that Plaintiffs were not likely to succeed on their sole claim. The superior court, though incorrect in granting relief, was correct that Plaintiffs could not succeed on the claim they brought.

“The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state.” Ga. Const. art. III, § 6, ¶ 1. Unlike the United States Congress, which has only delegated powers, the General Assembly’s powers are plenary, and it is “absolutely unrestricted in its power to legislate” unless it undertakes an act prohibited by the Constitution. Bryan v. Ga. Pub. Serv. Comm’n, 238 Ga. 572, 573 (1977) (quoting Sears v. State, 232 Ga. 547, 554 (1974)). It is a cardinal rule in Georgia that statutes are presumed to be constitutional and that all doubts must be resolved in favor of their validity. Albany Surgical, P.C. v. Ga. Dep’t of Cmty. Health, 278 Ga. 366, 368 (2004).

Plaintiffs’ Complaint was pled in only one count as follows:

By requiring that registered voters present a Photo ID before being issued a ballot and allowed to vote, the 2006 Photo ID Act violates Art. II, § I, ¶ II of the Georgia Constitution in either one of two ways, (a) the statute purports to make presentation of a Photo ID a new condition and qualification of voting, or (b) to disenfranchise voters from voting even though those voters who do not have a photo ID are lawfully registered and possess each of the qualifications set forth in Art. II, § I, ¶ II of the Georgia Constitution.

(Compl. ¶ 58, attached as Tab 2 to Movants' Appendix.) The superior court flatly rejected the argument that this provision of the Georgia Constitution prohibits the General Assembly from enacting any qualification or regulation affecting voting except for laws affecting the registration of electors. "The right to vote is not absolute as the State can impose voter qualifications and regulate access to voting." (TRO Order at 3 (emphasis added).) That conclusion is supported by Georgia law.

First, Article II, Section 1, Paragraph 1 of the Georgia Constitution provides both that elections by the people shall be by "secret ballot" and that those elections "shall be conducted in accordance with procedures provided by law." Ga. Const. art. II, § 1, ¶ 1. Accordingly, the Georgia Constitution specifically contemplates that the General Assembly shall enact statutes for both the method of voting and for the procedures to be used in conducting elections generally. As the 2006 Photo ID Act affects the procedures for in-person voting – as opposed to voter registration (for which no photo ID is required) – Article II, Section 1, Paragraph 1 is the applicable provision for reviewing the 2006 Photo ID Act, and that

constitutional provision expressly permits the General Assembly to enact appropriate statutes.

Second, nothing in the 2006 Photo ID Act would prohibit any Georgia voter from casting a ballot in any election. Even with enactment of the 2006 Photo ID Act, every eligible Georgia resident remains entitled to vote in any election. The 2006 Photo ID Act applies only to registered voters who vote in person, and any registered voter who does not possess a photo ID can obtain one free of charge at a location in his or her own home county or at any of the DDS service centers throughout Georgia.

If a voter does not wish to obtain a photo ID card, he or she may both register and, when elections occur, vote by mail without presenting a photo ID. The paragraph of the Georgia Constitution which Plaintiffs cite protects the right of qualified citizens to vote, but it does not require that those citizens must be allowed to vote in any particular manner. See Ga. Const. art II, § 1, ¶ 2.

This Court has emphasized that, although the right to vote cannot be “absolutely denied or taken away by legislative enactment,” it is “subject to reasonable regulation,” including the legislature’s right to prescribe how “qualifications shall be determined.” Franklin, 205 Ga. at 789; accord Griffin v. Trapp, 205 Ga. 176, 181-82 (1940); Stewart v. Cartwright, 156 Ga. 192, 197 (1923). Indeed, in setting forth the requirements for the qualifications of voters,

the Georgia Constitution “contemplates enactment of laws to determine these qualifications.” Franklin, 205 Ga. at 790. This Court has emphasized that the General Assembly has “wide latitude” in determining how voting qualifications required by the Georgia Constitution “may be determined,” provided that it does not make “the exercise of such right so difficult or inconvenient as to amount to a denial of the right to vote.” Id. at 790.

The only other court to have considered a state constitutional challenge to a law requiring photo IDs for voting in person has upheld the law against such a challenge:

[There is no] Constitutional violation committed every time the General Assembly enacts a new voting regulation since, as we have previously noted, under Indiana law “the Legislature has power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted, so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible.”

Ind. Democratic Party v. Rokita, No. 1:05-CV-0634-SEB-VSS, 2006 U.S. Dist.

LEXIS 20321, at \*187-89 (S.D. Ind. Apr. 14, 2006) (upholding Indiana’s photo ID law).

2. *The Superior Court Erred By Basing Its TRO on Grounds Not Alleged by Plaintiffs.*

After ruling that the General Assembly had the right to impose voter qualifications and regulate the access to voting, the Court nevertheless issued a TRO based on its determination (without a claim by Plaintiff or any factual findings or



legal support) that the 2006 Photo ID Act imposes an “undue burden” on the right to vote. As discussed above, no such allegation was made by Plaintiffs in their complaint. A judgment based on a claim where there is no prayer in the complaint for such relief and where defendant has not filed defensive pleadings nor appeared in court to defend against “is not merely erroneous but utterly void, since . . . the trial court in those circumstances acquires no jurisdiction to enter such a judgment.” Cross v. Cross, 230 Ga. 91 (1973); see also 42 Am Jur. 2d Injunctions § 251 (2006) (“if a claim or cause of action is not alleged, the trial court lacks the authority to issue an injunction”).

Here, the superior court concluded that Plaintiffs’ contention that Article II, Section 1, Paragraph 2 of the Georgia Constitution prohibits the legislature from imposing requirements relating to access to voting was unsupported, yet issued a TRO based upon a finding that the 2006 Photo ID Act “unduly burdens the fundamental right to vote rather than regulate it.” (TRO at 3.) The superior court lacked jurisdiction to issue a TRO on that basis.

**C. The Superior Court Erred By Concluding There Would Be Irreparable Harm to Plaintiffs if the 2006 Photo ID Act Were Not Enjoined and Ignored the More Significant Harm to the Public Interest.**

A showing of irreparable injury is “the *sine qua non* of injunctive relief” and cannot be presumed, even when there is a violation of constitutional rights. Siegel v. LePore, 234 F.3d 1163, 1176-77 (11th Cir. 2000) (quoting Ne. Fla. Chapter, 896

F.2d at 1285) (“Plaintiffs also contend that a violation of constitutional rights always constitutes irreparable harm. Our case law has not gone that far, however.”); see Garden Hills Civic Ass’n, 273 Ga. at 281-82 (citing McKinnon, 226 Ga. at 332) (emphasizing that a TRO or interlocutory injunction should be denied “where the denial . . . would not work ‘*irreparable injury*’ to the plaintiff or leave the plaintiff ‘practically remediless’ in the event it ‘should thereafter establish the truth of [its] contention.’”) (emphasis added). In all cases, a movant for a preliminary injunction against a state or local government must present facts that show a “real and immediate” threat of substantial, irreparable harm before a court will intervene. O’Shea v. Littleton, 414 U.S. 488, 494 (1974).

Plaintiffs’ only threatened injury in this case is their claimed inability to vote in person without valid photo ID. Evidence was presented at the hearing to cast doubt on Plaintiffs’ standing to maintain this action, much less irreparable injury. Plaintiff Lake can vote in person using a government-issued photo ID card from the State of Florida. (See Tab 6, Ex. D at 25-26, 48 & Ex. G) (Ms. Lake testifying in the DeKalb case that she has a photo ID issued by Florida International University (FIU) which has no expiration date).) Plaintiffs attempted to rectify this problem by presenting a subsequent affidavit from Plaintiff Lake indicating her belief that FIU would no longer consider her student ID valid. (See Affidavit of Rosalind Lake, ¶ 3 (attached as Tab 9 to Movants’ Appendix of Exhibits).)

Regardless of whether Plaintiff Lake or FIU considers it valid or not, the fact of the matter is that a government-issued ID which on its face has no expiration date is a valid form of photo ID for voting in person. O.C.G.A. § 21-2-417(a)(2).

Evidence was also presented indicating that Plaintiff Hess had been issued a Georgia driver's license. (See Tab 9.) Plaintiffs' counsel then represented that Mr. Hess's license had been stolen. There was no evidence that Plaintiff Hess, who was at the TRO hearing, could not get a replacement license or, for that matter, could not easily get a free photo ID card for voting across the street from the courthouse, or could not vote an absentee ballot by mail.

Thus, the only two Plaintiffs will not suffer any irreparable harm by the enforcement of the 2006 Photo ID Act. On the other hand, the State of Georgia and Fulton County have undertaken substantial effort and expense to (1) train election personnel to issue free photo IDs to registered voters who need them, (2) train election officials on the implementation of the 2006 Photo ID Act, (3) educate voters on requirements of the 2006 Photo ID Act for in-person voting, what identification is acceptable, and how to obtain a free photo ID card, and (4) educate voters on the option of voting an absentee ballot by mail without the necessity of obtaining a photo ID. Resources have also been committed to issuing printed advisories to voters, and recording and presenting public service announcements on both radio and television.

The issuance of the TRO by the superior court literally hours from the start of advance voting for the July 18 primary (and after a number of absentee ballots have been voted in person, with the presentation of required forms of photo ID, see Champion Aff., ¶ 4 & Ex. 3) will likely cause both election official and voter confusion. A court “should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws” when deciding whether a TRO or interlocutory injunction is appropriate. Miller v. Bd. of Comm’rs, 45 F. Supp. 2d 1369, 1372 (M.D. Ga. 1998) (quoting Reynolds v. Sims, 377 U.S. 533, 585 (1964)).

In contrast, Plaintiffs’ only threatened injury is their alleged inability to vote in a preferred manner. However, there is no constitutional right to vote in a preferred manner, either under the Georgia Constitution or the U.S. Constitution. See Ga. Const. art. II, § 1, ¶ 1 (permitting the General Assembly to “provide[ ] by law” the “[m]ethod of voting” in Georgia); Wheeler, 200 Ga. at 334 (“The legislative branch of our government is charged with the duty of providing the manner of holding elections . . . .”); see also Burdick v. Takushi, 504 U.S. 428, 433 (1992) (“[I]t does not follow, however, that the right to vote in any manner . . . [is] absolute.”); Rokita, 2006 U.S. Dist. LEXIS 20321, at \*115 (“[T]here is no absolute constitutional right to vote in any specific manner an individual may desire . . . .”).

Finally, it is in the public interest that the State of Georgia not be enjoined from applying its duly enacted and federally precleared photo ID requirement in the July 18, 2006 primary election, which is already underway. Georgia has a legitimate interest in maintaining the integrity of the election process and minimizing voter fraud. Ascertaining an individual's identity before allowing the person to vote is a rational way to guard against voter fraud. See Rokita, 2006 U.S. Dist. LEXIS 20321, at \*130 ("It is beyond dispute that Indiana has a compelling interest in ascertaining an individual's identity before allowing the person to vote. It is also well-established that Indiana has an important interest in preventing voter fraud.").

The public interest in eliminating the potential for voter fraud with better voter identification requirements "is to be given weight in deciding whether restraining a state statute would harm the public interest." BankWest, Inc. v. Baker, 324 F. Supp. 2d 1333, 1357 (N.D. Ga. 2004) (citing Premium Tobacco Stores, Inc. v. Fisher, 51 F. Supp. 2d 1099, 1108 (D. Colo. 1999)).

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

Id. at 1357-58 (emphasis added); see Ne. Fla. Chapter, 896 F.2d at 1285.

#### IV. CONCLUSION

For the reasons set forth above, State Defendants respectfully request that the Court stay the Temporary Restraining Order issued Friday afternoon by the Superior Court of Fulton County.

This 10th day of July, 2006.

Respectfully submitted,

THURBERT E. BAKER  
Attorney General  
Georgia Bar No. 033887

DENNIS R. DUNN  
Deputy Attorney General  
Georgia Bar No. 234098

STEFAN E. RITTER  
Senior Assistant Attorney General  
Georgia Bar No. 606950

40 Capitol Square, S.W.  
State of Georgia  
Department of Law  
Atlanta, GA 30334-1300  
Telephone: 404/656-7298  
Facsimile: 404/657-9932

Troutman Sanders LLP  
5200 Bank of America Plaza  
600 Peachtree Street, N.E.  
Atlanta, GA 30308  
Telephone: 404/885-3597  
Facsimile: 404/962-6753

Strickland Brockington Lewis LLP  
Midtown Proscenium, Suite 2000  
1170 Peachtree Street, N.E.  
Atlanta, GA 30309  
Telephone: 678/347-2200  
Facsimile: 678/347-2210



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MARK H. COHEN  
Special Assistant Attorney General  
Georgia Bar No. 174567



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ANNE W. LEWIS  
Special Assistant Attorney General  
Georgia Bar No. 737490

(signed with express permission by Mark H. Cohen)

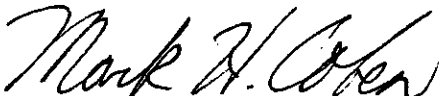
**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a true and correct copy of the  
MOVANTS' EMERGENCY MOTION TO STAY TEMPORARY  
RESTRAINING ORDER ENTERED BY THE SUPERIOR COURT OF FULTON  
COUNTY upon the following counsel of record via electronic mail and U.S. mail  
addressed as follows:

Roy E. Barnes, Esq.  
[roy@barneslawgroup.com](mailto:roy@barneslawgroup.com)  
Jennifer Auer Jordan, Esq.  
[jennifer@barneslawgroup.com](mailto:jennifer@barneslawgroup.com)  
The Barnes Law Group, L.L.C.  
P.O. Box 489  
Marietta, GA 30061

A. Lee Parks, Jr., Esq.  
Parks, Chesin & Walbert, P.C.  
26th Floor  
75 Fourteenth Street  
Atlanta, GA 30309  
[lparks@pcwlawfirm.com](mailto:lparks@pcwlawfirm.com)

This 10th day of July, 2006.

  
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MARK H. COHEN  
Georgia Bar No. 174567