

July 28, 2005

Mr. John Tanner  
Chief Voting Rights Section  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Ave, NW  
Washington, DC 20530

RE: Comments on Georgia House Bill 244, Submission under Section 5 (#2005-2029)

The Electronic Privacy Information Center (EPIC) opposes the photo identification requirement contained in Pre-Clearance Request, #2005-2029, submitted by the State of Georgia, pursuant to the enactment of Georgia House Bill 244. The new law will require all voters wishing to cast ballots in public elections in the State of Georgia to submit a state or federal photo identification document. The list of approved government photo identification documents does not include state and federal identification documents that would otherwise establish eligibility to vote. The State of Georgia does not intend to accept federal or state issued checks, employment identification documents, state college or university identification, utility bills, sworn affidavits, or public assistance identification. EPIC finds the new law's voting photo identification requirement objectionable, a barrier to the right to vote, and unnecessary in its encroachments on voters' privacy rights.

In EPIC's view, the photo identification requirements found in §§24, 25, and 59 of Georgia House Bill 244 should not receive Pre-Clearance approval as required by Section 5 of the Voting Right Act (42 U.S.C. 1973(c)) (the "Act").<sup>1</sup> We advise rejection on the basis that the change in photo identification requirements: (1) are unnecessary and their stated purposes are pretextual; (2) the circumstances surrounding their enactment suggest that they were enacted without regard for the advice of the state's top election administration official; and (3) the Georgia General Assembly and Governor disregarded the privacy rights of voters.

**The Change in Law to Require a Photo ID to Vote is Unnecessary and Pretextual:**

The Georgia legislature cited the curbing of voter fraud as an underlying goal of the statute. We believe that the proposed statute, by preventing certain citizens from accessing the polls, will more likely reduce than enhance voting integrity. Although we

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<sup>1</sup> Pub. L. 89-110, 79 Stat. 445 (current version at 42 U.S.C. § 1973 et seq. (2005)).

recognize the state's interest in verifying voter identity, we believe that compelling qualified citizens to acquire and present state-issued picture identification cards at voting polls represents an unjustified privacy infringement.

The Georgia state legislature has not cited evidence of actual effects of voter identity fraud on outcomes of Georgia elections. Indeed, Georgia Secretary of State Cathy Cox recently could recall not even “one documented case of voter fraud during [her] tenure as Secretary of State or Assistant Secretary of State that specifically related to the impersonation of a registered voter at voting polls.”<sup>2</sup> Further, the Georgia legislature has failed to show that limiting the acceptable forms of identification to those named in Georgia House Bill 244 would prevent future voter fraud.

House Bill 244 was, according to its author House Representative Sue Burmeister, simply “a housekeeping bill from the Secretary of State's office” and intended merely to “bring law up to date with technology, constitutional changes, etc.”<sup>3</sup> Georgia Senator Cecil Staton, author of the corresponding S.B. 84, similarly cited as his bill's aim “to abide by the federal Help America Vote Act [of 2002].”<sup>4</sup>

Yet, rather than aligning the existing Georgia statute with HAVA, House Bill 244 does the very opposite, stripping from the list of acceptable forms of identification several documents HAVA specifically permits, including a current utility bill, bank statement, government check or paycheck, and other government documents showing the voter's name and address.<sup>5</sup> Moreover, whereas HAVA requires only first-time voters to present photo identification, House Bill 244 requires every voter to produce valid photo identification at the poll location for every election. Unlike the Georgia bill, HAVA does not require voters who cannot produce the identification at the time of casting a provisional ballot to return to the poll within 48 hours with the named forms of identification in order to render that provisional ballot binding. Thus, to the extent that the Georgia statute was intended to render Georgia law consistent with HAVA, removing from the Georgia statute language that duplicated the HAVA standard directly contradicts the asserted intention of House Bill 244.

HAVA prohibits states from adopting alternative standards that are “inconsistent with . . . any law described in § 15545,”<sup>6</sup> including the Voting Rights Act of 1965. Under *Georgia v. Ashcroft*, Section 5 of the Voting Rights Act requires covered jurisdictions to show that a proposed amendment does not amount to a “retrogression in the position of racial minorities with respect to their respective exercise of the electoral franchise.”<sup>7</sup> The state bears the burden of showing that a law “does not have that purpose and will not

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<sup>2</sup> Letter from Cathy Cox, Secretary of State, State of Georgia, to Sonny Perdue, Governor, State of Georgia (Apr. 8, 2005), available at <http://www.aclu.org/VotingRights/VotingRights.cfm?ID=18652&c=168>.

<sup>3</sup> HB 244, Elections and Voting; Amend Provisions, Georgia House Rules Committee and Georgia Senate, 148th General Assembly, 2005 Regular Session.

<sup>4</sup> *Id.*

<sup>5</sup> See Pub. L. 107-252 (codified at 42 U.S.C. § 15301 et seq. (2005)).

<sup>6</sup> 42 U.S.C. § 15484.

<sup>7</sup> 539 U.S. 461, 466 (quoting *Beer v. United States*, 425 U.S. 130, 141).

have the effect of denying *or abridging* the right to vote on account of race”<sup>8</sup> (italics added).

The Georgia legislature has failed to meet this burden. As explained in comments already submitted to your office by members of Congress<sup>9</sup> and by the Georgia AARP and other groups,<sup>10</sup> the proposed identity standards would disproportionately burden minorities by presenting a significant financial and practical hurdle to poll access. Historically, basing such prerequisites on a desire to facilitate the voting process has been merely pretextual. As EPIC has previously explained in the analogous context of voter registration, voter registration was designed to deny suffrage to those groups that were deemed not to be worthy of equal participation in the democratic process.<sup>11</sup> From generation to generation the list of the outcasts of American Democracy included women, new citizens, minorities, young adults, first time voters, poor people and immigrants.<sup>12</sup>

Nor can the proposed statute be said to remedy voter fraud, accusations of which have, in recent years, centered on charges of fictitious registration.<sup>13</sup> The recent HAVA was passed partly on the grounds that requiring identification at the time of registration, rather than at the time of voting, would remedy this very problem.<sup>14</sup> Moreover, while multiple registrations have occurred in some instances, these incidents do not necessarily reflect an intention by the voter to cast multiple ballots: lack of understanding of the rules and poor administration of the registration process itself may induce honest persons to register multiple times in an effort to try to ensure registration.<sup>15</sup> Another documented reason for multiple registrations is poor governmental recordkeeping.<sup>16</sup> Regardless of the cause of the problem, compelling voters to present state-issued identification at the polls is unlikely to resolve voter fraud.

### **Georgia’s Secretary of State Opposes the Change in ID Requirement**

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<sup>8</sup> *Georgia v. Ashcroft*, 539 U.S. at 498 (quoting *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480).

<sup>9</sup> Letter from John Conyers, Jr., et al., Members of Congress, to R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (April 21, 2005), *available at* [http://www.house.gov/judiciary\\_democrats/letters/georgiavoteagltr42105.pdf](http://www.house.gov/judiciary_democrats/letters/georgiavoteagltr42105.pdf).

<sup>10</sup> Letter from Seth A. Cohen et al., Kilpatrick Stockton LLP, to John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Department of Justice (July 7, 2005), *available at* <http://www.acluga.org/briefs/photo.id/commentletter.PDF>.

<sup>11</sup> DENNIS R. JUDD & TODD SWANSTROM, *CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY* 86 (Addison-Westley Education Publishers Inc.) (2d ed. 1998).

<sup>12</sup> See ACLU & Dēmos, *Purged! How a Patchwork of Flawed and Inconsistent Voting Systems Could Deprive Millions of Americans of the Right to Vote* (Oct. 2004), *available at* <http://www.aclu.org/Files/OpenFile.cfm?id=16844>.

<sup>13</sup> CNN.com Online News Law Center, Mary Poppins prompts investigation, <http://www.cnn.com/2004/LAW/10/18/mary.poppins.registers.to.vote/>

<sup>14</sup> See Robert Pear, *The 2002 Campaign: Ballot Overhaul: Congress Passes Bill to Clean Up Election System*, N.Y. Times, Oct. 16, 2002, at A1 (quoting Sen. Bond (MO) as saying, “If your vote is canceled by the vote of a dog or dead person, it’s as if you did not have the right to vote.”).

<sup>15</sup> Dennis J. Willard & Doug Oplinger, *Figures Don’t Add Up*, Akron Beacon J., Oct. 2, 2004, at 8A.

<sup>16</sup> *Too Close to Election to Purge Voter Rolls*, Editorial, Indianapolis Star, Aug. 27, 2004, at A12; Brad Schrade & Anne Paine, *Bloated Registration Rolls Might Mean Long Lines at Polls*, Tennessean, June 28, 2004, at 1A.

Georgia’s Secretary of State Cathy Cox in letter on April 8, 2005 stated her opposition to the proposed changes in voting identification requirements.<sup>17</sup> The state currently has several measures in place to detect voter fraud of the kind alluded to during the debate over passage of the legislation. To date there is no evidence of fraud having been detected and thus no justification for the restriction of voter identification to only certain state and federal issued identification documents. The nature of voter identity fraud would yield complaints from voters who when attempting to vote in that state would have found that someone had voted in their name.<sup>18</sup> In addition this factor not being present to indicate a need for the change in identification requirements. It should also be noted that Georgia has “severe criminal sanctions” for the type of fraud suggested by the passage of the new identification requirements.<sup>19</sup> Further, the application of the new voter identification requirement to absentee voting is courteous. Especially in light of the numerous cases of voter fraud related to the casting of absentee ballots that have been noted by the State Board of Election.<sup>20</sup>

Finally, Georgia’s Secretary of State, the chief elections officer, said that Georgia House Bill 244 violates of Article II, Section I, paragraph II of the Georgia Constitution which states that:

Every person who is a citizen of the United State 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 the minimum residency requirements as provided by law shall be entitled to vote at any election by the people. The General Assembly shall provide by law for the registration of electors.

### **Georgia Voters’ Privacy Rights Disregarded**

Mandating presentation of state-issued documents as a condition to the exercise of the right to vote—unquestionably the most fundamental of all democratic freedoms<sup>21</sup>—represents a sharp departure from national precedent. Requiring voters to carry such documents could compromise the historic distinction between the United States and those nations requiring citizens to present papers as a condition to free passage. Identity cards have historically been a hallmark of injustice; they were essential to South Africa’s apartheid system and proved useful in the Nazi and Rwandan genocides, for which they were powerful tools to identify members of targeted groups.<sup>22</sup> Requiring citizens to present non-voting-related documents, such as a driver’s license, at voting polls is akin to demanding citizens to present government-issued food-rationing cards for unrelated purposes, a practice that prompted rebellion in World War II Britain.<sup>23</sup>

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<sup>17</sup> Cathy Cox, letter, Honorable Sonny Perdue, April 8, 2005

<sup>18</sup> *id.*

<sup>19</sup> *id.*

<sup>20</sup> *id.*

<sup>21</sup> “Other rights—even the most basic—are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

<sup>22</sup> Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 708-09 (Sept. 2004).

<sup>23</sup> *Id.* at 708.

Requiring voters to provide the state with information that is unnecessary to verify their identity or citizenship, such as the voter's address and fingerprints, may also raise questions of whether the vote itself is being cast in secret. Such concerns of voters are particularly acute in jurisdictions that use electronic voting machines, such as Georgia.<sup>24</sup> Whenever the state mandates disclosure of personal information, the possibility arises that the data will be collected, stored in a centralized database to which subjects lack direct access, and used for unknown purposes. Such a scheme of identification may thus chill rather than enhance popular confidence in election integrity. As one scholar notes, a system of mandatory identification by documentation raises fears that "[a]ll human behavior would become transparent to the State, and the scope for non-conformism and dissent would be muted to the point envisaged by the dystopian novelists."<sup>25</sup> Innocent voters may feel especially intimidated if their information is checked against a database, as they have "no way of knowing the contents of the database against which their identification is being run, whether these contents are accurate or not, or what further impositions might be triggered by the information linked to their identity card. This uncertainty will turn every identification demand into cause for apprehension."<sup>26</sup>

In *Burson v. Freeman*,<sup>27</sup> the Supreme Court described voter privacy as a means of preventing voter fraud while ensuring against undue coercion. Upholding, under strict scrutiny analysis, a Tennessee statute that prohibited political candidates from campaigning within 100 feet of a polling place entrance, the plurality stated:

. . . [A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.<sup>28</sup>

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<sup>24</sup> Georgia uses a touch-screen, direct recording electronic (DRE) voting system, which requires an access card to unlock the voting machine. Significantly, the Secretary of State Elections Web site includes the following statement about the card: "It contains no personal information about you or your vote." Georgia Secretary of State Cathy Cox, Elections, Frequently Asked Questions, [http://www.sos.state.ga.us/elections/electronic\\_voting/faqs.htm](http://www.sos.state.ga.us/elections/electronic_voting/faqs.htm) (last visited July 25, 2005). For an overview of security of electronic voting in Georgia, see Britain J. Williams, Security in the Georgia Voting System, Apr. 23, 2003, <http://www.votescount.com/georgia.pdf>.

<sup>25</sup> Steinbock, *supra* note 19, at 809 (quoting Roger Clarke, *Human Identification in Information Systems: Management Challenges and Public Policy Issues*, 7 INFO. TECH. & PEOPLE, (No. 4) 6, 34 (1994), available at <http://www.anu.edu.au/people/Roger.Clarke/DV/HumanID.html>).

<sup>26</sup> Steinbock, *supra* note 19, at 734 (citations omitted).

<sup>27</sup> 504 U.S. 191 (1992) (plurality opinion) (upholding a Tennessee law that prohibited candidates from

<sup>28</sup> *Id.* at 206.

Thus, voting and privacy work in tandem: the latter gives meaning to the former. Compelling voters to present photo identification and to reveal more information than is absolutely necessary to affirm identity before allowing them into the restricted zone will chill voters' sense of seclusion and infringe on the sanctity of the private vote.

Judicial precedent advises against giving a state wide latitude in the use of personal information for administrative purposes in elections. In *Greidinger v. Davis*,<sup>29</sup> the Fourth Circuit limited the scope of use of Social Security Numbers in the administration of elections after a Virginia citizen seeking to register to vote challenged the state's publication of the Social Security Numbers in the public voting roles. While allowing the use of Social Security Numbers for the limited purpose of preventing voter fraud, the Fourth Circuit held that publishing Social Security Numbers placed an impermissible burden on the right to vote.<sup>30</sup>

In *Harman v. Forssenius*,<sup>31</sup> the U.S. Supreme Court struck down a Virginia statute requiring voters to submit an affidavit of residence six months before Election Day as an alternative to paying the customary poll tax. Finding that the statute violated the Twenty-Fourth Amendment, the Court rejected state's the argument that the law was necessary to prevent voter fraud: "[C]onstitutional deprivations may not be justified by some remote administrative benefit to the State. . . . Moreover, . . . the State has not demonstrated that the . . . requirement is in any sense necessary to the proper administration of its election laws."<sup>32</sup>

The Georgia statute proposed here is equally onerous, requiring voters to obtain at least one form of identification for which the state typically collects a monetary charge. Georgia law allows persons who cannot afford a card to obtain one for free; however, this, requires not only documented proof of identity, state residency, and citizenship but also submission of an affidavit attesting to five statements, which include, "I am indigent and cannot pay the fee for the identification card."<sup>33</sup> Moreover, such applicants are required to apply for such cards well in advance of an election and to have a current mailing address: "If a citizen does not receive information via mail within three to six weeks, they [*sic*] should follow up with their local elections office."<sup>34</sup> As was the case in *Harman*, the state here provides no evidence that existing means of protection against voter fraud, such as the HAVA registration identification standards and criminal sanctions for fraudulent voter registration, are insufficient to ensure election integrity.<sup>35</sup>

Consideration of the Georgia statute should also be informed by the reasoning in *Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County*, in which the Supreme Court declined to hold that law enforcement, can mandate that citizens produce documents

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<sup>29</sup> 988 F.2d 1344 (4th Cir. 1993).

<sup>30</sup> *Id.* at 1344.

<sup>31</sup> 380 U.S. 528 (1965).

<sup>32</sup> *Id.* at 542-43.

<sup>33</sup> See Georgia Department of Driver Services, Georgia Identification Card for Voter Services, <http://www.dds.ga.gov/drivers/dldata.aspx?con=1749371755&ty=dl> (last visited July 25, 2005).

<sup>34</sup> *Id.*

<sup>35</sup> See *Harman*, 380 U.S. at 543.

proving their identity.<sup>36</sup> In that case, the Court upheld a Nevada statute that required a person stopped by police to disclose his or her name when reasonable, articulable suspicion of a crime was present. The Court reasoned that the statute did not violate the Constitution because “[t]he request for identity has an *immediate relation* to the purpose, rationale, and practical demands of a *Terry stop*”<sup>37</sup> (italics added).

No such reasonable relation exists here. The Georgia statute would require all citizens presenting themselves at the poll—the vast majority of whom presumably arouse no suspicion whatsoever—to disclose not only their names but also all information that appears on their identification cards. Further, the Georgia statute would require citizens to present the cards not to police but to poll workers, most of whom are neither professionally licensed in law enforcement nor permanent governmental employees.<sup>38</sup> Furthermore, the Georgia statute would mandate self identification not in the context of criminal apprehension—a state interest that, although strong, must be balanced vis à vis Fourth Amendment rights<sup>39</sup>—but as a condition to an innocent person’s exercise of the constitutional right to vote.<sup>40</sup>

The disclosure of personal information mandated by the proposed Georgia law could be considerable. The most common form of identification likely to be used—a Georgia driver’s license—includes not only the voter’s name and photographic likeness but also such information as the voter’s age, height, weight, driver’s license number, restrictions owing to disability or impairment (such as for imperfect vision or a prosthetic limb<sup>41</sup>), and fingerprints. Furthermore, the State of Georgia, and not the voter, has sole control over the information placed into a state-issued identification card, and the applicant for such identification cannot choose to withhold certain data. Changes in the design and content of driver’s licenses and other state-issued identification are also at the discretion of the government rather than the data subjects.

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<sup>36</sup> 542 U.S. 177 (2004) (upholding Nevada statute because “[a]s we understand it, the statute does not require a suspect to give the officer a driver’s license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make—the statute is satisfied and no violation occurs.”).

<sup>37</sup> *Id.* at 177.

<sup>38</sup> See Georgia Secretary of State Cathy Cox Web site, Become an Election Poll Worker, [http://www.sos.state.ga.us/elections/poll\\_worker.htm](http://www.sos.state.ga.us/elections/poll_worker.htm) (last visited July 25, 2005); Georgia Secretary of State Press Office, Media Backgrounder, Poll Worker Training: Aggressive Statewide Program Targets Those Who Make the Critical Difference on Election Day, [http://www.sos.state.ga.us/pressrel/media\\_backgrounder3.pdf](http://www.sos.state.ga.us/pressrel/media_backgrounder3.pdf). Georgia has provided no evidence that volunteer poll workers examining proverbial “mug shot” photographs on identification cards will accurately match those images to faces at the polls.

<sup>39</sup> See, e.g., *Muehler v. Mena*, 125 S. Ct. 1465, 1470 (2005) (holding that no Fourth Amendment violation occurred where officers handcuffed suspect during lawful search: “Inherent in [the] authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.”).

<sup>40</sup> The U.S. Constitution places no such restriction on the right to vote and specifically excludes several restrictions. See U.S. Const. art. XIV, § 2; U.S. Const. amend. XIV, U.S. Const. amend. XV; U.S. Const. amend. XIX; U.S. Const. amend. XXIV; U.S. Const. amend. XXVI.

<sup>41</sup> For a list of restriction codes that appear on Georgia driver licenses, see Georgia Department of Driver Services, Georgia License Restriction Codes, updated June 21, 2005, <http://www.dds.ga.gov/drivers/DLdata.aspx?con=1745149218&ty=dl> (last visited July 25, 2005).

The cumulative effects of what many would deem a minor burden on voter rights would be substantial over time because checking papers has “an additional subjective effect on a grand scale: the psychic harm to free people of having to ‘show your papers’ . . . . Not only would people forced to go through identity checkpoints experience some degree of fear and surprise, but also knowing that this has become a permanent part of the social fabric would diminish their sense of liberty.”<sup>42</sup> Such effects are certainly immeasurable, but there can be no question that the effects are compounded where the right at issue—voting—is the very heart of democratic liberty.

In short, election integrity would not be served by Georgia House Bill 244, which we believe would instead impede access to the polls by groups that have been historically underrepresented in local, state, and federal governments. The bill does not satisfy the legislature’s stated intent of bringing Georgia law into line with HAVA. Nor can House Bill 244 be justified on the grounds of past fraudulent voter representation, which has not been shown to have occurred in Georgia elections. Further, historic examples of “papers, please” societies, which made document production a condition to the exercise of basic freedoms caution against such a mandate. Judicial precedents suggest that states may not limit access to the polls. Finally, mandating disclosure of personal information at the voting site is a grave privacy invasion that may coerce voters and signal an unwelcome compromise of our core democratic freedom, the right to vote.

For these reasons, EPIC urges the Department of Justice to refuse the Pre-Clearance of the identification requirements of Georgia House Bill 244.

Sincerely,

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<sup>42</sup> Steinbock, *supra* note 19, at 740.