Casenote

Reasonable Restrictions on the Franchise: Georgia's Voter Identification Act of 2006

I. INTRODUCTION

In *Democratic Party of Georgia, Inc. v. Perdue*,[1] the Georgia Supreme Court declared constitutional the Voter Identification Act of 2006 (2006 Act),[2] insofar as it required registered Georgia voters to present valid photo identification at the polls when voting in person in any Georgia election.[3] The 2006 Act was the most recent amendment in a series of iterations of section 21-2-417 of the Official Code of Georgia Annotated (O.C.G.A.)[4]–the provision of the Georgia code imposing certain polling requirements for in-person voting.[5] Each version of the law has generated much controversy as to polling and voting requirements in Georgia, and the law has been challenged in both federal and state court for perceived violations of both the United States and Georgia constitu-

1. 288 Ga. 720, 707 S.E.2d 67 (2011).
2. Ga. H.R. Bill 432, Reg. Sess., 2006 Ga. Laws 3 (codified as amended in scattered sections of O.C.G.A. tits. 21 & 40).
3. *Perdue*, 288 Ga. at 729, 707 S.E.2d at 75.
4. O.C.G.A. § 21-2-417 (2008).
5. *Id.*

tions.[6] In *Perdue*, however, the Georgia Supreme Court, in a 6-1 opinion, declared the law constitutional under the Georgia Constitution, holding that the state had an important regulatory interest in preventing fraud at the polls, and the reasonable, non-discriminatory regulations passed constitutional muster.[7] Interestingly, the court ruled in favor of the state despite a lack of an actual showing of fraud in support of the photo ID law.[8]

II. FACTUAL BACKGROUND

This lawsuit represented the second state court constitutional challenge to the 2006 Act,[9] following a complex string of federal and state court challenges to the photo ID law.[10] In *Democratic Party of Georgia, Inc. v. Perdue*,[11] the Democratic Party of Georgia filed a declaratory action against Georgia election officials, challenging the constitutionality of the 2006 Act and seeking permanent injunctive relief against enforcement of the law.[12] Following the trial court's grant of summary judgment in favor of the election officials, the Democratic Party appealed the ruling to the Georgia Supreme Court, alleging a violation of the Georgia Constitution in the form of an undue burden on Georgia voters' fundamental right to vote.[13]

In a 6-1 opinion, the Georgia Supreme Court affirmed the ruling of the trial court and found in favor of the Georgia election officials charged with administering the 2006 Act.[14] Writing for the majority, Justice Thompson held that prevention of fraud by impersonation was a legitimate state interest justifying a reasonable restriction on the franchise, finding in favor of the Georgia election officials.[15]

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6. *Perdue*, 288 Ga. at 720-22, 707 S.E.2d at 69-70.
7. *Id.* at 728-30, 707 S.E.2d at 74-75.
8. *See id.* at 729-30, 707 S.E.2d at 75.
9. Ga. H.R. Bill 432, Reg. Sess., 2006 Ga. Laws 3 (codified as amended in scattered sections of O.C.G.A. tits. 21 & 40).
10. *See generally* Common Cause/Ga. v. Billups (*Common Cause / Ga. III*), 504 F. Supp. 2d 1333, 1337-42 (N.D. Ga. 2007).
11. 288 Ga. 720, 707 S.E.2d 67 (2011).
12. *Id.* at 720, 707 S.E.2d at 69.
13. *Id.* The Supreme Court of Georgia may exercise direct appellate review over equity cases such as those seeking injunctive relief against the state. GA. CONST. art. VI, § 6, para. 3.
14. *Perdue,* 288 Ga. at 730, 707 S.E.2d at 75.
15. *Id.*

III. LEGAL BACKGROUND

At the turn of the twenty-first century, a troubling tone was set for the conduct of elections in the United States with the now infamous 2000 presidential election between then Texas Governor George W. Bush and Vice President Al Gore. Controversies surrounding that election –especially the conduct of Florida election officials with respect to "butterfly" ballots and inaccuracies in vote-counting–gave rise to harsh criticism for both the legal treatment of the outcome of that election and the way in which the voting process itself had been conducted.[16]

It is likely that episodes similar to the 2000 presidential election precipitated the recent phenomena in stringent state regulation of elections, such as required presentation of valid photo identification at polling precincts.[17] Georgia is not unique in its passage of the Voter ID Act of 2006;[18] this state joins a host of others that have enacted similar photo ID laws with varying degrees of stringency.[19] The following analysis provides a general overview of the federal courts' treatment of state voting regulations and the scrutiny applied to such laws, providing the background to the state constitutional challenge in *Democratic Party of Georgia v. Perdue*.[20]

A. *Federal Court Treatment of State Voting Regulations*

Article I of the United States Constitution allocates the power to facilitate the time, manner, and place of both federal and state elections to state legislatures.[21] The United States Supreme Court has recognized that the Elections Clause provides broad power for the state facilitation of elections so long as that power does not infringe upon other constitutional provisions, particularly those pertaining to individual voting rights.[22] That broad power under the Elections Clause includes state laws controlling the "registration, supervision of

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16. *See generally* Jonathan K. Van Patten, *Making Sense of* Bush v. Gore, 47 S.D. L. REV. 32 (2002) (discussing the Florida recount controversy, the Supreme Court's intervention, and its aftermath and implications).

17. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 689-90 (2006) (discussing the social response to the election and the legal reaction in the form of voting regulation).

18. Ga. H.R. Bill 432, Reg. Sess., 2006 Ga. Laws 3 (codified as amended in scattered sections of O.C.G.A. tits. 21 & 40).

19. *See* WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES IN 2012 4-5 (2012).

20. 288 Ga. 720, 707 S.E.2d 67 (2011).

21. U.S. CONST. art. I, § 4.

22. *See* Cook v. Gralike, 531 U.S. 510, 523-24 (2001).

voting, protection of voters, [and] prevention of fraud and corrupt practices."[23] The genesis of state photo ID laws–requiring a showing of one or more forms of government-issued photo ID–is found in this broad interpretation of the Elections Clause.

Two cases from the United States Court of Appeals for the Seventh Circuit, articulated by Judge Posner, help to provide an overview of the federal courts' treatment of such state voting regulations, in particular the recent trend in state photo ID laws. In *Griffin v. Roupas*,[24] Judge Posner wrote that the Elections Clause, without infringing upon other constitutional provisions, permits states to draft "extensive restrictions on voting," which, by necessity, will affect the ability of some minority groups to cast a ballot.[25] The crucial issue in cases challenging state voting restrictions, though, is not the extent to which such groups are disenfranchised but, rather, whether the "resulting exclusion[s] are reasonable given the interest the restriction serves."[26] In *Griffin*, a group representing working mothers challenged an Illinois law providing narrow qualifications for absentee voting because the law did not include a qualification for general hardship, which, they argued, should be guaranteed to them under the United States Constitution.[27] Recognizing that striking the balance between preventing voter fraud and enabling voters to cast their ballots is a state legislative function, Judge Posner wrote that the Illinois absentee provisions were not so facially egregious and inimical to due process or equal protection as to warrant judicial interference.[28]

Another Seventh Circuit case, *Crawford v. Marion County Election Board*,[29] dealt with a constitutional challenge to Indiana's photo ID law requiring presentation of valid government photo ID when voting in person in any Indiana election.[30] Affirming the Seventh Circuit, the

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23. *See id.* (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).
24. 385 F.3d 1128 (7th Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).
25. *Id.* at 1130.
26. *Id.* (citing Burdick v. Takushi, 504 U.S. 428, 438-42 (1992)).
27. *Id.* at 1129.
28. *See id.* at 1132 (noting that "unavoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection").
29. 472 F.3d 949 (7th Cir. 2007).
30. *Id.* at 950; IND. CODE § 3-10-1-7.2 (Supp. 2008). In *Crawford*, the Seventh Circuit refused to apply strict scrutiny–requiring a narrowly tailored law advancing a compelling state interest–to Indiana's law, noting that the Supreme Court rejected that level of scrutiny in an earlier case because it would impermissibly bind the states' broad Elections Clause authority. 472 F.3d at 952 (citing Burdick v. Takushi, 504 U.S. 428, 433-34 (1992)). The court upheld Indiana's law on the grounds that the state advanced a reasonable interest in preventing voter fraud against the slight burden on Indiana voters. *Id.* at 952-

United States Supreme Court held that preventing voter fraud is a "valid neutral justification[]" sufficiently supporting the Indiana voting law.[31] Interestingly, the Supreme Court acknowledged in *Crawford* that there was no evidence or any cases of actual fraud by impersonation ever occurring in the state of Indiana.[32] Nonetheless, the Supreme Court rejected the appellant's argument that criminal laws against voter fraud provided adequate protection, making Indiana's law unnecessary.[33] The Court held further that even though no actual examples of fraud by impersonation could be shown in Indiana, the fact that such fraud occurs more generally in other American elections gave that justification legitimacy.[34] Avoiding the political question of whether the Indiana law was good policy, the Court stated that "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."[35]

The Seventh Circuit, in both *Griffin* and *Crawford*, relied on a balancing test reinforced in an earlier Supreme Court case addressing state voting laws.[36] In *Burdick v. Takushi*,[37] the Supreme Court refused to apply a strict level of scrutiny where the state election law imposed only a minimal burden on voters, holding that general, non-discriminatory regulations pursuant to the state's Elections Clause powers will generally justify that minimal burden.[38] Applying that standard to the facts of *Burdick*, the Court held that a Hawaii law prohibiting write-in voting was a reasonable voting administration law that imposed only a minimal burden on some Hawaiian voters.[39] The Court noted that "any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme."[40]

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53. Judge Posner wrote that "[t]o deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Id.* at 954 (quoting Clingman v. Beaver, 544 U.S. 581, 593 (2005)).

31. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008).

32. *Id.* at 194. The same recognition was made by the Seventh Circuit Court of Appeals. *See Crawford*, 472 F.3d at 953.

33. *Crawford*, 553 U.S. at 194-96.

34. *Id.* at 195-96.

35. *Id.* at 196.

36. *Griffin*, 385 F.3d at 1130 (citing Burdick v. Takushi, 504 U.S. 428, 438-42 (1992)); *Crawford*, 472 F.3d at 952 (citing Burdick v. Takushi, 504 U.S. 428, 433-34 (1992)).

37. 504 U.S. 428 (1992).

38. *Id.* at 434 (citing Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983)).

39. *Id.* at 441-42.

40. *Id.* at 441. The Court in *Burdick* was expanding on a more general articulation of the balancing test for state election laws found in *Anderson v. Celebrezze*. *See* 460 U.S.

The federal courts' treatment of state voting regulation, then, is based on the balance between the state's asserted justification and the degree to which it burdens the franchise.[41] The analysis will hinge on the severity of the burden, and only severe burdens on the franchise will be subject to strict scrutiny.[42] But where the court finds that the burden is minimal, reasonable and non-discriminatory restrictions will justify the burden on the franchise consistent with the fundamental right to vote under the Equal Protection Clause of the Fourteenth Amendment.[43]

B. Georgia's Voter Identification Law of 1997

In 1997, the Georgia General Assembly amended Title 21 of the Official Code of Georgia Annotated (O.C.G.A.),[44] controlling elections conducted in the state of Georgia, and added provisions requiring the presentation of certain forms of government-issued identification by an elector upon registration or voting.[45] According to those provisions, each elector was required to "present proper identification to a poll worker at or prior to completion of a voter's certificate at any polling

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780, 788 (1983). In *Anderson*, an Ohio statute requiring registration of independent presidential candidates in March of an election year was challenged by an independent candidate who was denied a nomination on the ballot by the Ohio Secretary of State because he filed in April, one month past the deadline. *Id.* at 782. The candidate challenged the statute on Equal Protection grounds, arguing that there was no legitimate interest advanced by the state in requiring independent candidates to register seven months before the election. *Id.* at 783. The Supreme Court agreed, declaring the law unconstitutional on the grounds that the state's justification–protecting political stability–did not justify the burden on independent candidates and voters. *Id.* at 805-06. This outcome was consistent with the Court's proclamation that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *Id.* at 788 (footnote omitted). However, "[i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Id.* at 806 (quoting Kusper v. Pontikes, 414 U.S. 51, 59 (1973)). The Court did resolve further, however, that

> challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions . . . . [T]he Court must not only determine the legitimacy and strength of each [state] interest[]; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 789.

41. *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788-89).
42. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).
43. *Id.* (quoting *Anderson*, 460 U.S. at 788); *see also* U.S. CONST. amend. XIV, § 1.
44. O.C.G.A. tit. 21 (2008 & Supp. 2011).
45. Ga. S. Bill 273, Reg. Sess., 1997 Ga. Laws 662 (codified as amended in scattered sections of O.C.G.A. tit. 21).

place."[46] The newly-added § 21-2-417 then listed fourteen categories of identification that would be accepted under this requirement, including a Georgia driver's license, government employee identification card, passport, a student identification card from a school located in Georgia, and even a valid hunting or fishing license.[47] This section provided further that, if the elector was unable to provide one of the allowed forms of identification, they would be able to vote after swearing under oath and threat of a punishable felony as to their identity, which required no further affiance or confirmation following the ballot-casting.[48] This law was considered a drastic change in the conduct of Georgia elections,[49] but was not challenged in state or federal court on constitutional grounds.

C. The Amended Voter Identification Law of 2005

In 2005, the General Assembly amended the voter ID law, providing a more restrictive list of approved forms of identification and introducing the new caveat that if a Georgia voter voting in person lacked acceptable identification and had to cast a provisional ballot by signing an affidavit as to their identity, they would have to verify their identity within a certain amount of time at the county registrar's office with a state-issued ID.[50] The new list of approved identification was limited to a Georgia driver's license, government employee identification card, passport, military ID, or tribal identification card.[51] If a voter casting a provisional ballot did not have one of these acceptable forms of ID to confirm their identity at the county registrar's office, then they could obtain a special, provisional ID at the Department of Driver Services (DDS).[52]

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46. Ga. S. Bill 273, § 3, 1997 Ga. Laws at 664 (codified at O.C.G.A. § 21-2-417 (Supp. 1998) (current version at O.C.G.A. §§ 21-2-417 to -417.1 (2008))).

47. O.C.G.A. § 21-2-417(a)(1)-(14) (current version at O.C.G.A. §§ 21-2-417 to -417.1 (2008)).

48. *Id.* § 21-2-417 (b) (Supp. 1998) (current version at O.C.G.A. §§ 21-2-417 to -417.1 (2008)).

49. *See* Peter Mantius, *Coming in '98: With ID, One Vote*, ATLANTA J. CONST., Aug. 1, 1997, at B (writing that the new voter identification law was a "sweeping [change] in Georgia voting law," having been approved by the United States Department of Justice and quoting then Secretary of State Lewis Massey: "I believe we have moved Georgia into the forefront of ballot security"; also noting that a similar law was passed in 1994 but never approved by the Justice Department); *see also* Stacy Shelton, *State Beats Sugar Hill to Punch on Voter ID Law*, ATLANTA J. CONST., Apr. 16, 1997, at J (quoting state representative Vance Smith, Jr. and writing that "the purpose was to 'hold down on voter fraud'").

50. Ga. H.R. Bill 244, § 59, Reg. Sess., 2005 Ga. Laws 253, 295 (codified at O.C.G.A. § 21-2-417 (Supp. 2005) (repealed 2006)).

51. O.C.G.A. § 21-2-417(a)(1)-(6) (Supp. 2005) (repealed 2006).

52. O.C.G.A. § 21-2-417(b) (Supp. 2005) (repealed 2006).

The new law provided specifically that if a voter wished to obtain a card, they would not be charged for one so long as they swore under oath at the DDS that they were either indigent or needed the card to cast a vote and could not afford the required fee normally charged for such cards.[53]

In September of 2005, the first legal challenge to Georgia's photo ID law was brought in the United States District Court for the Northern District of Georgia.[54] After conducting an injunction hearing, the district court in *Common Cause/Ga. v. Billups* (*Common Cause/Ga. I*)[55] preliminarily enjoined the enforcement of the 2005 amendments to the photo ID law pending ultimate adjudication of the plaintiffs' claims before the court.[56] Although the district court was precluded from addressing the plaintiffs' claims under the Georgia Constitution by the Eleventh Amendment to the U.S. Constitution,[57] the court did find that the plaintiffs' federal constitutional challenge was likely meritorious because the photo ID requirement inadvertently constituted a poll tax in violation of the Twenty-Fourth Amendment to the U.S. Constitution, and the burden on Georgia voters was impermissible in light of the state's purported justification.[58]

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53. Ga. H.R. Bill 244, § 66, 2005 Ga. Laws at 301 (codified as amended at O.C.G.A. § 40-5-103(d) (Supp. 2005) (repealed 2006)).

54. *See* Common Cause/Ga. v. Billups (*Common Cause/Ga. I*), 406 F. Supp. 2d 1326 (N.D. Ga. 2005). The suit was brought by a non-partisan citizen lobby group devoted to ethics in government and preservation of the franchise on behalf of other groups in opposition to the photo ID law and Georgia voters against Georgia election officials responsible for enforcing the law. *Id.* at 1329-1331. The plaintiffs asserted numerous claims against the law: the photo ID requirement violated the Georgia constitution, the law constituted a poll tax in violation of the Twenty-Fourth Amendment and the Equal Protection clause of the U.S. Constitution, the law unduly burdened the fundamental right to vote, and that it violated both the Civil Rights Act of 1964 and Section 2 of the Voting Rights Act. *Id.* at 1354. Based on these claims, the plaintiffs sought to have the photo ID law preliminarily enjoined in anticipation of the impending off-year election in November. *Id.* at 1354-55.

55. 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

56. *Id.* at 1377-78. The district court based this finding upon the plaintiffs' satisfaction of the four elements necessary for a preliminary injunction: the plaintiffs had a substantial likelihood of success on the merits, they would suffer irreparable harm if the law were not enjoined, the potential harm to the plaintiffs outweighed the potential harm to the defendants, and the injunction would serve the public interest. *Id.* at 1376.

57. *Id.* at 1356-60 (quoting DeKalb Cnty. Sch. Dist. v. Schrenko, 109 F.3d 680, 687 (11th Cir. 1997)) ("In short, the Eleventh Amendment constitutes an 'absolute bar' to a state's being sued by its own citizens, among others.").

58. *Id.* at 1376. The court also held that the plaintiffs produced insufficient evidence to support their claims under the Civil Rights Act and Voting Rights Act. *Id.* at 1372, 1375.

The court reached its poll tax conclusion based on the fact that Georgia voters had to pay a fee to obtain a card that satisfied the 2005 amended list of acceptable identification.[59] Importantly, the court recognized that the photo ID law provided exceptions for indigent voters and those who otherwise could not afford the card fee; notwithstanding those exceptions, the court held "the fact that some individuals avoid paying the cost for the Photo ID card does not mean that the Photo ID card is not a poll tax."[60] Furthermore, applying the *Burdick* standard controlling state regulation of voting, the court held that the asserted state interest of preventing voter fraud did not justify the burden on Georgia voters' fundamental right to vote due to the fees collected on issuing photo ID cards.[61] The court held that the law was not narrowly tailored to achieve the state's interest of preventing voter fraud, and, coupled with the impermissible burden on the fundamental right to vote, was likely to fail under the *Burdick* or strict scrutiny standard.[62] Therefore, holding that the plaintiffs would likely succeed on their claims that the law unduly burdened the fundamental right to vote and constituted a poll tax, the court granted the plaintiffs' motion for a preliminary injunction on October 18, 2005.[63]

D. The Amended Voter Identification Law of 2006

Almost immediately following the injunction of the 2005 amendments to the photo ID law by the district court in *Common Cause/Ga. I*, the Georgia General Assembly amended the photo ID law yet again in early 2006.[64] Two important changes were made to the law, prompted specifically by the defects noted by the district court in *Common Cause/Ga. I*: (1) to the list of acceptable photo ID was added the new "Georgia voter identification card,"[65] and (2) a new code section was

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59. *Id.* at 1369-70.

60. *Id.* at 1370.

61. *Id.* at 1366. Importantly, the district court addressed the likelihood of success of the plaintiffs' Equal Protection claims under both the *Burdick* standard and a strict scrutiny analysis, finding that under either standard–depending on how burdensome a court may find the photo ID law–that the plaintiffs had a likelihood of success on the merits because of the fee imposition. *See id.* at 1361-66; *see also Burdick*, 504 U.S. at 434.

62. *Common Cause/Ga. I*, 406 F. Supp. 2d at 1366 (noting Secretary of State Cathy Cox's testimony that, in her eight years in office, she received not a single complaint of voter fraud or impersonation, reinforcing the court's conclusion that the purported state justification for the law failed the *Burdick* standard).

63. *Id.* at 1376-78.

64. Ga. H.R. Bill 432, 2006 Ga. Laws 3 (codified as amended in scattered sections of O.C.G.A. tits. 21 & 40).

65. O.C.G.A. § 21-2-417(a)(2).

added providing explicitly that such cards would be provided free of charge to any Georgia voter, without exception.[66] Although seemingly small changes, these amendments proved significant and changed the course of Georgia's voter identification law.

1. Impact on the Federal Challenge. On April 26, 2006, the *Common Cause/Ga.* plaintiffs amended their federal complaint to challenge the 2006 amendments upon substantially similar grounds as the challenge to the 2005 amendments, which were preliminarily enjoined in *Common Cause/Ga. I*.[67] On July 5, 2006, the plaintiffs filed another motion for a preliminary injunction, seeking to enjoin the enforcement of the 2006 amendments on the grounds that the law imposed an undue burden on Georgia voters' fundamental right to vote under the Equal Protection clause of the United States Constitution.[68] Although the district court ultimately granted an injunction against the 2006 Act, the court based that decision on very different grounds than the injunction in *Common Cause/Ga. I* and specifically limited the injunction to the July 18, 2006 primary elections and subsequent run-off elections.[69]

First, the district court enjoined enforcement of the 2006 Act in the July 18, 2006 primary because it constituted an impermissible burden on the right to vote under the *Burdick* standard.[70] Unlike the burden imposed by the 2005 amendments, the court determined that the severe burden imposed by the 2006 Act was not in its technical requirements but, instead, was created by the lack of effort to educate Georgia voters about the new requirements between the law's enactment and the July 18 primary.[71] The court held that a significant number of Georgia voters would be severely burdened by the law because the state would be unable to adequately educate voters about the new requirements before the primary, and many of those who may know about the new requirements may still be unable to procure a free voter ID card before the primary.[72] As a result, many voters would be caught unaware and

66. *Id.* § 21-2-417.1(a).
67. Common Cause/Ga. v. Billups (*Common Cause/Ga. II*), 439 F. Supp. 2d 1294, 1298, 1303 (N.D. Ga. 2006); *Common Cause/Ga. I*, 406 F. Supp. 2d at 1366.
68. *Common Cause/Ga. II*, 439 F. Supp. 2d at 1299-1300.
69. *Id.* at 1360.
70. *See id.* at 1351-52.
71. *Id.* at 1351.
72. *Id.*

discouraged from voting for want of knowledge about the new law, thereby creating a severe burden.[73]

Second, the district court rejected the plaintiffs' poll tax claim as to the 2006 Act.[74] Because the new law eliminated the requirement that a voter would have to swear that they were either indigent or could not afford the voter ID card in order to get one for free, the poll tax effectively created by the 2005 amendments was eliminated.[75] Moreover, the court rejected the plaintiffs' more creative argument that travelling to the DDS to obtain a card was itself a poll tax.[76] Absent a showing that a Georgia voter would incur any sort of actual monetary cost in obtaining a card, the court held that the poll tax claim was no longer meritorious.[77]

Thus, because of the severe burden resulting from the state's lack of educational efforts regarding the 2006 Act and the likelihood that many voters would be caught unaware in the July 18 primary, the district court enjoined enforcement of the 2006 Act.[78]

2. The First State Court Constitutional Challenge. The 2006 amendments also gave rise to the first constitutional challenge to the photo ID law in state court. In *Perdue v. Lake*,[79] a Georgia voter filed a declaratory action to have the 2006 Act declared unconstitutional under Article II, Section I, Parts II and III of the Georgia Constitution.[80] Although the trial court found in favor of the plaintiff and declared the law unconstitutional pursuant to those constitutional provisions, the Georgia Supreme Court vacated the permanent injunction entered by the trial court and remanded with instructions to dismiss on the grounds that the plaintiff lacked standing to challenge the constitu-

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73. *See id.* It is important to note, however, that in finding the law constituted a severe burden, the court only reached that conclusion because of the fast-approaching July 18 primary. *Id.* In fact, the court notes explicitly that the photo ID requirement was not necessarily unconstitutional as to future elections; it was only overly burdensome as to the July 18 primary because so many voters would be unaware of the new law. *Id.* at 1351-52.

74. *Id.* at 1354-55.

75. *Id.* at 1354.

76. *Id.* at 1354-55.

77. *Id.* at 1355.

78. *Id.* at 1360. In addition to finding that the poll tax claim against the 2006 Act lacked any merit, the court also found that the plaintiffs' claims under the Civil Rights Act and the Voting Rights Act were equally unmeritorious. *Id.* at 1357-58.

79. 282 Ga. 348, 647 S.E.2d 6 (2007).

80. *Id.* at 348; GA. CONST. art. II, § 1, para. 2-3 (providing that any resident Georgia voter at least eighteen years old and not disenfranchised by any other part of Article II is entitled to vote–exceptions including conviction of a "felony involving moral turpitude" and any "person who has been judicially determined to be mentally incompetent").

tionality of the 2006 Act.[81] The court stated that the plaintiff lacked standing because she fell within two excepted categories of voters not required to present photo ID at the polls and, therefore, she had suffered no injury sufficient to give her standing.[82] The court did not address the merits of the plaintiff's claim or determine whether the 2006 Act was constitutional under the Georgia Constitution.[83]

3. The Adjudication of the *Common Cause/Ga.* Federal Challenge. The decision in *Lake* was handed down by the Georgia Supreme Court on June 11, 2007. On August 1, 2007, the United States District Court for the Northern District of Georgia lifted a stay of proceedings on the *Common Cause/Ga.* litigation–instituted in anticipation of the decision of the Georgia Supreme Court in *Lake*–and set a bench trial date to adjudicate the merits of the federal challenge.[84] The only remaining claim asserted at trial by the *Common Cause/Ga.* plaintiffs was that the 2006 Act unduly burdened Georgia voters' fundamental right to vote under the Equal Protection clause of the U.S. Constitution.[85]

Although the district court concluded that none of the plaintiffs remaining in the *Common Cause/Ga.* litigation had standing to challenge the 2006 Act, the court nonetheless addressed the plaintiffs' claims and the constitutionality of the photo ID law.[86] The district court determined on the sole remaining claim–that the 2006 Act burdened Georgia voters' fundamental right to vote protected by the Equal Protection clause–that the burden demonstrated by the plaintiffs was minimal and therefore the state's asserted interest of preventing voter fraud, reasonable on its face, was sufficient to justify that burden.[87] Under the *Burdick* standard, the court held that the plaintiffs did not have a likely successful constitutional challenge to the 2006 Act.[88]

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81. *Lake*, 282 Ga. at 350, 647 S.E.2d at 8.

82. *Id.* at 349-50, 647 S.E.2d at 7-8; *see also id.* at 348, 647 S.E.2d at 7 (noting that "the only prerequisite to attacking the constitutionality of a statute is a showing that it is hurtful to the attacker") (quoting Agan v. State, 272 Ga. 540, 542, 533 S.E.2d 60, 62 (2000)).

83. *See id.* at 349-50, 647 S.E.2d at 8.

84. Common Cause/Ga. v. Billups (*Common Cause/Ga. III*), 504 F. Supp. 2d 1333, 1341 (N.D. Ga. 2007). *See generally id.* at 1337-42 (outlining with a detailed timeline the various stages of and challenges to Georgia's photo ID law leading up to this case).

85. *Id.* at 1342.

86. *Id.* at 1374.

87. *Id.* at 1382.

88. *See id.* at 1382-83.

On appeal, the Eleventh Circuit Court of Appeals vacated the order of the district court dismissing the plaintiffs for lack of standing but ultimately concluded that, on the merits of the claim, the district court correctly concluded that the 2006 Act was constitutional and entered a ruling in favor of the Georgia election officials.[89] Adhering to the *Burdick* standard, the court held that "[t]he insignificant burden imposed by the Georgia statute is outweighed by the interests in detecting and deterring voter fraud," and therefore the fraud justification was sufficient to justify the burden on Georgia voters.[90] Certiorari was unanimously denied by the United States Supreme Court.[91]

4. The Rise of the Present Action. Following the ultimate adjudication of the *Common Cause / Ga.* litigation, a second constitutional challenge was filed in state court, giving rise to the present action. On May 23, 2008, the Democratic Party of Georgia filed suit against Georgia election officials, alleging that the 2006 Act was unconstitutional because of the undue qualification and burden it placed on Georgia voters.[92] Having unsuccessfully secured injunctions against the enforcement of the Act in both the July 2008 primary election and the November 2008 general election, a trial was conducted on the merits of the plaintiffs' claims.[93] The trial court found that the 2006 Act neither placed an undue qualification on Georgia voters nor imposed an undue burden in violation of the Georgia Constitution's equal protection clause, granting the Georgia election officials' motion for summary judgment.[94] The Democratic Party of Georgia appealed to the Georgia Supreme Court.

IV. THE COURT'S RATIONALE

A. *The Majority Opinion*

Writing for the majority in *Democratic Party of Georgia, Inc. v. Perdue*,[95] Justice Thompson held for the Georgia election officials, holding that the 2006 Act[96] was a reasonable restriction on the fran-

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89. Common Cause/Ga. v. Billups (*Common Cause / Ga. IV*), 554 F.3d 1340, 1357 (2009).
90. *Id.* at 1354.
91. *Id.*, *cert. denied*, 129 S. Ct. 2770 (2009).
92. Democratic Party of Ga., Inc. v. Perdue, 288 Ga. 720, 723, 707 S.E.2d 67, 71 (2011).
93. *Id.* at 723-24, 707 S.E.2d at 71.
94. *Id.* at 724, 707 S.E.2d at 71.
95. 288 Ga. 720, 707 S.E.2d 67 (2011).
96. Ga. H.R. Bill 432, Reg. Sess., 2006 Ga. Laws 3 (codified in scattered sections of O.C.G.A. tits. 21 & 40).

chise in advancing the legitimate state interest of preventing voter fraud.[97] In holding for the state, the court addressed the three arguments advanced by the Democratic Party of Georgia.[98] First, the Democratic Party argued that the 2006 Act imposed an undue qualification or condition on the right to vote in violation of Article II of the Georgia Constitution.[99] Second, they argued that the Act creates an independent ground on which voters may be disqualified in contravention of the constitution's express disqualification provisions.[100] Lastly, they argued that the Act imposed an undue burden on Georgia voters in violation of the Georgia Constitution's equal protection clause.[101]

The Georgia Supreme Court rejected all of the Democratic Party's arguments.[102] First, they held that although the Georgia Constitution provides that Georgia residents at least eighteen years of age and not otherwise disqualified under other constitutional provisions shall have the unhindered right to vote, the same provision also provides that the Georgia General Assembly has the power to administer reasonable regulations to determine voter eligibility.[103] The court held that so long as such restrictions are not so burdensome as to effectively deny the right to vote, they are within the power afforded the General Assembly under the constitution.[104] Moreover, the court held that the Act also does not impose an undue qualification, as the law does not deprive anyone the right to vote but instead merely provides for a procedural requirement that can be satisfied by any Georgia voter who obtains a free voter ID card.[105] Lastly, as to the Democratic Party's first two arguments, the court held that the Act does not create an independent ground for disqualification aside from those articulated in Article II of the Georgia Constitution because the requirements of the Act were merely procedures for identity validation, not voter disenfranchisement.[106]

Addressing the Democratic Party's final equal protection argument, the court held that the minimal burden imposed on Georgia voters was

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97. *Perdue*, 288 Ga. at 730, 707 S.E.2d at 75.

98. *Id.* at 724, 727-28, 707 S.E.2d at 71, 73-74.

99. *Id.* at 724, 707 S.E.2d at 71; *see also* GA. CONST. art. II, § 1, para. 2.

100. *Perdue*, 288 Ga. at 727, 707 S.E.2d at 74; *see also* GA. CONST. art. II, § 1, para. 3.

101. *Perdue*, 288 Ga. at 727, 707 S.E.2d at 74; *see also* GA. CONST. art. I, § 1, para. 2.

102. *See Perdue*, 288 Ga. at 730, 707 S.E.2d at 75.

103. *Id.* at 725, 707 S.E.2d at 72; GA. CONST. art. II, § 1, para. 2 ("The General Assembly shall provide by law for the registration of electors.").

104. *Perdue*, 288 Ga. at 725, 707 S.E.2d at 72 (quoting Franklin v. Harper, 205 Ga. 779, 790, 55 S.E.2d 221, 229 (1949)).

105. *Id.* at 726-27, 707 S.E.2d at 72-73.

106. *Id.* at 727, 707 S.E.2d at 74; *see also* GA. CONST. art. II, § 1, para. 3.

reasonable and justified by the state's goal of fraud prevention.[107] Holding that Georgia's equal protection clause mirrors the protections of the United States Constitution's Equal Protection Clause[108] as to the fundamental right to vote, the court applied the standards articulated in *Anderson v. Celebrezze*[109] and *Burdick v. Takushi*.[110] Under the *Burdick* standard, the 2006 Act's legitimate purpose of preventing voter fraud justified the minimal burden imposed on Georgia voters and was thus constitutional.[111] As a result, the court concluded, "[as] did virtually every other court that considered this issue, we find the photo ID requirement as implemented in the 2006 Act to be a minimal, reasonable, and nondiscriminatory restriction which is warranted by the important regulatory interests of preventing voter fraud."[112]

B. The Lone Dissent

Justice Benham offered the only dissent in this case.[113] Framing his argument in the context of fringe groups of Georgia voters most impacted by regulations such as the 2006 Act, Justice Benham wrote that in the absence of an actual showing of fraud being prevented by the 2006 Act's regulations, the actual effect was not legitimate but was instead an effective disenfranchisement of "the poor, infirm, and elderly."[114] He explained that although the Georgia Assembly has wide latitude in determining voter qualification by law, such requirements should not be permitted where they are so burdensome on some groups of voters as to effectively deny them the right to vote.[115] Justice Benham suggested that while photo ID requirements may not be very burdensome for many Georgia voters, that burden is amplified for the poor, elderly, and infirm with limited access to transportation, education about such voting laws, or the means to pay for collateral expenses to obtain such identification.[116] "Such inconvenient and difficult impediments," he wrote, "to exercising the franchise are in express contradiction of [the Georgia Constitution]."[117]

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107. *Perdue*, 288 Ga. at 730, 707 S.E.2d at 75.
108. U.S. CONST. amend. XIV, § 1.
109. 460 U.S. 780, 789 (1983).
110. 504 U.S. 428, 434 (1992).
111. *Perdue*, 288 Ga. at 729, 707 S.E.2d at 74-75.
112. *Id.* at 730, 707 S.E.2d at 75.
113. *Id.* at 730-34, 707 S.E.2d at 76-78 (Benham, J., dissenting).
114. *Id.* at 731, 707 S.E.2d at 76.
115. *Id.* at 732, 707 S.E.2d at 77.
116. *Id.* at 733, 707 S.E.2d at 77-78.
117. *Id.* (citing *Franklin*, 205 Ga. 779, 55 S.E.2d 221).

V. IMPLICATIONS

Applying the balancing test of *Anderson v. Celebrezze*,[118] the court held in *Democratic Party of Georgia, Inc. v. Perdue*[119] that preventing voter fraud was an adequate justification for a state voting law requiring presentation of photo ID at the polls.[120] Because the burden on voters was minimal in the opinion of the court–as there are adequate voting alternatives available and the process to obtain a voter ID is easy–the court did not apply the more stringent standard requiring that a severe burden on voters must be justified by a narrowly-drawn and compelling state interest.[121] Seemingly, then, the court has established a low bar for state justification of voting laws under the *Anderson* test where the burden on voters is minimal because, as the Democratic Party of Georgia offered to the court, there was virtually no showing of an actual issue of fraud in Georgia elections before the court.[122]

In its brief before the court, the Democratic Party offered support for the argument that in-person voter fraud is not a pressing problem in Georgia elections.[123] It noted that the Georgia Secretary of State recognized–in response to the 2006 Act[124]–that in the nine years she was in office, there was not a single case of fraudulent misrepresentation at the polls resulting from impersonation.[125] Moreover, the Secretary of State also observed that while there were no cases of voter impersonation, her office regularly dealt with fraud by absentee ballot.[126] Resting on the Secretary of State's assertions, the Democratic Party argued that while there was no true underlying fraud being prevented, there was a real impact felt by certain blocks of voters, particularly among poor communities and the African-American community where the impact is "most acutely felt."[127] In dissent, Judge Benham arrived at the same conclusion, stating that "the 'free' voter identification card . . . is an unnecessary construct making the ability to vote more

118. 460 U.S. 780, 789 (1983).
119. 288 Ga. 720, 707 S.E.2d 67 (2011).
120. *Id.* at 729-30, 707 S.E.2d at 74-75.
121. *Id.* (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).
122. Brief of Appellant, *Perdue*, 288 Ga. 720, 707 S.E.2d 67 (No. S10A1517), 2010 WL 3252954, at *3-4 (arguing that the fraud justification is facile at best and based largely on bare assumption that fraud is a pressing problem in Georgia elections).
123. *See id.* at *4.
124. Ga. H.R. Bill 432, Reg. Sess., 2006 Ga. Laws 3 (codified in scattered sections of O.C.G.A. tits. 21 & 40).
125. Brief of Appellant, *supra* note 122.
126. *Id.*
127. *Id.* at *7-10.

burdensome for persons who are poor, infirm, or elderly."[128] Nonetheless, the Georgia Supreme Court arrived at the conclusion in *Perdue* that the fraud prevention justification was adequate support for the 2006 Act, despite no actual showing of fraud by impersonation in Georgia elections.[129] The court even makes mention of *Crawford v. Marion County Election Board*,[130] noting that the Supreme Court upheld Indiana's photo ID law under the same standard (and further that the dissent in *Crawford* cites to Georgia's photo ID law as a point of comparison for Indiana's law, noting that Georgia's is less restrictive).[131] Notwithstanding the absence of a showing of actual fraud, the court accepted the fraud prevention justification in this case despite the underlying indirect effects that the Democratic Party contended the law will have on the poor and certain minority groups.[132] Therefore, this case seems to imply that where there is a minimal effect on the majority of Georgia voters, a reasonable justification from the state will suffice despite no actual showing of evidentiary support for that justification and despite the indirect effects that law may have on certain minority groups of Georgia voters. However, as the court pointed out in this case, the appellants offered only the testimony of a single, elderly Georgia voter who was unable to cast a vote in person on election day due to her not having a valid photo ID.[133] Had the appellants made a more impactful showing, for example where large numbers of minority Georgia voters had been disenfranchised, then perhaps the court would have been more persuaded by their argument.

What, then, is the real importance of this case where there is no measurable, acute fraud being prevented and where the appellant's showing of voter disenfranchisement is also lacking? The answer likely does not lie with the evidentiary support, but instead it lies with the true subject of the case itself: the franchise. Drawing on the tone of Justice Benham's dissent,[134] this case does not hold importance because of the minimal effect the photo ID law may have on certain

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128. *Perdue*, 288 Ga. at 733, 707 S.E.2d at 77 (Benham, J., dissenting).

129. *Perdue*, 288 Ga. at 730, 707 S.E.2d at 75 (majority opinion); *see also* Michael Cooper, *New State Rules Raising Hurdles at Voting Booth*, N.Y. TIMES, Oct. 2, 2011, http://www.nytimes.com/2011/10/03/us/new-state-laws-are-limiting-access-for-voters.html?_r=1 (discussing Georgia's voter ID law in the grander scheme of other state voter ID laws cropping up around the country as well as the Brennan Center's report).

130. 553 U.S. 181 (2008).

131. *Perdue*, 288 Ga. at 730, 770 S.E.2d at 75; *Crawford*, 553 U.S. at 240 (Souter, J., dissenting).

132. *See Perdue*, 288 Ga. at 730-33, 770 S.E.2d at 76-78 (Benham, J., dissenting).

133. *Id.* at 729, 707 S.E.2d at 75 (majority opinion).

134. *See id.* at 730-34, 707 S.E.2d at 76-78 (Benham, J., dissenting).

groups of voters, but instead it is a conversation worth having because of the very institution it purportedly affects. Therefore, while the effect of the photo ID law on the franchise may be minimal, this case offers a reminder of the careful scrutiny that such laws should be subject to, as they tend to affect the most important democratic institution in our society: "the right to be among one's fellow citizens at the polling precinct and to openly exercise his or her right to participate in a democracy."[135]

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135. *Id.* at 733, 707 S.E.2d at 78.