



Secretary of State
214 State Capitol
Atlanta, Georgia 30334

Cathy Cox

SECRETARY OF STATE
(404) 656-2881

April 8, 2005

Honorable Sonny Perdue
Governor, State of Georgia
203 State Capitol
Atlanta, Georgia 30334

Dear Governor Perdue:

I am writing to you to request that you veto House Bill 244. It is my strong belief that the picture identification requirement in House Bill 244 is (1) unnecessary, (2) creates a very significant obstacle to voting on the part of hundreds of thousands of Georgians, including the poor, the infirm and the elderly who do not have drivers licenses because they are either too poor to own a car, are unable to drive car, or have no need to drive a car, (3) very unlikely to receive pre-clearance under the Voting Rights Act by the Department of Justice, (4) violates Art. II, section I paragraph I of the Georgia Constitution by adding a condition on the right to vote that is not contained in the constitution and (5) imposes an undue burden on a fundamental right of all citizens, the right to vote, in violation of both the state and the federal constitutions.

My concerns in this regard are not fanciful or without thorough consideration. I call your attention to an official opinion issued by the Attorney General of Michigan in 1997, in which he declared unconstitutional a voter identification statute adopted by the Michigan legislature that was less restrictive than the provisions in House Bill 244. For your convenience, I have attached a copy of that opinion to this letter. It is my opinion that absent a veto of House Bill 244, it is important that the state assess the legality of the legislation before it becomes subject to possible litigation with respect to its constitutionality which, in turn, could bring unnecessary cost and embarrassment to our state.

In order to more clearly state my concerns, I submit to you the following:

1. The photo identification requirements of House Bill 244 are unnecessary.

One of the primary justifications given by the Legislature for the passage of the photo identification provisions of House Bill 244 -- the elimination of voter ID fraud at the polls -- is an unfounded justification. I cannot recall one documented case of voter fraud during my tenure as Secretary of State or Assistant Secretary of State that specifically related to the impersonation of a registered voter at voting polls. Our state currently has several practices and procedures in existence to ensure that such cases of voter fraud would have been detected if they in fact occurred, and at the very least, we would have complaints of voters who were unable to vote because someone had previously represented himself or

herself as such person on that respective Election Day. As a practical matter, there is no possibility that vote fraud of this type would have gone undetected if it had in fact occurred because there is a list of registered voters at each polling place that is checked off as each person votes. If the impersonator voted first, and the legitimate voter came to the polling place later in the day and tried to vote, he or she would be told that they had already "voted" and would not be allowed to vote a second time in the same day. It is reasonable to suspect that a voter who cared enough to show up at the polls to cast a ballot would almost certainly have complained - but there have been no such complaints. If the opposite occurred, and the legitimate person came to the polls first and cast his ballot, the impersonator who showed up later would not be allowed to vote for the same reason and the attempted fraud would have been prevented.

In addition, this state has adopted severe criminal sanctions for the type of voter impersonation that is purportedly of concern and it is evident that such penalties have been a sufficient deterrent. In essence, there is no voter fraud problem currently in existence that House Bill 244 addresses. Additionally, the concern for this type of voter fraud has not prompted other states to approve legislation as restrictive as House Bill 244. Forty-two of those states provide for other valid forms of identification besides photo identification. Of the other seven states, not one is as restrictive as the legislation recently enacted in our state. If this type of voting fraud was a national trend, other states would likely be adopting legislation as restrictive as House Bill 244.

In contrast to the lack of voter fraud relating to impersonation of voters at polls during my tenure, the State Election Board has reviewed numerous cases of voter fraud relating to the use of absentee ballots. However, the Legislature, in adopting House Bill 244 grossly expanded the opportunities for absentee voting by mail without any photographic identification requirement whatsoever, even though absentee ballots pose more of a threat of voting fraud than people voting in a polling location in their community. As a result, the type of voter fraud that *has* frequently occurred in our state is not addressed, and in fact is enhanced by the expansion of vote-by-mail opportunities. In sum, the justification for House Bill 244 is but a pretext.

2. *The photo identification requirements of House Bill 244 create substantial obstacles to many Georgia voters.*

Requiring someone who is otherwise registered and fully qualified to vote to present a government issued picture identification at the polling place as a condition of voting places a very real burden on many people, and especially upon the poor and the elderly who do not own or cannot drive a car and therefore do not have drivers' licenses. It is estimated by the League of Women Voters and the AARP that an estimated 152,664 individuals over the age of 60 who voted in the 2004 presidential election do not have a Georgia driver's license and are likely not to have other photo identification. For such voters to obtain identification is often an unnecessarily burdensome task, particularly if such voters are in retirement communities and assisted living facilities, or live in rural areas.

In addition, for many of the poorest residents of our state, photographic identification is not just a matter of unnecessary documentation that has no direct bearing on their day to day lives (they often have no need to drive or travel, or otherwise engage in activities that require a license), but is a burden of cost, economy and time. Although seemingly nominal, the \$8.00 fee for an identification card may be a cost that many of our poor residents are unable to bear. Given the fact that the United State Supreme Court has held that a \$1.50 poll tax is an unconstitutional burden on the ability for an individual to vote (*Harper v. State Bd of Elections*, 383 U.S. 663 (1966)), an \$8.00 fee for an identification card required by the state would also seemingly be unconstitutional, even if such fee may be waived by the state in the event that a voter swears that he or she is indigent. In fact, to require that someone swear and affirm they are indigent when they are above the level of indigence but nonetheless too poor to afford the cost of an identification card, is both an affront to that person as well as an unlawful requirement that he or she swear to something that is not true. In addition, there are other costs related to obtaining an identification which the state does not have the ability to waive. For an individual working on an hourly wage, the time it takes to travel to a DMVS (which may be an unreasonable distance away from the residents home or office), wait in the lengthy lines that result from only having 56 DMVS offices in the state (according to the list of locations posted on www.dmv.ga.gov) and then the return commute, results in actual lost wages. For the state to require this of our citizens, some of whom cannot afford to take such time off, is an unnecessary burden related to the exercise of that person's right to vote.

The geography of state DMVS offices poses a significant burden on many residents who would be required to obtain identification in order to vote. Given this state has only 56 DMVS offices, citizens without cars who reside in 103 of the 159 counties in Georgia must travel outside their home counties to obtain a state-issue picture ID in order to vote. Nor is there a single location to obtain such an ID in the city of Atlanta.

3. ***The photo identification requirements of House Bill 244 are very unlikely to receive pre-clearance by the Department of Justice under the Voting Rights Act.***

As you are aware, pursuant to Section 5 of the Voting Rights Act of 1965, as amended by 42 U.S.C. § 1973c, when this state (or any other state) seeks to administer any changes in voting qualification or prerequisites to voting or standards, practice or procedure it must submit such qualifications for pre-clearance by the U.S. Department of Justice Civil Rights Division. To obtain pre-clearance under §5, the state, as submitting authority, has the burden of showing that the submitted change has neither discriminatory purpose nor effect. (*Brooks v. State Bd. of Elections*, 775 F.Supp. 1470, aff'd 498 U.S. 916).

There are demographic factors that give pause for concern regarding the disparate impact that House Bill 244 may have with respect to the disenfranchisement of a class of voters. Recent census data indicates that African Americans in Georgia are nearly five times more likely not to have access to a motor vehicle than are whites. *Census Summary File 3 (SF3) HCT 33B*. This statistic, as well as the general discussion above regarding the economic impact of requiring voters to obtain identification, raises even greater scrutiny of the

constitutionality of House Bill 244. The very issue of disparate impact on minority voters is one of which we should be mindful and could possibly lead to the “retrogression in the position of racial minorities with respect to their effective exercise of their electoral franchise.” *Beer v. United States*, 425 U.S. 130 (1976).

I helped to write Georgia’s current Voter ID law in 1997, and the existing list of acceptable types of ID was crafted in careful consideration with the Department of Justice so that we could assure pre-clearance. The affidavit provision in current law, which serves as a “fall back” provision to prevent a valid voter from being turned away at the polls, was specifically included at the request of the Department of Justice.

The fact that the photo identification provisions of House Bill 244 will have disparate impact on the elderly, the disabled, rural voters and minority voters, as well as the fact that there are limited DMVS locations available in our state to satisfy the demand we are placing on citizens to obtain photographic identification, and that no “fall back” provisions exist for a voter who simply does not have or may have lost their photo ID, I have great concern with respect to the prospects of House Bill 244’s pre-clearance. In particular, and as you may be aware, in 1994 and 1995, the DOJ objected to certain provisions of Louisiana’s then voter identification statute which was strikingly similar to House Bill 244.

4. **The photo identification requirements of House Bill 244 violate Article II Section I, paragraph II of the Georgia Constitution.**

Article II, Section I, Paragraph II of the Constitution of the State of Georgia provides that:

“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 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.”

As noted above, the relevant portion of the Georgia Constitution sets forth the qualifications for entitlement to vote in elections by the people, and the General Assembly provides by law for the registration of electors. The Georgia Constitution does not vest in the General Assembly the authority to add qualifications to the eligibility to vote. Under House Bill 244, even if an elector satisfies each of the qualifications set forth in Article II, Section I, Paragraph II, the elector may still not be eligible to vote if such elector does not possess a photo identification in accordance with House Bill 244. This is in clear contradiction to the Georgia Constitution and is, in my opinion, a fundamental aspect of the unconstitutionality of House Bill 244.

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5. *The photo identification requirements of House Bill 244 impose an undue burden on the fundamental right of all citizens – the right to vote – in violation of the state and federal constitutions.*

Our federal and state courts have consistently recognized the right to vote as one of the most fundamental rights of our citizens. *Wesberry v. Sanders*, 376 US 1 (1964). The right to vote is “preservative” of other rights, and is one that bears the strictest of scrutiny and it is the fundamental nature of this right which cannot be burdened by state actions. *Harper v. State Bd of Elections*, 383 U.S. 663 (1966), *Reynolds v. Sims*, 377 US 533 (1964). The United States Supreme Court, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), recognized the close constitutional review required with respect to any restriction on the right to vote. In particular, the Supreme Court held in *Dunn* that “before the right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet strict constitutional scrutiny.” In addition, our state Supreme Court has also held that “substantive due process requires that state infringement on a fundamental right be narrowly tailored to serve a compelling state interest.” *State of Ga. v. Jackson*, 269 Ga. 308 (1998). Our Supreme Court has also held that “when it is established that the legislation ‘manifestly infringes upon a constitutional provision or violates the rights of the people’ that the statute should be declared unconstitutional.” *Cobb County School District v. Barker*, 271 Ga. 35 (1995). The intersection of these two precedents presents two clear questions. First, acknowledging that the right to vote is a fundamental right, is House Bill 244 narrowly tailored to serve a compelling state interest? Second, is it established that the photo identification requirements of House Bill 244 do not manifestly infringe upon the rights of the people? Based on the foregoing facts referenced above, the answer to both of these questions is no.

Governor, House Bill 244 places an unfair and heavy burden on the right to vote of tens of thousands of Georgia citizens, especially on the poor, the elderly and the physically infirm, and therefore has been vigorously opposed by the AARP, the NAACP, the League of Women Voters and dozens of churches and denominations of all faiths for this reason.

In the event that you do not agree with my analysis, I request that you ask Georgia Attorney General Thurbert Baker for his opinion as to the constitutionality of House Bill 244. The request of such an opinion could not possibly harm the state and could save the state the considerable embarrassment and expense of having House Bill 244 either rejected by the Department of Justice under the Voting Rights Act, or from having to defend any case brought by voters in the state or federal courts to have House Bill 244 declared unconstitutional.

I appreciate your consideration and urge your veto of House Bill 244.

Sincerely,



Cathy Cox

cc: Honorable Thurbert Baker