

March 28, 2006

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

Re: Comments to Georgia Submission under Section 5 with respect to S.B. 84

Dear Mr. Tanner:

We write on behalf of individuals and organizations that are advocates for voting rights. They are identified at the end of this letter and on **Schedule I** attached hereto. They are the substantially the same group that opposed Georgia House Bill 244 (“**H.B. 244**”) and they now oppose Georgia Senate Bill 84 (“**S.B. 84**”).

For reasons set forth in this letter, we object to the preclearance approval of S.B. 84, a bill hastily passed by the Georgia Assembly on January 24, 2006, and signed by Governor Perdue on January 26, 2006. S.B. 84 provides for partial modifications to Georgia Act 53 (which, prior to codification, was H.B. 244) and correspondingly the amendments to O.C.G.A. § 21-2-417 promulgated thereunder. Act 53 is currently enjoined by an order issued on October 18, 2005 by Judge Harold Murphy of the United States District Court for the Northern District of Georgia.¹ It is our position that S.B. 84’s modifications to the voter ID requirements established by H.B. 244 (now codified at O.C.G.A. § 21-2-417, Act No. 53) are insignificant and superficial corrections to a deeply flawed statute, and in no way remediate the discriminatory and retrogressive effect of the voter ID requirements established by H.B. 244.

In fact, it is our reasoned opinion that the circumstances surrounding passage of S.B. 84 are even more indicative of the retrogressive nature of the statute than those surrounding enactment of H.B. 244. Substantial information has been made available to the Legislature and the Governor via public comment, public media reports, and publicly available court proceedings. These sources have all amply established that the voter ID requirements promulgated by H.B. 244 are discriminatory and retrogressive. However, the Legislature did not take appropriate time and consideration in the legislative session to evaluate and weigh such information, nor did the Legislature address the aspects of the voter ID requirements that are retrogressive, as recognized by Judge Murphy, as well as certain members of the staff of the Voting Section, Civil Rights Division of the Department of Justice (the “**Section Staff**”) in the “draft”

¹ See *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), attached as **Exhibit A** hereto.

Section 5 Recommendation Memorandum regarding H.B. 244 (“the **Section Staff Memorandum**”).²

Furthermore, despite the fact that the public record indicates fraud in absentee voting is more prevalent than even in-person voting fraud, the Legislature has not taken meaningful measures to address this kind of fraud in the same fashion it has focused on in-person fraud. In short, given that the Legislature did not cure or even attempt to cure a statute with a known retrogressive impact, the intent of the new legislation itself is suspect.

As such, the Department of Justice (the “**Department**”) should refuse preclearance approval pursuant to the authority granted to it in accordance with Section 5 of the Voting Rights Act.

Under Supreme Court precedent and the regulations for implementing Section 5, “the last legally enforceable practice or procedure” is the benchmark for comparison when determining whether an election change has a retrogressive purpose or effect.³ H.B. 244, adopted in 2005, is currently enjoined by the U.S. District Court for the Northern District of Georgia. Consequently, the benchmark is the practice in which Georgia requested, but did not require, photo identification to vote in person. As set forth below, particularly in view of the additional information regarding intent to discriminate and the Legislature’s failure to investigate, much less address the concerns of members of American-Africans and Hispanics,⁴ the Department should not preclear S.B. 84, including those parts which retain the voter ID provisions of H.B. 244.

As you are aware, under Section 5 of the Voting Rights Act, the Department must refuse preclearance of state legislation affecting voting procedures that either has a discriminatory purpose or “the effect of denying or abridging the right to vote on account of race or color.”⁵ Georgia has the burden of showing that its proposed changes do not violate either prong of Section 5.⁶

Georgia has once again failed to carry this burden with respect to its contemplated voter ID requirements. S.B. 84 should fail preclearance approval because: (1) in its attempt to hastily revise the deficiencies in H.B. 244 raised by Judge Murphy’s order, Georgia failed to address the many sources of retrogression in S.B. 84; (2) the Legislature’s blatant disregard for S.B. 84’s retrogressive effects and its calculated decision to retain a known retrogressive statute are both evidence of a retrogressive intent; (3) S.B. 84 contains debilitating ambiguities that require further

² We refer to the Section Staff’s Section 5 Recommendation Memorandum re: Act No. 53 (H.B. 244), dated August 25, 2005. Since the Washington Post made this memo available to the public, we refer to the comments contained therein.

³ *Abrams v. Johnson*, 521 U.S. 77, 96 (1997), quoting the Section 5 regulations, 28 C.F.R. 51.54(b).

⁴ 28 C.F.R. 51.58(d)

⁵ 42 U.S.C. § 1973.

⁶ *Brooks v. State Bd. of Elections*, 775 F. Supp. 1470 (S.D. Ga. 1989), *aff’d* 498 U.S. 916 (1990).

clarification from the Georgia legislature, such that it is impossible to clearly understand the scope of the retrogressive nature of the statute; and (4) preclearing S.B. 84 will require Georgia's counties to quickly respond with much needed administrative regulations that will all require preclearance review, causing a tremendous strain on the Department to respond in time for the July 2006 elections.⁷

As noted above, since our last letter opposing the clearance of S.B. 84's predecessor, H.B. 244, many acute problems with the original bill have come to light. We do not attempt to restate the arguments set forth in our letter dated July 7, 2005, although we incorporate those arguments by reference in this letter, and for your convenience have attached that letter as **Exhibit B** hereto. We have, however, taken leave to restate certain arguments with respect to the retrogressive nature of the voter ID requirements that are maintained by S.B. 84. We also specifically set forth reasons why S.B. 84 does not obviate the retrogressive nature of the requirements, and in fact, exacerbates them. Because S.B. 84 modifies parts of the current requirements, but only insofar as addressing the manner, cost and locations in which the photo identification cards themselves can be obtained, we refer herein to the photo ID requirements established by H.B. 244 as the "**ID Requirements.**"

A. The revised photo identification requirements contained in S.B. 84 still will have a retrogressive effect on minority voters in Georgia.

As amply supported by statistical evidence available to the Department, any African-Americans do not have one of the six forms of identification established by the ID Requirements. S.B. 84 does not expand or alter the number of forms of identification necessary to satisfy the ID Requirements. As a convenience, we present statistics that indicate that African-Americans are far less likely to have one of these six acceptable forms of identification:

- Based on the amount of black households without access to a vehicle, it is reasonable to infer that approximately the same amount of African-Americans do not have a valid driver's license.
- Less than 20 percent of the entire U.S. population has a valid passport.⁸
- Seventy-seven percent of employed African-Americans in Georgia work for private employers. Therefore, they would not have a government-issued

⁷ Although the State will need to submit specific regulatory schemes mandated by S.B. 84 to the Department for preclearance on an individual basis, Georgia is nonetheless requesting preclearance of S.B. 84 in its entirety and on an expedited basis. The result of this approach is that the Department cannot truly understand the scope of the retrogressive nature of the statute until all of the regulatory requirements (i.e., what types of identification will be satisfactory for obtaining photo identification, locations in each county where the ID cards will be available) have been established and reviewed. Georgia also does not currently have sufficient equipment to comply with S.B. 84. On March 20, 2006, only months before the next state-wide primary election in Georgia, the State Election Board had just approved a request for proposals with respect to such equipment. *See Summary of Special Called State Election Board Meeting By Conference Call*, March 20, 2006, available at <http://www.sos.state.ga.us/elections>.

⁸ Section Staff Memorandum, at 16.

identification from their place of employment. Even though 19 percent of employed African-Americans work in the public sector, many do not have government-issued employee identification because government employees who work outside of Georgia's large urban areas usually do not receive photo identification.⁹

Opponents of the photo identification requirements and the Section Staff itself have reported that the ID Requirements will have a retrogressive effect on the voting rights of racial minorities. Indeed, Judge Murphy's opinion, not disturbed by the Eleventh Circuit, established that the new ID requirements imposed substantial burdens on the effective exercise of franchise. The Department should respect Judge Murphy's determinations, leaving the Department with a factual inquiry that goes primarily to the particular impact on minority voters.

Although much of the evidence in the Section Staff Memorandum properly refers to the retrogressive impact of the ID Requirements, these sources of retrogression have not been addressed by S.B. 84. Indeed, at least to the extent currently known (given that certain rules and regulations mandated by the statute have yet to be established), the new statute could make the ID Requirements even more retrogressive. In particular, we call your attention to the racially disparate transportation, literacy, economic, and logistical barriers to voting that made the ID Requirements retrogressive, and that make the modifications set forth by S.B. 84 even more retrogressive.

1. The transportation obstacles to obtaining photo identification under S.B. 84 disparately impact racial minorities.

S.B. 84 requires the photo ID cards be made available in at least one "place" in every county. However, there is no accompanying requirement that the "place" be centrally located, accessible by public transportation or otherwise adequately publicized. Accordingly, these requirements do not mitigate the racially disparate transportation barriers created by the ID Requirements; rather, such provisions of S.B. 84 increase the requirements' disparate impact. We call your attention to the following:

- Before passing H.B. 244, Governor Perdue reported that at least 300,000 Georgians do not have driver's licenses.¹⁰ No information has subsequently been presented to refute this estimate. These individuals would have as much difficulty traveling to any "place" within their county, as they would to a DDS location, particularly given the lack of readily available public transportation in Georgia.

⁹ *Id.* at 28.

¹⁰ See Jim Tharpe & Nancy Badertscher, *Voter ID Bill Likely to Be Law*, Atlanta Journal Constitution, Apr. 2, 2005.

- African-Americans in Georgia are nearly five times less likely than whites to have access to a motor vehicle.¹¹ The Section Staff itself has noted that 390,414 Georgians of voting age do not have access to a vehicle.¹² Over half of the 250,000 households in Georgia without access to a vehicle are African-American. This translates to 17.7 percent of African-American households without access to a vehicle, compared to 4.4 percent of white households. In Atlanta, the number of African-American households without a vehicle is even higher, reaching almost 20 percent.¹³
- The State of Georgia still has not sufficiently provided data that correlates any statistical relationship between race and possession of drivers licenses.¹⁴ Notwithstanding the lack of readily available data, which we urge the Department request from the State, we direct you to a study done in Wisconsin regarding relationships between drivers licenses and race, specifically relating to the voting age population, attached as **Exhibit C** hereto.¹⁵ This study found an alarming disparity between African-American and white voting age residents with driver's licenses. We concur with the Section Staff that, if provided, Georgia's statistics would show a "stronger correlation between driver's license ownership and race."¹⁶

Before S.B. 84 was passed earlier this year, supporters of the bill, including House Speaker Glenn Richardson and House Majority Whip Barry Fleming, suggested that the voter identification cards would be made available at every county's voter registration office.¹⁷ Besides the fact that the State Election Board has not passed any implementing regulations to determine what "place" § 21-2-417.1 contemplates, offering the photo IDs at county registrar offices does not address the retrogressive transportation barriers caused by S.B. 84. Even if the State Election Board adopts the Representatives' suggested location (a decision which itself would need to be precleared by the DOJ), the retrogressive impact of S.B. 84 will not be alleviated. In

¹¹ Census Summary File 3 (SF3).

¹² Section Staff Memorandum, at 14.

¹³ Wendell Cox & Alan E. Pisarski, *Blueprint 2003: Affordable Mobility and Access for All Atlanta and Georgia*, at 24, available at <http://ciprg.com/ul/gbt/atl-report-20040621.pdf>.

¹⁴ It is important to note that the Legislature had over ten months to evaluate this data and commission statistical studies, however, it failed to do so. The State anticipated revisiting the ID Requirements, but nonetheless failed to sufficiently conduct research and compile relevant data for purposes of a Section 5 review, which it anticipated would be necessary. This further act of omission raises the question of retrogressive intent.

¹⁵ See John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin*, Employment and Training Institute, University of Wisconsin-Milwaukee, June 2005, available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

¹⁶ Section Staff Memorandum, at 26-27.

¹⁷ See Nancy Badertscher, *General Assembly's First Day: No Time Wasted on Revised ID Bill*, Atlanta Journal Constitution, Jan. 10, 2006, at A1.

fact, it would create additional transportation-related obstacles for African-American voters. For example:

- Unlike Department of Driver Services offices which can be readily located by a map on the Department of Driver Services website and by road signs and other prominent signage, county election registrar offices are not easily locatable. Although there is a centralized list on the Secretary of State's website, finding this information is not intuitive or readily accessible.¹⁸
- Registrar offices are not necessarily in easily recognizable locations that have sufficient signage to identify the office.
- Many registrar offices are not located in readily accessible areas and may not be accessible by elderly or disabled persons. Of the 159 counties in Georgia, 54 counties do not have any public transportation. Also, given the fact that registrar offices are usually small offices, it is likely that even in counties with some public transportation, many of the offices may be off these transportation routes.

The State has submitted to the Department that the State's GLOW Bus is an adequate remedy to address the retrogressive nature of the ID Requirements. Remarkably, despite publicly available information to the contrary (and presumably because the Department did not obtain additional information from the State regarding the GLOW Bus), in a letter dated October 7, 2005 to Senator Bond, attached as **Exhibit D** hereto, Assistant U.S. Attorney General William E. Moschella of the Department of Justice mistakenly stated that the GLOW bus will eliminate any adverse effect on African-Americans in need of photo identification. However, for the following reasons, the GLOW program hardly mitigates any of the racially disparate transportation barriers explained above:

- There is only one GLOW bus available for the entire state (57,906 square miles). It has an already well-documented history of having mechanical failures and low impact even when it is operational.¹⁹
- Contrary to Mr. Moschella's position that the GLOW bus is a "critical factor mitigating (if not eliminating) any potential adverse impact," the highly limited availability of the GLOW bus makes it an insignificant factor in measuring S.B. 84's retrogressive impact. The GLOW bus is only available to the public for a few dates a month. As of the date of this letter, the

¹⁸ In fact, even assuming voters will have readily accessible Internet access (which is an assumption not based on probable facts), a visitor to the Secretary of State's general website will have to traverse through three web pages before there is a link to the local registrar's addresses.

See <http://www.sos.state.ga.us/default1024.asp>.

¹⁹ See Jim Wooten, Editorial, *Voter Photo ID 'Problem' Overstated*, Atlanta Journal Constitution, Oct. 25, 2005, at A15; Nancy Badertscher, *State Bus Will Roll for Voter Ids*, Atlanta Journal Constitution, Aug. 9, 2005, at B1.

Georgia Department of Drivers' Services website does not have a single date scheduled in April 2006 for the GLOW bus to provide voter identification cards.²⁰ Furthermore, the bus made only one stop in March.²¹ At this rate, the GLOW bus would only visit (or revisit) one of Georgia's 159 counties before the July 2006 election.

- The GLOW program does not address the problem of obtaining supporting documents required to obtain a voter identification card.
- The GLOW bus is not handicapped accessible.

In light of the retrogressive impact the new statute would have on the voting rights of African-Americans by reasons of accessibility, and the fact that the GLOW program is not situated to improve S.B. 84's disparate impact, we recommend that the Department further request the following information from the State:

- Additional statistically sound information regarding the correlation between African-Americans' possession of state ID cards and/or licenses and their voting registration status;
- Statistical information regarding the concentration and geographic proximity of African-American residents in regard to locations of DDS and county election offices (until the State Election Board submits regulations clearly defining the "place" where the photo IDs will be made available);
- Additional information regarding the location of county election offices, signage, and accessibility of those locations by public transit;
- Additional information regarding the GLOW program and its operations, including a proposed schedule leading up to the July 2006 primary election and description of outreach efforts over the coming months.

2. Considering Georgia literacy levels, the ID Requirements and S.B. 84 disparately and retrogressively impact racial minorities because absentee balloting inherently disenfranchises more African-Americans.

The literacy level in Georgia among African-Americans is yet another significant source of S.B. 84's retrogressive impact. The following statistics are

²⁰ See <http://www.dds.ga.gov/drivers/glowbus.aspx>, attached as **Exhibit E** hereto.

²¹ The GLOW bus's most recent stop came on March 26 at the Georgia International Horse Park near Conyers, Rockdale County, Georgia. Of significant note, the Horse Park is not accessible to any public transportation. The closest MARTA location to Conyers is the Indian Creek station which is approximately 35 minutes away. In fact, there is no general Rockdale County mass transit. Rockdale County Senior Services provides services to older residents for trips to the Senior Center in Rockdale County, trips to medical appointments and social service agencies, but it is not clear if the Horse Park is on the list of approved locations. In any event, it may not matter since the Senior Services operates from 7:30 a.m. to 4:00 p.m., Monday through Thursday, and 7:00 a.m. to 3:30 p.m. on Friday. Notably, the service center was not open on Saturday, the day when the GLOW bus came to Rockdale County.

particularly alarming with respect to the ability of voters to navigate the drastically changed voting and absentee ballot requirements under S.B. 84. For example:

- Based on a study by the National Institute for Literacy, attached as **Exhibit F** hereto, 23 percent of the voting age population in Georgia is at the lowest literacy level, “Level 1.”²² These adults have difficulty using basic literacy skills to complete tasks “considered necessary for functioning in everyday life.”²³ Adults at this literacy level can sign their name, however they generally cannot enter background information on a social security form, locate their eligibility from a table of benefits, or even locate an intersection on a street map.²⁴ By requiring illiterate Georgia voters to navigate a newly established voter ID system, in addition to other documentary requirements, the Georgia legislature is essentially imposing a literacy test on Georgia voters. Oddly enough, as touch screen balloting reduces literary barriers for Georgians to exercise their right to vote, requiring voters to navigate a new administrative system diminishes these benefits.
- Voters at Level 1 Literacy have the skills to sign their name. Under the current law, African-American voters (who statistically have higher percentages at Level 1 literacy or below) are not disparately affected because they can sign their name swearing their personal identity. By eliminating affidavits and imposing more cumbersome standards and procedures, S.B. 84 will disparately impact and disenfranchise disproportionate numbers of African-American voters at low literacy levels.
- The six counties in Georgia with the highest percentage of their voting age population at Level 1 all have African-American populations above 55 percent. We call your attention to the following table:

County	Percentage of the Voting Age Population at Level 1 Literacy ²⁵	Percentage of the county population that is African-American (based on the 2000 census) ²⁶
Hancock	47	78
Jefferson	41	56
Macon	41	60
Randolph	42	60
Talbot	40	62
Terrell	41	61

²² National Institute for Literacy, *The State of Literacy in America: Estimates at the Local, State, and National Levels*, at 4-5 (1998).

²³ *Id.*

²⁴ *Id.*

²⁵ *See id.*

²⁶ These figures are based on the Georgia Office of Planning and Budget’s 2000 Census, available at http://www.gadata.org/information_services/Census_Info/2000race_county.htm.

- The Section Staff previously recognized that African-Americans would have a harder time voting by absentee ballots because this method “requires knowledge of the deadlines and the application process, which may be harder for illiterate and less well-educated voters, who are disproportionately black.”²⁷ By merely examining the Absentee Ballot Application, attached as **Exhibit G** hereto, it is not difficult to see that even an individual with literacy skills above Level 1 would have trouble navigating the form. Yet, the State has taken no steps to assist illiterate voters in registering for an absentee ballot, which the State touts as a widely available alternative to voting without photo identification.

Given the percentage of African-Americans at the lowest literacy level, it is impossible to ignore the retrogressive racial impact of S.B. 84. Yet, the State has offered no arrangements to aid these African-American voters who, because of their low literacy level, will be adversely affected, if not entirely disenfranchised by S.B. 84.

In light of the disparate impact the new statute would have on illiterate voters, or even voters with Level 1 literacy skills, who are disproportionately African-American, we recommend that the Department further request the following information from the State:

- Additional statistically sound information regarding literacy rates and the limitations on the illiterate or marginally literate with respect to obtaining voter ID cards; and
- Additional information regarding the number of available personnel at each county elections office who can assist with the completion of necessary paperwork to obtain a voter ID card.

3. The economic obstacles to obtaining photo identification under S.B. 84 disparately impact racial minorities.

Despite the fact that the State is now offering an identification card itself for no charge, there still are accompanying costs to obtain the card that will disparately impact African-American voters. Under S.B. 84, in order to obtain an ID card an individual still will need to provide some other form of certified identification information, which ironically was largely the same information previously permissible to use for identification at the polls. Difficulties obtaining these certified documents, including the time and cost needed to travel and obtain the card, have a disparate impact on lower-income African-Americans. Given that the uniform requirements for what certified documentation will be acceptable by each county elections office have not yet been finalized (or even submitted to the Department for Section 5 preclearance review) the aggregate per person costs are still uncertain. We specifically note the following

²⁷ Section Staff Memorandum, at 36.

costs that African-American voters will disproportionately face in order to obtain a voter ID card:

- A certified copy of a birth certificate can cost anywhere from \$10 to \$45, if rush delivery is required. In situations where voters might use provisional ballots because they do not have proper identification, it is highly likely that voters will need to have these materials delivered to them overnight in order to meet the tight 48-hour deadline required for the provisional vote to be counted.
- Certified naturalization documents cost \$210.
- Passports cost at least \$97 (on a non-expedited basis).
- In cases where individuals do not have birth certificates because they were delivered by midwives or born at a time prior to centralized birth record-keeping, a birth certificate would be impossible to obtain.²⁸
- In order to obtain supporting documents and the voter identification card itself, voters will likely have to take time off of work. For many lower income and hourly-waged workers, this time would be extremely costly. Statistics generally support the proposition that this cost would disproportionately impact Georgia's African-American population.

As the Section Staff previously noted, for African-Americans making less than the median income of \$12,576, or whose income falls below the poverty line, "these fees are significant."²⁹ Indeed, according to a report by the Kaiser Family Foundation, non-whites in Georgia are nearly six times more likely than whites to fall below the poverty line.³⁰ Thus, S.B. 84 imposes these additional costs so as to burden African-American voters more heavily than white voters.

We recommend that the Department request the State to produce information regarding the total economic cost of obtaining IDs and also, regarding how the cost may disproportionately impact African-Americans.

4. Additional sources of retrogression exist under S.B. 84.

In addition to transportation, literacy, and economic factors related to the ID Requirements and S.B. 84 that will have a disproportional impact on African-American

²⁸ Cynthia Tucker, Editorial, *Voter ID Laws Ugliness Can't Be Disguised*, Atlanta Journal Constitution, Feb. 8, 2006, at A11. In her article, Tucker describes the experience of Ruth White, mother of Mayor Shirley Franklin, who was born at home. After writing several letters to Georgia's Bureau of Vital Statistics, Ms. White was told there was no record of her birth. In his opinion, Judge Murphy cited Ms. White's declaration and noted that Ms. White "could not get a Photo ID card because the State of North Carolina could not find her birth certificate, but was issued a letter that was good enough to get a passport from the federal government—yet not good enough to get a Photo ID card." *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1341-42 (N.D. Ga 2005).

²⁹ Section Staff Memorandum, at 30.

³⁰ *Georgia Poverty Rate by Race/Ethnicity*, available at <http://www.statehealthfacts.org/cgi-bin/healthfacts.cgi?action=profile&area=Georgia&category=Demographics+and+the+Economy&subcategory=People+in+Poverty&topic=Poverty+Rate+by+Race%2fEthnicity>.

voters, S.B. 84 gives rise to other sources of retrogression. These include problems that existed with H.B. 244 that have not been remedied by S.B. 84. In particular, we note the following:

- a) African-American voters rely more heavily on forms of identification that S.B. 84, and its predecessor H.B. 244, eliminated.
 - Given the high number of African-Americans below the poverty line and receiving government aid, eliminating non-photo government documents (i.e.: TANF documentation and unemployment checks) will disproportionately affect African-American voters.

- b) Expanding the availability of absentee voting to voters who do not have photo identification does not cure the retrogressive effect of S.B. 84.
 - Both H.B. 244 and S.B. 84 expand opportunities in Georgia for absentee voting. It is well documented that African-American voters do not vote by absentee ballots as often as white voters. Across the country and in Georgia, white voters vote by absentee almost twice as often as African-American voters. In the 2004 presidential election, of all non-Hispanic black voters registered, only 5.7 percent requested absentee ballots, compared to 11 percent of non-Hispanic white voters.³¹ In Georgia, approximately seven percent of registered African-American women voted by absentee ballots, compared with 12 percent of registered white female voters.³² Approximately six percent of Georgia's registered African-American male voters voted by absentee ballots, compared with 11 percent of male white voters.³³
 - As we explain above, many African-Americans do not have the economic resources or literacy skills to navigate the new voter ID requirements or use absentee ballots as a viable alternative.
 - Furthermore, Georgia has presented no plans as to how voters will be informed about the relaxed standards for absentee voting. Absentee voting requires meeting deadlines and registering in advance; thus for the reasons set forth above, African-American voters are disproportionately less likely to be aware of these guidelines and use the "alternative" of absentee voting.

- c) African-American voters rely more heavily on using the affidavit option to prove their identity in lieu of photo identification.

³¹ Kimball W. Brace & Dr. Michael P. McDonald, *Final Report of the 2004 Election Day Survey*, submitted to the U.S. Election Assistance Commission, at 5-8 (Sept. 27, 2005).

³² See Absentee Voters By Race Gender, attached as **Exhibit H** hereto. These statistics were generated by Georgia Secretary of State's Office after the 2004 general election. Judge Murphy relied on these figures in his opinion enjoining H.B. 244. See *Common Cause/Georgia*, 406 F. Supp. 2d at 1353.

³³ *Id.*

- By eliminating this alternative to photo identification, those minority voters who are unable to get a voter ID card and have limited literacy skills will be completely disenfranchised.

As noted above, it is Georgia's burden to present evidence that S.B. 84 is not retrogressive. In Georgia's preclearance submission for H.B. 244, Susan Laccetti Meyers, Chief Policy Advisor to the Georgia House of Representatives, admitted to the Section Staff that the Legislature did no analysis or independent inquiry into the effect the photo identification requirements might have on racial minorities. According to Meyers, the Georgia legislature relied solely on the uncorroborated statistic that more Georgians had driver's licenses than were registered to vote.³⁴

The State's failure to provide readily-available evidence and statistics on these issues is particularly troubling and further demonstrates the State's retrogressive intent in passing S.B. 84, especially considering the amount of regularly recorded and easily accessible statistics.³⁵ For example, election workers in Georgia are required to record the type of identification presented by voters on the voter's certificate. The voter's certificate form, approved by the Secretary of State and used by election officials, includes check boxes for the different types of identification. The certificates are required to be kept for a minimum of 24 months.³⁶ Georgia is also one of the few states, which records the race of voters. These two sources of information could reveal which types of identification documents have been presented by the race of the voter. It also could reveal the race of voters who executed an affidavit, instead of presenting identification.

We once again recommend that the Department request from Georgia information from these sources, which would be instructive regarding the racial impact of limiting the types of acceptable identification. The information is available, and should be produced whether statewide or by sampling of representative precincts. This is exactly the type of information the state should have investigated before adopting S.B. 84 and the ID requirements.

This type of detailed information regarding the race of persons who used alternative election structures was utilized by the Department to interpose an objection to certain changes in Florida law in 1999. In that instance, the Department relied on information as to the race of persons who requested absentee ballots and the race of persons whose absentee ballots were rejected.³⁷ Similarly, the available data kept by Georgia is probative and should be requested in order for the submitting jurisdiction to meet its burden of proof.

³⁴ Section Staff Memorandum, at 6-7.

³⁵ See Section B, *infra*.

³⁶ See O.C.G.A. § 21-2-411.

³⁷ See Letter from Acting Assistant Attorney General Bill Lann Lee to Assistant Attorney General of Florida, George L. Wass, p. 3-4, June 1, 1999.

Despite having an additional ten months to compile such readily-available research, Georgia presents no statistical evidence to refute the retrogressive effects of S.B. 84. The Section Staff themselves recognized that by not producing even a scintilla of evidence as to the racial impact of the ID requirements, Georgia has not carried its burden under Section 5.³⁸ Having a second opportunity, Georgia once again fails to meet its burden. Accordingly, we urge the Department deny preclearance and investigate the statistical information necessary to fully measure the retrogressive impact that is clearly generated by S.B. 84 and the ID Requirements generally.

B. The legislative history and alleged purpose of S.B. 84 suggest the bill was passed with a retrogressive intent.

As noted above, we believe S.B. 84 is an attempt to make a known retrogressive law enforceable in the eyes of a court and, regrettably not an attempt to sufficiently reduce or remove the statute's sources of retrogression. The statements of public officials have made this abundantly clear. Unfortunately, Georgia is no stranger to such efforts to modify retrogressive laws in a misguided attempt to pass legal and constitutional muster before the courts. A recent report by the American Civil Liberties Union states that Georgia is one of the most persistent and egregious challengers to the protection of voting rights.³⁹ Sadly, in this instance, Georgia is living up to its reputation. For the following reasons, we believe that not only do S.B. 84 and the ID Requirements have a retrogressive effect, but that they were passed by a legislature with a retrogressive intent.

1. The manner in which Georgia voted on and passed S.B. 84 evidences Georgia's retrogressive intent.

Federal District Court Judge Harold Murphy enjoined H.B. 244 on October 18, 2005. Judge Murphy issued a 123-page order explaining the many problems with the photo identification requirements. Between October 2005 and January 2006, the state had ample time to research and prepare a curative proposal with respect to the ID Requirements. In fact, shortly after the statute was passed in the Spring of 2005, it appeared the Legislature would revisit the ID requirements in their entirety, with particular discussion of absentee ballot fraud, a much more prevalent form of voter

³⁸ See Section Staff Memorandum, at 20 ("The submitting attorney provided almost no information regarding the availability of the seventeen forms of identification that are acceptable under the benchmark, the method to obtain them, or any discrepancies in ownership of these forms of identification by race. As it is the jurisdiction's burden to demonstrate that the proposed voting change is not retrogressive, it has failed to do so.").

³⁹ See Laughlin McDonald & Daniel Levitas, *The Case for Extending and Renewing the Voting Rights Act - Voting Rights Litigation 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union*, March 2006. In particular, nearly half of the 293 voting rights complaints the ACLU Voting Rights Project has filed since 1982, when the Voting Rights Act was last renewed, were in Georgia.

fraud in Georgia.⁴⁰ Instead, upon resuming session in 2006, the Legislature hastily passed S.B. 84 in the Georgia General Assembly with alarming and reckless speed.

The State waited for the 2006 session of the General Assembly to begin and then rushed the “revised” Voter ID bill onto the agenda. The bill’s rapid journey through the Georgia legislature and approval by the Governor demonstrates the State’s retrogressive intent and disregard for maladies in the original bill. For example:

- On January 9, 2006, the first day of the 2006 session, the House Governmental Affairs Committee approved S.B. 84 on a party-line vote, mere hours after Speaker of the House, Glenn Richardson announced the bill. Just three days later, on January 12, 2006, S.B. 84 was passed by the entire House of Representatives.
- The Chairman of the House Governmental Affairs Committee, Rep. Austin Scott, limited the speaking time of those who testified about S.B. 84 so that he and another representative could make another meeting.⁴¹
- State Representative Gail Buckner reported to the House of Representatives that the bill was rushed through committee so fast that the state’s elections director did not have time to read the bill, let alone comment on its impact on local registrars.⁴² She commented that: “I was reminded of the adage haste makes waste.”⁴³
- Within two weeks, the Senate voted for S.B. 84. The House then gave its final approval on January 25, 2006, and Governor Perdue signed the bill the next day.

The State did not conduct vital fact-finding regarding the potential discriminatory effect a photo identification bill might have on African-American voters. The proponents of S.B. 84 did not engage in any discussions with opponents of the ID Requirements, or otherwise reach out to determine the concerns of the impacted parties.⁴⁴ Nor did the Legislature consider alternatives to curb the alleged problems it sought to address with the ID requirements.⁴⁵

⁴⁰ On April 24, 2005, in an interview on WXIA Channel 11 in Atlanta, Representative Bill Stephens, then part of the Georgia Republican leadership of the House and now a candidate for Secretary of State, promised that during the next legislative session there would be a discussion of the absentee ballot issue. That promise was not realized, as there was no substantive dialogue of absentee ballots during the S.B. 84 debate.

⁴¹ See Mike Billips, *Voter ID, Gas Cut Pushed Through Committees on First Day*, Macon Telegraph, Jan. 10, 2006.

⁴² *Voter ID Bill on its Way to the House Floor*, Atlanta Journal Constitution, Jan. 11, 2006, at B4.

⁴³ Nancy Badertscher & Sonji Jacobs, *Legislature 2006: In Brief*, Atlanta Journal Constitution, Jan. 11, 2006, at B4.

⁴⁴ House Speaker Glenn Richardson told critics of S.B. 84 on the record that they could draft separate legislation if they wanted to deal with absentee fraud. See Alan Judd, *Absentee Voter Fraud Untouched by ID Law: Most Frequent Form of Cheating May Be Eased by Recent Rules*, Atlanta Journal Constitution, Jan. 29, 2006, at A1.

⁴⁵ The Section Staff had previously outlined several available alternatives that would lessen the impact of Georgia’s proposed changes on African-American voters. These alternatives were not substantively incorporated in the new legislation.

In deciding whether to preclear S.B. 84, Attorney General must consider, *inter alia*, the extent to which Georgia allowed African-American voters “an opportunity to participate in the decision to make the change” and the extent to which Georgia took into account concerns of African-American voters in making the change.⁴⁶ In its great haste to pass S.B. 84 through the legislative process, Georgia completely disregarded the voice of African-American lawmakers, voters and other opponents to S.B. 84.⁴⁷

As S.B. 84 was pushed through the Legislature, Georgia made it very clear that it had no intention of curing the retrogression in H.B. 244, or even considering alternatives that would have a lesser racially disparate impact. The Legislature’s intent in making these choices apparently was to retain the discriminatory and retrogressive effects inherent in the currently proposed ID Requirements.

2. The photo identification requirements purport to fix a non-existent problem.

S.B. 84’s stated purpose is to eliminate voter impersonation and fraud at the polls. However, Georgia has no such problem of any materiality. Several different sources have corroborated other evidence that Georgia’s claimed interest is non-existent:

- Secretary of State Cathy Cox testified that neither she nor any of her staff could recall a single case or complaint of voter impersonation at the polls.⁴⁸
- David Worley, an appointee to the State Election Board said that the bill was “designed to correct a problem that doesn’t exist.”⁴⁹
- The Report of the Commission on Federal Election Reform noted that, requiring voter identification at the polls to prevent alleged fraud is “a solution in search of a problem.”⁵⁰
- Georgia Representative Calvin Smyre, chairman of the House Democratic Caucus stated that: “This is not about voter fraud. I’m just going to peel the onion away. This came from the playbook of the Republican national movement.”⁵¹

⁴⁶ See 28 C.F.R. § 51.57.

⁴⁷ As just one example of the limited discourse on S.B. 84, despite great interest of the opponents of S.B. 84 to testify with respect to the proposed bill, Representative Austin Scott, chairman of the House Governmental Affairs Committee, limited the speaking time of those opponents prior to the time when S.B. 84 was voted on by the Committee. See Mike Billips, *Voter ID, Gas Cut Pushed Through Committees on First Day*, Macon Telegraph, Jan. 10, 2006.

⁴⁸ Cox Depo. at 14, 16, 47.

⁴⁹ Alan Judd, *Absentee Voter Fraud, Untouched by ID Law: Most Frequent Form of Cheating May Be Eased by Recent Rules*, Atlanta Journal Constitution, Jan. 29, 2006, at A1.

⁵⁰ Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, at 18 (Sept. 2005).

⁵¹ Carlos Campos, *Voter ID Bill Clears House*, Atlanta Journal Constitution, Jan. 13, 2006.

- State Senator Robert Brown commented, “This does not have anything to do with fraud. If we were interested in fraud, we would be going after absentee ballots.”⁵²

Given the non-existent fraud that S.B. 84 purports to remedy, the ID requirements in these bills are unnecessary, or at least, overly onerous. Simply put, the anti-fraud rationale advanced for S.B. 84, like H.B. 244 before it, is pretextual. The Legislature must have another stimulus for continuing to push this bill forward with such rigor, in the face of far-reaching political opposition and ever-increasing legal costs for the State in defending the bill in court.⁵³

The only logical inference is that the Legislature attempted to use this piece of legislation as a means to disparately suppress the African-American vote in Georgia. This inference is supported by statements made by the bill’s sponsor, Representative Sue Burmeister, who said that if there were fewer blacks voting it would only be because there is less opportunity for fraud. She continued to remark that if African-Americans in her district “are not paid to vote, they don’t go to the polls.”⁵⁴ These words alone and Burmeister’s admission that her statement as reported by the Section Staff Memorandum “was more accurate than not” helps bring to light the Legislature’s retrogressive intent behind the ID requirements of S.B. 84 and H.B. 244.⁵⁵

3. The Legislature expanded the availability of absentee voting, the greatest source of voter fraud.

Absentee voting is the area with the highest reported rate of voter fraud. Secretary of State Cox reported in her deposition that the State Elections Board has dealt with cases of fraud in connection with absentee voting at nearly every meeting over the past ten years.⁵⁶ Indeed, since the beginning of 2004, 16 of the 27 cases brought before the Elections Board involved absentee ballots.⁵⁷

Despite unequivocal evidence that voting by absentee creates greater opportunities for fraud and irregularities, the Legislature opted not to target this form of voting. Instead, the Legislature went after in-person voting, which to date has been free of fraud and voter impersonation. This alone would be enough to seriously

⁵² Mike Billips, *Senate Passes Voter ID Bill*, Macon Telegraph, Jan. 25, 2006.

⁵³ Walter C. Jones, *State Could Need \$2.5 Million to Defend Voter ID Law*, Athens Banner-Herald, Jan. 19, 2006; Shannon McCaffrey, *Cox Draws Fire for Voting to Fund Defense of State’s Voter ID Law*, Ledger-Enquirer, Jan. 19, 2006.

⁵⁴ Nancy Badertscher, *General Assembly’s First Day: No Time Wasted on Revised ID Bill*, Atlanta Journal Constitution, Jan. 10, 2006, at A1.

⁵⁵ See Bob Kemper & Sonji Jacobs, *Voter ID Memo Stirs Tension: Sponsor of Disputed Georgia Legislation Told Feds that Blacks in Her District Only Vote If They Are Paid To Do So*, Atlanta Journal Constitution, Nov. 18, 2005, at A1.

⁵⁶ Cox Dep. at 12-13.

⁵⁷ See Alan Judd, *Absentee Voter Fraud Untouched by ID Law*, Atlanta Journal Constitution, Jan. 29, 2006, at A1.

question the Legislature's intent. However, the Legislature then undertook to expand the availability of absentee voting. It is no coincidence that almost twice as many white voters use absentee ballots compared to their African-American counterparts.

In light of this evidence, it is quite implausible that the Legislature's true intent in passing S.B. 84 was to cure alleged voter fraud at the polls. If the Legislature were truly concerned with voter fraud, at the polls or otherwise, it certainly would not have invited widespread fraud to Georgia's elections by drastically relaxing the requirements to obtain absentee ballots. This discrepancy in the law has been recognized by many figures at the forefront of this debate:

- Secretary of State Cox wrote in her memorandum to the Georgia State Senate: "If the authors are indeed concerned about voter fraud, they would not likely authorize the easiest-and most prevalent form-of election law violations: unregulated voting by mail."
- Judge Murphy also recognized in his order that the Legislature "let the field wide open for voter fraud by absentee voting."⁵⁸
- Representative Carolyn Fleming Hugley stated: "In the same breath, you say that for absentee voters we're going to expand the period [for absentee voting] – and the form of identification that's necessary for an absentee voter is their signature. So there's still inconsistencies there and this bill is a solution to something that's never been a problem in Georgia."⁵⁹

The Legislature's actions with respect to absentee voting indicate that the intent behind S.B. 84 was to disadvantage African-American voters. We urge the Department to revisit the issue of intent by conducting more exhaustive discussions with the proponents and opponents of S.B. 84, and in particular the Speaker of the House and the Chairs of the Governmental Affairs Committee. We also recommend that the Department review the procedural history of S.B. 84 in an effort to understand why it was so hastily approved. We are confident that a full vetting of the passage of S.B. 84 will further illuminate the retrogressive nature of the statute.

C. S.B. 84 contains ambiguities that require further clarification before preclearance can be granted.

The State's submission asks the Department to preclear S.B. 84 in its entirety. However, under Section 5, preclearance is required before the State may "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or

⁵⁸ *Common Cause/Georgia*, 406 F. Supp. 2d at 1362.

⁵⁹ Nancy Badertscher, *General Assembly's First Day*, Atlanta Journal Constitution, Jan. 10, 2006, at A1.

procedure with respect to voting."⁶⁰ Indeed, even those "ministerial" acts the individual counties must undertake in administering S.B. 84 require preclearance.⁶¹

The language of § 21-2-417.1(h) mandates that the State Election Board "shall adopt rules and regulations for the administration" of the voter identification provisions located elsewhere in S.B. 84. Once in place, these regulations that set forth the administrative scheme of S.B. 84 will cause substantial changes in voting practices in Georgia that, in addition to the substantive requirements of S.B. 84, require preclearance. There remains considerable ambiguous language in S.B. 84, which would be subject to the varying interpretations of 159 different county boards of registrars and each dependent upon Section 5 preclearance by the Department. We call your attention to the following ambiguities:

- Section 21-2-417.1(a) requires each county board of registrars to provide "at least one *place* in the county" where voter ID cards shall be provided. (emphasis added). Without further explanation, this "place" could be anywhere the county election board chooses to distribute the IDs. For example, this "place" could be an office, a library, or a school, but it could also could also a small office space in a mall or an inaccessible space in an office park (or even someone's home, which is the location of the county registrar in at least one Georgia county).⁶² Further, given the numerous transportation obstacles that African-Americans are likely to face to reach this "place," further elaboration is essential for preclearance. As written, the location of the "place" is entirely within the discretion of each county election board. Indeed, the potential exists for counties to situate these offices in predominately white neighborhoods, making the IDs even more inaccessible for African-American voters.
- Section 21-2-417.1(e) requires the "presentation and verification" of supporting documents in order to obtain a voter ID card. However, as this language stands, the county employees will be the arbiter of whether the documents submitted are sufficiently "presented" and "verified." Georgia must clarify what is required to "present" and to "verify" the documentary prerequisites for voters to obtain an identification card. Putting further discretion in the hands of county (not State) employees will most definitely result in inconsistent application. This also increases the risk that bias and discrimination will be injected into the process, without any provision for monitoring to direct such problems.
- Section 21-2-417.1(e) identifies four forms of documentation required to obtain a voter ID in substantially vague terms. For example, § 21-2-417.1(e)(1) calls for "a photo identity document, except that a nonphoto identity document is

⁶⁰ 42 U.S.C. § 1973(c).

⁶¹ *Curtis v. Smith*, 121 F. Supp. 2d 1054, 1061-63 (E.D. Tex. 2000) ("[W]here a subdivision of a state takes 'ministerial' action in accordance with state law whereby a change in voting practice occurs, that subdivision is seeking to administer such a change. That in and of itself requires preclearance where there is potential for discrimination.").

⁶² Nancy Badertscher, *Legislature 2006: Voter ID Bill Up for Vote Today: Democrats to Fight for a Delay till 2010*, Atlanta Journal Constitution, Jan. 12, 2006, at C1.

acceptable if it includes both the person's full name and date of birth." As written, any private club membership card with a picture would satisfy the language of § 21-2-417.1(e)(1). Furthermore, the forms of acceptable nonphoto identification under § 21-2-417.1(e)(1) are also wide open for disparate and arbitrary interpretation.

Given the inherent retrogressive effects of S.B. 84, we believe that the regulations to implement S.B. 84 also will likely have a disparate and retrogressive effect on the voting rights of racial minorities in Georgia. As noted above, the danger is even greater that S.B. 84's requirements will be administered in a racially discriminatory manner. For example, Georgia has the burden of showing that the machines' locations in each county will not create transportation and economic obstacles that disparately affect African-Americans. However, Georgia has not yet identified where the ID-making machines will be located. How then can the Department meaningfully assess any potential retrogression? Georgia must present the locations of the ID-making machines in each county before the Department can approve the underlying statute. Given the potential for discrimination in a largely unguided county-by-county implementation of S.B. 84, and the resulting burden on the Department, the need for Georgia to submit a more detailed plan to implement S.B. 84 and the ID Requirements cannot be understated.

We take the position, and respectfully urge the Department to take the position, that Georgia must clarify the above listed ambiguities, and in each case seek separate preclearance with respect to the particulars of administering S.B. 84. Additionally, to the extent that S.B. 84 requires each individual county to effectuate changes to the current benchmark practices, all 159 counties in Georgia will be submitting such changes to the Department for preclearance. This will ultimately result in an overwhelming amount of submissions even closer to the time of elections.

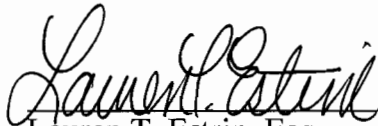
We believe that having to review numerous submissions on such a hurried schedule would endanger the preclearance process and effectively require the Department to return to ad hoc, case-by-case adjudications that was the procedure in place before the Voting Rights Act and Section 5 were enacted. Thus, in the interests of efficiency, reliability of Section 5 and its protections, and the goal of an orderly elections process in Georgia, the Department, in this specific case, should decline preclearance of S.B. 84 until all its component parts are in place. Until this time, S.B. 84 remains fatally vague and should not be precleared.

D. Conclusion

Once again, Georgia has failed to carry its burden under Section 5 of the Voters Rights Act. Implementing S.B. 84 has a far-reaching retrogressive impact on African-American voters in Georgia. Furthermore, and perhaps most troubling, Georgia has failed to show that the legislation was not enacted without a retrogressive intent, despite significant evidence to that effect. S.B. 84's rapid rush through the Legislature

without careful consideration of potential retrogressive effects on a historically suppressed racial minority is contrary to the core purposes of the Voting Rights Act and the Fifteenth Amendment. S.B. 84 is vigorously opposed by the American Civil Liberties Union, Common Cause/Georgia, National Voting Rights Institute, the Georgia Association of Black Elected Officials, the NAACP, the NAACP Legal Defense and Educational Fund, the AARP, the League of Women Voters, the Lawyers' Committee for Civil Rights Under Law, the National Council of Jewish Women and other public interest organizations, as well as dozens of religious organizations of all faiths. Accordingly, we submit to you in the strongest terms, S.B. 84 should be denied preclearance under Section 5 of the Voting Rights Act.

Respectfully submitted,



Lauren T. Estrin, Esq.
Kilpatrick Stockton LLP
1100 Peachtree Street, NE
Suite 2800
Atlanta, Georgia 30309



Seth A. Cohen, Esq.
Kilpatrick Stockton LLP
1100 Peachtree Street, NE
Suite 2800
Atlanta, Georgia 30309
Phone: 404-815-6442

Miles J. Alexander, Esq.
Kilpatrick Stockton LLP
1100 Peachtree Street, NE
Suite 2800
Atlanta, Georgia 30309

Ralph I. Knowles, Esq.
Doffermyre Shields Canfield
Knowles & Devine, LLC
1355 Peachtree Street, Suite 1600
Atlanta, Georgia 30309

Emmet J. Bondurant, Esq.
Bondurant Mixson & Elmore, LLP
1201 West Peachtree Street NW
Suite 3900
Atlanta, Georgia 30309

Neil Bradley, Esq.
American Civil Liberties Union
National Voting Rights Project
2725 Harris Tower
253 Peachtree Street, NE
Atlanta, Georgia 30303

Gerald Weber, Esq., Legal Director
Margaret Garrett, Esq., Staff Attorney
American Civil Liberties Union of Georgia
70 Fairlie Street, Suite 340
Atlanta, Georgia 30303

Jon Greenbaum, Esq.
Director – Voting Rights Project
Lawyers' Committee for Civil Rights
Under Law
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

cc: United States Attorney General Alberto R. Gonzales
Governor Sonny Perdue
Georgia Attorney General Thurbert Baker
Georgia Secretary of State Cathy Cox

attachments

Schedule I Organizations

AARP
Advancement Project
ACLU of Georgia
ACLU – National Voting Rights Project
American Jewish Committee, Atlanta Chapter
Asian American Justice Center
Asian Pacific American Legal Center
Anti-Defamation League, Southeast Region
Atlanta Black-Jewish Coalition
Common Cause/Georgia
Demos: A Network for Ideas & Action
Georgia Association of Black Elected Officials
Georgia Association of Community Organizations for Reform Now
Georgia for Democracy
Georgia Rural Urban Summit
Jewish Council for Public Affairs (JCPA)
Lawyers’ Committee for Civil Rights Under Law
League of Women Voters of Georgia, Inc.
Legislative Black Caucus
National Association for the Advancement of Colored People
National Association for the Advancement of Colored People – Legal Defense and
Educational Fund, Inc.
National Council of Jewish Women Georgia
National Voting Rights Institute
Project Vote
The Georgia Alliance of African American Attorneys