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When the Dust Has Settled: Fallout from the 2020 Presidential Election and S.B. 202 placed Georgia's Election Code in the Nation's Crosshairs

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"Y'know, Nietzsche says: 'Out of chaos comes order'." — Howard Johnson[1]

I. INTRODUCTION

Long regarded as a "safe" red territory, Georgia was thrust into the center of a national debate on federal and state elections when President Joe Biden flipped the state blue in the 2020 presidential election.[2] In the wee hours of the morning on November 4, 2020, as the final votes were tallied and the electorate results became clear, the Peach State became the ignition point for a fiery, and often hyper-partisan, national debate over federal elections and how states conduct such contests. Due in part

*I would like to extend a special thank you to Professor Jim Fleissner for graciously sharing his guidance, expertise, and wisdom with me throughout my time at Mercer University School of Law. Another special thank you to Katherine Twomey, for her assistance with navigating the Election Code of Georgia. And finally, thank you to my loving parents, Ellen and Bill Wheeler.

1. BLAZING SADDLES (Mel Brooks dir., 1974).

2. Associated Press, *Joe Biden wins Georgia, flipping the state for Democrats*, PBS NEWS HOUR (Nov. 19, 2020), https://www.pbs.org/newshour/politics/joe-biden-wins-georgia-flipping-the-state-for-democrats [https://perma.cc/QU5Z-L4XZ]. Joe Biden won 16 electoral votes by flipping Georgia, which brought him to a total of 306. A majority of electors is required to win a presidential election. Currently, there are a total of 538 electors; thus, at least 270 are needed for a presidential candidate to emerge victorious. *See* Office of the Federal Register, *Distribution of Electoral Votes*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Mar. 6, 2020), https://www.archives.gov/electoral-college/allocation [https://perma.cc/YZ77-7GF8].

to the contrived rhetoric espoused by acolytes of the "Make America Great Again" (MAGA) party, many Georgia voters, as well as disgruntled citizens, pundits, and politicians across the nation could not accept that a majority of Georgians had cast their ballots for a Democratic presidential candidate for the first time since 1992.[3]

The reactions to the results of the election were swift and costly; litigation was filed within hours of the polls closing, and many respectable attorneys have seen their legal careers thrust into jeopardy as they unsuccessfully attempted to litigate the results of the 2020 presidential election.[4] Although the results of the election were certified nearly two years ago, the probes and litigation continues; Governor Brian Kemp was recently subpoenaed to testify before a grand jury on the matter of election interreference, and former Trump attorney Rudy Giuliani is currently the center of a criminal investigation in Fulton County.[5]

Most of the fallout from the election litigation has settled, but Georgia remains under scrutiny for measures taken by the Georgia General Assembly in response to the 2020 Presidential Election.[6] Why are

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3. Caitlyn Stroh-Page, *When was the last time Georgia voted blue? It's been nearly 30 years*, ATHENS BANNER-HERALD (Nov. 5, 2020), https://www.onlineathens.com/story/news/politics/elections/2020/11/06/when-was-last-time-georgia-voted-blue-itrsquos-been-nearly-30-years/43004695/ [https://perma.cc/YSJ4-KHUC]. Until Joe Biden in 2020, Bill Clinton was the last Democrat to win a majority of Georgia votes during his initial 1992 campaign. *Id*.

4. Author's Note: Several attorneys who represented (or continue to represent) plaintiffs in litigation filed in attempt to challenge or overturn the results of the 2020 presidential election have faced professional and legal consequences to various degrees of severity. This Comment is not focused on determining whether the consequences were and are justified, nor is it meant to cast any doubt on the competency of the attorneys who were zealously representing their clients.

5. Kate Brumback, *Georgia Gov. Brian Kemp Fights Election Probe Subpoena*, PBS NEWS HOUR (Aug. 25, 2022), https://www.pbs.org/newshour/politics/georgia-gov-brian-kemp-fights-election-probe-subpoena [https://perma.cc/CMG8-UJ3V].

6. There have been at least eight notable lawsuits filed in response to the 2020 United States presidential election in Georgia. *See In re:* Enforcement of Election Laws & Securing Ballots Cast or Received after 7:00 P.M. on November 3, 2020, No. SPCV2000982-J3, 2020 WL 6701610 (Ga. Super. Ct.) (Nov. 5 2020) (dismissing plaintiffs' allegations that late ballots were counted illegally); Brooks v. Mahoney, No. 4:20-CV-00281-RSB-CLR, Proposed Def. Intervenor's Mot. to Intervene, 2020 WL 7054489 (S.D. Ga. Nov. 12, 2020) (alleging software glitch miscalculated votes); Wood v. Raffensperger, 501 F. Supp. 3d 1310 (N.D. Ga. 2020) (dismissing plaintiff's allegations that absentee ballots were unlawfully tallied), *aff'd*, 981 F.3d 1307 (11th Cir. Dec. 5, 2020), *cert. denied*, 141 S. Ct. 1379 (Feb. 22, 2021); Pearson v. Kemp, 831 F. App'x 467 (11th Cir. 2020) (dismissing plaintiffs' allegation of illegal vote manipulation by election software and hardware distributors); Boland v. Raffensperger, No. 2020CV343018, 2021 WL 103596 (Ga. Super. Ct. Jan. 4, 2021) (dismissing plaintiffs' allegations that state officials willfully broke election code

Georgia elections still a national talking point and how did the Election Integrity Act impact the way states conduct presidential elections across the country?

II. THE BUILD UP

A. A New Kind of "Battleground State"

Much of the noise surrounding the 2020 presidential election stems from former-president Donald Trump's efforts to have the results of the election reversed. Trump lost the election, as decided by voters across the United States, yet he subsequently enlisted a proverbial army of attorneys in an attempt to overturn the will of the people through aggressive, and often baseless, litigation.[7] This all-out assault on the election results has been multi-faceted, rife with claims of foreign interference, rigged voting machines, Russian hackers, paid votes, and ludicrous "deep state" conspiracies. The former president conducted a nationwide symphony of unacceptance and discontent, reaching a crescendo on January 6, 2021, as a deadly mob stormed the United States Capitol in a dire effort to physically stop the election certification process with terror, force, and violence.[8] Much of the rage from the disgraced

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regulations); Trump v. Raffensperger, No. S21M0561 (Ga. Sup. Ct. Dec. 12, 2020) (dismissing plaintiffs' allegations of widespread, systemic vote manipulation by election officials and voters & denying emergency petition for writ of certiorari); Favorito v. Fulton Cnty., No. 2929CV343938 (Ga Super. Ct. Dec. 12, 2020) (dismissing plaintiffs' allegations that a large number of absentee ballots were counterfeit); Trump v. Kemp, 511 F. Supp. 3d 1325 (N.D. Ga. 2020) (denying motion concerning plaintiffs' allegations of widespread voter fraud conducted by state officials).

7. *See In re:* Enforcement of Election Laws & Securing Ballots Cast or Received after 7:00 P.M. on November 3, 2020, No. SPCV2000982-J3, 2020 WL 6701610, at *__; *Brooks*, No. 4:20-CV-00281-RSB-CLR, Proposed Def. Intervenor's Mot. to Intervene, 2020 WL 7054489 at *__; *Wood*, 501 F. Supp. 3d at __; *Pearson*, 831 F. App'x at __; *Boland*, No. 2020CV343018, 2021 WL 103596 at *__; *Trump*, No. S21M0561 at *__ ; *Favorito*, No. 2929CV343938 at *__; *Trump*, 511 F. Supp. 3d at __. Most, if not all, of these suits were filed in attempt to have the Supreme Court of the United States either block the election results from certification, or to outright overturn the results of the 2020 presidential election. None of the lawsuits have been successful, with many being dismissed for lack of standing, substance, or failure to state a claim which can be remedied.

8. Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, THE NEW YORK TIMES (July 27, 2021) https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html [https://perma.cc/22ED-7B2B]. President Donald Trump used his social media platforms to mobilize his supporters in the aftermath of the 2020 election, tweeting things like "Big protest in D.C. on January 6th, be there, will be wild!" Trump held a "Stop the Steal" rally a few blocks from the U.S. Capitol while Congress was in the process of certifying the election results. Rally-goers stormed the Capitol and occupied the building, causing Senators and Representatives to either barricade and take

executive and his followers has been directed at Georgia, due to heavy expectations and analyst projections that predicted an easy win for Trump in the Peach State.[9]

Another point of contention that has kept Georgia in the center of the discussion regarding election law is the litany of highly publicized orders and legislative acts executed by Governor Brian Kemp and the Georgia General Assembly, both prior to and in response to the 2020 presidential election.[10] The snowball started rolling in 2018 when then-Secretary of State Brian Kemp oversaw his own gubernatorial election.[11] This decision may have been technically appropriate under both the Georgia and United States constitutions, but the decision to refuse to step down from his position as secretary of state while campaigning for governor was widely panned as less than scrupulous by Kemp's opponents, and this quickly became a national news story.[12]

B. The Lead to Legislative Action

The Governor Kemp signed Senate Bill 202 (SB 202), titled the "Election Integrity Act", on March 25, 2021, much to the chagrin of those across the aisle from the Republican Governor and the GOP-controlled state legislature.[13] This oft-vilified bill did not come about in a vacuum, nor did it arise on a lark; SB 202 was a direct response to the tsunami of litigation that crashed into courthouses all across the state in the wake

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shelter-in-place or evacuate. Despite this insurrection, which caused the death of at least four American citizens, the election results were certified. *Id*.

9. Trump and his team focused on Georgia in the days, weeks, and months after the election. Former Trump attorney Rudy Giuliani is the focus of an ongoing investigation by Fulton County Prosecutors. The primary focus of this investigation revolves around Giuliani's December 2020 efforts to persuade the Georgia General Assembly to block Georgia's electorate college delegates from casting their votes for Joe Biden. *See* Richard Fausset & Danny Hakim, *Giuliani Is Told He Is A Target in Trump Election Inquiry in Georgia,* THE NEW YORK TIMES (Aug. 15, 2022), https://www.nytimes.com/2022/08/15/us/graham-georgia-investigation-trump.html [https://perma.cc/5FPQ-PTLG].

10. The Georgia General Assembly has made several changes to state election laws in the aftermath of the 2020 presidential election. The law that has been the most controversial is the Election Integrity Act of 2021, which was signed into law by Governor Brian Kemp in March of 2021. This law will be analyzed later in this Comment. *See* S. Bill 202, Reg. Sess., 2021 Ga. Laws 14.

11. Alan Blinder, *Brian Kemp Resigns as Georgia Secretary of State, With Governor's Race Still Disputed*, THE NEW YORK TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/us/georgia-brian-kemp-resign-stacey-abrams.html [https://perma.cc/5UGS-4BH6].

12. David Leonhardt, *Opinion–Was Georgia's Election 'Legitimate'?*, THE NEW YORK TIMES (Nov. 19, 2018), https://www.nytimes.com/2018/11/19/opinion/georgia-election-legitimate-abrams.html [https://perma.cc/2RHS-V958].

13. S. Bill 202, 2021 Ga. Laws 14.

of the 2020 presidential election. An understanding of why SB 202 was drafted and passed can only come after looking into the election lawsuits that were filed on both the state and federal levels challenging electoral procedures. SB 202 has been maligned by partisan critics, but the core reason for such legislation was to prevent the unacceptable and unprecedented behaviors in the aftermath of the election from reoccurring, and to clarify the legal authority surrounding federal elections and how they are conducted by states.

The procedure and law surrounding states and federal elections is more complex than one might think, as evidenced by the way many of Trump's attorneys, most of whom are very intelligent, successful, and competent, bumbled and stumbled through this area of law.[14] However, the Supreme Court's decision in a key case arising from the 2020 presidential election makes it very clear that, under the United States Constitution, individual states are permitted to conduct elections in accord with their state constitutions and legislative bodies.[15]

1. Texas v. Pennsylvania

In the immediate wake of the 2020 presidential election, politicians across the country moved swiftly to try and challenge President Joe Biden's historic victory.[16] One hundred and twenty-six members of Congress, all Republican, signed onto *amicus curiae* briefs in favor of the plaintiff in *Texas v. Pennsylvania*.[17] This lawsuit was filed directly with

14. A cursory review of the opinions issued in the cases referenced in footnote six makes it clear that the judges presiding over these litigations felt that many of the attorneys brining the suits were either fooling themselves or engaging in frivolous litigation. Over a dozen attorneys from six states have received bar complaints for their actions tangent to representing clients seeking to overturn the results of the 2020 presidential election. *See* Ryan Boysen, *15 Attorneys Hit With Complaints Over 'Big Lie' Suits*, LAW360 (Sept. 1, 2022) https://www.law360.com/pulse/articles/1526588/15-attorneys-hit-with-complaints-over-big-lie-suits [https://perma.cc/CAS3-TYYP].

15. Texas v. Pennsylvania, 141 S. Ct. 1230 (2020). The Supreme Court held that Plaintiff Texas failed to demonstrate a "judicially cognizable interest" in how other States lawfully and constitutionally conduct their elections. *Id*.

16. Tina Davis, *Trump's Election Lawsuits: Where the Fights Are Playing Out*, BLOOMBERG LAW (Nov. 7, 2020), https://news.bloomberglaw.com/us-law-week/trumps-election-lawsuits-where-the-fights-are-playing-out [https://perma.cc/NF3P-AG44]. Seven lawsuits had been filed within 24 hours of Biden being announced as the victor of the 2020 election, and over 60 would be filed in the following days and weeks. *Id*.

17. Nomaan Merchant & Alanna D. Richer, *Supreme Court rejects Texas lawsuit–backed by Trump and most House GOP Members–to overturn election results*, CHICAGO TRIBUNE (Dec. 11, 2020), https://www.chicagotribune.com/election-2020/ct-republicans-texas-supreme-court-election-lawsuit-20201211-gnoqqkepqbfwxiuoc3b5oqnjvy-story.html [https://perma.cc/5VSN-KW8X].

the Supreme Court[18] by Texas State Attorney General Ken Paxton to officially contest the results of the 2020 Presidential Election in Pennsylvania, Wisconsin, Michigan, and Georgia.[19] In this suit, Texas alleged that Georgia and the other defendant states had violated the United States Constitution in the weeks and months leading up to the 2020 presidential election by making alterations to their respective state-level electoral procedures via non-legislative measures.[20]

At the core of this lawsuit, Plaintiff Texas alleged that the numerous changes Georgia made in advance of the presidential election constituted multiple violations of the U.S. Constitution and the independent state legislature theory.[21] The COVID-19 pandemic was raging in the United States during the 2020 election cycle, and Georgia, like many other states, had enacted a variety of measures to make voting easier and safer for constituents that were at risk of serious illness or death if exposed to the novel coronavirus.[22] These changes included increased access to postal voting ("Vote-by-mail") as well as early voting and expanded access to absentee voting. These measures were enacted by the executive branch, under Governor Kemp and Georgia Secretary of State Brad

18. Although the Supreme Court typically hears cases on appeal, the U.S. Constitution establishes the Supreme Court's original jurisdiction for cases where a state is a party. *See* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases . . . in which a State shall be [a] Party, the [S]upreme Court shall have original [j]urisdiction."). The Supreme Court's original jurisdiction in suits between two states is "exclusive." *See also* 28 U.S.C. § 1251(a).

19. Texas v. Pennsylvania (No. 22O155), SUPREME COURT DOCKET, https://www.supremecourt.gov/docket/docketfiles/html/public/22O155.html [https://perma.cc/PJ8N-RT2W] (last visited Dec. 13, 2022).

20. *Id.*; Motion for Leave to File Bill of Complaint at para. 64–76, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 22O155). Author's Note: The law clerk drafting the complaint and the motion to amend the complaint mixed up Georgia's Code; the documents repeatedly refer to O.C.G.A. title 12, which pertains to conservation and natural resources. The title on elections is 21; an honest mistake, but all references to O.C.G.A. title 12 have been corrected to reflect the intended statutes.

21. Motion For Leave to File Bill of Complaint at para. 1–7.

22. *Id.* In the complaint, Texas specifically alleged that:

> (a) Georgia Secretary of State Brad Raffensperger circumvented the state legislature and took unilateral action to abrogate O.C.G.A. § 21-2-386(a)(2), which prohibits the opening of absentee ballots prior to the opening of the polls on election day;
>
> (b) Under Raffensperger's directives, election workers violated O.C.G.A. § 21-2-386(a)(1)(B)–(C) by accepting absentee ballots that were improperly signed;
>
> (c) Raffensperger entered into an agreement with the Democratic Party of Georgia to materially change the statutory requirements of verification of absentee ballots to circumvent ratification by the Georgia General Assembly.

See Complaint at para. 64–76, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 22O155).

Raffensperger.[23] At the time, there was a national and state emergency which created a dire need for expeditious action, so many state executives ordered changes and amendments to accelerate and increase the efficacy of such measures, instead of relying on the often groaningly slow process of the state legislative bodies. Plaintiff Texas' position was that since these changes were not enacted by duly-elected state legislators, the new measures and regulations put into place by the state executives were unconstitutional, thus, the electors from the four defendant states should not be counted.[24] Instead, Texas prayed for the court to extend the deadline of when the states were required to certify their electors, in order to give Georgia and the other Defendant states time to "identify and remedy" any voting fraud.[25]

Texas alleged that Georgia and the other Defendant states committed violations of three specific constitutional provisions.[26] According to the Plaintiff,[27] the changes the Defendant states made to their respective election laws violated the Electors Clause,[28] the Due Process Clause,[29] and the Equal Protection Clause.[30]

a. The Electors Clause

The Electors Clause mandates that states appoint electors and gives state legislatures the authority to choose how this process should be executed. The exact language of the clause reads that "[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[31] Plaintiff Texas interpreted the use of "shall" to mean that state legislatures have the sole authority to set the rules for how a state may govern elections, and any actions taken by a state executive branch are unconstitutional.[32]

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23. *Id.*

24. *Id.*

25. *Id.* This "prayer for relief" is extremely peculiar; Texas did not seek time to "redo" its own election but asked for time for the defendant states to do so, time that the defendant states did request for an action the defendant states did not ask to execute.

26. *Id.*

27. *Id.*

28. U.S. CONST. art. II, § 1, cl. 1.

29. U.S. CONST. amend. XIV.

30. U.S. CONST. amend. XIV, § 1.

31. U.S. CONST. art. II, § 1, cl. 1.

32. *Texas*, 141 S. Ct. at 1230, Pl.'s Mot. to Leave to File Bill of Compl., (No. 22O155) (2020); *See* Count I at 36.

b. Due Process Clause

The Due Process Clause, found in the Fourteenth Amendment, creates a legal obligation for all levels of state government to operate within the law and to provide fair procedures for all Americans.[33] Essentially, this provision requires that all local, state, and federal government actions are within the law. Plaintiff Texas alleged that state-level executives in Georgia and the other Defendant states illegally circumvented state legislation to modify their respective electoral procedures in order to benefit Joe Biden and change the outcome of the election.[34]

c. Equal Protection Clause

The Equal Protection Clause, also found in the Fourteenth Amendment guarantees that all Americans must be treated equally. The language reads "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . without due process of law."[35] Plaintiff Texas claimed that the various changes made by Defendant state officials created differential voting standards, which effectively diminished the concept of "one person, one vote".[36] Texas alleged that not every valid vote was counted and that an undetermined number of invalid votes were counted, thus, there was disparity in the weight of each constituent's vote.[37]

Essentially, Plaintiff Texas attempted to argue that each of the Defendant states had committed numerous Constitutional infractions, and that Texas would suffer great harm if the electoral votes from Georgia, Pennsylvania, Wisconsin, and Michigan were certified, as such certification would cause the Texas electors to become "diluted."[38]

Although Plaintiff Texas made numerous allegations, including general accusations regarding the violation of the three aforementioned constitutional provisions, two claims were levied directly at Georgia. First, Plaintiff Texas alleged that Georgia Secretary of State Brad Raffensperger mandated new procedures for the review of signatures on absentee ballot envelopes without legislative authorization, which effectively made it much more difficult, if not impossible, to challenge

33. U.S. CONST. amend. XIV.

34. *Texas*, 141 S. Ct. at 1230, Pl.'s Mot. to Leave to File Bill of Compl., (No. 22O155) (2020); *See* Count III at 38–39, para. 140–44.

35. U.S. CONST. amend. XIV, § 1.

36. *Texas*, 141 S. Ct. at 1230; Pl.'s Mot. to Leave to File Bill of Compl., (No. 22O155) (2020); *See* Count II at 37–38, para. 134–39.

37. *Id.*

38. *Id.* at para. 64–76.

defective signatures.[39] Additionally, Texas claimed that the Georgia State Election Board permitted the processing of absentee ballots as early as three weeks before Election Day, which constituted a violation of a statutory provision that prohibited this type of processing before the polls opened on the day of the election.[40] Texas' allegations, true or false, miss a key principle—states have the right to conduct elections in accord with the way their constituents see fit.[41]

A state's power to conduct and govern elections stems from the Elector's Clause of the U.S. Constitution.[42] The Constitution is silent regarding how state legislators must appoint electors, but the Supreme Court has held that the word "appoint" is intended to "convey[] the broadest power of determination," allowing states vast freedom to select presidential electors in a variety of different ways.[43]

Texas sought injunctive relief by asking for the certification process of the results of the 2020 presidential election to be temporarily postponed but failed to demonstrate that it had legal standing to bring the case before the Supreme Court. The Supreme Court responded to Texas's filing on December 11, 2020, a mere three days after the suit was initiated, by summarily dismissing the action due to a lack of standing.[44] Despite the fact that the majority of the then-sitting Supreme Court Justices were appointed by Republican presidents, the Court was 7-2 in favor of dismissal.[45] The two justices that believed jurisdiction was proper, Justice Alito and Justice Thomas, declined to issue any statements regarding the merits of Plaintiff' Texas's claims.[46]

The majority opinion merely consisted of two curt sentences: "The State of Texas' motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which

39. *Id*. (alleging that such action was in violation of O.C.G.A. § 21-2-386(a)(1)(B)–(C)).

40. *Id*. Specifically, Texas claimed this action was in violation of O.C.G.A. § 21-2-386(a)(2).

41. U.S. CONST. art. II, § 1, cl. 1.

42. U.S. CONST. art. II, § 1, cl. 2.

43. McPherson v. Blacker, 13 U.S. 1, 8 (1892).

44. *Texas*, 141 S. Ct. at 1230.

45. Chief Justice John Roberts was appointed by President George W. Bush, Justice Clarence Thomas was appointed by President George H.W. Bush, Justice Samuel Alito was appointed by President George W. Bush, Justice Neil Gorsuch was appointed by President Donald Trump, Justice Brett Kavanaugh was appointed by President Donald Trump, and Justice Amy Coney Barrett was appointed by President Donald Trump.

46. *Texas*, 141 S. Ct. at 1230 (Thomas, J., dissenting).

another State conducts its elections."[47] The Court needed not delve into the additional elements of standing, nor did the merits of the case require attention or analysis; Texas failed to demonstrate that it was harmed by any of the Defendant states, so the case was promptly dismissed.[48]

The decision to dismiss *Texas v. Pennsylvania,* may have marked the end of the "big" federal litigation arising from the results of the 2020 presidential election, but it marked the beginning of the turmoil and discord surrounding Trump's ousting. Things began to heat up on the ground, and it seemed that because the highest court in the country would not help Trump overturn the results of the election, his supporters would take matters into their own hands.

2. Georgia on the Defense: Additional Litigation

Texas v. Pennsylvania may have been the most notable case involving Georgia and the 2020 presidential election, but it was far from the only one. The first legal action subsequent to the election was filed by the Georgia Republican Party and Donald J. Trump for President, Inc., on November 4, 2020, not even 24 hours after the last Georgians had cast their ballots.[49] The petitioners alleged that election officials improperly stored and illegally counted late ballots in violation of section 21-2-386(a)(1)(F) of the Official Code of Georgia Annotated.[50] Chatham County Superior Court Judge James F. Bass, Jr. dismissed the suit, ruling that the petitioners failed to present any evidence to support such a claim.[51]

On November 11, 2020, four Georgia voters sued the Chairman of the Chatham County Board of Elections over an alleged software glitch, which they claimed caused miscalculations with the official vote tally.[52]

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47. *Texas*, 141 S. Ct. at 1230. The Court referenced the Article III elements of standing required to bring suit. While the article does not use the word "standing," it plainly spells out when the Supreme Court, as well as all other lower courts, will have jurisdiction over the "cases and controversies" of two parties. *See* U.S. CONST. art. III, § 2. The modern elements of standing stem from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); a plaintiff must demonstrate injury in fact, causation, and likelihood of redress. *Id.* at 560–61. Analysis on whether Plaintiff Texas demonstrated causation and redressability is moot, as Plaintiff could not demonstrate injury, and all three elements are required.

48. *Texas*, 141 S. Ct. at 1230.

49. *In re* Enforcement of Election Laws & Securing Ballots Cast or Received after 7:00 P.M. on November 3, 2020, No. SPCV20-00982, 2020 WL 6701610, at *1 (Ga. Super. Ct. Nov. 5, 2020).

50. *Id.* O.C.G.A. § 21-2-386(a)(1)(F) states that all absentee ballots returned after the polls close on election day must be stored unopened until all properly cast votes have been tallied, at which point the late absentee ballots must be destroyed, without being opened.

51. *In re* Enforcement of Election Laws, 2020 WL 6701610, at *1.

52. Brooks v. Mahoney, No. 4:20-CV-00281, 2020 WL 6682873 (S.D. Ga. Nov. 12, 2020).

Plaintiffs voluntarily dismissed the action a few days later, pursuant to Federal Rule of Civil Procedure 41(a)(1).[53] In *Wood v. Raffensperger*,[54] a registered voter in Fulton County filed suit, alleging that Secretary Raffensperger had implemented unconstitutional procedures for collecting, counting, and verifying absentee ballots, and requested injunctive relief to prevent Georgia from certifying the results of the presidential election.[55] This prayer for relief was denied by United States District Court for the Northern District of Georgia, with the court holding that Plaintiff did not have standing to make a claim for such relief.[56] The plaintiff appealed this denial to the United States Court of Appeals for the Eleventh Circuit, which affirmed the lower court's ruling.[57]

The Court of Appeals decision was appealed again, but the Supreme Court denied appellant's writ of certiorari, which effectively affirmed the trial court's denial as the final ruling on the matter.[58] The important takeaway from the *Wood* cases is that discontent with the procedures or outcomes of elections does not satisfy the "injury" requirement for legal standing, nor does it necessarily evoke due process or equal protection concerns. The element of injury is the "first and foremost of standing's three elements" and a plaintiff must show that they suffered a violation of a "legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical."[59] A plaintiff must demonstrate that they have a "personal stake in the outcome of the controversy" and status as a registered voter does not confer such a "stake."[60] The denial of certiorari supports the fact that federal courts are not forums for parties to air their general grievances about their problems, and the Supreme Court has held that the requisite injury must be distinct from general grievances about the government.[61] The district

53. *Brooks*, 2020 WL 6682673, Pl.'s Notice of Voluntary Dismissal. Federal Rule of Civil Procedure 41(a)(1)(A) permits plaintiffs to dismiss an action without a court order if the file a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment.

54. 501 F. Supp. 3d 1310 (N.D. Ga. 2020) [hereinafter *Wood I*].

55. *Id.* at 1316.

56. *Id.* The Court found that there was no injury to Plaintiff, thus, there was no standing.

57. Wood v. Raffensperger, 981 F.3d 1307 (11th Cir. Dec. 5, 2020) [hereinafter *Wood II*].

58. Wood v. Raffensperger, 141 S. Ct. 1379 (2021) [hereinafter *Wood III*].

59. Spokeo Inc. v. Robbins, 136 S. Ct. 1540, 1547–48 (2016); *see* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). The three elements required for legal standing are (1) injury in fact, (2) causation, and (3) redressability. *Id.* at 560–61.

60. Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018).

61. *Id.* at 1923.

court made it abundantly clear that, regardless of how much money an individual has contributed to a particular candidate's campaign, a losing outcome of an individual's preferred candidate does not qualify as an injury satisfactory of the requisite elements for standing as a voter.[62]

The litigation continued: on November 25, 2020, a teenage conservative activist filed suit against Governor Kemp, among other state officials, claiming that the manufacturer of Georgia's election software and hardware, Dominion Voting Systems, was involved in a conspiracy to "steal" the election from Donald Trump.[63] *Pearson v. Kemp,*[64] along with *King v. Whitmer*,[65] became known as the "Kraken" lawsuits, and the complaints were rife with conspiracy theories. These suits alleged that state officials from Georgia and Michigan had entered into illegal agreements with Dominion Voting Systems and foreign actors to rig the presidential election against Donald Trump.[66] The plaintiffs sought a temporary protective order (TPO) to prevent the defendants from destroying data regarding the voting machines, an injunction from the court to "de-certify" the results of the presidential election in Georgia, and court authorization to inspect the Dominion Voting Systems machines.[67]

This quizzical lawsuit was filed directly with the Eleventh Circuit Court of Appeals (a court of review, not a trial court) after a district court granted the plaintiff's request for a TPO to preserve data potentially contained on the voting machines. *Pearson* was succinctly dismissed because the court of appeals did not have jurisdiction to hear the case, as there was no underlying final judicial decision to review.[68]

Shortly after *Pearson* was dismissed by the appellate court, Judge Timothy Batten, who granted the preliminary TPO, held a hearing to address the Plaintiff's requests to inspect the voting machines. Judge Batten then dismissed the case, as the court found that the plaintiff's lacked standing, failed to file the case in a timely manner, venue was

62. *Wood I*, 501 F. Supp. 3d at 1321. The court said the allegations in the complaint "fall far short" of demonstrating standing. *Id.*

63. Pearson v. Kemp, 831 Fed. App'x 467 (11th Cir. 2020).

64. *Id*.

65. 505 F. Supp. 3d 720 (N.D. Mich. 2020).

66. *Pearson*, 831 Fed. App'x at 467; *King*, 505 F. Supp. 3d at 720. Key evidence in *Pearson* consisted of an affidavit from noted "QAnon" conspiracy theorist Ron Watkins. These suits became known as the "Kraken" suits due to the Plaintiff's attorney claiming that the information that would come out during discovery would destroy the defendants, an allusion to Greek mythology.

67. *Pearson*, 831 Fed. App'x at 469.

68. *Id.* at 473. TPOs are not final judicial decisions.

improper, and the "injury" suffered by the plaintiff's lacked redressability.[69]

Although the denials and dismissals were piling up, the onslaught of electoral litigation continued; the bullrush was no coincidence, as litigants scrambled to beat the "safe harbor" provision of 3 U.S.C. § 5. Part of the Electoral Count Act of 1887, this statute states:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination … shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.[70]

Under this law, if a state does not have all the controversy surrounding elections resolved within thirty-five days of the election, Congress has more discretion to choose which electors it will recognize. This thirty-five-day window is too brief a time to conduct "do-over" elections, so any actions regarding recounts and certification must be filed expeditiously.

The next post-election suit was filed by a Georgia voter, Paul Boland, who claimed state election officials systemically violated multiple provisions in the election code of Georgia.[71] In *Boland v. Raffensperger*,[72] the allegations focused on a statistical analysis of the rejection rate for ballots and the high number of absentee ballots.[73] Fulton County Superior Court Judge Emily K. Richardson dismissed the case for the same reasons many of the other Georgia election suits failed: the plaintiff did not have standing, the plaintiff failed to state a claim upon which

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69. Pearson v. Kemp, No. 1:20-CV-04809, 2020 WL 7040582, at *1 (N.D. Ga. 2020). The case was determined to not be "timely", as the proper time for such action would have been shortly after the Dominion machines were contracted, months before the election. Additionally, in accord with the Elector's Clause, a district court is not proper venue for such lawsuits; plaintiffs should have filed in state court from the onset. Finally, the relief sought by the plaintiffs was impossible for the court to grant, as the district court does not have the power to "de-certify" a state's election results. *Id.*

70. 3 U.S.C. § 5.

71. Boland v. Raffensperger, No. 2020CV343018, 2021 WL 103596, at *1 (Ga Super. Ct. Jan. 4, 2021).

72. *Id.*

73. *Id.*

relief could be granted by the court, and that the suit was not timely.[74] The plaintiff appealed the denial to the Supreme Court of Georgia, which declined to hear the case.[75]

Never one to back down from a losing battle, Donald Trump and his campaign got directly involved with litigation and filed a suit in Fulton County Superior Court on December 4, 2020.[76] Like many of the unsuccessful plaintiffs who filed prior, the Trump team made sweeping allegations against Georgia officials and election workers, accusing them of committing numerous infractions of state laws and the Georgia constitution.[77] Plaintiffs claimed that these violations had permitted tens of thousands of illegal votes to be counted. Due to this alleged impropriety, they sought an injunction from the court nullifying the results of the 2020 presidential election, as well as an order requiring the conduction of a second election.[78] This legal action quickly joined the pile of dismissed or denied lawsuits pertaining to the 2020 election, as Plaintiffs attempted to have the case heard directly by the Georgia Supreme Court instead of the underlying court where it was initially filed; the Court unanimously voted to reject the case, as the plaintiffs failed to demonstrate why the Georgia Supreme Court would have original jurisdiction over the matter.[79] Notably, *Trump v. Raffensperger* preceded the infamous January 2, 2021 phone call between Trump and Secretary Raffensperger. During this hour-long call, the former president tried to pressure Raffensperger into "finding" the votes needed to reverse Biden's victory. Trump also insinuated that the secretary of state would be breaking the law if he didn't "find" 11,780 votes for Trump, one more than the former president's margin of defeat. This phone call would haunt Trump, as it was cited in the articles of his second impeachment

74. *Id.*

75. *Id.*

76. Trump v. Raffensperger, No. 2020CV343255, Pl.'s Original Compl., Doc. 1-1 at 12–75 (Ga. Super. Ct. Dec. 4, 2020), *dismissed,* Order on Case Status (Ga. Super. Ct. Dec. 9, 2020), *cert. denied*, No. S21M0561 (Sup. Ct. of Ga. Dec. 12, 2020); *see also Trump v. Raffensperger*, HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/detail?id=414 [https://perma.cc/D8LT-PX6D] (last visited Dec. 16, 2022).

77. Trump v. Raffensperger, No. 2020CV343255, Pl.'s Original Compl., Doc. 1-1 at 12–75 (Ga. Super. Ct. Dec. 4, 2020), *dismissed,* Order on Case Status (Ga. Super. Ct. Dec. 9, 2020), *cert. denied*, No. S21M0561 (Sup. Ct. of Ga. Dec. 12, 2020).

78. *Id.*

79. *Id.* The plaintiffs seemed to believe that petitioning the Supreme Court of Georgia was the only course of action; by this point, three recounts had been conducted, the "safe harbor" date was rapidly approaching, and no substantial evidence of any type of voting/electoral impropriety had been uncovered, despite fervent investigations into such claims. Needless to say, the clock was ticking, but that does not give appellate courts general jurisdiction over novel claims.

and led to multiple administrative and criminal investigations into the president, some of which are still ongoing.[80]

In an absolute and final rejection of the will of Georgia voters, Trump filed another suit in federal court against Governor Kemp and Secretary of State Raffensperger.[81] In this last-ditch, Hail Mary attempt to overturn his electoral loss, the former-president-plaintiff alleged that the defendants maliciously violated the Electors Clause, claiming that the way Georgia conducted the 2020 presidential election was not "with[in] the laws established by the legislature."[82] Plaintiffs further allege that they were denied Fourteenth Amendment Due Process rights when state officials certified the election results, and that Trump was denied his "right" to an election contest.[83] Plaintiff's motion for a preliminary hearing was denied, and Trump voluntarily dismissed the lawsuit on January 7, 2021, one day after the deadly insurrection at the U.S. Capitol.[84]

The common thread throughout all these cases surfacing subsequent to Biden's electoral victory in Georgia is a lack of standing. Article III of the U.S. Constitution and subsequent Supreme Court decisions are quite explicit in laying out what is required for a plaintiff to have legal standing, yet post-election litigation bogged down the federal and state courts of Georgia in the aftermath of the contest. This reactionary litigation is unprecedented in the modern era and was an unacceptable squandering of time and resources. In an attempt to prevent such insanity in future elections, the Georgia General Assembly went to the drawing board and came up with infamous SB 202.

III. ELECTION INTEGRITY ACT OF 2021

The Georgia General Assembly passed the Election Integrity Act of 2021 (SB 202) on March 25, 2021, and Governor Kemp signed the legislation the same day, with the bill immediately going into effect.[85] The law was immediately vilified by political pundits and opponents of the Republican officials, and the hubbub around the legislation even

80. Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors H. R. Res. 24, 117th Cong. (2021).

81. Trump v. Kemp, 511 F. Supp. 3d 1325 (N.D. Ga 2021).

82. *Id.* at 1331. *See* Compl. para. 71.

83. *Id.* at 1331–32.

84. *Id. See* Pl.'s Notice of Voluntary Dismissal, Trump v. Kemp 511 F. Supp. 3d 1325 (N.D. Ga 2021) (No. 1:20-cv-05310-MHC). Due to the sharp spike in scrutiny surrounding Trump after the dust settled on January 6th, it is likely that the plaintiffs did not want to present evidence or witnesses in front of a court and open themselves up to discovery and cross-examination.

85. Ga. S. Bill 202, 2021 Ga. Laws 14.

prompted Major League Baseball (MLB) to relocate its All-Star spectacle from Atlanta to Denver.[86] Atlanta businesses lost out on countless dollars in revenue from hosting such an event, and other economic heavyweights in the Atlanta area, including the Chief Executive Officers of Coca-Cola and Delta Air Lines, voiced their disdain with the bill's passage.[87]

The reaction to this piece of legislation was immediate and overwhelmingly negative, with many partisan opponents clamoring that the bill denied Georgians their constitutional right to vote. President Joe Biden even likened the SB 202 to modern day Jim Crow laws in official remarks.[88] Due to the aggressively disapproving media coverage, condemnations from elected officials, and economic boycotts, one would think that the Georgia General Assembly had successfully pulled off a devious plot to ensure Georgia returns to being a "safe" red territory, but that perception misses the mark; SB 202 was enacted to create more trust and confidence in Georgia's electoral systems, and the belief that it will favor one party or another, over time, is misguided. This legislation has been, and will continue to be, challenged in state and federal courts, and will ultimately protect, not hinder, the voting rights of every Georgian, regardless of racial, ethnic, economic, religious, or cultural background/status.

A. What the Heck is in this Thing?

It should be no surprise that the turmoil in the aftermath of the 2020 presidential election would spark legislative action. Much of the litigation arising from the electoral results revolved around state

86. Ronald Blum, *MLB All-Star Game yanked from Georgia over voting law*, ASSOCIATED PRESS (April 2, 2021), https://apnews.com/article/mlb-baseball-rob-manfred-georgia-voting-rights-e1cf72c8b2d61afad049cae498ccbbe0 [https://perma.cc/W3FA-HAHA]. The decision to move the event to Denver was met with backlash, as many Colorado voting laws are similar, if not stricter, than the measures enacted in SB 202. *See* Andrew Kenney, *Fact Check: How Colorado, Georgia Voting Laws Differ Despite Conservatives' Claims*, NPR (April 7, 2021), https://www.npr.org/2021/04/07/984857562/fact-check-how-colorado-georgia-voting-laws-differ-despite-conservatives-claims [https://perma.cc/5NSN-QZWK].

87. Blum, *supra* note 86.

88. President Joe Biden, *Statement by President Biden on the Attack on the Right to Vote in Georgia*, THE WHITE HOUSE (Mar. 26, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/26/statement-by-president-biden-on-the-attack-on-the-right-to-vote-in-georgia/ [https://perma.cc/57K5-3747]. Jim Crow laws, enacted in reaction to the 13th Amendment, were designed to marginalize African Americans by denying them various rights, including the right to vote. These state and local laws were enacted in many states in the north and the south, and many were in effect until the Supreme Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), and the passage of the Civil Rights Act, Voting Rights Act, and Fair Housing Act in the 1960s.

executives taking actions that plaintiffs and petitioners felt were solely within the power of legislatures. Although the numerous state, district, circuit, and Supreme Court decisions made it abundantly clear that the various litigants lacked standing to bring suit, there was not much discourse regarding the merits of the claims. The Georgia General Assembly passed SB 202 to resolve any doubt by delegating specific powers to different governmental bodies through codification.

This comprehensive behemoth of a bill clocks in at approximately 98 pages and serves as an exhaustive revision of O.C.G.A. title 21 chapter 2, which relates to election procedures in Georgia.[89] Section 2 of the act clearly states that the measures within the legislation are a response to the aftermath of both the 2018 gubernatorial and midterm elections, as well as the 2020 presidential election; Georgia legislators recognized that there was a surging lack in the confidence of the state's electoral procedures, as constituents reserved concerns regarding voter suppression and voter fraud.[90] While many of these concerns were unfounded, as there were no instances of widespread or systemic suppression or fraud uncovered, the General Assembly realized that a lack of confidence in electoral processes deters civic engagement and an enjoyment of voter rights regardless of whether the suspicion and doubt are grounded in reality. The legislators would be unable to convince every Georgian that their fears were unwarranted, but they could, and did, enact measures to make sure such suspect discrepancies would not arise in future elections.

Section 2 explains that much of the anxiety regarding the 2020 presidential election pertained to emergency measures put in place due to the global COVID-19 pandemic.[91] The main change that was implemented in the face of the statewide and national emergency was the extension of absentee-by-mail ballots; Georgia had never conducted an election with such a large percentage of absentee-by-mail votes, so logistic issues were inevitable. By October 20, 2020, over 1,777,947 Georgians had already voted and 731,979 of those votes were absentee-by-mail. Compared to the 2016 presidential election, Georgia saw an overall increase in early voting by 142% and an increase in absentee-by-mail voting by 640.6%.[92] This sharp increase can largely be

89. Ga. S. Bill 202, 2021 Ga. Laws 14 para. 1.

90. *Id.* § 2.

91. *Id.*

92. *Record Breaking Early In-Person Voting Continues: October 20, Noon Update*, GEORGIA SECRETARY OF STATE (Oct. 20, 2020), https://sos.ga.gov/news/record-breaking-early-person-voting-continues-october-20-noon-update [https://perma.cc/7L83-UJHG]. Early voting numbers by October 25, 2016 totaled 820,766 and 103,239 of them were absentee-by-mail.

attributed to the pandemic, as at-risk Georgians were much more likely to vote by mail or vote early to avoid putting themselves at risk of contracting COVID-19 in long lines on election day. The overall increase reflects trends around the United States; the 2020 presidential election had the largest turnout in American history.[93] Historical levels of civic engagement is logical, as the pool of eligible voters grows as the population increases. Furthermore, the two candidates in the 2020 general election were quite polarizing, and many Americans felt urgency to go out and vote for the preferred septuagenarian.[94]

With the numbers up, and the logistics nightmare of processing all the nontraditional votes, it is no wonder that errors were made, counts came in late, and those dissatisfied with the results became suspicious.[95] The burden on election officials was extreme, so Georgia legislators learned from this chaos and set forth to make changes to the electoral system in order to make it "easy to vote and hard to cheat."[96]

1. Changes to Absentee-by-Mail Voting

Many of the allegations in the election suits filed in Georgia, as well as *Texas v. Pennsylvania* focused on absentee-by-mail voting, accusing state officials and election workers of using this accessible, voter-friendly mode of casting ballots to skew the balance against candidate Trump.[97] As previously stated, there was a tremendous influx in absentee-by-mail votes cast in the 2020 presidential election, and counting them all was time consuming and tedious.

SB 202 did not change the class of voters who are eligible to vote via mail-in absentee ballot, but the bill clarifies the frame for applications, amends the process for requesting such ballots, and adds security measures to reduce the possibility of illegitimate absentee-by-mail votes from being tallied.

This alternative means of voting is still eligible to Georgians over the age of 65, constituents with disabilities, Georgia citizens who are in the

93. Drew Desilver, *Turnout soared in 2020 as nearly two-thirds of eligible U.S. voters cast ballots for president*, PEW RESEARCH CENTER (January 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/ [https://perma.cc/98WU-QNGQ].

94. *Id.*

95. Author's Note: by "nontraditional" votes, I mean votes cast in a means other than at the ballot box on election day. This includes absentee-by-mail voting and early voting.

96. Ga. S. Bill 202, 2021 Ga. Laws 14 § 2, para. 17.

97. See *In re* Enforcement of Election Laws, 2020 WL 6701610 at *1; *Boland*, 2021 WL 103596, at *1; *Wood I*, 501 F. Supp. 3d at 1310; *see also Texas*, 141 S. Ct. at 1240.

military, or Georgia citizens residing overseas.[98] Georgians falling into one of these specified classes will automatically receive absentee ballots after successfully applying for one. However, the change comes with the time-frame; Georgia voters now must request an absentee-by-mail ballot within 78 days of a general or runoff election, instead of the previous 180 days.[99] The deadline for submitting an application has also changed—Georgians wishing to vote-by-mail must turn in their application two Fridays before an election; the previous deadline was one Friday before an election.[100]

These truncated timeframes have been put in place to whittle down the number of absentee-by-mail votes election workers must process in the run-up to election day. Georgia voters who were eligible to vote in this manner before SB 202 are still eligible, they just need to get their applications submitted in a tighter window. In fact, the class of eligible electors is expanded by SB 202; new language has been added to ensure that Georgians who are incarcerated but are eligible to vote must be permitted and assisted with the application for absentee ballots.[101] The effects of this change should still permit access to absentee-by-mail voting to Georgians who need it but will reduce the strain and stress for poll-workers on election day.

Applying for an absentee-by-mail ballot will now require Georgia voters to provide their driver's license number, a state identification number, or a copy of another acceptable form of voter identification.[102] This measure is intended to make sure each Georgian gets one, and only one, vote. Although some voter identification laws are maligned as being discriminatory, Georgia accepts a wide-range of identification forms, many of which are free, and recent studies suggest that voter identification laws neither increase or decrease voter turnout.[103] The identification measures are required so election workers can verify the votes, in lieu of the previous method of merely matching signatures.

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98. Ga. S. Bill 202, § 25. Note: the guidelines set forth by SB 202 regarding absentee-by-mail voting are all in accordance with federal law.

99. *Id.* § 25(a)(1)(A).

100. *Id.*

101. *Id.* § 25(a)(1)(D).

102. *Id.* § 25(a)(3)(B).

103. Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008–2018*, NATIONAL BUREAU OF ECONOMIC RESEARCH, https://www.nber.org/papers/w25522 [https://perma.cc/J4C9-625V] (last visited Dec. 13, 2022). This study showed that voter identification laws had "no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation."

In keeping up with modern times and complex changes in technology, the Georgia General Assembly added security requirements for absentee-by-mail ballots. The ballots must now be printed on a special type of anti-forgery security paper, with the responsive precinct name and identification clearly printed at the top of the ballot.[104] Completed absentee ballots must be returned in an included security envelope that must have the voter's name, signature, date of birth, and either the voter's driver's license number, state identification number, or the last four digits of the voter's Social Security number.[105] Additional security measures prohibit state and local governments from sending out unsolicited absentee-by-mail ballot applications and mandate that third-party groups who send such applications must designate that the applications are "NOT an official government publication" and are "NOT [] ballot[s]."[106]

The Georgia State Election board authorized the use of absentee ballot drop boxes due to the COVID-19 emergency in order to prevent unnecessary exposure to vulnerable Georgians. These boxes were not used in the state prior to the pandemic, but they were implemented to increase safety during the 2020 election season.[107] Although these drop boxes were approved due to the pandemic emergency, SB 202 codifies their utilization and ensures that drop boxes are here to stay in Georgia, making voting more accessible for absentee-by-mail voters. Under the new law, each of the 159 counties in Georgia are required to have at least one drop box but may have no more than one box per 100,000 voters or one for every early voting site, whichever number is fewer.[108] The boxes must now be located inside the early voting sites and will only be accessible when such sites are open.[109] These boxes increase civic engagement amongst Georgia voters and their codification stands in stark contrast to the apprehension other Republican-led state legislatures have expressed regarding their security and usefulness.[110]

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104. Ga. S. Bill 202, 2021 Ga. Laws 14 § 25(a)(1)(C).

105. *Id.* § 28(a).

106. *Id.*

107. Mark Niesse, *Ballot Drop Boxes Approved for Georgia Voters during Coronavirus*, THE ATLANTA JOURNAL-CONSTITUTION (April 15, 2020), https://www.ajc.com/news/state--regional-govt--politics/ballot-drop-boxes-approved-for-georgia-voters-during-coronavirus/4Bir3Ymx1zL0ZOGsXMazEO/ [https://perma.cc/SWL2-QMJ3]. The drop boxes are simply secure receptacles for Georgia voters to drop off their absentee-by-mail ballots, free of any postal charge.

108. Ga. S. Bill 202, 2021 Ga. Laws 14 § 26(c)(1).

109. *Id.*

110. *See* LaRose, F. Directive 2020-16 (Aug. 12, 2020) https://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-16.pdf (Ohio Secretary of State Frank LaRose

2. Changes to Early Voting

SB 202 contains measures that both expand and restrict Georgian voters' ability to vote early. The bill gives Georgia counties the option to expand voting hours from 9:00 a.m. through 5:00 p.m. to 7:00 a.m. through 7:00 p.m. and requires early voting sites to be open, at the very minimum, 9:00 a.m. to 5:00 p.m.[111] Legislators also require an additional Saturday of early voting and permit counties to decide whether they will allow Sunday voting hours.[112] Additionally, the bill has provisions that prohibit mobile polling vehicles, require larger and clearer signage indicating changes to voting locations, and requirements for counties to report and publicly post daily statistics about how many people have voted and additional information about absentee ballots.[113]

Section 33 contains one of the most controversial aspects of SB 202: the prohibition of anyone other than poll-workers from distributing food and water.[114] . This portion, which has been highly criticized by the media and served as a central talking-point in the pushback from economic leaders, politicians, and the MLB, reads:

> No person shall solicit votes in any manner or by any means or method, nor shall any person distribute or display any campaign material, *nor shall any person give, offer to give, or participate in the giving of any money or gifts, including, but not limited to, food and drink, to an elector*, nor shall any person solicit signatures for any petition, nor shall any person, other than election officials discharging their duties, establish or set up any tables or booths on any day in which ballots are being cast.[115]

These restrictions apply to a radius of 150 feet around buildings where polling is occurring, within any such buildings, or within 25 feet of any voter standing in line to vote.[116] The bill includes language that clearly allows poll-workers to set up water stations to keep Georgians waiting in line to vote hydrated, but that caveat was insufficient to insulate the

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issued a directive limiting each county to just one drop box, regardless of population); *see also* Abbott v. Anti-Defamation League Austin, 2020 WL 6265526 (2020). The Texas Supreme Court upheld Governor Abbott's executive order limiting each county to just one drop box, regardless of population.

111. Ga. S. Bill 202, 2021 Ga. Laws 14 § 28(d)(1)(B).

112. *Id.*

113. *Id.* § 28(d)(1)(B)(3).

114. *Id.* § 33(a).

115. *Id.* (emphasis added). The italicized portion of the quote is the new language; the rest of the provision is carried over from the 2017 version of O.C.G.A. § 21-2-414 (2017).

116. *Id.*

Georgia General Assembly from criticism.[117] This section was likely intended to prevent political groups from influencing queued voters, but the heavy-handed language essentially criminalizes handing out water; the law makes such activities a misdemeanor, punishable by up to a year of incarceration, a $1,000 fine, or both.[118]

3. Changes to the State Election Board

Some of the biggest changes enacted with the passage of SB 202 are seemingly innocuous to most Georgia voters but they have the potential to make the greatest impact on election procedure in the Peach State. Under SB 202, the State Election Board has been granted the power to replace county election boards upon a finding of poor performance after evaluation.[119] The State Election Board may take this action after receiving a petition from an aggrieved party or it may choose to conduct the evaluation on its own accord.[120] The law gives the State Election Board the power to then replace the county election board and/or the probate judge that supervises elections in the respective county with an election "superintendent" of their choosing.[121] Essentially, the state board could replace an entire county board of elections with one individual of their choosing; the state board-imposed superintendent would then have unilateral power to oversee vote certification procedures, alter polling locations, and decide matters involving voter eligibility. This seemingly small change gives the Republican-controlled State Election Board enormous power over counties and the way they conduct elections in Georgia.

In what appears to be an effort to increase transparency and reduce the appearance of impropriety, SB 202 removes the sitting secretary of state from their role as State Election Board chair.[122] Instead, the state board would be chaired by a nonpartisan individual who has not run for public office, worked with an official political party organization, or made campaign contributions for two years prior to appointment.[123] This new chair must be a nonpartisan actor, but must be appointed by a majority of the Georgia House of Representatives and the Georgia Senate, both of

117. *Id.* § 33(e) ("This Code section shall not be construed to prohibit a poll officer from . . . making available self-service water from an unattended receptacle to an elector waiting in line to vote.").

118. O.C.G.A. § 21-2-414(f) (2021).

119. Ga. S. Bill 202, 2021 Ga. Laws 14 § 7.

120. *Id.* § 7(a).

121. *Id.* § 6.

122. *Id.* § 5(a.1)(1).

123. *Id.* § 5(a.1)(2).

which are Republican majorities.[124] Furthermore, SB 202 gives the governor power to appoint a qualified chair if the position becomes vacant when the General Assembly is not in session.[125] These changes give the General Assembly, the governor, and the State Election Board much more power than before which drastically raises the risk of partisan interference in the way Georgia counties manage state and federal elections, despite the insistence that the changes focus on nonpartisanship.

4. Other Changes

As previously mentioned, SB 202 is a dense bill with a litany of changes to the election code of Georgia. Some additional changes include: the implementation of a law enforcement hotline to collect voter complaints; unlimited challenges to voter eligibility; greater access to poll watchers; prohibition of election funding from outside sources; accelerated runoff elections; and required partisan primaries for special election.[126]

IV. DID THEY GET IT RIGHT?

The Election Integrity Act of 2021 sparked reactions on both sides of the partisan aisle; Republicans and their supporters enthusiastically endorsed the bill and opined that the legislation would help prevent fraud and "re-legitimize" the electoral procedures in Georgia, while left-leaning opponents cried foul, insisting that the new law was a form of de facto discrimination meant to suppress turnout of voting Georgia democrats. The reaction was not limited to headlines and tweets, however, as the fight over on the changes made by, and the constitutionality of, SB 202 quickly entered the courtroom.

A. In re *Georgia Senate Bill 202*[127]

The United States District Court for the Northern District of Georgia recently consolidated six lawsuits that challenged SB 202. The court decided to consolidate the cases as they "involve virtually identical defendants" and pertain to "mostly the same facts and legal issues."[128]

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124. *Id.*

125. *Id.* § 5(a.1)(3).

126. *Id.*

127. 2022 WL 3573076 (N.D. Ga. 2022).

128. *In re* Georgia Senate Bill, Order Opening Consolidated Case, 2022 WL 3573076 (N.D. Ga. 2022). The consolidated cases were The New Ga. Project v. Raffensperger, 2021 WL 2450547 (N.D. Ga 2021); United States v. Georgia, 574 F. Supp. 3d 1245 (N.D. Ga 2021);

The underlying suits were brought against Georgia officials by various voter-advocacy groups alleging that the "line warming" provision in SB 202 violated the First Amendment.[129] The consolidated plaintiff class consisted of various organizations who focused on "fostering participation in the democratic process" and many of the plaintiff organizations were seeking a preliminary injunction on the enforcement of this provision, as part of their community outreach consisted of line-warming during elections.[130]

Before issuing an opinion on the constitutionality SB 202 § 33, the court first turned to the history of line warming in Georgia.[131] The Georgia General Assembly amended the election code in 2010 to create a restricted "buffer zone" within 150 feet of the exterior of buildings hosting polling sites. The 2010 amendment also outlined a "supplemental zone" extending to the twenty-five feet around any voters who were standing in line to vote.[132] Under the 2010 amendment, solicitation of signatures or votes, and the distribution of campaign literature was banned within these zones.[133] Over the next decade, there were growing concerns that, despite the clear prohibition of certain activities within these demarcated zones, political organizations were finding ways to work around the bans. Some of these methods of circumnavigation included volunteers handing out food, coffee, and other "gifts of value" while dressed in "political attire."[134] State legislators became concerned that the humanitarian gesture of offering water to voters waiting outside had mutated into the bribes of food and drink offered to persuade voters to cast their ballot for the party or politician supported by the grantors. Thus, the state legislators amended the provision with SB 202 to create a bright-line rule about what was and was not allowed at polling locations.[135] Because the bright-line rule created by SB 202, a prohibition on disseminating food, drinks, water, literature . . . essentially anything, limited the plaintiff's

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Sixth District of African Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260 (N.D. Ga 2021); Ga. State Conf. of the NAACP v. Raffensperger, 2021 WL 6495893 (N.D. Ga. 2021); The Concerned Black Clergy of Metropolitan Atlanta, Inc. v. Raffensperger, No. 1:21-cv-01728-JPB (N.D. Ga 2021); and Asian Americans Advancing Justice Atlanta v. Raffensperger, No. 1:21-cv-01333-JPB (N.D. Ga 2021).

129. *In re* Georgia Senate Bill, 2022 WL 3573076, at *1. "Line-warming" is used by both the court and by plaintiffs to describe the distribution of food, drinks, or other gifts to voters who are queued at voting sites.

130. *Id.*

131. *Id.* at *2.

132. *Id.* at *4. *See* Ga. H.R. Bill 540, Reg. Sess. (2010).

133. *In re* Georgia Senate Bill, 2022 WL 3573076, at *2.

134. *Id.* at *5.

135. *Id.* at *7.

ability to express themselves, they claimed it constituted a violation of their First Amendment rights.[136]

The First Amendment explicitly prohibits laws that "abridge the freedom of speech" and political speech "occupies the highest, most protected" form of speech.[137] Although political speech is one of the most sacred categories of protected speech, the Supreme Court has recognized that there are times that political speech, in regards to elections, may need to be regulated to preserve the fairness and honesty of elections and to prevent "campaign-related" disorder.[138] Before determining what level of scrutiny must be applied, however, the court had to first determine whether or not the Plaintiffs were engaging in activity that constituted expressive conduct, which is protected by the First Amendment.

Any time a court addresses the constitutionality of a particular statute that regulates speech, the court must first consider whether the regulations "draws distinctions based on the message [the] speaker conveys."[139] The court determined that line warming is considered speech, and justified this determination by looking at the preamble of SB 202, which states that the statute is intended to prevent the "improper interference, political pressure, or intimidation" on voters.[140] Thus, the restriction on such conduct is a content-based regulation on speech.

After deciding that line warming prohibition is a content-based restriction, the Court applied strict scrutiny review to determine whether the provision is constitutional.[141] Content-based restrictions are presumed to be unconstitutional, and the government must prove that such restrictions are narrowly tailored to meet a compelling government interest and are the least restrictive means to advance such compelling interest.[142] To overcome a strict scrutiny analysis, however, a government must do more than prove that the regulation is narrowly tailored; the state actor must show that the regulations are necessary to further the compelling interest.[143]

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136. *Id.* at *8.

137. *Id.* at *9 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992)).

138. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

139. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

140. *In re* Georgia Senate Bill, 2022 WL 3573076, at *14; *see* Ga. S. Bill 202, 2021 Ga. Law 14 § 2, para. 13.

141. *Id.*

142. *Reed*, 576 U.S. at 163; *see* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

143. Burson v. Freeman, 504 U.S. 191, 199 (1992).

Speech-restrictions pertaining to elections and the democratic process require the application modified version of strict scrutiny analysis.[144] When a government interest pertains to voter intimidation, a government does not have to demonstrate the that the restrictive regulation is the least restrictive means necessary to further the compelling interest.[145] The rationale behind this relaxation of requirement is to permit legislatures to take action to prevent electoral chaos rather than wait for problems to occur.[146] Furthermore, protecting the fundamental right of voting freely is presumed to be a compelling interest. States should not have to wait for voter intimidation or violence to occur before taking corrective action. This modified strict scrutiny analysis is known as the "*Burson* standard."

Although the *Burson* standard removes the requirement of a government showing that the pertinent restriction is the least restrictive measure available, the government party must still show that the restriction is necessary and is narrowly tailored.[147]

The Georgia General Assembly's interest in "preserving the integrity of [Georgia's] election process" is presumed, and the district court found that legislators had proved necessity, despite having no requirement to do so.[148] After finding that the state had satisfied part of a strict scrutiny test, the court then looked to the reasonableness of the line warming provision. The court broke down the provision into two parts, the restriction on the "buffer zone" and the "supplemental zone". The state-imposed restrictions on the buffer zone were found to be reasonable, as the buffer zone only extended to 150 feet beyond a polling station, noting that similar zones that covered larger areas had been upheld by federal courts.[149] Thus, the restriction, as applied to the buffer zone area, was not an unreasonable impingement on First Amendment freedoms.

The court then turned to analysis of the supplemental zone and found that, as the supplemental zones are virtually limitless, with no lines of demarcation, they are unreasonable and constitute a significant violation on free speech.[150] Having decided that the buffer zone restrictions were constitutionally sound, but the supplemental zone restrictions were

144. *Timmons*, 520 U.S. at 358.

145. *Burson*, 504 U.S. 191 at 208–10.

146. Eu v. San Francisco Co. Democratic Cent. Committee, 489 U.S. 214, 231 (1989).

147. *In re* Georgia Senate Bill, 2022 WL 3573076, at *18.

148. *Id.* (quoting Purcell v. Gonzalez, 549 U.S. 1, 4 (2006)).

149. *In re* Georgia Senate Bill, 2022 WL 3573076, at *19 (citing Schirmer v. Edwards, 2 F.3d 117, 122 (5th Cir. 1993)) (upholding a similar zone that extended to 600 feet around the exterior of buildings hosting polling sites).

150. *In re* Georgia Senate Bill, 2022 WL 3573076, at *20.

unconstitutional, the court then looked to the "*Purcell* doctrine" to determine whether the injunctive relief sought by the plaintiffs should be ordered.[151]

The *Purcell* doctrine, as established in *Purcell v. Gonzalez*,[152] permits, and even encourages, courts to decline injunctions that impact existing election rules and procedures when an election is imminent.[153] The *Purcell* court found that such injunctions should be avoided, as they would likely cause "voter confusion" and would increase the likelihood that eligible voters would refrain from going to the polls.[154]

In the case at hand, the court ultimately concluded that, despite the finding that portions of the line warming provision were unreasonable infringements of First Amendment rights, the injunction sought by the plaintiffs would conflict with the *Purcell* doctrine.[155] Thus, the injunction was denied, but acknowledged that, barring the implications imposed by the *Purcell* doctrine and the temporal proximity to the 2022 elections, the plaintiff's claim was meritorious.[156] This decision is notable, as the court left the door open for further litigation on the constitutionality of the line warming provision in the future, as long as such litigation occurs well before (or after) an election season.

V. CONCLUSION

The battles over election law will likely continue in the future; it is foreseeable that a court will strike down the unconstitutional provisions of § 33 if a future petitioner challenges the ban on line warming outside of an election season. It is yet to be seen whether the provisions that grant sweeping power to the State Election Board will hold up in court. And, while there were many fears that the provisions regarding voting-by-mail would disenfranchise Georgia voters, more Georgians are casting absentee ballots than ever before.[157] On the first day polls opened in Georgia, over 133,000 voters cast their ballots in person; approximately 11,000 absentee ballots had already been returned, and

151. *Id.* at *22.

152. 549 U.S. 1 (2006).

153. *Id.* at 5–6.

154. *Id.* at 4–5.

155. *In re* Georgia Senate Bill, 2022 WL 3573076, at *27.

156. *Id.* The holding of *In re* Georgia Senate Bill 202 essentially invites future plaintiffs to challenge the law in the future, as long as they file far in advance of any imminent elections.

157. Mark Niesse, *Turnout on first day of Georgia early voting breaks midterm record*, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 18, 2022), https://www.ajc.com/politics/georgia-election-2022-record-number-of-voters-at-start-of-early-voting/GT3VOM7355GTPPDT3KQ45K52LE/ [https://perma.cc/4BDJ-8XPB].

40% of these early voters were minorities. These metrics, across the board, indicate a sharp increase from the 2018 elections, so it seems safe to say that SB 202 has not yet made it more difficult for Georgians to cast their ballot.[158]

Voting turn-out numbers are already reaching historic highs. This indicates that more Georgians feel like it is their duty to vote, and this increase in civic engagement is precisely what is needed to increase voter confidence. There are numerous reasons as to why more people are voting, but the fears that SB 202 was going to dissuade Georgia voters should be abated . . . for now. There are still problems with giving the GOP-controlled Georgia General Assembly and State Election Board such unilateral power over electoral procedures. The prohibition on line warming has already been found to be, at the very least, partially unconstitutional. And the debate surrounding voter ID laws is unlikely to die out any time soon. But as Georgia's election law gets challenged, affirmed, struck down, and amended, other states may look to Georgia's legislation and electoral procedures as a roadmap to how states may effectively, and constitutionally, conduct and oversee their own elections.

158. *Id.*