IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COALITION FOR GOOD GOVERNANCE, et al., Plaintiffs, vs. BRIAN KEMP, et al., Defendants.	CIVIL ACTION NO.: 21-CV-02070-JPB

AMICUS CURIAE BRIEF OF
GEORGIA FIRST AMENDMENT FOUNDATION

The Georgia First Amendment Foundation ("the Foundation") respectfully submits this brief as *amicus curiae* and requests that the Court grant Plaintiffs' Motion for Preliminary Injunction with respect to the challenged provisions of SB 202 that infringe First Amendment Rights.[1]

The Georgia First Amendment Foundation is a Georgia-based non-profit that has advocated for decades regarding the right of citizens, journalists, and public servants to gather information about the operation and performance of government institutions. With respect to this mission, there is no government function for which transparency is more important than elections. Public confidence in the

[1] This amicus brief is submitted solely with respect to the First Amendment issues raised by Plaintiffs and the Foundation takes no position on the other claims set forth in the Complaint and the Motion.

fairness, accuracy, and rectitude of our election system is what imparts our government institutions with legitimacy.

For this reason, the Foundation submits that the limitations on information gathering contained in SB 202 that are challenged in Plaintiff's Motion should be preliminarily enjoined. These limitations – the "Elector Observation Felony," the "Gag Rule," the "Estimating Bans, "and the "Photography Ban" – now take the form of vaguely defined criminal laws that would potentially punish routine, constitutionally-protected newsgathering by journalists and interested citizens. The Eleventh Circuit has forcefully ruled on numerous occasions that criminal laws of this type imposing ill-defined limitations on First Amendment protected speech should be prescriptively enjoined to avoid a "chilling effect" on speech.

For this reason, an injunction is warranted here. Georgia journalists and citizens should not have to retreat from undertaking legitimate news gathering out of concern that they will now be punished for merely "observing," "estimating," or "photographing" important aspects of Georgia elections. SB 202 has imposed new and dangerous restrictions on news gathering that threaten the ability of the public and press to remain informed about Georgia elections.

Identity and Interest of Amicus Curiae

The Georgia First Amendment Foundation is a non-profit which has advocated for greater government transparency and free speech in Georgia for

more than 25 years. The Foundation has been particularly active in connection with Georgia's laws regarding newsgathering, including photographing and filming. As part of its overarching mission, the Georgia First Amendment Foundation also works to ensure Georgia citizens have access to Georgia public forums and spaces, including in buildings of the type in which elections are held.

Argument and Citation of Authority

I. The Passage of SB 202 Made Significant Changes to Georgia Law that Limit Legitimate Information Gathering about Voting.

In-person voting in Georgia has always been a public process. Election superintendents are required "to cause all rooms used as polling places" to be arranged so as "to permit the public to observe the voting without affecting the privacy of the electors as they vote." O.C.G.A. § 21-2-267. During voting, reporters and interested members of the public are generally allowed to enter a polling place to observe voting so long as they remain outside the "enclosed space" (usually behind a temporary guardrail or other temporary barrier) where each elector casts their vote. O.C.G.A. § 21-2-452. Additionally, all locations where votes are counted using scanning equipment are required to be "open to the view of the public." O.C.G.A. § 21-2-483(b). Although Georgia law requires voting to be a public process, SB 202 has introduced vague and ill-defined criminal penalties into Georgia law that will "chill" the right of the press and public to gather information and communicate what they legally observe.

A. The Elector Observation Felony.

SB 202 enacted O.C.G.A. § 21-2-568.1, which renders it a felony "to intentionally observe an elector while casting a ballot in a manner that would allow such person to see for whom or what the elector is voting." The threat of a felony conviction for observing voters in the act of voting threatens to impose a substantial chill on legitimate First Amendment-protected newsgathering. A reporter or citizen who decides to examine how a local polling location is functioning while remaining outside the enclosed space will nonetheless be at risk of prosecution if officials arbitrarily decide the reporter's "manner" of observation could have allowed them to observe how electors were voting. The statute makes no attempt specify what "manner" of observation is forbidden.

For this reason, the Elector Observation Felony is unconstitutional. The law is well-established that neither members of the public nor the press can be prosecuted for observing or communicating information that is readily observable from a location where citizens and journalists are allowed to be. *See generally Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down Florida statute criminalizing disclosure of crime victim information publicly posted by sheriff: "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."); *Smith v. City of Cumming*, 212 F.3d 1332,

1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2012) ("It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or of the press' and encompasses a range of conduct related to gathering and dissemination of information.").

B. The Gag Rule.

SB 202 also enacted O.C.G.A. § 21-2-386(a)(2)(B)(vii), which precludes "monitors" and "observers" from "communicating any information that they see while monitoring the processing or scanning of absentee ballots, whether intentionally or inadvertently, about any ballot, vote, or selection to anyone other than an election official who need such information to lawfully carry out his or her official duties." As a threshold matter, the "Gag Rule" is void for vagueness under First Amendment standards because the statute never defines who constitutes an "observer." By its ordinary meaning, this language could include any individual who observes a tabulation process that is statutorily required to be "open to the view of the public." O.C.G.A. § 21-2-483(b). For this reason, the statute is fatally overbroad under well-established First Amendment standards. *See, e.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72, 117 S.Ct. 2329, 138 L.Ed.2d 874

(1997) ("The vagueness of [content-based regulations of speech] ... raise[s] special First Amendment concerns because of its obvious chilling effect on free speech.")

As the Eleventh Circuit has explained:

> Content-based regulations require "a more stringent vagueness test." While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," "government may regulate in the area" of First Amendment freedoms "only with narrow specificity."

Wollschlaeger v. Governor, Florida, 848 F.3d 1293, 1320 (2017) (internal citations omitted). Here, Georgia has not regulated with "narrow specificity." To the contrary, any "observer" from the public or press who witnesses the tabulation process thereafter faces an unlawful restriction on their right to communicate what they observed.

Moreover, even if the Gag Rule had narrowly defined "observers" to confine it to government officials directly involved in the tabulating process, the statute would fail because it is not narrowly tailored to serve "a state interest of the highest order." *See, e.g.*, *Cooper v. Dillon*, 403 F.3d 1208, 1218-19 (2005) ("Because the curtailment of First Amendment freedoms by [the Florida statute] is not supported by a compelling state interest, the statute fails to satisfy strict scrutiny and unconstitutionally abridges the rights to speak, publish, and petition government."). The Gag Rule is underinclusive and impermissibly limits to whom information can be disclosed thereby undermining its purported goal of securing election integrity.

It, in effect, requires the "observer" to disclose possible wrongdoing solely to the very election official who may be involved in the observed misconduct. The Rule cannot stand constitutional muster.

C. The Estimating Bans.

The Estimating Bans fail for the same reasons as the Gag Rule, but these limits on speech proceeds one constitutional misstep further. The Estimating Bans, found at O.C.G.A. § 21-2-386(a)(2), state in subsection A that "no person shall tally, tabulate or estimate . . . the absentee ballots cast until time for the closing of the polls . . ."; and state in subsection B that no "monitors or observers" shall conducting such "tallying, tabulating or estimating" while "viewing or monitoring the process set forth in this paragraph." Not only do these statutes fail because they appear to criminalize the activities of any "person" or "observer" in connection with the tabulating of absentee ballots – as opposed to a narrow class of election officials directly involved in the process – but they take the added step of criminalizing "pure thought." The mere mental act of "estimating" – whether expressed or not – is rendered a criminal activity. The notion of criminalizing a mental process is starkly at odds with First Amendment principles. *See, e.g., Palko v. Connecticut*, 302 U.S. 319, 327 (1937) ("freedom of thought, and speech ... is the matrix, the indispensable condition, of nearly every other form of freedom.").

D. The Photography Rule.

Finally, the Photography Rule introduced by SB 202 significantly changes Georgia law. Previously, Georgia law did not allow photos, video, or other recordings to be made "within [a] polling place" except if permitted by "a poll manager in his or her discretion." O.C.G.A. § 21-2-413(e). Thus, under prior Georgia law, photography of voting could take place (1) within the polling place with permission of the poll manager and (2) outside the polling place with the permission of any elector in possession of their own absentee ballot. By the enactment of O.C.G.A. § 21-2-568.2, SB 202 changed the law. The Photography Rule will render it illegal to: "(1) [p]hotograph or record the face of an electronic ballot marker while a ballot is being voted or while an elector's votes are displayed on such electronic ballot marker; or (2) [p]hotograph or record a voted ballot."

The Photography Rule extends too far. While prior Georgia law could be justified on trying to protect "the privacy of electors as they vote[d]" "within a polling place," no similar privacy restriction can justify the broad sweep of O.C.G.A. § 21-2-568.2. For example, the Photography Rule would prevent routine press photographs or video recordings of election workers counting ballots (or recount ballots) in tabulation rooms after elections. The Photography Rule would also prevent an individual voter from taking a photograph (or photocopy) of their own absentee ballot even though it will become a public record once it is voted.

There is no justification for this law. Defendants make vague allusions to voting fraud but offer no substantiation for that claim. An individual citizen is constitutionally entitled to take a photograph of their own absentee ballot while they have custody of it. Because they are legally in possession of their ballots to photograph them, the government cannot penalize citizens from waiving their own privacy right and sharing an image of the appearance of the ballot with others.

The Photography ban should be enjoined. The United States Supreme Court has protected photographic images and depictions in even the most concerning of circumstances. In *U.S. v. Stevens*, 559 U.S. 460 (2010), the Court rejected a federal law attempting to criminally ban the "creation, sale, or possession of certain depictions of animal cruelty." The Court emphasized the language of the statute could not be reasonably confined to constitutionally unprotected speech, and it rejected the government's efforts to overcome this flaw by asking the Court to trust the government's prosecutorial discretion. "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* at 480.

For similar reasons, the Court should grant an injunction against the Photography Rule. It purports to limit photography not just "within a polling

place," but to extend the restriction to all depictions of a voted ballot. This goes too far. The Rule should be enjoined.

II. The Criminal Penalties Instituted by SB 202 Impose A Constitutionally Impermissible "Chilling Effect" on Speech and Should be Enjoined

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373(1976). The Eleventh Circuit has repeatedly recognized that this principle is particularly apt where regulatory or criminal laws are enacted in a way that causes individuals to fear government punishment as a result of exercising First Amendment rights.

The Elector Observation Felony, the Gag Rule, the Estimating Bans, and the Photography Ban are calculated to try to stop interested members of the media and public from obtaining and disclosing information about the conduct of Georgia elections. The statutes are content based restrictions and, as such, faced the heaviest of constitutional burdens. As the Eleventh Circuit recently explained:

> Few categories of regulation have been as disfavored as content-based speech restrictions, which are "presumptively invalid." That's because, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." So regulations that are grounded in the content of speech, and that allow the government "to discriminate on the basis of the content" of that speech, "cannot be tolerated under the First Amendment.

Otto v. City of Boca Raton, Florida, 981 F.3d 854, 862 (2020) (internal citations omitted). Indeed, standing principles in First Amendment injunctive relief cases are grounded in concerns about "self-censorship" and ensuring "breathing space" for speech. *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 2003) ("[W]e agree with the First Circuit's admonition that the credible threat of prosecution standard 'is quite forgiving.'").

The restrictions on First Amendment rights imposed by SB 202 should be enjoined. The Foundation respectfully requests that Plaintiff's Motion for a Preliminary Injunction be granted.

This the 30th day of June, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2021, I filed a copy of the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send notice of the filing to all counsel of record, including:

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