
THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 75 Commentaries FALL 2022

WHY GEORGIA'S VOTING RIGHTS LEGISLATION VIOLATES THE FIRST AMENDMENT

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INTRODUCTION

Voting rights jurisprudence in the United States has faced substantial changes since the adoption of the original Constitution, when only white male property owners could vote.[1] The Constitution does not explicitly provide protection of the right to vote.[2] Hence, Black and other minority voters had been denied the right to vote, and once they were allowed to vote, they faced restrictions in voting.[3] Even with the passage of the Fourteenth and Fifteenth Amendments of the Constitution, Black voters still faced disenfranchisement.[4] It was not until the passage of the

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1. Lesley Kennedy, *Voting Rights Milestones in America: A Timeline*, HIST. (Apr. 19, 2021), https://www.history.com/news/voting-rights-timeline.

2. Angelys Torres McBride, *The Evolution of Voting Rights in America*, NAT'L CONST. CTR. (May 27, 2021), https://constitutioncenter.org/blog/the-evolution-of-voting-rights-in-america.

3. *See generally* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman & Chandler Davidson eds., 1992) (providing an overview of the Voting Rights Act and its significance after the first Reconstruction era).

4. *Id.* at 7.

Voting Rights Act of 1965 that notable progress in Black voter participation began to develop.[5]

Yet, this development has not stopped legislators and other state actors from introducing restrictive voting rights bills.[6] At issue in this commentary is Georgia's recently enacted statute known as the Election Integrity Act of 2021 ("SB202").[7] The Department of Justice has filed a complaint against the State of Georgia,[8] alleging that the law is racially discriminatory and violates Section 2 of the Voting Rights Act, Section 10301 of Title 52 of the U.S. Code, and the Fourteenth and Fifteenth Amendments of the United States Constitution.[9]

This commentary seeks to explore the possibility of challenging SB202 under the First Amendment Freedom of Speech Clause. While the complaint brought by the Justice Department has merit, it was a missed opportunity to have the Court determine that voting is speech. If the Court were to hold that voting constitutes free speech, then it would follow that restrictive voting legislation violates the First Amendment. This commentary will argue that although the Court has never held that voting constitutes speech, the Court has left the door open through its decisions, for example in *Buckley v. Valeo*,[10] that this is possible.

I. SB202 AND ITS EFFECT

SB202 consists of many restrictions. First, SB202 targets access to absentee ballots.[11] Additionally, SB202 provides new restrictive identification requirements, such as mandating that an absentee ballot application have the number from a "Georgia driver's license number or identification card" issued by the Department of Driver Services ("DDS-issued ID").[12] It has been shown that Black voters make up 56% of the

5. *Id.* at 7, 21.

6. *See Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021.

7. S. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

8. Complaint, United States v. Georgia, No. 21-cv-02575 (N.D. Ga., June 25, 2021). Additional parties to the complaint are the Georgia State Election Board and Brad Raffensperger, Georgia's Secretary of State. *Id.* at 1.

9. *Id.* at 44–45; *Justice Department Files Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provisions of New Voting Law*, U.S. DEP'T OF JUST. (June 25, 2021), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-georgia-stop-racially-discriminatory.

10. 424 U.S. 1, 19 (1976).

11. *See* Ga. S. 202 § 16; Complaint, *supra* note 8, at 10–20.

12. Ga. S. 202 § 28. To further comply, the DDS-issued ID number must be printed on the absentee ballot envelope; if the voter does not have the ID number, then he or she can use another form of identification, for example a utility bill. *See id.* §§ 25–28; Complaint, *supra* note 8, at 13–15.

voters who do not have a driver's license number associated with their registration and are less likely to have a DDS-issued ID.[13] The total number of registered voters in Georgia by May 12, 2021, was 7,395,688; of that, 3,896,526—52.7%—were non-Hispanic white, and 2,215,230—30%—were non-Hispanic Black.[14] SB202 also places new restrictions on the time, place, and manner of the election process; for example, it requires one drop box per county and limits additional drop boxes for ballots.[15]

II. CURRENT WAYS TO CHALLENGE VOTING LAWS AND THE DIFFICULTIES

Currently, to challenge an election law like SB202, an injured party can bring a cause of action under the Equal Protection Clause of the Fourteenth Amendment,[16] the Fifteenth Amendment,[17] or the Voting Rights Act of 1965.[18] The requirements for establishing these causes of action are similar; however, the Voting Rights Act of 1965 was amended in 1982 to address the court ruling in *City of Mobile v. Bolden*.[19] However, because of decisions in cases like *Crawford v. Marion County Election Board*[20] and *Brnovich v. Democratic National Committee*,[21] the Court has significantly weakened the Fourteenth and Fifteenth Amendments analysis and the Voting Rights Act of 1965. Thus, it is necessary to reevaluate the way voting rights restrictions are challenged.

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13. Complaint, *supra* note 8, at 15.

14. *Id.* at 6. As such, although non-Hispanic Black voters represent approximately 30% of registered voters, they make up 56% of voters that do not have a driver's license. *Id.* at 6, 15.

15. *See* Ga. S. 202 §§ 16, 26. The act also regulates drop boxes, food and water distribution, and out-of-precinct provisional ballots. *See id.* §§ 25, 33; Complaint, *supra* note 8, at 17–22.

16. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

17. *Id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

18. Voting Rights Act of 1965, Pub. L. No. 89-110 § 2, 79 Stat. 437, 437 ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.").

19. 466 U.S. 55 (1980); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to The Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1352–56 (1983).

20. 458 U.S. 527 (1982).

21. 141 S. Ct. 1263 (2021).

III. THE FIRST AMENDMENT ARGUMENT AGAINST SB202

A. Voting as Speech

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . or the right of the people peaceably to assemble."[22] A reasonable interpretation of voting is that citizens are engaging in free speech.[23] The Court has never considered whether voting is speech, and when the argument has been raised in the past, the Court has not rejected this interpretation.[24] However, the Court has expressed in cases dealing with different aspects of the electoral process that voters have a right to have their voices heard through participation and association.[25] Notably, in *Buckley v. Valeo*, the Court determined that the First Amendment protects political association as well as political expression and that limiting the amount of money a person can spend on political communication restricts their expression because it is necessary to spend money to communicate ideas.[26] In making this determination, the Court explained that the First Amendment prohibits election regulations that "restrict the speech of some elements of our society in order to enhance the relative voice of others."[27]

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22. U.S. CONST. amend. I.

23. Armand Derfner & J. Gerald Herbert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 471 (2016).

24. In *Harper v. Va. State Bd. of Elections*, the petitioner argued that the First Amendment guarantees a right to vote in state elections, but the Court—rather than addressing the relationship between voting and political expression—decided the case under the Equal Protection Clause of Fourteenth Amendment. *See* 383 U.S. 663, 665 (1966).

25. Reynolds v. Sims, 377 U.S. 533, 537, 565 (1964). In *Reynolds*—which involved the apportionment plan for Alabama's bicameral state legislature—the Court held that "each and every citizen has an inalienable right to full and effective participation," which requires that "each citizen have an equally effective voice in the election of members of his state legislature." *Id.*; *see also* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (involving an Equal Protection challenge to Georgia's congressional districting statute where the Court found that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live" and that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined"); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969) ("Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.").

26. Buckley v. Valeo, 424 U.S. 1, 19, 93 n.127 (1976) ("[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

27. *Id.* at 48–49. The Court has also expanded the scope of the First Amendment to include the right to spend money in politics, but also to "commercial advertising, flag

To determine what speech is protected, the Court generally relies on the marketplace of ideas theory.[28] The marketplace of ideas theory involves the competition of ideas and the value of having robust debate.[29] The Court is concerned when the government—by disfavoring a particular speech—"potentially interfer[es] with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live."[30] Voting is a way for individuals to express thoughts and ideas that determine the kind of society one wishes to live in and "help shape that society."[31]

The Court has already determined that there is a connection between the Fourteenth Amendment right to vote and the First Amendment right to expressive association.[32] In *Williams v. Rhodes*, the Ohio American Independent Party and the Socialist Labor Party challenged an Ohio law that required a new political party to obtain petition signatures by qualified electors—totaling 15% of the ballots cast in the prior gubernational election—in order to be on the presidential ballot.[33] The Court, using the Equal Protection Clause and the First Amendment, found the requirement unconstitutional.[34] In deciding against the Ohio law, Justice Black explained that it "give[s] the two old, established parties a decided advantage over any new parties . . . and thus place[s] substantially unequal burdens on both the right to vote and the right to

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burning, forms of hate speech, and . . . the right of insurance companies to buy prescription data from drug stores." Derfner & Herbert, *supra* note 23, at 489 (footnotes omitted).

28. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 968 (1978); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.").

29. *See* Baker, *supra* note 28, at 964 ("The classic marketplace of ideas model argues that truth (or the best perspectives or solutions) can be discovered through robust debate, free from governmental interference."); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (explaining that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

30. Reed v. Town of Gilbert, 576 U.S. 155, 177 (2015) (Breyer, J., concurring).

31. *Id.*; *see* Thomas P. Crocker, *Displacing Dissent: The Role of Place in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2606 (2007) ("[T]he core aim of the First Amendment is not to protect autonomy itself, but to protect political speech to further the democratic value of collective self-determination."). *See also* Derfner & Herbert, *supra* note 23, at 487 ("Voting and petition-signing plainly express a point of view and represent a decision to sign on to a particular idea in the marketplace of ideas or support a particular candidate who best represents the voters' political beliefs.").

32. *See* Williams v. Rhodes, 393 U.S. 23, 29–30 (1968); Daniel R. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 772–73 (2016).

33. *Williams*, 393 U.S. at 24–25.

34. *Id.* at 24, 30–31.

associate."[35] Just as there is an expressive nature in associating, there is expressive communication in voting.[36]

Thus, placing restrictions on certain voters while providing an advantage to other voters allows for unequal burdens on the right to vote and the right to speech. Justice Black even alludes to the marketplace of ideas theory when he stated "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."[37] A competition in ideas and governmental policies occurs when individuals vote, and as Justice Black asserts, this competition is at the core of the First Amendment freedoms, which is why voting should be protected by the First Amendment as speech.[38]

Therefore, a restrictive election law like Georgia's can be viewed as restricting the voices of some voters to enhance those of others. The following section will focus on challenging the restrictions under the First Amendment as content-based and viewpoint-based restrictions and how a future party challenging an election law like SB202 may articulate a cause of action and overcome a compelling reason argument.

B. Content-Based Restrictions

It can be asserted that SB202 is a content-based restriction, which means that communication is being restricted because of its message.[39] When a law is determined to be based on content, it is subject to strict scrutiny and will only be deemed valid if it is "narrowly tailored to [serve] a compelling government interest."[40] A law is content-neutral if, in its application, the restriction limits the expression and does not implicate the content or communicative impact of the expression.[41]

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35. *Id.* at 31.

36. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 53 (1975) ("Voting is political expression, not simply in the sense of choosing among candidates and policies, but also in the sense of making a statement about the public issues raised during a political campaign.").

37. *Williams*, 393 U.S. at 32.

38. *See id.*

39. Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 UNIV. CHI. L. REV. 81, 81 (1978); *see also* R. George Wright, *Content-Based on Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 UNIV. MIA. L. REV. 333, 334 (2006) (explaining that content-based restrictions commonly "restrict expression because of its message, its ideas, its subject matter, or its content") (footnotes omitted).

40. Wright, *supra* note 39, at 361; *see* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 UNIV. PA. L. REV. 2417, 2417 (1996).

41. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987); *see* Stone, *supra* note 39 ("Content-neutral restrictions restrict communication without regard to the message conveyed.").

In *Reed v. Town of Gilbert*, the Court determined that the Arizona state law regulating the manner that people could post outdoor signs was content-based.[42] This restriction was obviously content-based because the level of regulation a sign received was based solely on its message; however, the Court noted that facially content-neutral laws are considered content-based regulations of speech: "laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'"[43] Therefore, even if a law is not on its face content-based, it may be deemed content-based if it can be shown that the law was adopted because the government disagreed with the message that is being conveyed.[44]

Here, it could be asserted that the SB202 is a content-based restriction on speech. Unlike in *Reed*, where the law was facially content-based, SB202 on its face is applied to all voting equally. This means that SB202 is facially content-neutral since it does not explicitly determine what regulations apply based on the message being conveyed in an individual's vote. Therefore, it is not necessary to understand the content of the speech to apply the law.

Although SB202 is applied equally to everyone that votes, SB202 was adopted by Georgia because of Georgia's disagreement with the Democratic message that was being conveyed by Black voters.[45] The Democratic message that Black voters tend to convey in their voting does not align with the message Republican legislators convey.[46] Important facts to consider include that SB202 was drafted in secret by the Republican-controlled legislature with little input from the public, local election officials, civil rights advocates, or their Democratic colleagues.[47] Georgia is attempting to maintain Republican control over the legislature, which conflicts with the Democratic message that has

42. 576 U.S. 155, 159 (2015).

43. *Id.* at 164 (alteration in original).

44. *Id.*

45. *See* Richard Fausset et al., *Why the Georgia G.O.P.'s Voting Rollbacks Will Hit Black People Hard*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/us/politics/georgia-black-voters.html (discussing Stacy Abrams's statement in reference to Republicans fixing the system instead of obtaining new votes because Black voters were a "major force in Democratic success in recent elections" and that "[r]ather than grappling with whether their ideology is causing them to fail, they are instead relying on what has worked in the past").

46. *See id.*

47. Erica Thomas, *Georgia's New Voting Restrictions Are a Step Back into Our State's Dark History*, TIME (Mar. 31, 2021, 3:50 PM), https://time.com/5951273/georgia-voting-restrictions-history/. In addition to SB202 being drafted in secret, State Representative Park Cannon, a Black woman, was arrested and handcuffed after knocking on the Governor's door to inquire into why the public was being left out of the SB202 drafting process. *Id.*

recently been conveyed through the election process. Thus, Georgia is targeting individuals that vote Democratic with these regulations; these individuals happen to be Black voters.[48]

In particular, this law can also be considered a viewpoint-based restriction, which is a subsection within content-based restrictions.[49] Courts have reached the conclusion that the category of content-based restrictions must at least include viewpoint-based restrictions.[50] Viewpoint-based restrictions are "laws that expressly restrict the communication of particular ideas, viewpoints, or items of information."[51] It is considered a fundamental rule of the First Amendment that "viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional."[52] Viewpoint discrimination can occur when a facially neutral law is created to suppress individuals from expressing a particular viewpoint.[53] A neutral law will be deemed unconstitutional if it was "motivated by a discriminatory purpose."[54]

Here, it can be asserted that the restrictions imposed in SB202 are viewpoint-based because these restrictions will have the most impact on voters in predominately Democratic areas, like Fulton and Gwinnett, which are also predominately black communities.[55] Black voters have recently been successful in electing candidates who represent their mainly Democratic viewpoint, as seen with the election of President Joseph Biden, as well as Jon Ossoff and Reverend Raphael Warnock for Georgia's Senate seats.[56] Seventy-three percent of Black voters supported

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48. *See Same Old Jim Crow: Georgia Voter Law Counties Long History of Disenfranchisement*, S. POVERTY L. CTR. (Apr. 23, 2021), https://www.splcenter.org/news/2021/04/23/same-old-jim-crow-georgia-voter-law-continues-long-history-disenfranchisement; Zach Beauchamp, *Georgia's Restrictive New Voting Law, Explained*, VOX (Mar. 26, 2021, 2:40 PM), https://www.vox.com/22352112/georgia-voting-sb-202-explained.

49. Wright, *supra* note 39, at 340; *see also* Geoffrey R. Stone, *Content Regulation and The First Amendment*, 25 WM. & MARY L. REV. 189, 197 (1983) (explaining that viewpoint-based restrictions "are at the very core of the content-based/content-neutral distinction").

50. Wright, *supra* note 39, at 340.

51. Stone, *supra* note 49. *See generally* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L. Q. 99 (1996) (defining viewpoint discrimination and analyzing the importance of viewpoint neutrality).

52. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 601 (1998) (Souter, J., dissenting). *See also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

53. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 736–37 (2010) (Alito, J., dissenting).

54. *Id.* at 736; *see also* Crawford v. L.A. Bd. of Educ., 458 U.S. 527, 544 (1982).

55. *See* Fausset et al., *supra* note 45.

56. Complaint, *supra* note 8, at 2; Fausset et al., *supra* note 45; Steven Peoples et al., *Warnock, Ossoff Win in Georgia, Handing Dems Senate Control*, AP NEWS (Jan. 6, 2021), https://apnews.com/article/Georgia-election-results-4b82ba7ee3cc74d33e68daadaee2cbf3.

Raphael Warnock, in comparison to only 22% of white voters.[57] Only 4% of Black voters supported the Republican incumbent Senator Kelly Loeffler, in comparison to 38% of white voters.[58] Furthermore, nine out of ten Black voters supported Jon Ossoff, in comparison to 28% of white voters.[59] Seven percent of Black voters supported the Republican incumbent, Senator David Perdue, in comparison to 70% of white voters.[60] As shown by the voter turnout, Black voters in Georgia tend to vote Democratic.[61]

It was not until after the presidential election of 2020—when the state turned blue—that the Republicans passed SB202.[62] There was a major increase in Black voters utilizing absentee voting.[63] In 2018, 6.89% of Black voters casted an absentee ballot in the November election, in comparison to 4.24% of white voters.[64] In 2020, during the COVID-19 pandemic, Black voter absentee ballot participation increased to 29.27%, while white voters grew to 23.88%.[65] Yet SB202 prevents the state and local government from mailing absentee ballot applications to a voter if it was not requested by the voter or an authorized relative of the voter.[66] Shortening the time frame to request an absentee ballot also targets Democratic voters because "Black voters were more likely than white voters to request absentee ballots between ten and four days before Election Day," which is now prohibited under SB202.[67] In Georgia's fall elections, 52% of absentee ballot requests were rejected because the voters had missed the deadline under SB202.[68]

Additionally, SB202 targets Black voters because they are more likely than white voters to not have the required DDS-issued ID

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57. Laura Santhanam, *Georgia's Black Voters Overwhelmingly Supported Democratic Senate Candidates*, PBS (Jan. 6, 2021, 3:17 PM), https://www.pbs.org/newshour/politics/georgias-black-voters-overwhelmingly-supported-democratic-senate-candidates.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Thomas, *supra* note 47.

63. Complaint, *supra* note 8, at 1.

64. *Id.* at 6–7.

65. *Id.* at 7. Furthermore, in the January 2021 runoff election, absentee ballot participation by Black voters was 27.65%, while white voters was 21.72%. *Id.*

66. S. 202, 156th Gen. Assemb., Reg. Sess. § 25 (Ga. 2021); Complaint, *supra* note 8, at 12.

67. Complaint, *supra* note 8, at 16.

68. Kelly Mena & Ethan Cohen, *New Deadline Imposed by Georgia Voting Law Leads to Rejections of Absentee Ballot Requests*, CNN (Nov. 30, 2021, 5:52 PM), https://www.cnn.com/2021/11/30/politics/georgia-voting-law-absentee-ballot-rejections/index.html.

number.[69] In Georgia, Black voters make up approximately 30% of registered voters and approximately 56% of the voters who do not have the required DDS-issued identification associated with their registration.[70] This discrepancy means that Black voters will be disproportionally burdened in comparison to their white counterparts because they will be required to include an alternative identification when requesting an absentee ballot, which does not include the readily available last four digits of their social security number.[71] If Black voters fail to comply with this requirement, then they encounter the risk of having their ballots discarded.[72] Having the required DDS-issued ID number is a prerequisite for voters to cast an absentee ballot,[73] and, as discussed above, Black voters are more likely to utilize absentee ballots.[74] Again, this situation demonstrates that SB202 is targeting the Democratic message Black voters express when voting.[75]

Furthermore, the provisions in SB202 impose a limit on drop boxes.[76] In Cobb County, which, as mentioned above, recently turned Democratic, approximately 60% of absentee ballots were returned by drop box.[77] In November 2020, some metro-Atlanta counties experienced significant usage of drop boxes, which resulted in additional drop boxes being added for the January 2021 runoff election.[78] However, with this provision, counties like Fulton will see a decrease in drop boxes—specifically eight drop boxes instead of the thirty-eight that were available during the fall 2020 election.[79]

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69. Complaint, *supra* note 8, at 37.

70. *Id.* at 6, 15.

71. *Id.* at 37.

72. *See* Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html.

73. Complaint, *supra* note 8, at 36; Rebecca Reyes, *Georgia's Election Integrity Act of 2021: How Strict Voter ID Requirements Negatively Impact People of Color*, COLUM. UNDERGRADUATE L. REV. (Aug. 22, 2021), https://www.culawreview.org/journal/georgias-election-integrity-act-of-2021-how-strict-voter-id-requirements-negatively-impact-people-of-color?rq=rebecca.

74. *See* Complaint, *supra* note 8, at 6–7.

75. *Id.* at 70.

76. *See* S. 202, 156th Gen. Assemb., Reg. Sess. § 26 (Ga. 2021); Complaint, *supra* note 8, at 18.

77. Complaint, *supra* note 8, at 18.

78. *Id.*

79. Julia Marnin, *Number of Election Drop Boxes Falls from 38 to 8 in Fulton County, Georgia*, NEWSWEEK (Apr. 19, 2021, 3:27 PM), https://www.newsweek.com/number-election-ballot-drop-boxes-falls-38-8-fulton-county-georgia-1584803. Gwinnett County will have approximately six drop boxes, and DeKalb County and Cobb County will have approximately five drop boxes each. Complaint, *supra* note 8, at 20.

As of 2019, over one million people lived in Fulton County.[80] Thus, voters who decide to cast an absentee ballot must travel further than before.[81] As noted, Black voters use absentee ballots more than white voters and are less likely to have access to a vehicle.[82] This provision will make reaching a drop box more burdensome for those who rely on them the most, mainly Democratic voters.[83]

Thus, the purpose behind SB202 was to restrict voters that are minorities who vote Democratic to prevent additional Democratic victories.[84] The history of Georgia reflects that support from Black voters is vital to the success of Democratic candidates.[85] SB202 is therefore restricting the Democratic viewpoint: it limits the ability to have a robust debate because one entire ideology has been removed from the conversation.

Yet, it can be argued that there are still alternative ways for voters to participate in the voting process. Therefore, it is important to consider whether the restrictions that appear modest are actually substantial in hindering the communication of a particular viewpoint.[86] A state has the right to regulate its election process.[87] Therefore, some restrictions will be deemed constitutional "if they are 'necessitated by a compelling government interest' and are 'narrowly tailored to serve that interest.'"[88] Thus, the Court should apply the balancing test that "the greater the interference with the marketplace of ideas, the greater the burden on the government to justify the restriction."[89] The legislators claimed that there was "lack of confidence in Georgia's election system," and that there were allegations of "rampant voter fraud."[90] Ensuring confidence in Georgia's election system and combatting voter fraud are undoubtedly compelling state interests.[91]

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80. Marnin, *supra* note 79.

81. *See id.*

82. Complaint, *supra* note 8, at 6–7, 38.

83. *Id.* at 38. Similarly, the issue of transportation arises from the prohibition on counting a provisional ballot that was not cast in the voter's assigned precinct, even if it was cast in the voter's county. *Id.* at 21–22. Since 2002, these out-of-precinct provisional ballots have been counted toward the election, but now this practice will no longer be permitted if the ballots were cast prior to 5 p.m. on the day of the election. *Id.* at 21.

84. *See Same Old Jim Crow*, *supra* note 48; Corasaniti & Epstein, *supra* note 72.

85. Charles S. Bullock II & Ronald Keith Gaddie, *Voting Rights Progress in Georgia*, 10 N.Y.U. J. LEGIS. & PUB POL'Y 1, 43 (2006).

86. *See* Stone, *supra* note 49, at 224–25.

87. *See* Derfner and Herbert, *supra* note 23, at 490.

88. Stone, *supra* note 41, at 50.

89. *Id.* at 58.

90. S. 202, 156th Gen. Assemb., Reg. Sess. § 2(1) (Ga. 2021).

91. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 225 (2008) (Souter, J., dissenting) ("There is no denying the abstract importance, the compelling nature, of

In *Frank v. Walker*, Wisconsin voters challenged a voting law that required photo identification to vote as violating the Fourteenth Amendment and Section 2 of the Voting Rights Act.[92] The court recognized that detecting voter fraud and promoting public confidence in the election system were compelling state interests.[93] However, the court found virtually no evidence of voter impersonation in Wisconsin and that it was unlikely to become a problem in the foreseeable future; thus, the law was found to be unreasonable.[94] The court also found that the defendants did not produce any empirical support to show that the photo identification requirement furthered the interest of promoting public confidence in the election system.[95] In contrast, the plaintiffs provided evidence that there is "zero relationship" between voter identification laws and the public's confidence in the electoral process, resulting in the court finding that the law did not further the state's interest in promoting public confidence in the electoral process.[96]

Here, in Georgia—like in Wisconsin—no evidence has been found to support a finding of voter fraud.[97] At least nine lawsuits that challenged the 2020 general election based on alleged voter fraud were rejected by state and federal judges.[98] There were also two statewide recounts that confirmed the results of the 2020 general election.[99] Georgia has not produced empirical evidence to support the finding that these restrictive provisions will improve the public's confidence in the electoral process.

Therefore, it is not reasonable to comply with the strict provisions of SB202. SB202 is not narrowly tailored to serve the compelling state interests because Georgia has not provided any empirical evidence to support that these provisions will have any effect on voter fraud or ensure public confidence in the electoral process.[100] Instead, it has been demonstrated that Democratic voters will be substantially burdened,

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combating voter fraud."); Frank v. Walker, 17 F. Supp. 3d 837, 847, 851 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

92. *Frank*, 17 F. Supp. 3d at 842.

93. *Id.* at 847.

94. *Id.* at 847–50; *see also* Veasey v. Abbott, 830 F.3d 216, 263–65 (5th Cir. 2016) (finding that a photo identification requirement violated Section 2 of the Voting Rights Act because there was no evidence that undocumented immigrants were voting to support a finding of voter fraud and no evidence to support the notion that low voter turnout was due to lack of faith in the electoral process).

95. *Frank*, 17 F. Supp. 3d at 850–51.

96. *Id.* at 851–52.

97. Complaint, *supra* note 8, at 40; *see also Same Old Jim Crow*, *supra* note 48; Beauchamp, *supra* note 48.

98. *Same Old Jim Crow*, *supra* note 48.

99. Complaint, *supra* note 8, at 40.

100. *See id.* at 28.

thus increasing the likelihood of not being able to vote or engaging in First Amendment right to free speech.[101]

CONCLUSION

Although there are alternative common ways to challenge restrictive election laws, the First Amendment challenge to SB202 is a powerful one. The Court has consistently diminished the effectiveness of the Voting Rights Act of 1965 and made it more difficult to bring successful challenges under the Fourteenth and Fifteenth Amendments.[102] While the right to vote is not expressly protected in the Constitution, the rights to freedom of speech and association are protected; however, they should be afforded further protection.[103]

The Court has consistently referenced the importance of the "voice" of a voter in an election.[104] Voting is a part of the marketplace of ideas because there are often robust debates and discussions that occur based on the outcome of voting, which is directly the result of individuals expressing their beliefs through voting. Thus, the provisions of SB202 in questions are violative of the First Amendment. The restrictions are content and viewpoint-based, and therefore subject to strict scrutiny.[105]

Additionally, SB202 targets the message that is being conveyed by Black voters that support the Democrat party.[106] The Republican-controlled legislature is attempting to maintain control by suppressing the viewpoints of those who support Democratic ideologies.[107] Georgia does not have a compelling state interest in implementing the regulations in SB202 because there has been no evidence of voter fraud in the elections.[108] Therefore, SB202 violates the First Amendment and should be invalidated.

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101. Corasaniti & Epstein, *supra* note 72.
102. *See supra* Part II.
103. *See* McBride, *supra* note 2; U.S. CONST. amend. I.
104. *See supra* note 25 and accompanying text.
105. *See supra* notes 39, 49 and accompanying text.
106. *See Same Old Jim Crow*, *supra* note 48.
107. *See id.*
108. *See id.*