

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DEMOCRATIC PARTY OF GEORGIA,
INC., DSCC, and WARNOCK FOR
GEORGIA,

Plaintiffs,

v.

THE STATE OF GEORGIA,

Defendant.

Civil Action No. 2022-CV-372734

BRIEF OF AMICI CURIAE LEGAL DEFENSE FUND AND ACLU OF GEORGIA IN
SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER AND/OR INTERLOCUTORY INJUNCTION

Amici Legal Defense Fund (“LDF”) and ACLU of Georgia respectfully submit the following brief asking this Court to grant Plaintiffs’ request for emergency relief, including a declaration that O.C.G.A. § 21-2-385(d)(1) does not prohibit Georgia counties from conducting in-person advance voting on Saturday, November 26, 2022, for the upcoming December 6, 2022 runoff election.

INTRODUCTION

The opportunity to cast ballots at advance voting locations during weekend hours has proven critical for Georgia voters. Weekend voting options are especially important for Georgia’s Black voters, who utilize weekend voting at substantially higher rates than other voters. The Secretary of State’s misreading of Georgia law to prohibit counties from offering advance voting on Saturday, November 26, 2022, will disproportionately burden Black voters. Indeed, in Georgia’s 2021 U.S. Senate runoff election, Black voters were nearly *twice as likely* as white voters to vote on Saturday.

The plain language of the statute permits counties to offer voting on Saturday, November 26, 2022. Moreover, even if there were any ambiguity in the statute, this Court should be guided by the principles underlying Georgia’s constitutional protection of the right to vote, and longstanding canons of statutory interpretation, to resolve that ambiguity in favor of permitting broader voting access.

Amici therefore respectfully urge this Court to grant Plaintiffs’ request for emergency relief, including declaring that O.C.G.A. § 21-2-385(d)(1) does not prohibit counties from conducting in-person advance voting on November 26.

STATEMENT OF INTEREST

Founded in 1940, LDF is the nation’s first and foremost civil rights law organization. For more than 80 years, LDF has been guided by its founder, Thurgood Marshall’s goal of securing equal justice under the law for all Americans and breaking down barriers that prevent Black Americans from fully participating in American democracy. LDF focuses on eliminating racial discrimination in education, economic opportunities, criminal justice, and political participation, and has been involved in precedent-setting litigation relating to representation and voting rights before state and federal courts in matters that implicate the voting rights of people of color. *See, e.g., Milligan v. Merrill*, No. 21-1086 (argued Oct. 4, 2022); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021); *Evenwel v. Abbott*, 578 U.S. 54 (2016); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

The ACLU of Georgia is a non-profit, non-partisan organization dedicated to preserving the civil rights and liberties enshrined in the United States Constitution, in the Bill of Rights, and under state law. In its effort to protect and defend fundamental rights, the ACLU of Georgia routinely challenges laws that inappropriately infringe on those rights, including laws that infringe on Georgians’ ability to cast their ballot. Last year, LDF, ACLU of Georgia, and other civil rights

groups filed a lawsuit in federal court challenging certain provisions in Georgia’s Senate Bill 202.¹ During this litigation, Plaintiffs have offered evidence showing that Georgia voters experience extremely long wait times for in-person voting and that non-white voters face substantially longer wait times than white voters. Amici have long advocated for the right to vote in Georgia, and have even advocated on the issue of advance voting in the December 6, 2022 runoff by sending a letter to all 159 counties urging them to exercise their discretion to add all additional advance voting days permissible under Georgia law.²

BACKGROUND

Georgia voters are set once again to exercise their fundamental right to engage in American Democracy by voting in the December 6 runoff, less than one month after the 2022 general election. It is widely expected that turnout for the December 6 runoff will be extremely high. Advance voting options are critical to accommodate the large number of voters and to avoid long delays at the polls.

Nevertheless, the Secretary of State has misconstrued Georgia law to limit advance voting options for voters throughout the state. On November 12, the Secretary issued an “Official Election Bulletin” to county election officials (“November 12 Bulletin”) declaring that advance voting cannot occur on Saturday, November 26, because, according to the Secretary, it is prohibited by O.C.G.A. § 21-2-385(d)(1).³ The Secretary’s novel interpretation of Georgia law contradicts his own public statements just days earlier that he “anticipate[s] that some counties may likely have

¹ First Amended Complaint, *Sixth Dist. of the African Methodist Episcopal Church v. Kemp*, No. 1:21-cv-01284-JPB (N.D. Ga. May 24, 2021), ECF No. 83.

² See Letter from LDF, ACLU of Georgia, and S. Poverty L. Ctr., to Georgia Election Supervisors and Boards of Election (Nov. 15, 2022), <https://www.naacpldf.org/wp-content/uploads/2022.11.15-FINAL-Letter-re-Runoff-Advance-Voting25.pdf>. Because the Georgia Secretary of State had issued incorrect guidance asserting that counties are not allowed to offer advance voting on Saturday, November 26, Amici did not urge counties to defy this guidance and offer advance voting options on that Saturday.

³ See Exhibit 1 to Plaintiffs’ Memorandum of Points and Authorities in Support of Their Emergency Motion for Temporary Restraining Order and/or Interlocutory Injunction.

Saturday voting following Thanksgiving.”⁴ It also contradicts his office’s interpretation of the law during the 2021 runoff election, when his office permitted counties across the state to provide advance voting on Saturday, December 26, the day after the Christmas holiday.⁵

Within days of the issuance of the November 12 Bulletin, Plaintiffs in this action filed this lawsuit asking this Court to declare that Georgia law does not prohibit counties from providing advance voting on November 26. The same day, multiple counties considered the dates they would provide advance voting for the runoff, recognized the pending legal challenge to the Secretary’s interpretation of O.C.G.A. § 21-2-385, and voted that they would provide advance voting on November 26 if the Secretary reversed his position or this Court permitted it.⁶ Taking into account the voting trends from the 2020 election and the added hurdle of the Thanksgiving and state holidays which fall shortly before December 6, it is imperative that Georgia counties be permitted to exercise their discretion under the law to provide advance voting on Saturday, November 26.

ARGUMENT AND CITATION TO AUTHORITIES

This Court should grant Plaintiffs’ emergency motion for a temporary restraining order and/or interlocutory injunction. The Secretary of State’s flawed interpretation of O.C.G.A. § 21-2-385(d)(1) to prohibit advance voting on Saturday, November 26 will have a disparate impact on Black voters, whose access to the ballot box will be disproportionately restricted without a Saturday advance voting option. The plain language of the statute forecloses the Secretary’s basis for prohibiting advance voting on November 26. Even if there were any ambiguity in the language,

⁴ *Ga. Sec’y of the State News Conf. on Election Results*, CSPAN, at 5:08–5:25 (Nov. 9, 2022), <https://www.c-span.org/video/?524156-1/georgia-secretary-state-brad-raffensperger-updatesenate-runoff-election>.

⁵ *See LIST | Early Voting Locations Around Atlanta for Georgia Senate Runoffs*, 11Alive (Dec. 9, 2020), <https://www.11alive.com/article/news/politics/elections/list-early-voting-locations-around-atlanta-georgia-senate-runoffs/85-6e82565b-0e57-4fb5-a09a-0866a18236de> (updated Jan. 3, 2021).

⁶ *See, e.g.,* FGTV - Fulton Government Television, *Fulton County Board of Registration & Elections Meeting, November 15, 2022*, YouTube, at 41:10–43:10 (Nov. 15, 2022), <https://www.youtube.com/watch?v=vkoPBb7mIfg>.

however, this Court should, consistent with the democracy canon of statutory interpretation, construe the statute in the manner most favorable to voters and permit advance voting on November 26. Amici, therefore, urge this Court to grant Plaintiffs' request for emergency relief.

I. Prohibiting Advance Voting on Saturday, November 26 Will Have a Disparate Impact on Black Voters.

The lack of a Saturday advance voting option for the upcoming runoff election will disproportionately hinder the ability of Black voters in Georgia to have their voices heard in the election. Black voters use Saturday advance voting at a rate consistently higher than white voters in Georgia. Indeed, during the 2021 runoff election, Black voters were nearly *twice as likely* as white voters to use Saturday advance voting.⁷ Economic disparities that limit the opportunity of Black voters to vote during the work week make Saturday advance voting a critical avenue for Black voters in Georgia to participate in the political process. This is even more true in the context of a truncated runoff election timeline, during which advance voting opportunities in general are significantly more limited.

The fact that Black voters utilize Saturday voting options at higher rates is a longstanding reality of Georgia's voting patterns. In a forthcoming article, scholars Michael Herron and Daniel Smith compare the advance voting rates of Black and white voters in Georgia for the past eight elections.⁸ Relying on election returns and voter registration data from the Georgia Secretary of State, their study concludes that in each of these elections, Black voters in Georgia are consistently more likely to utilize Saturday advance voting than white voters.⁹ Higher rates of Saturday advance

⁷ Michael C. Herron & Daniel A. Smith, *The Racial Politics of Early In-Person Voting in Georgia*, J. Election Admin. Rsch. & Practice (forthcoming 2022) (manuscript at 15) (attached as Exhibit A).

⁸ *Id.* at 14–15. Herron and Smith draw advance voting data from the following elections: the 2016 Presidential Preference Primary; the 2016 Primary; the 2016 General; the 2018 Primary; the 2018 General; the 2020 Primary; the 2020 General; and the 2020 Runoff.

⁹ *Id.*

voting among Black voters are not surprising given the economic disparities Black Georgians face that make it more difficult for them to vote during weekdays. There is a severe racial income gap in Georgia. Based on data provided by the U.S. Census, per capita income among white Georgians is \$38,136, whereas per capita income among Black Georgians is \$24,114.¹⁰ Black residents are more than four times as likely to use public transportation to commute to work.¹¹ These disparities (among many others) make it more difficult for Black voters to take time off of work to vote. Saturday voting gives Black voters the flexibility to balance family and work obligations that can make voting on a weekday extremely burdensome.

Saturday advance voting also reduces traffic at both Election Day polling sites and advance voting locations during other days, reducing long lines that disproportionately impact Black voters. Georgia voters consistently face some of the longest lines in the country.¹² Georgia stands out even among states with long lines because its voters face longer-than-average lines whether they vote on Election Day or during advance voting.¹³ And voters of color bear the brunt of these burdens. In every Georgia election for which data exists, non-white voters have faced substantially longer average wait times than white voters.¹⁴ These disparities exist even when controlling for other factors, such as whether a voter lives in a rural or urban area.¹⁵

The risk of long lines is even more significant given the dramatic increases in voter turnout in Georgia in recent years and anticipated high turnout for the upcoming runoff. Georgia had

¹⁰ See U.S. Census 2020 American Community Survey Table A14024.

¹¹ See U.S. Census 2020 American Community Survey Table B08105.

¹² See An Evaluation of SB202's Impact on Election Wait Times in Georgia by Dr. Stephen Pettigrew at i, *In Re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB (N.D. Ga. May 25, 2022), ECF No. 171-21.

¹³ *Id.* at 9–11.

¹⁴ *Id.* at 13–14 & Fig. 3.7.

¹⁵ *Id.* at 15–19.

record-breaking turnout every day of the advance voting period in November's election.¹⁶ This is a continuation of record turnout in recent Georgia elections, including both the November 2020 general election and the January 2021 runoff elections. Advance voting was a major factor in the ability of local election officials to accommodate the increased turnout in these elections. Approximately 2.7 million Georgians utilized advance voting in the 2020 general election.¹⁷ More than 2 million voters cast ballots through advance voting in the runoff elections.¹⁸ A significant driver of the record-breaking turnout in these elections was the historic participation of Black voters: of the over 5 million Georgians who voted in the general election, 30% were Black.¹⁹ While turnout typically declines significantly for runoff elections, that was not true in the January 2021 runoff, when over 4.4 million Georgians returned to the polls. Advance voting turnout was particularly high in counties with large minority populations, with some counties seeing a nearly 500% increase.²⁰ Saturday advance voting rates among Black voters were disproportionately higher than those of white voters, by a factor of nearly double during the runoff.²¹ Indeed, turnout in the January 2021 runoff election was even higher than that of the recent November 2022 general election, foreshadowing extremely high turnout in the upcoming runoff election.

The lack of a Saturday advance voting option, combined with the anticipated high turnout and extremely truncated advance voting period, will only exacerbate the existing racial disparities

¹⁶ *Georgia Voters Set All-Time Midterm Early Turnout Record*, Sec'y of State (Nov. 5, 2022), <https://sos.ga.gov/news/georgia-voters-set-all-time-midterm-early-turnout-record>.

¹⁷ *Record Breaking Early In-Person Voting Continues: October 25, Noon Update*, Ga. Sec'y of State (Oct. 25, 2020), <https://sos.ga.gov/news/record-breaking-early-person-voting-continues-october-25-noon-update>.

¹⁸ *See Georgia Early Voting Statistics - 2021 Senate Run-Off Election*, U.S. Elections Project (Jan. 6, 2021), https://electproject.github.io/Early-Vote-2020G/GA_RO.html.

¹⁹ *New Georgia Runoffs Data Finds That More Black Voters Than Usual Came Out. Trump Voters Stayed Home*, Wash. Post (Jan. 29, 2021), <https://www.washingtonpost.com/politics/2021/01/29/new-georgia-runoffs-data-finds-that-more-black-voters-than-usual-came-out-trump-voters-stayed-home/>.

²⁰ *See Jason Braverman, State Sees Record Early Voting Turnout, Including Nearly 500% Increase in Gwinnett from 2016*, 11Alive (Oct. 13, 2020), <https://www.11alive.com/article/news/politics/elections/georgia-early-voting-compared-to-2016/85-95453fa4-7c11-4fc5-bc00-3debc4fdeafd>.

²¹ Herron & Smith, *supra* note 7 (manuscript at 15).

in Georgia that hinder access to the ballot box for Black voters.

II. The Plain Language of O.C.G.A. § 21-2-385(d)(1) Permits Counties to Conduct Advance Voting for the Runoff Election on Saturday, November 26.

For the reasons explained in Plaintiffs’ Motion, O.C.G.A. § 21-2-385(d)(1) permits counties to conduct advance voting for the December 6 runoff election on Saturday, November 26.²² Relying on an incorrect interpretation of the statute, the Secretary of State claims that counties are barred from holding advance voting on Saturday, November 26, because it follows the Thanksgiving Holiday on Thursday, November 24, and a generic “State Holiday” on Friday, November 25 (which was formerly a holiday commemorating Robert E. Lee’s birthday).²³ According to the Secretary, the statute precludes advance voting on the second Saturday prior to the election “if the second Saturday before *the runoff* follows a Thursday or Friday that is a state holiday” (emphasis added).²⁴ But the Secretary of State’s interpretation is belied by the plain language of this statute, which, contrary to the November 12 Bulletin, does not apply the post-holiday prohibition on advance voting to runoff elections. Rather, O.C.G.A. § 21-2-385(d)(1) unambiguously applies this restriction *only* to primary elections and general elections.

The statute differentiates between, on the one hand, a “primary or election,” and on the other hand, a “runoff from any general primary or election.” *Compare* O.C.G.A. § 21-2-385(d)(1)(A) and (B). The language that precludes advance voting “if such second Saturday

²² The statute provides broad discretionary authority to counties to commence advance voting “[a]s soon as possible prior to a runoff from any general primary or election but no later than the second Monday immediately prior to such runoff.” O.C.G.A. § 21-2-385(d)(1).

²³ *See* Brian P. Kemp, Governor, to State Department Heads and Other Officials (Dec. 22, 2021), <https://team.georgia.gov/wp-content/uploads/2020/09/2022-State-Holidays-memo-12.22.21.pdf> (noting that the Friday after Thanksgiving is a generic “State Holiday”); *see also* Nathan Deal, Governor, to State Department Heads and Other Officials (July 28, 2014), <https://team.georgia.gov/wp-content/uploads/2014/08/2015-GA-State-Holidays.pdf> (noting that the Friday after Thanksgiving is a state holiday commemorating “Robert E. Lee’s Birthday”).

²⁴ *See* Bulletin from Blake Evans, Election Division Director, to County Election Officials and County Registrars (Nov. 12, 2022), <https://www.democracydocket.com/wp-content/uploads/2022/11/OEB-11122022-General-Election-Certification-and-December-Runoff-Advance-Voting.pdf>.

follows a public and legal holiday occurring on the Thursday or Friday immediately preceding such second Saturday” is limited to a “primary or election.” O.C.G.A. § 21-2-385(d)(1). In contrast, other provisions of the statute explicitly apply to “each primary, election, or runoff.” *Id.* The Secretary’s interpretation of the statute “runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”²⁵ Therefore, the language limiting advance voting on the second Saturday following a public and legal holiday does not apply to runoff elections.

III. To the Extent There Is Any Ambiguity in O.C.G.A. § 21-2-385(d)(1), This Court Should Interpret the Statute in Favor of Broader Voter Access.

Even if there were any ambiguity in the language of O.C.G.A. § 21-2-385(d)(1), this Court should interpret the statute in favor of broader access to the franchise and construe the statute to permit advance voting on Saturday, November 26. When evaluating ambiguities in state election laws, this Court should be guided by the “democracy canon,” a broadly accepted canon of statutory interpretation providing that “statutes tending to limit the citizen in his exercise of this right [to vote] should be liberally construed in his favor.”²⁶ In this case, this Court should apply the democracy canon and construe any ambiguity in the scope of the post-holiday restriction on Saturday voting to permit broader availability of advance voting options rather than to restrict the availability of advance voting.

The democracy canon has its roots in the U.S. Constitution and state constitutional provisions like Article II, Section 1 of the Georgia Constitution, which provides broad protection

²⁵ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted).

²⁶ *Owens v. State ex rel. Jennett*, 64 Tex. 500, 509 (1885). See also Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69, 71 (2009) (explaining that the democracy canon of statutory construction “has long and broad support in state courts” from cases in the 1800s through the present); see also Rebecca Guthrie, *State Courts, the Right to Vote, and the Democracy Canon*, 88 Fordham L. Rev. 1957, 1970 (2020) (tracking and collecting cases relying on the democracy canon through the present).

for the right to vote: “Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people.” Although the issue has not to Amici’s knowledge previously arisen in Georgia, other state courts have interpreted similar state constitutional provisions as a basis to apply the canon. For instance, the Supreme Court of Florida has held, based on the Florida Constitution’s language protecting the right to vote, that “the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters[.]”²⁷ And the Supreme Court of Ohio has held that “[a]ll election statutes should be liberally interpreted in favor of the right to vote according to one’s belief or free choice, for that right is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state.”²⁸ Similarly, the Pennsylvania Supreme Court held that “[a]ll statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage.”²⁹

Moreover, courts have repeatedly applied this democracy canon of statutory interpretation in rejecting limitations on access to the franchise proposed by state executive officials. For example, in *State ex rel. Myles v. Brunner*, the Supreme Court of Ohio rejected the Ohio Secretary

²⁷ *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (1940).

²⁸ *State ex rel. Beck v. Hummel*, 80 N.E.2d 899, 905–06 (1948) (citation omitted).

²⁹ *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020), cert. denied sub nom. *Donald J. Trump for Pres., Inc. v. Degraffenreid*, 209 L. Ed. 2d 172 (Feb. 22, 2021) (citation omitted).

of State’s interpretation of a statute to require rejection of absentee ballot applications based on an applicant’s failure to mark a box on an application form as “unreasonable,” and concluded that its determination was “consistent with our duty to liberally construe election laws in favor of the right to vote.”³⁰ Similarly, in *Morper v. Oliver*, the New Mexico Supreme Court invalidated the New Mexico Secretary of State’s interpretation of a statutory requirement that led her to reject nominating petitions for U.S. Representative based on the omission of a form heading.³¹ The New Mexico Supreme Court held that “[w]e must analyze the Secretary’s action with a skeptical eye in order to protect the right of New Mexico citizens to vote for the candidate of their choice.”³² To the extent this Court finds any ambiguity in the language of O.C.G.A. § 21-2-385(d)(1), the democracy canon should be applied to prevent this unnecessary curtailment of an important access point for many Georgians’ right to vote.

Conclusion

For the foregoing reasons, Amici respectfully ask this Court to grant Plaintiffs’ motion for temporary restraining order or interlocutory injunction. Amici also respectfully request that they be allowed five minutes of argument time.

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³⁰ *State ex rel. Myles v. Brunner*, 120 Ohio St. 3d 328, 2008-Ohio-5097, 899 N.E.2d 120.

³¹ *Morper v. Oliver*, 2020-NMSC-012, 470 P.3d 245, 251.

³² *Id.* (citation and internal quotation marks omitted).

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Respectfully submitted, this 17th day of November, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing Brief of Amici Curiae Legal Defense Fund and ACLU of Georgia to be served upon all counsel of record by the Odyssey E-file GA System.

This 17th day of November, 2022.

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EXHIBIT A

The Racial Politics of Early In-Person Voting in Georgia^{*}

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November 16, 2022

Forthcoming, *Journal of Election Administration Research & Practice*

Abstract

Amidst a torrent of unfounded accusations that the 2020 presidential contest was illegitimate if not outright stolen, numerous controversies have erupted across American state legislatures over ballot access. Our focus is Georgia, a battleground state where legislative changes in 2021 to voting rules—in particular, to available days of early in-person voting—were couched in language about election integrity. We show that the legislative back-and-forth in Georgia over early voting—where, for example, Sunday early voting was first eliminated in a proposed election reform bill and then reinserted—reflects racial regularities in use of this voting method. Among other things, Black voters in Georgia are more likely than White voters to cast ballots on the early voting days scrutinized during debates over a new voting law. Nonetheless, there is no evidence that offering early voting on any particular day has any substantive implications for election integrity. The recent battle in Georgia over ballot access and early voting in particular illustrates the continued grip of racial politics in the United States, even concerning technical debates over election rules and procedures.

^{*}The authors thank Nicolás Macri, Enrijeta Shino, Luise White, and Madigan Wilford for helpful comments on earlier drafts of this paper.

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Introduction

Access to the ballot by eligible voters is a *sine qua non* of democracy. In the decades since the 1965 passage of the Voting Rights Act, laws regulating the conduct of elections across the states have generally expanded the methods by which voters may cast ballots. This has made voting less costly (Downs 1957; Li, Pomante II and Schraufnagel 2018), increasing the opportunities for citizens to engage in democratic politics. Still, the evolution of ballot access in the United States has rarely proceeded in a uniform and steady way (Keyssar 2009; Berman 2015). This remains evident in ongoing debates across the country over technical aspects of election administration such as photo identification laws, same-day and automatic voter registration, felon disenfranchisement, no-excuse absentee voting, ballot drop boxes, and early in-person (EIP) voting (Pitzer, McClendon and Sherraden 2021).

Contemporary election administration debates in the United States have to a significant extent been publicly motivated by fears of a lack of election integrity. An exemplar of this is Florida’s Senate Bill 90, signed into law by Governor Ron DeSantis on May 6, 2021. This piece of post-2020 election legislation restricted the use of drop boxes in Florida, changed the requirements for updating vote registration records, and increased the frequency at which voters who wish to vote by mail must indicate this to county elections officials.¹ In expressing support for Senate Bill 90, proponents of the bill claimed that its passage would improve election integrity in Florida, with no deleterious consequences. “The goal for everybody is to make it as easy as possible to vote and as hard as possible to cheat,” asserted Florida state senator Joe Gruters, who also serves as Chair of the Republican Party of Florida,” continuing that Senate Bill 90 “does nothing to suppress the vote. It does nothing to restrict the vote.”²

¹See “Florida Senate Bill 90 Updates,” *Sumter County Supervisor of Elections*, available at <https://www.sumterelections.org/Voters/Florida-Senate-Bill-90-Updates> (last accessed October 27, 2022).

²“Florida Senate Passes Controversial Vote-By-Mail Changes,” *WUSF*, April 26, 2021, available at <https://wusfnews.wusf.usf.edu/politics-issues/2021-04-26/florida-senate-passes-controversial-vote-by-mail-changes> (last accessed October 28, 2022).

Similarly in Texas, Governor Greg Abbott signed into law Senate Bill 1, whose preamble describes the bill as “relating to election integrity and security, including by preventing fraud in the conduct of elections in this state; increasing criminal penalties; creating criminal offenses.”³ According to Gov. Abbott, “[W]e must have trust and confidence in our elections. [Senate Bill 1] that I’m about to sign helps to achieve that goal.”⁴ Among other changes to the Texas election ecosystem, Senate Bill 1 reduced opportunities for voters to cast EIP ballots in some urban counties by creating uniform voting hours across the state and expressly prohibited “drive-thru voting,” which was used by Harris County in the 2020 election.⁵

Beyond state legislatures as exemplified by the aforementioned Florida and Texas examples, the federal judiciary has also stepped into contemporary colloquies over the intersection between election administration and concerns over election integrity. Most recently, in its 6-3 decision in *Brnovich v. DNC*, which concerned the legality of some Arizona election practices, the United States Supreme Court in 2021 ruled that the state of Arizona was permitted to (1) not allow voters to receive assistance in the collection of mail ballots and (2) not count ballots cast out-of-precinct. As to why, the Court’s majority ruled that Arizona had a legitimate state interest in seeking to preserve the integrity of its election procedures, that its restrictions on ballot assistance and out-of-precinct ballots did not exceed usual burdens of voting, and that such restrictions on voting processes did not violate Section 2 of the Voting Rights Act.⁶ And even if there “was no evidence that fraud in connection with early ballots had occurred in Arizona,” the Court’s majority reasoned that, “a State may take action to prevent election fraud

³For the text of the enrolled Senate Bill 1, see <https://capitol.texas.gov/tlodocs/872/billtext/html/SB00001F.htm> (last accessed November 5, 2022).

⁴“Gov. Greg Abbott signs Texas voting bill into law, overcoming Democratic quorum breaks,” *The Texas Tribune*, September 7, 2021, available at <https://www.texastribune.org/2021/09/01/texas-voting-bill-greg-abbott/> (last accessed October 30, 2022).

⁵“Gov. Greg Abbott signs election integrity bill, SB1, into law,” *ABC 13, Eyewitness News*, September 7, 2021, available at <https://abc13.com/texas-politics-senate-bill-1-signed-into-law-when-does-sb1-start/11005841/> (last accessed October 28, 2022).

⁶See https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf (last accessed July 23, 2021), p. 30 (on ballots cast out-of-precinct) and p. 34 (on absentee ballot return).

without waiting for it to occur and be detected within its own borders.”⁷

While contemporary debates in the United States over ballot access—in state legislatures, the federal judiciary, and beyond—have been shaped by stated concerns over election integrity, the matter of race remains an ever-present factor in these debates (Klinkner and Smith 1999; Johnson 2010). At its founding, the country’s franchise excluded all Black persons, and it was not until the Civil War that, in principle, voting eligibility included Black male citizens. Nonetheless, race did not vanish as a key factor in voting rights following the ratification of the 14th and 15th Amendments to the United States Constitution. Rather, through the Jim Crow period and for much of the 20th Century, access to the franchise for Black citizens was restricted and, in many jurisdictions, effectively non-existent (Kousser 1974; Keyssar 2009; Anderson 2018).

With all this as background, our interest among the country’s many post-2020 election reform debates is Georgia, specifically the state’s EIP voting rules and how changes to these rules came to be included in an election reform bill known as Georgia Senate Bill 202 (hereinafter SB 202). Approximately 2.7 million Georgians cast EIP ballots in the 2020 General Election, followed by more than two million such ballots in subsequent federal runoff elections in January 2021 for two United States Senate seats. Georgia’s public debate over EIP voting that took off after the January runoff elections reflected the well-worn theme of how many days of early voting should there be and which days in particular should be offered. Legislation that reduces EIP voting opportunities has the potential to raise the cost of voting, possibly altering the electoral landscape by reducing access to the polls for some voters.

What made debate in Georgia around SB 202 notable is the context in which it took place: record Black voter turnout in November 2020, the defeat of President Donald Trump in a state he won handily in 2016, the tight 2018 gubernatorial election of Brian Kemp over African American Stacey Abrams, and the ascendance of Georgia’s first

⁷See https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf (last accessed October 31, 2022), p. 33.

Black United States Senator, Raphael Warnock. These issues were all present amid numerous accusations of widespread malfeasance in the 2020 election, none of which has been supported by convincing evidence (Eggers, Garro and Grimmer 2021).⁸ A confusing ballot format in Georgia’s Gwinnett County in the 2020 General Election notwithstanding (Cottrell et al. 2022), it should perhaps come as no surprise given Georgia’s history that the debate over SB 202 was intertwined with race (Key 1949; Reingold and Wike 1998; Inscoc 2009; Hood III and Bullock III 2011; Gillespie 2015; McKee 2018).

In what follows, we describe how the evolution of SB 202’s regulations on EIP voting in Georgia reflected both the tenor of the times—voiced concerns post-November 2020 about election integrity in the absence of evidence indicating that American elections are threatened by vote manipulation—as well as historical practices, specifically what appears to be the targeting of early voting days used heavily by Black voters. We argue that legislative efforts to scale back EIP voting in Georgia raise a red flag about the intensity of disputes over election administration and illustrate how proposed reforms of technical election details can find themselves in an environment characterized by concerns over election integrity.

Early in-person voting across the United States

Prior to 1978, when California became the first state to adopt EIP voting (Biggers and Hanmer 2015), voters in the United States who wished to cast in-person ballots could do so only on Election Day. However, in recognition of the burden that this imposes,

⁸Looking beyond this election, scholarly literature on election malfeasance in the United States concludes that election malfeasance is not widespread in the country and does not pose a threat to election integrity (Minnite 2010; Cottrell, Herron and Westwood 2018; Goel et al. 2020). Indeed, lawmakers in Georgia provided no evidence of widespread vote manipulation in the 2020 election cycle in the state. Even Georgia Secretary of State Brad Raffensperger articulated as such on numerous occasions following the November 2020 election. See “Secretary Raffensperger Releases Letter to Pence, Congressional Leaders,” *Georgia Secretary of State*, January 6, 2021, available at https://sos.ga.gov/index.php/elections/secretary_raffensperger_releases_letter_to_pence_congressional_leaders (last accessed March 7, 2021).

nearly all states (all but four) currently allow in-person ballot-casting prior to Election Day. Of these, 13 allow Sunday in-person voting.⁹ There is considerable state variation in what EIP voting entails—from the start date and length of a state’s early voting period, to the number of early voting locations allocated per jurisdiction, to whether early voting is offered after normal work hours or on weekends. Debates over these technical details, however, should not detract from the fact that EIP is accepted in both red and blue states as a method by which voters can conveniently exercise the franchise (Gronke 2012).

Not all states use the adjective “early” to describe in-person voting that takes place before Election Day. In Maine, for example, absentee ballots may be voted in the presence of town clerks once these ballots are available to the public (Herron and Smith 2021). While Maine does not technically have what would be described as an early voting period, it effectively does insofar as this state allows in-person absentee voting in election offices. In North Carolina, early voting is known as “One-Stop” voting. These technicalities notwithstanding, EIP voting means, in-person voting before Election Day.

As with other election administration battles (Bentele and O’Brien 2013; Burden et al. 2014; Hicks et al. 2015), the trend towards expanding EIP voting has not been without setbacks. Following record turnout among Black voters in 2008, for example, Florida’s legislature cut the number of permissible early voting days—which included the elimination of the final Sunday before Election Day (Herron and Smith 2012). Unsurprisingly, Black voters who had cast ballots on the final Sunday of early voting in 2008—a day eliminated by lawmakers—were not only less likely to turn out early, but were also less likely to vote in the 2012 General Election (Herron and Smith 2014), exemplifying a form of “downstream effects” noted by Cottrell, Herron and

⁹“State Laws Governing Early Voting,” *National Conference of State Legislatures*, October 10, 2020, available at <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> (last accessed November 6, 2022). Florida requires at least one day of Sunday EIP voting; five states (Alaska, Illinois, Maryland, New York, and Ohio) permit Sunday EIP voting statewide; and, seven states (California, Kansas, Massachusetts, Michigan, North Carolina, North Dakota, and Virginia) allow counties to offer Sunday EIP voting.

Smith (2021) and Pettigrew (2021) in their studies of polling place congestion on subsequent turnout. In North Carolina, Herron and Smith (2015) show that the state’s legislature’s reduction in early voting days in 2013 (signed into law just days after the Supreme Court struck down section 4(b) of the Voting Rights Act in *Shelby County v. Holder*), disproportionately targeted days on which North Carolina’s Black voters were more likely to turn out to vote (Walker, Herron and Smith 2019). And in Ohio, the Secretary of State and state legislature restricted counties by homogenizing EIP voting opportunities in 2010 (Kaplan and Yuan 2020), reducing EIP voting in the state’s three most populous counties, cuts that disproportionately affected Black voters (Weaver 2015). A national study reaffirms these state-level analyses, showing that a county’s racial and ethnic composition affects the density of EIP voting locations (Fullmer 2015). The evidence from these states that curtailed early voting is clear: reducing EIP voting opportunities increases the cost of voting and can disproportionately burden minority voters.

According to data compiled by the Voting Rights Lab,¹⁰ in 2021 some 31 bills were enacted in 18 states that dealt with early voting availability, and in 2022, another seven laws dealing with EIP voting were enacted. Although many of these laws expanded opportunities to cast in-person ballots in advance of Election Day (for example, New York’s Senate Bill 4306, which increased required early voting locations and expanded weekend early voting hours, and Virginia’s House Bill 1968, which authorized local elections officials to offer early voting on Sundays), not all moved in the same direction. Most notably, Texas’s Senate Bill 1, mentioned in the introduction, limited the hours that local clerks may offer EIP voting and prohibited counties from offering drive-through polling locations, requiring that early voting locations be located “indoors” (Harris County allowed curbside voting in 2020, permitting voters to fill out and cast their ballots from inside their vehicles).

¹⁰See “States Voting Rights Tracker, *Voting Rights Lab*, available at <https://tracker.votingrightslab.org/pending/search> (last accessed October 17, 2022).

Early in-person voting in Georgia

In the wake of Joe Biden’s triumph in the 2020 presidential election and the victories of two Democratic candidates running for United States Senate in Georgia’s January 2021 runoff elections, both chambers of the Georgia legislature passed SB 202, the so-called “Election Integrity Act of 2021.”¹¹ SB 202 made an array of changes to Georgia’s election administration laws, modifying regulations on voting by mail and runoff elections, expanding the state legislature’s control over election administration, and curtailing the days ahead of Election Day on which counties are allowed to offer what the state calls in-person “advance voting”—what we refer to as EIP voting. Behind closed doors, Governor Brian Kemp signed SB 202 into law on March 25, 2021, the same day the bill passed both chambers on party-line votes.¹² The governor’s signature on SB 202 scaled back numerous actions the Georgia legislature had made over the previous two decades to expand the opportunity for eligible citizens to cast ballots in the Peach State, including no-excuse absentee ballots and EIP voting, which the legislature had adopted in 2005 (Biggers and Hanmer 2015).

Justifications offered for SB 202

Supporters of SB 202 framed their hastened legislative efforts as reflecting election security exigencies. Governor Kemp assured the public that ensuring election integrity, not scaling back convenience voting, was the motivation for the legislation. “President Biden, the left, and the national media,” Kemp said in a statement immediately after

¹¹“A BILL to be entitled an Act to amend Chapter 2 of Title 21 of the Official Code of Georgia,” available at <https://www.legis.ga.gov/legislation/59827> (last accessed July 23, 2021). Biden had defeated then-President Donald Trump by fewer than 12,000 votes, following a full paper ballot recount. See <https://results.enr.clarityelections.com/GA/107231/web.264614/#/summary> (last accessed July 31, 2021).

¹²See “Kemp Signs 98-Page Omnibus Elections Bill,” *Georgia Public Broadcasting*, March 25, 2021, available at <https://www.gpb.org/news/2021/03/25/kemp-signs-98-page-omnibus-elections-bill> (last accessed November 5, 2021) and “Georgia Gov. Kemp signs GOP election bill amid an outcry,” *AP NEWS*, March 26, 2021, available at <https://apnews.com/article/donald-trump-legislature-bills-state-elections-voting-rights-b2b014cc81894a50fc513168a5f1d0b8> (last accessed November 5, 2022).

signing SB 202 into law, “are determined to destroy the sanctity and security of the ballot box.”¹³

During Georgia’s 2021 legislative session, in which SB 202 became law, multiple election-related bills were introduced, justified by implementing changes needed to increase voting security. For example, proposed legislation would “make Georgia elections fair, more accessible, more transparent,” proclaimed House Speaker Pro-Tempore, Representative Jan Jones.¹⁴ Some lawmakers dismissed concerns that their proposals for election reform might affect voting rights, with supporters of new proposals chafing at the claims that SB 202 (and other bills) would dampen Black turnout. “For those who want to keep hollering about suppression? I’ll tell you something: This is a politicized issue, folks. It’s about keeping people whipped up into a frenzy,” said Republican state Representative Alan Powell.¹⁵ “It will make Georgia elections fair, more accessible, more transparent,” proclaimed House Speaker Pro-Tempore, Republican Representative Jan Jones, one of SB 202’s sponsors.¹⁶

In contrast, opponents to the bills introduced in Georgia’s 2021 legislative session endeavored to drive home the message that the real motivation behind post-2020 election administration legislation was racial politics.¹⁷ Speaking to her colleagues, Democratic Representative Kimberly Alexander claimed that,

¹³See Governor Kemp’s statement at “Governor Kemp Responds to President Biden’s Attack on Election Integrity Legislation,” *Office of the Governor*, March 26, 2021, available at <https://gov.georgia.gov/press-releases/2021-03-26/governor-kemp-responds-president-bidens-attack-election-integrity> (last accessed September 20, 2021).

¹⁴“Georgia House Dems Condemn Passage of HB 531,” *CBS Atlanta*, March 3, 2021, available at <https://atlanta.cbslocal.com/2021/03/03/georgia-house-dems-condemn-passage-of-hb-531-this-is-a-step-in-the-wrong-direction> (last accessed March 5, 2021).

¹⁵“Georgia House passes GOP election bill that would add restrictions to voting process,” *11 Alive*, available at <https://www.11alive.com/article/news/politics/ga-house-passes-gop-election-bill/85-bce0e5a4-12e3-4006-ae40-c4263c706912> (last accessed September 21, 2021).

¹⁶“Georgia House Dems Condemn Passage of HB 531: ‘This Is A Step In The Wrong Direction,’” *CBS Atlanta*, March 3, 2021, available at <https://atlanta.cbslocal.com/2021/03/03/georgia-house-dems-condemn-passage-of-hb-531-this-is-a-step-in-the-wrong-direction/> (last accessed March 5, 2021).

¹⁷“Voting Laws Roundup: July 2021”, July 22, 2021. <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021> (last accessed September 20, 2021).

“Republicans in the Georgia General Assembly are trying to change the rules of the election here in Georgia [because] [y]ou know that your only chance of winning future elections is to prevent Georgians from having their votes counted and their voices heard.”¹⁸ Aunna Dennis of Common Cause Georgia summed up the sentiments of many opposed to the slate of bills, calling one of them, House Bill 531, “Jim Crow with a suit and tie.”¹⁹

The legislative evolution of SB 202 and weekend EIP voting

The enactment of what would become SB 202 merged language contained in bills introduced in both chambers of the Georgia state legislature.²⁰ On February 18, 2021, the Georgia House Special Committee on Election Integrity, which was created by the Georgia House Speaker the day after the January 6, 2021 riot at the United States Capitol, considered House Bill (HB) 531.²¹ Among a panoply of provisions, this proposed legislation included language that eliminated out-of-precinct ballots from being counted, curtailed the use of mobile voting buses deployed to alleviate pressure on EIP voting, cut the window for voters to apply for absentee ballots, and restricted EIP voting days and times.²² Specifically regarding EIP voting, HB 531, which the full Georgia House passed on a party-line vote on March 1, 2021, restricted Georgia’s

¹⁸“Voting restrictions bill passes Georgia House over strong opposition,” *Atlanta Journal-Constitution*, March 1, 2021, available at <https://www.ajc.com/politics/georgia-house-to-vote-on-election-restrictions-amid-staunch-opposition/46SNHMIYGZGMZDG5KLGHAB6NQ4> (last accessed March 5, 2021).

¹⁹“Georgia Republicans Are Doubling Down on Racist Voter Suppression,” *Mother Jones*, February 19, 2021, available at <https://www.motherjones.com/politics/2021/02/georgia-republicans-voter-suppression-bill/> (last accessed March 4, 2021).

²⁰While the genesis of the bill remains in question, Jessica Anderson, the Executive Director of Heritage Action claimed that the law contained “eight key provisions that Heritage recommended.” See “Leaked Video: Dark Money Group Brags About Writing GOP Voter Suppression Bills Across the Country,” *Mother Jones* May 13, 2021, available <https://www.motherjones.com/politics/2021/05/heritage-foundation-dark-money-voter-suppression-laws> (last accessed August 2, 2021).

²¹“Georgia House Speaker to name special committee on election integrity,” *Fox5 Atlanta*, January 7, 2021, available <https://www.fox5atlanta.com/news/georgia-house-speaker-to-name-special-committee-on-election-integrity> (last accessed July 31, 2021).

²²“A BILL to be entitled an Act to amend Chapter 2 of Title 21 of the Official Code of Georgia Annotated, relating to elections and primaries generally,” available <https://www.legis.ga.gov/legislation/59831> (last accessed August 1, 2021).

159 county election administrators from offering weekend voting. Rather than allowing counties to determine the number of weekends to offer EIP voting over a three-week period, or allowing counties to offer voting on both Saturdays and Sundays, the bill specified that weekend voting “shall be conducted on the second Saturday and the registrar shall choose either the third Saturday or third Sunday prior to a primary or election.”²³ In short, HB 531 targeted for elimination EIP voting on the second Sunday before Election Day and forced counties to choose EIP voting on either the Saturday or the Sunday, but not both days, on the third weekend prior to Election Day.

As the Georgia House was holding hearings on HB 531 (and other related bills), the state’s Senate on February 23, 2021 introduced its own election reform legislation, SB 241.²⁴ The shorter Senate bill contained many of the same provisions as the 66-page HB 531 but included language prohibiting the Office of the Secretary of State from entering into consent agreements, as it had done prior to the 2020 General Election regarding the matching of voters’ signatures on return absentee ballots.²⁵ The Senate bill also restricted absentee voting to age 65 and older, with a physical disability, or who were out of town on Election Day.

With regard to EIP voting, SB 241 only required this form of voting on the second Saturday prior to a primary or election if state or federal candidates were on the ballot. However, if the second Saturday were to follow or precede a public and legal holiday, SB 241 would prohibit EIP voting on that Saturday, moving it to the third Saturday before a primary or election.²⁶ SB 241 made no mention of Sunday advance voting.

²³Ibid., p. 38, lines 946-947.

²⁴“A BILL to be entitled an Act to comprehensively revise elections and voting,” <https://www.legis.ga.gov/legislation/60009> (last accessed July 31, 2021).

²⁵Perhaps not surprisingly, since it attacked the duties of his office, Georgia Secretary of State Raffensperger was critical of SB 241. His office put out a statement on February 23, 2021, stating, “At the end of the day many of these bills are reactionary to a three month disinformation campaign that could have been prevented,” and that none of them “prioritizes the security and accessibility of election.” See February 23, 2021 tweet by Stephen Fowler, *Georgia Public Radio*, available <https://twitter.com/stphnfwlr/status/1364361837702225921> (last accessed July 31, 2021).

²⁶“A BILL to be entitled an Act to comprehensively revise elections and voting,” p. 16, lines 389-399.

After being engrossed on a party-line third reading in the Senate on March 8, 2021, and following the second (of three) readings on the House floor on March 10, 2021, SB 241 was abruptly withdrawn in the House.²⁷

Then, on March 17, 2021, a 93-page strike-all substitution bill—SB 202—was introduced by Representative Barry Fleming, cobbling together portions of HB 531 and SB 241.²⁸ With regard to EIP voting, Fleming’s replacement bill sought to standardize EIP advance voting days and hours across Georgia counties. The “General Assembly finds and declares” that “standardized advance voting hours means a dramatic increase in voting hours for some counties with slight decreases in other counties, but uniformity across the state will be achieved and all voters in Georgia will have access to multiple opportunities to vote in person on the weekend for the first time.”²⁹

The language of Fleming’s substitute bill, SB 202, stipulated that form of EIP voting on weekdays was permitted to start the fourth Monday prior to a primary or general election. The first iteration of SB 202, which was the penultimate version of this legislation, curtailed weekend EIP voting, allowing counties to offer in-person advanced voting only on the “second Saturday and, at the registrar’s or absentee ballot clerk’s choosing, either the third Saturday or third Sunday prior to a primary or election.”³⁰ As such, the penultimate version of SB 202 cut down on the opportunities for voters registered in counties that previously had offered *both* Saturday and Sunday advance

²⁷The Senate Ethics Committee passed out of committee two other election-related bills: SB 69, which would have eliminated automatic voter registration at Department of Motor Vehicle offices (which the Georgia legislature adopted unanimously in 2012) (Hicks, McKee and Smith 2016), and SB 71, which would have restricted mail voting to those registered voters with a physical disability or who were out of town, altering Georgia’s no-excuse absentee ballot statute which the state’s legislature adopted in 2005 (Shino, Suttmann-Lea and Smith 2022).

²⁸“A BILL TO BE ENTITLED AN ACT To amend Chapter 2 of Title 21 of the Official Code of Georgia Annotated, relating to elections and primaries generally,” available <https://www.legis.ga.gov/api/legislation/document/20212022/201121> (last accessed July 31, 2021). The legislative history of SB 202 is summarized as such: 3/8/2021 Engrossed on 3rd reading in Senate; 3/8/2021 Tabled in Senate; 3/8/2021 Taken from Table in Senate; 03/25/2021 Passed House by Rules Committee Substitute as Amended; 03/25/2021 Modified Structured Rule; 3/25/2021 Senate Agreed to House Substitute.

²⁹Ibid, p. 3, line 65; p. 4, lines 83-87.

³⁰Ibid, pp. 55-56, lines 1408-1421.

voting, on either or both the second or third weekends prior to an election, would in fact face fewer EIP voting opportunities—at most, only a single weekend day on the second and third weekends before Election Day.

Legislative wrangling continued on March 25, 2021. Later on the same day that Fleming’s strike-all substitution bill, SB 202, was introduced, Republican House and Senate legislative leaders made a set of changes to SB 202’s language regarding EIP voting. Specifically, legislative leaders relented on the harshest restrictions that the earlier version of SB 202 had placed on weekend EIP voting prior to primaries and elections.³¹ The final version of SB 202 that was signed into law by Governor Kemp specified that the state’s 159 counties “shall” be required to offer advanced voting on the second and third Saturdays before Election Day (retaining the limited hours, 9AM to 5PM), but could choose to offer EIP voting on “the second Sunday, the third Sunday, or both the second and third Sundays” prior to Election Day (with hours no longer than 7AM to 7PM).³²

In short, under the adopted SB 202, which went into effect on March 25, 2021 upon Governor Kemp’s signature, all 159 counties in Georgia were *required* to offer advance voting on the second and third Saturdays prior to Election Day. The 13 Georgia counties that had offered a full complement of EIP voting in the 2020 General Election—that is, offered EIP voting on both days of both allowable weekends—were permitted to continue to do so. Counties, though, were not required to offer Sunday EIP voting on either the second or third weekend before Election Day. As discussed, SB 241 and HB 531, as well as the penultimate version of SB 202, would have forced the 13 counties that offered a full slate of EIP weekend voting to cut their offerings in half, eliminating the second Sunday before Election Day and either the third Saturday or third Sunday prior to Election Day.

³¹SB 202 had different language pertaining to runoff elections with no federal candidates, specifically, reducing the number of days of advance voting from three weeks to just one week, and not requiring either Saturday or Sunday EIP voting.

³²“A BILL TO BE ENTITLED AN ACT To comprehensively revise elections and voting,” as passed, Senate Bill 202, available <https://www.legis.ga.gov/legislation/59827> (last accessed July 31, 2021), p. 59, lines 1500-1503.

In the next section we address the question of how, if at all, SB 202, and a previous election reform bill, HB 531, engaged Black voters in Georgia. Drawing on statewide voter files and early voting files for eight recent elections, we find evidence that HB 531 would have targeted, and SB 202 did target, days that Black voters historically have been more likely to cast EIP ballots. As adopted, SB 202 mitigated the impact of what HB 531 would have had on Georgia’s EIP voting ecosystem. Had HB 531 become law, EIP voting opportunities in Georgia would have been diminished, disproportionately raising the cost cost of voting on Black Georgians, given their EIP voting practices.

When Georgians cast EIP ballots

Our statewide analysis of EIP voting in Georgia encompasses all voters in the state who cast EIP ballots in the eight statewide elections held in the 2016, 2018, and 2020 election cycles.

Data

We draw on election administration data published by the Georgia Secretary of State. In particular, our data consist of lists of (1) registered voters and (2) individuals who cast EIP ballots and on the days they did so.³³ We merge these lists in a time period covering the 2016, 2018, and 2020 election cycles.³⁴

The 2016 election cycle in Georgia consisted of three elections (presidential primary, primary, and general); the 2018 cycle had two elections (primary and

³³We create an aggregate voter registration list by combining eight snapshots of the Georgia statewide “Daily Voter Base.” These statewide voter files are dated January 8, 2021, October 20, 2020, September 9, 2020, October 15, 2018, March 13, 2017, October 26, 2016, September 7, 2016, and June 4, 2015). When a voter appears in multiple lists, we use the record from the most recent list.

³⁴We downloaded lists of voters who cast EIP ballots from <https://elections.sos.ga.gov/Elections/voterabsenteefile.do>, restricting attention to records whose *Ballot Style* is “IN PERSON.” Across our eight lists of EIP ballots, we screen out the small number of records that were recorded as being cast on holidays (when early voting was not offered), cast before an election’s EIP period officially began, or cast after an EIP period ended. We merged registered voter lists and EIP ballot lists using official Georgia voter registration numbers.

general); and the 2020 cycle had three elections (primary, general, and runoff). On account of the COVID-19 pandemic, Georgia’s 2020 presidential primary was combined with the state’s regular primary. The 2020 cycle’s runoff, which took place on January 5, 2021, included contests for two United States Senate seats. We treat the 2020 runoff as part of the 2020 election cycle.

Each of our elections in the cycles of 2016, 2018, and 2020 had an EIP voting period that ran from the Monday three weeks before Election Day to the Friday before Election Day (inclusive). Within this period, counties had some discretion on which weekend days a voter could cast an EIP ballot.³⁵ Our focus is White and Black EIP voters in Georgia, reflecting historical racial politics in Georgia that have turned on conflicts between Blacks and Whites.³⁶ These two groups cover slightly under 83 percent of the 7,741,628 registered voters in the state as of January 8, 2021.³⁷

Early in-person voting by day

Table 1 provides statewide EIP ballot counts (“EIP ballots”) across our eight elections for White and Black voters. As the table makes clear, millions of Georgians cast such ballots across the three election cycles. In the 2020 cycle, for example, White voters cast roughly 2.8 million EIP ballots and Black voters, more than 1.4 million. To put these numbers in context, Joe Biden bested Donald Trump in the 2020 presidential election in Georgia by only 11,779 votes. The contest was so close it was recounted twice, first by hand and later by machine.

Turning to Table 1’s “Black-White ratio” columns, these report the ratios of Black

³⁵There is no EIP voting in Georgia on national holidays. New Years Day in 2021 fell on a Friday that ordinarily would have been in the EIP voting period for the 2020 runoff.

³⁶Prior to the 2020 General Election, there were roughly 2.18 million registered Black voters compared to 260,000 registered Hispanic voters in Georgia. See “Black, Latino and Asian Americans have been key to Georgia’s registered voter growth since 2016,” Pew Research Center, available <https://www.pewresearch.org/fact-tank/2020/12/21/black-latino-and-asian-americans-have-been-key-to-georgias-registered-voter-growth-since-2016/> last accessed September 15, 2021.

³⁷Georgia’s registered voter lists include a field for voter race, and we use this field after merging our EIP lists with lists of registered voters. See fn. 34.

Table 1: Statewide EIP voting usage by Black and White voters

| Year | Election | EIP ballots | | Black-White ratio | | |
|------|----------|-------------|---------|-------------------|--------|----------|
| | | White | Black | Saturday | Sunday | Weekdays |
| 2016 | PPP | 265,281 | 97,972 | 1.12 | 2.17 | 0.99 |
| 2016 | Primary | 209,012 | 74,490 | 1.16 | 6.60 | 0.98 |
| 2016 | General | 1,342,668 | 630,581 | 1.23 | 2.44 | 0.97 |
| 2018 | Primary | 189,755 | 86,412 | 1.10 | 2.05 | 0.99 |
| 2018 | General | 1,121,064 | 564,636 | 1.23 | 2.72 | 0.97 |
| 2020 | Primary | 179,976 | 118,941 | 1.20 | 3.89 | 0.98 |
| 2020 | General | 1,538,424 | 676,944 | 1.30 | 1.79 | 0.96 |
| 2020 | Runoff | 1,177,626 | 630,327 | 1.93 | 1.82 | 0.96 |

EIP voting rates to White EIP voting rates across the eight elections. Ratios greater than one denote days on which Black EIP voting is more common than White EIP voting, and ratios less than one connote the opposite.

To determine these ratios, we first calculated the percentage of all White and Black voters who cast their early ballots on Saturdays, Sundays, and on weekdays. For example, in the 2016 presidential primary (PPP), the Black EIP rate on Saturdays was approximately 5.42 percent, meaning that 5.42 percent of all EIP ballots cast by Black voters in that election were cast on the two available Saturdays. The corresponding White rate was approximately 4.84 percent. The ratio between these two rates is 1.12, which can be found in the “Saturday” column of the top row of Table 1. Thus, on Saturdays in the 2016 presidential primary election, Black voters in Georgia used EIP voting 1.12 times as often as—or 12 percent more—than White EIP voters.

The Saturday and Sunday Black-White ratios in Table 1 range from slightly more than one to greater than six. Sunday ratios are greater than Saturday ratios in every election except the 2020 runoff. In every election, weekday Black-White ratios are less than one, complementing the greater-than-one weekend ratios. On weekends, therefore, Black EIP voters are disproportionately more common than white EIP voters; the opposite result obtains on weekdays.³⁸

³⁸Across seven of the eight elections (the only exception being the 2016 PPP), Black voters were more likely to cast ballots both on Saturday and (especially) on Sunday of *both* the first and second weekends EIP voting was offered; that is, the Black-White ratio is above one on

Table 1 highlights the fundamental racial nature of the debate over days of allowed EIP voting in Georgia. Namely, the *only* days on which Black EIP voting rates are greater than White EIP voting rates are weekend days, and these are the *only* days that have been up for discussion as to continued EIP voting. On *all* weekdays, the opposite obtains. Consider as well that there is no evidence in academic literature on election administration that weekend early voting is any more vulnerable to threats to election integrity than weekday early voting.

Recalling that concerns about election integrity were used to motivate SB 202, we should have been expected to see in legislative debates perhaps as much of a discussion of EIP voting on non-weekends than on weekends (and, actually more of a discussion of the former given that there are five non-weekend days each week and only two weekend days). Putting aside the matter of which weekend days were targeted under SB 202, the fact that the EIP debate that accompanied this legislation focused on weekends rather than weekdays is consistent with Georgia’s history of White-Black racial conflict.

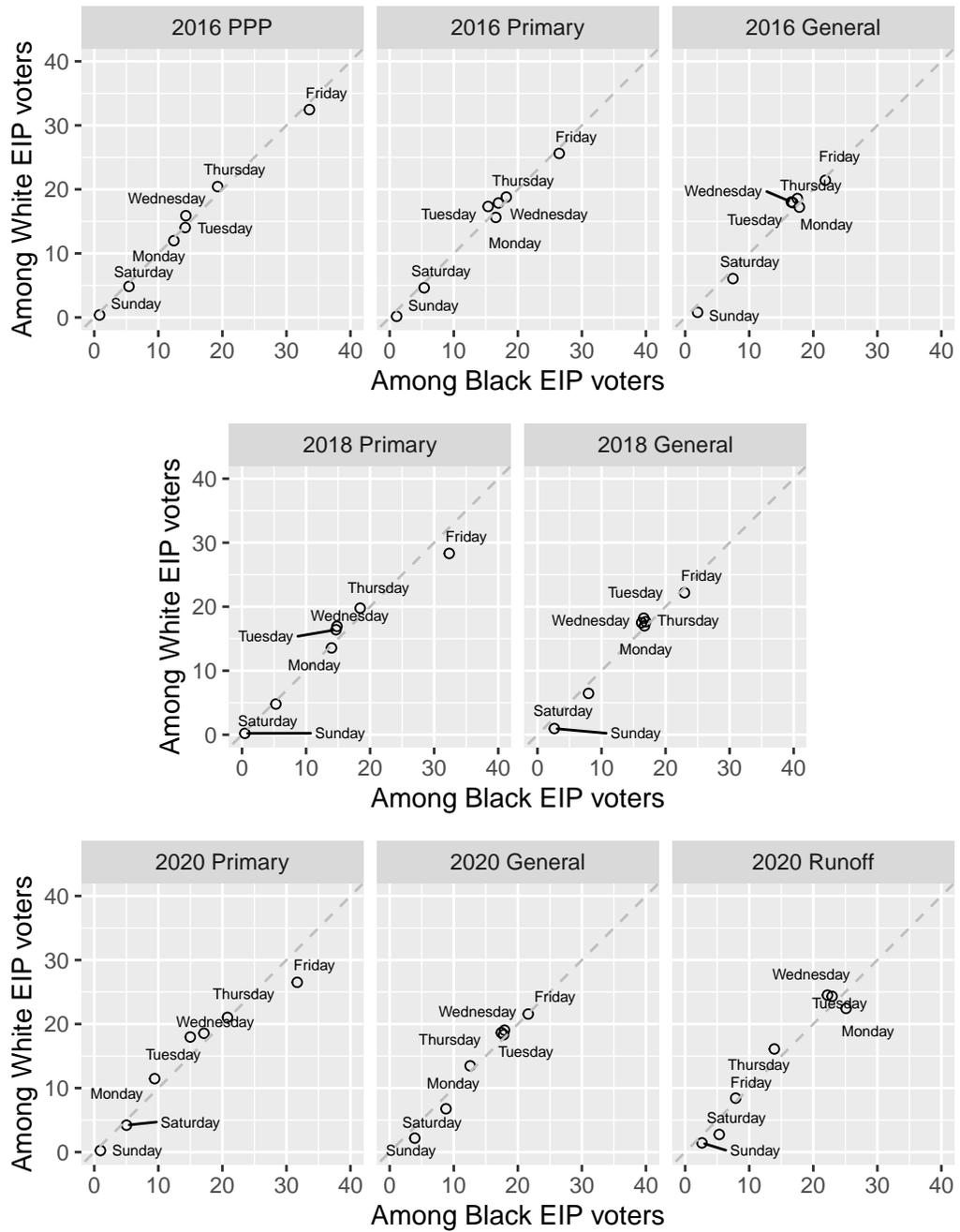
EIP votes cast by day of week

Across our eight elections of interest, we now disaggregate by individual day of week EIP ballots cast by White and Black voters. In a given election, we define the percent of EIP ballots cast by White (Black) voters on Mondays as the number of EIP ballots cast on Mondays by White (Black) voters divided by the total number of EIP ballots cast by White (Black) voters in the election. An election has 14 such percentages—seven days by two race groups—which are plotted against each other in Figure 1.

There are eight panels in Figure 1, one per election. Each panel is labeled with a year and an election type and contains seven points, which represent days of the week. Moreover, each panel includes a dashed 45-degree line. Points that fall *on* 45-degree lines denote days of the week on which, in a given election, Black and White percentages of EIP votes are identical. Points *above* a line denote days in which White voters cast

Saturday and Sunday of both weekends.

Figure 1: Statewide Black and White EIP rates by day of week



disproportionately many EIP votes, and points below, the opposite.

If the points in Figure 1 all fell on 45-degree lines we would know that Black and White EIP voters in Georgia voted at similar rates across the seven days of the week. We know that this is not the case, however, having just covered the results in Table 1.

To wit, Figure 1 shows that Black voters who cast EIP ballots were more likely to do so on both Saturdays and Sundays than comparable White voters. Across the panel’s eight elections, all Saturday and Sunday points lie to the right of and below the pictured 45-degree lines. Though these points may appear to not be far from corresponding 45-degree lines, they are nonetheless *always* below such lines. Another regularity in Figure 1 is Wednesday. In all eight elections, White EIP voters cast disproportionately more EIP ballots on this day than Black voters. Other days—Mondays, Tuesdays, Thursdays, and Fridays—do not consistently favor one group over another although Thursdays were akin to Wednesdays on seven of eight days. Regardless, and as we noted above, in the recent debates on EIP voting in Georgia, there was no serious discussion of restrictions on EIP voting during any of the five weekdays, nor to the best of our knowledge was there any evidence presented in these debates that weekend early voting *per se* poses a specific risk to election integrity.

Broadly speaking, Table 1 and Figure 1 explain why the subject of permitted days of EIP voting in Georgia is a political football. While the points in the figure are not drastically far from 45-degree lines, it is nonetheless clear that weekend early voting is more Black than White. As we noted above, the Biden-Trump margin in the 2020 presidential election was decided by fewer than 12,000 votes and the Georgia presidential contest was recounted twice. In a very close election, even small perturbations in turnout for a particular group can be pivotal.

EIP voting on SB 202-targeted days

We now consider how SB 202 interacts with the regularities in EIP voting, by day, that we have now established. Under this legislation, county elections officials in Georgia are required to offer EIP voting from 9:00AM until 5:00PM every weekday starting the fourth Monday prior to an election through the Friday immediately prior to election day.³⁹ In addition, SB 202 requires county election officials to offer EIP voting on the

³⁹See fn. 22, p. 59.

second and third Saturdays prior to Election Day. Local election officials under the law may offer EIP voting on the second and third Sundays prior to Election Day. As mentioned previously, 13 Georgia counties offered EIP voting on all four days of the two allowable weekends in the the 2020 General Election.

Table 2 provides counts of Black and White voters across our eight elections who would be affected by SB 202’s passage. In particular, it shows that more than 73,000 Black EIP voters cast ballots on SB 202-optional weekend dates of EIP voting, and similarly for more than 74,000 White voters. More White voters cast EIP ballots than Black voters on such optional days, but this is hardly surprising: in our aggregated voter file, approximately 53 percent of Georgia registered voters are White and only roughly 30 percent, Black. Therefore, Black EIP voters are disproportionately represented among EIP voters who cast their ballots on SB 202’s optional voting weekend days. On the weekend days that EIP is required per SB 202, White voters predominate.

Table 2: Statewide EIP counts on SB 202-targeted weekend days

| Year | Election | Optional | | Required | |
|-------|----------|----------|--------|----------|---------|
| | | Black | White | Black | White |
| 2016 | PPP | 802 | 999 | 5,308 | 12,832 |
| 2016 | Primary | 805 | 342 | 4,005 | 9,664 |
| 2016 | General | 12,223 | 10,686 | 46,997 | 81,413 |
| 2018 | Primary | 383 | 410 | 4,568 | 9,090 |
| 2018 | General | 14,875 | 10,862 | 44,994 | 72,376 |
| 2020 | Primary | 1,139 | 443 | 5,982 | 7,567 |
| 2020 | General | 26,491 | 33,544 | 59,465 | 104,080 |
| 2020 | Runoff | 16,510 | 16,922 | 33,521 | 32,391 |
| Total | | 73,228 | 74,208 | 204,840 | 329,413 |

Of course, our entire discussion of SB 202-targeted weekend days needs to be understood in the context of the lack of legislative debate about EIP voting on *weekdays*. In the debate over SB 202, there was no consideration of whether, say, early voting on Mondays might be eliminated or curtailed either on account of election integrity risks to voting on said Mondays, or for budgetary reasons that might alleviate pressure on weekend EIP voting. In other words, the entire legislative debate

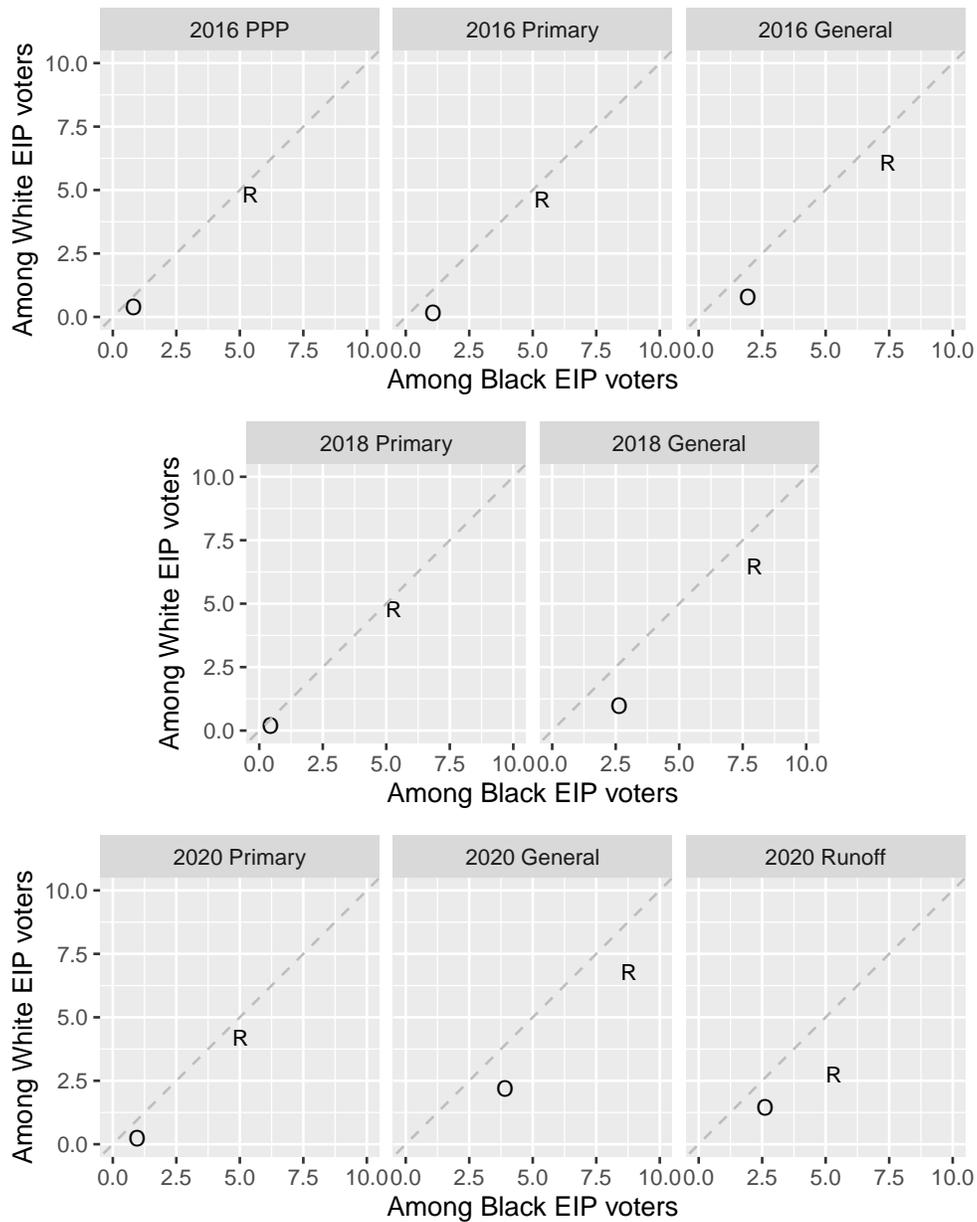
on which days of EIP voting should be permitted focused from the outset on days in which Black EIP voting rates are consistently greater than White EIP voting rates.

This point notwithstanding, we summarize the results shown in Table 2 with Figure 2, which includes eight panels, one for each election. Each panel incorporates two letters: the letter “R” representing the two required Saturdays of EIP voting, and the letter “O” representing the two optional Sundays of EIP voting under SB 202. The vertical axis in each of the panels in Figure 2 is the percent of all EIP voters among White voters who cast EIP ballots on a given set of weekend days; and, the horizontal axis in each panel is the percent of all EIP voters among Black voters who cast EIP ballots on each set of weekend days.

As Figure 2 reveals, in all eight elections, Black voters who cast EIP votes in the election cycles of 2016, 2018, and 2020 were more likely to do so on Saturdays (required) and Sundays (optional). In other words, days of EIP voting singled out for scrutiny in SB 202 are days in which Blacks voters are disproportionately represented. Though Black voters who cast EIP ballots on the two required Saturdays (“R”) in the previous eight elections were more likely to do so than comparable White EIP voters, a relatively high percentage of White EIP voters (over five percent in the 2016, 2018, and 2020 general elections, for example) also did so on the two Saturdays. In contrast, in none of the eight elections did more than 2.5 percent of White EIP voters cast their ballots on SB 202’s two optional (“O”) Sundays.

To be sure, a voter’s previous method of casting a ballot is no guarantee of future behavior when it comes to turning out to vote. Voters who in previous elections cast ballots on EIP days no longer required under SB 202 have the opportunity to vote in person on other available days of early voting or on Election Day itself—or even to vote by mail. But studies show, however, whether it comes to reprecincting or changes in polling locations (Amos, Smith and Ste. Claire 2017; Brady and McNulty 2011; Clinton et al. 2020), long wait times at the polls (Cottrell, Herron and Smith 2021; Pettigrew 2021), or the elimination of days of early voting (Walker, Herron and Smith 2019; Herron and Smith 2012, 2014), that even seemingly minor changes to the election code

Figure 2: Statewide Black and White EIP rates on weekend days targeted by SB 202



Note: The letter “O” denotes *Optional EIP voting days per SB 202*, and “R” denotes *Required days*.

can have downstream effects that dampen the likelihood of turning out to vote.

A counterfactual: EIP voting on HB 531-targeted days

We have already explained that SB 202 was not as draconian as its predecessors with respect to limitations on EIP voting in Georgia. This is particularly true regarding HB 531, which required weekday EIP voting but eliminated EIP voting on the second Sunday prior to Election Day and also permitted counties to only offer EIP voting on *either* the third Sunday *or* the third Saturday prior to Election Day. As a counterfactual exercise, we thus characterize the extent to which the curtailment of EIP voting under HB 531 would have burdened Black and White voters in Georgia.

Table 3 casts into stark relief the impact that HB 531 would have posed for thousands of the state’s EIP voters, particularly Black voters. Table 3 reveals the past usage of EIP voting by Black and White voters on the three weekend days targeted by HB 531—(1) the optional third Saturday before Election Day; (2) the optional third Sunday before Election Day; and, (3) the elimination of the second Sunday before Election Day.

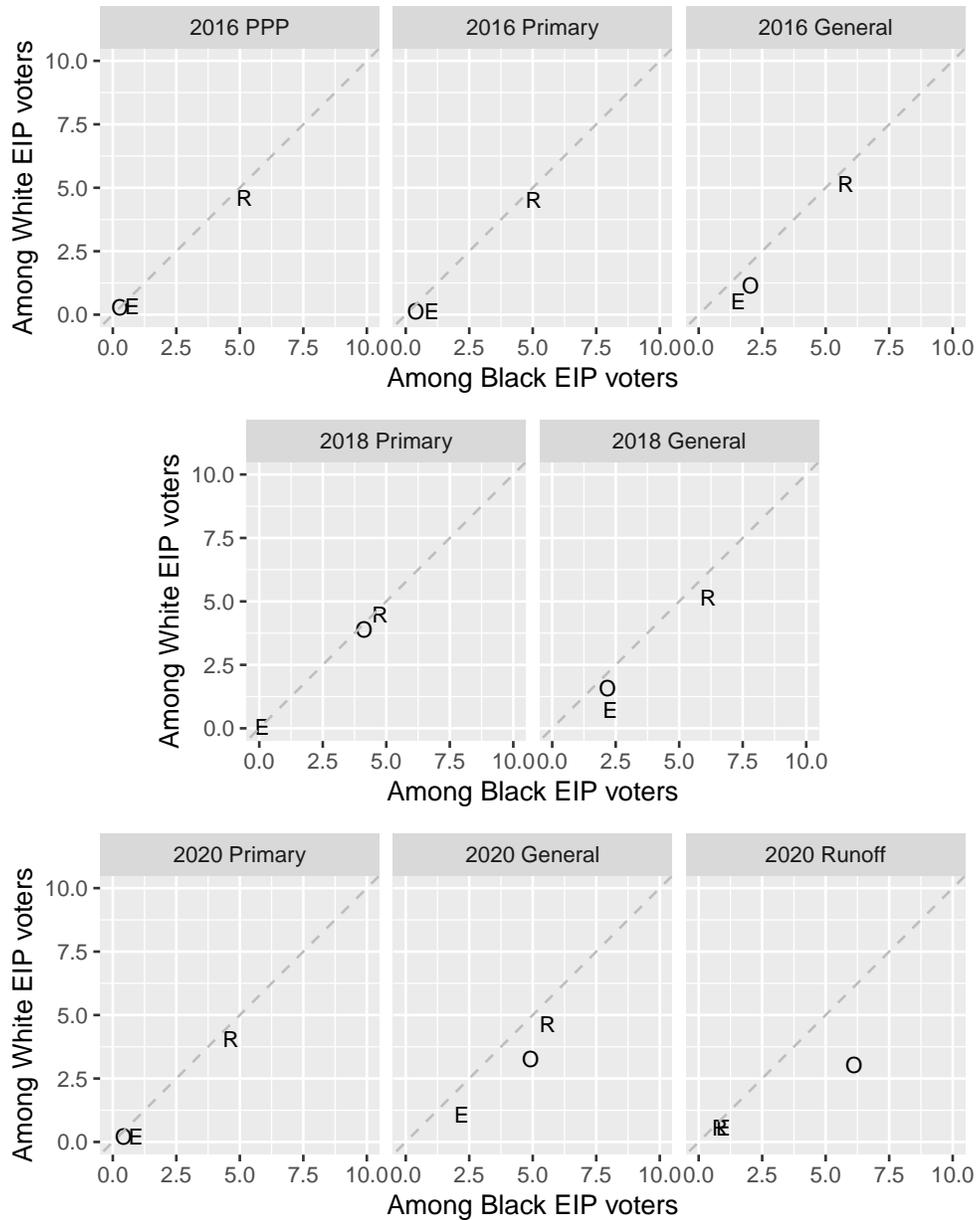
Table 3: Statewide EIP counts on HB 531-targeted weekend days

| Year | Election | Eliminated | | Optional | | Required | |
|-------|----------|------------|--------|----------|---------|----------|---------|
| | | Black | White | Black | White | Black | White |
| 2016 | PPP | 758 | 837 | 282 | 811 | 5,070 | 12,183 |
| 2016 | Primary | 763 | 288 | 300 | 269 | 3,747 | 9,449 |
| 2016 | General | 9,828 | 7,258 | 12,885 | 15,583 | 36,507 | 69,258 |
| 2018 | Primary | 104 | 92 | 3,562 | 7,393 | 4,106 | 8,485 |
| 2018 | General | 12,886 | 8,018 | 12,337 | 17,651 | 34,646 | 57,569 |
| 2020 | Primary | 1,083 | 378 | 508 | 370 | 5,530 | 7,262 |
| 2020 | General | 14,937 | 16,314 | 33,249 | 50,134 | 37,770 | 71,176 |
| 2020 | Runoff | 6,168 | 6,624 | 38,551 | 35,911 | 5,312 | 6,778 |
| Total | | 46,527 | 39,809 | 101,674 | 128,122 | 132,688 | 242,160 |

In the 2020 runoff election, for example, over more Black voters (38,551) cast EIP ballots on the Saturday and Sunday three weeks ahead of Election Day than White voters (35,551). Under HB 531, only one of those two weekend days could be offered by county election officials. Moreover, across our eight elections, some 46,527 votes were cast by Black voters on the second Sunday before Election Day, a day slated for elimination by HB 531. Although 39,809 votes were cast by White voters on this HB

531-eliminated Sunday, there were 1.75 times *more* White registered voters in Georgia than Black registered voters as of January 8, 2021. The elimination of the second Sunday before Election Day, proposed under HB 531, would have disproportionately affected Black voters in Georgia.

Figure 3: Statewide Black and White EIP rates on days targeted by HB 531



Note: The letter “O” denotes *Optional* EIP voting days per HB 531, “R” denotes *Required* days, and “E” denotes *Eliminated* days.

Figure 3 provides more perspective on how Black and White EIP voters would have been relatively impacted by the weekend days targeted by HB 531, had this iteration of the legislation been adopted. The figure includes eight panels, one per election, and each panel has three letters. Each letter—optional (“O”), required (“R”), and eliminated (“E”)—describes how HB 531 would have dealt with EIP on these weekend days. Figure 3 refines our earlier analysis of Saturdays and Sundays, as shown in Figure 1, insofar as HB 531 singled out specific Saturdays and Sundays.

The locations of the letter “R” shown in each panel of Figure 3—every one centered to the right of corresponding 45-degree lines—reflects the types of racial regularities in voting modalities that we discussed at length. That is, the EIP voting days that were required by HB 531 (“R”) are all close to 45-degree lines. These are days when the Black EIP voting rate in Georgia is similar to the White EIP voting rate. In contrast, HB 531’s proposed eliminated days (“E”) and optional days (“O”) are days in which Black EIP voting rates more clearly exceed White EIP voting rates. This exemplifies how HB 531 targeted days of EIP voting in a way that would have disproportionately affected Black voters in Georgia.

Discussion

Despite mixed evidence about the relationship between EIP voting and voter turnout (Leighley and Nagler 2013; Burden et al. 2014; Fraga 2018), voting in person prior to Election Day is now commonplace in the United States. It is used across the country and in seven of the nine states covered (in full or in part) by Section 5 of the Voting Rights Act pre-*Shelby County v. Holder*. EIP voting is also used in states without Georgia’s history of racial discrimination.

That EIP voting has become institutionalized, however, does not mean that every state legislature is keen on ensuring that EIP voting remains convenient. Georgia’s recent legislative push to cut back on early voting opportunities did not occur in a vacuum. Indeed, in 2021, following the 2020 election and its extended aftermath, state

lawmakers in 49 states considered over 440 bills restricting voting access.⁴⁰

Regardless of whether an election administration reform turns on a technical issue or is justified in the name of election integrity, the reform should be assessed for its potential impact on ballot access, particularly on voting opportunities for racial and ethnic minorities. Our analysis of EIP voting patterns in Georgia across three recent election cycles shows that Black voters who cast early ballots in person were more likely than White early voters to cast ballots in person on days considered for elimination by SB 202. In the legislative debate on this bill, there was no serious discussion of eliminating EIP voting on any of the five weekdays, which happen to be days on which White voters are over-represented. Leaving aside other aspects of SB 202—including restrictions placed on requesting and casting absentee ballots as well as limitations on ballot drop box locations—this implies that the actions of the Georgia legislature to allow county election officials to curtail in part or in whole weekend in-person voting before Election Day disproportionately burdens Black voters seeking to exercise the franchise. This conclusion is independent of whether the legislature’s effort to allow counties to curtail EIP voting *intentionally* selected against people of a given racial group. And it is of course possible that Black voters who typically have voted EIP on eliminated weekends might react to cutbacks and choose instead to vote early during the week, on Election Day, or by mail. Regardless, the Georgia legislature’s curtailing of *only* weekend EIP voting disrupted a consistent pattern of Black turnout in Georgia and in so doing raised the cost of voting for these individuals.

The targeting of weekend early voting days—to the exclusion of other days—by the Georgia state legislature raises a number of important questions. If voters of a select racial group disproportionately choose a particular method of voting, and if this method is curtailed by local election officials, does this constitute a violation of the Voting Rights Act (VRA)? The VRA is designed, in part, to ensure that election administration

⁴⁰“Voting Laws Roundup: December 2021,” *Brennan Center for Justice*, available at <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> (last accessed January 6, 2022).

does not discriminate against racial/ethnic minorities. Although the Supreme Court in *Shelby v. Holder* (2013) functionally rendered inactive Section 5 of the VRA (requiring “preclearing” of changes to election rules and procedures in jurisdictions with a history of discrimination, including the state of Georgia), the Act’s Section 2 remains, allowing groups to challenge jurisdictions if they enact rules or laws resulting “in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,” regardless of legislative intent. We leave it to others to mine the legislative record to determine whether the motives behind SB 202, or for that matter HB 531, might violate the “intent test” of Section 2 of the VRA. Here, though, we have provided evidence that speaks to Section 2’s “results test.” Not one day of EIP voting in Georgia where the rate of White EIP voters casting ballots was greater than that of Black EIP voters was slated for elimination by the Georgia legislature in its post-2020 election debate on election reform.

The status of Section 2 of the VRA remains a subject of debate, most recently in *Brnovich v. Democratic National Committee*, heard by the Supreme Court in 2021. The court’s ruling in *Brnovich* considered challenges to Arizona law limiting voters casting mail ballots from receiving assistance and invalidates ballots cast out-of-precinct. Our findings on EIP voting in Georgia speak directly to oral arguments in *Brnovich*, during which there were two notable exchanges among Justices Elena Kagan and Brett Kavanaugh, and Michael Carvin, an attorney defending Arizona. “If a state has long had two weeks of early voting and then the state decides that it is going to get rid of Sunday voting on those two weeks—leave everything else in place—and Black voters vote on Sunday 10 times more than White voters,” Justice Kagan asked Mr. Carvin, “is that system equally open?” Mr. Carvin responded, “I would think it would be.”⁴¹ Soon after, during his exchange with Mr. Carvin, Justice Kavanaugh proffered a possible standard to determine whether a

⁴¹ *Brnovich v. DNC*, Consolidated Oral Argument, Supreme Court of the United States, March 2, 2021, time of 20:47, available at <https://www.c-span.org/video/?507934-1/brnovich-v-dnc-consolidated-oral-argument> (last accessed March 2, 2021).

jurisdiction’s law might be subject to challenge under the VRA’s Section 2. “One factor would be if you’re changing to a new rule that puts minorities in a worse position than they were under the old rule,” Kavanaugh stated, “and a second factor would be whether a rule is commonplace in other states that do not have a similar history of racial discrimination.”⁴²

Would the curtailment of Sunday EIP voting in some counties under SB 202 in Georgia trigger what might be called the “Kavanaugh Rule?” SB 202 arguably places Black voters in a worse position than they were prior the enactment of the law, and roughly a dozen states allow local election officials to offer Sunday in-person voting. In addition, two states—Nevada and Utah—that have all-mail voting expressly permit local officials to offer Sunday ballot drop-off hours.⁴³ As a recent example of the way in which racial politics underlying voting access interact with technical election administration changes, SB 202 poses an interesting test to the so-called Kavanaugh Rule.

⁴²Ibid., time of 28:40.

⁴³See fn. 9 for additional details and citations.

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