

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

**COALITION FOR GOOD  
GOVERNANCE, et al.,**

**Plaintiffs,**

**v.**

**BRIAN KEMP, et al.,**

**Defendants.**

**Civil Action No. 21-cv-02070-  
JPB**

**PLAINTIFFS' TIME-SENSITIVE MOTION TO STAY**

Plaintiffs respectfully move to stay this case until Defendants promulgate the regulations necessary for the enforcement of challenged provisions of SB 202, as further defined below. This Motion is time-sensitive because this case is scheduled for hearing on Defendants' Motion for Summary Judgment on July 2, 2024. Plaintiffs' counsel has conferred with Defendants' counsel and Defendants oppose this Motion. In support of this Motion, Plaintiffs show the Court the following:

1. The eleven counts of Plaintiffs' Second Amended Complaint (Doc. 104) may be grouped as follows:

a) The “Suspension Rules”<sup>1</sup> claims: Counts I, II, and III. These counts challenge the provisions of SB 202 that allow the State Election Board to remove county superintendents and registrars and to take control of county election management.

b) The “Observation Rule”<sup>2</sup> claims: Counts IV, V, and VI. These counts challenge the provisions of SB 202 that make it a felony to “intentionally observe an elector while casting a ballot in a manner that would allow such person to see for whom or what the elector is voting.” O.C.G.A. § 21-2-568.1.

c) The “Communication Rule”<sup>3</sup> claim: Count VII. This count challenges the provision of SB 202 making it a misdemeanor for “monitors and observers” to communicate “any information that they see while monitoring the processing and scanning of absentee ballots.” O.C.G.A. § 21-2-386(a)(2)(B)(vii).

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<sup>1</sup> In their Complaint and Amended Complaint, Plaintiffs referred to the Suspension Rules as the “Takeover Provisions.” In the Second Amended Complaint, Plaintiffs changed the names of the challenged laws to conform to the Court’s terminology.

<sup>2</sup> In their Complaint and Amended Complaint, Plaintiffs referred to the Observation Rule as the “Elector Observation Felony.”

<sup>3</sup> In their Complaint and Amended Complaint, Plaintiffs referred to the Communications Rule as the “Gag Rule.”

d) The “Tally Rules”<sup>4</sup> claims: Count VIII and XI. These counts challenge the provisions of SB 202 making it a misdemeanor for “monitors and observers” to, among other things, tally, tabulate, estimate or attempt to estimate any votes on the absentee ballots cast. O.C.G.A. § 21-2-386(a)(2)(A) & (B)(vi).

e) The Photography Rule<sup>5</sup> claims: Counts IX and X. These counts challenge the provisions of SB 202 making it a misdemeanor to “[p]hotograph or record the face of an electronic ballot marker while a ballot is being voted or while an elector’s votes are displayed on such electronic marker,” or to “[p]hotograph or record a voted ballot.” O.C.G.A. § 21-2-568.2 (2)(B).

2. As further explained below, SB 202 requires the State Election Board to promulgate regulations relating to six of the eleven counts of the Second Amended Complaint: the Suspension Rules (challenged in Counts I, II and III), the Communications Rule (challenged in Count VII), and the Tally Rules, challenged in Counts VIII and XI. The State Election Board has not taken any steps to promulgate these regulations. Although SB 202 does not

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<sup>4</sup> In their Complaint and Amended Complaint, Plaintiffs referred to the Tally Rules as the “Estimating Bans.”

<sup>5</sup> In their Complaint and Amended Complaint, Plaintiffs referred to the Photography Rule as the “Photography Ban.”

mandate regulations relating to the other five claims (relating to the Observation Rule and the Photography Rule), as will be explained, a stay of the entire case is the most efficient way to proceed.

3. As to regulations relating to the Suspension Rules, a core provision of the statute, O.C.G.A. § 21-2-33.2, describes the circumstances warranting suspension and the procedures for suspending a county or municipal election superintendent. The procedures for suspension center upon the requirement of a “preliminary hearing,” O.C.G.A. § 21-2-33.2(b) (“the State Election Board shall conduct a preliminary investigation . . . [which] shall be followed by a preliminary hearing”), and an unnamed hearing following a preliminary hearing. O.C.G.A. § 21-2-33.2(c) (“Following the preliminary hearing described in subsection (b) of this Code section, the State Election Board may suspend a county or municipal superintendent . . . after notice and hearing...”). However, O.C.G.A. § 21-2-33.2(b) states, in no uncertain terms:

The State Election Board shall promulgate rules and regulations for conducting such preliminary investigation and preliminary hearing.

This requirement to promulgate rules for conducting preliminary investigations and preliminary hearings – central processes in any suspension proceeding – is mandatory. The requirement’s placement in the heart of the Suspension Rules also strongly suggests that the General

Assembly contemplated that the State Election Board would promulgate regulations immediately upon the passage of SB 202, or at the very latest before it attempted to enforce the provisions. Yet, in the three years since the enactment of SB 202, the State Elections Board has done nothing: it has not proposed or promulgated any such rules or regulations.

4. As to regulations relating to the Communications and Tally Rules: both sets of rules are found in subparagraph (B) of paragraph (2) of O.C.G.A. § 21-2-386(a). Subparagraph (C) of paragraph (2) states:

The State Election Board shall promulgate rules requiring reconciliation procedures; prompt and undelayed scanning of ballots after absentee ballot envelopes are opened; secrecy of election results prior to the closing of the polls on the day of a primary, election, or runoff; and other protections to protect the integrity of the process set forth in this paragraph.

In the three years since the enactment of SB 202, the State Elections Board has not proposed or promulgated any such rules.

5. In their Motion for Summary Judgment, Defendants argue repeatedly that Plaintiffs' pre-enforcement challenge to SB 202 is premature and "ill-suited for adjudication" because SB 202 "contemplates that state agencies will promulgate additional regulations in the future." (Doc. 140 at 2). Defendants state: "Accordingly, this Court should also grant Defendants' Motion because, absent a plausible claim of facial invalidity, there is no basis

to take action *until those regulations are put forth by the appropriate state agency.*” (*Id.* (emphasis added)).

In support of their Motion for Summary Judgment on Plaintiffs’ procedural due process challenge to the Suspension Rules, Defendants cite O.C.G.A. § 21-2-33.2(b) (block-quoted above) and state: “These rules have not yet been promulgated, but they provide the State Election Board with the ability to responsibly fill in any purported interpretative gaps Plaintiffs claim to see as problematic, including establishing a protocol for providing a more descriptive notice procedure to individual members of a superintendent and any Board as a whole.” (Doc. 140 at 16). Further, in response to Plaintiffs’ argument that SB 202 violates due process because it does not provide for notice to individual board members, Defendants again rely on the promise of regulation: “Moreover, because the SEB is still able to promulgate rules relating [to] the investigation and preliminary hearing pursuant to this section, Plaintiffs are not able to claim that ‘no notice’ will be provided for under SB 202.” (Doc. 140 at 17).

6. In their defense of the Communication and Tally Rules, the Defendants do not explicitly reference the yet-to-be-promulgated regulations,

but it is reasonable to assume that they will do so.<sup>6</sup> After all, Defendants may maintain, the State Election Board might one day promulgate regulations narrowing the reach of the Communications or Tally Rules into some arguably constitutional limit, or clarify them to avoid a void-for-vagueness challenge.

### **Discussion**

These facts present two related dilemmas. The first is if it is premature *for the Court* to adjudicate Plaintiffs' challenges to these provisions of SB 202, as Defendants contend, is it premature *for the Defendants* to attempt to enforce them? On the one hand, we are told to presume that the State will follow the law. The law requires the State Election Board to promulgate these regulations, regulations which clearly are

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<sup>6</sup> Defendants do not confine their arguments to those that they advance in their initial Brief in Support of their Motion for Summary Judgment. For example, Defendants argue for the first time in their Reply Brief that Plaintiffs do not have organizational standing to bring this suit (Doc. 140 at 3), after not even mentioning organizational standing in their initial brief (Doc. 123-1, *passim*) or their Statement of Material Facts (Doc. 123-2, *passim*). Defendants defend this lapse by noting that, since standing is jurisdictional, it cannot be waived. But Plaintiffs do not contend that Defendants have waived the issue or that Plaintiffs need not establish standing at trial. Instead, summary judgment may not be granted on this issue because Defendants did not carry their initial burden of showing the absence of a genuine issue to be tried. Fed. R. Civ. P. 56(c).

material to how and whether the rules are to be enforced.<sup>7</sup> One might assume that the State Election Board, acting in good faith and recognizing their own failure to promulgate regulations, would not attempt to suspend a local election board for the local board's failure to follow election rules. The same is true with the Governor, who is responsible for the enforcement of the criminal laws, including the Communications Rules and the Tally Rules.

On the other hand, Defendants fall short of explicitly committing to withholding enforcement until the regulations are promulgated. Though the State Election Board has not suspended any local election boards, it initiated proceedings against Fulton County that could easily have led to suspension. In addition, as this Court stated in its April 4, 2022, Order denying Defendants' Motion to Dismiss: "Notably, State Defendants do not refute Plaintiffs' contention that any alleged violation of SB 202 will be 'vigorously' prosecuted." (Doc. 78 at 9).

The second dilemma is the prospect that the State Election Board, which is under new leadership, may soon promulgate regulations that will assist the Court in evaluating the constitutionality of the challenged

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<sup>7</sup> The State Election Board has had the legal talent necessary to promulgate these rules. It was chaired from June 2022 to August 2023 by former District Court Judge Duffey and is represented in this case today by no fewer than twenty-one (21) individually named attorneys. (Doc. 140 at 24-26).

provisions or narrow the scope of the litigation. The promise of rulemaking is particularly relevant to the consideration of Plaintiffs' first count, the procedural due process attack on the Suspension Rules. As the Court explained in its Order denying the Defendants' Motion to Dismiss, "determining whether a constitutional violation has occurred requires an analysis of what process the State provides under the circumstances." (Doc. 78 at 19-20). Plaintiffs are confident that they will prevail without a stay given the absence of any regulation providing due process, but if clarifying regulations are enacted during the pendency of the litigation, the facts relevant to the due process issue may change.

In addition, the Suspension Rules permit the State Election Board to remove, but not to replace, a board of registrars, leaving an entire county and its voters with no official to handle voter registration or any of the many tasks associated with absentee voting. This feature of SB 202 plainly is unconstitutional. The State Election Board could resolve the issue with a regulation providing that boards of registration which cannot be replaced will not be suspended.

As to the Communications Rule and the Tally Rules, one issue that could be resolved by regulation is whether those rules only apply to speech occurring in the ballot-processing room or apply to speech occurring

anywhere. The Court has ruled that Tally Rule 2 applies only to speech in the ballot-processing room. Plaintiffs argue that, as written, both Rules (but especially Tally Rule 1 and the Communications Rule) apply to speech anywhere (and hence are unjustifiably broad content-based regulations). *See generally* Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, Doc. 134 at 43-46, (discussing differences between Tally Rule 1 and Tally Rule 2) and *id.* at 39-43 (discussing scope of the Communications Rule). Defendants' interpretation of the territorial scope of the Tally and Communications Rules is unclear. The State Election Board, via the General Assembly-mandated regulations, could answer the territorial question by stipulating that the rules apply anywhere (leaving the statutes plainly unconstitutional) or apply only to speech in the ballot-processing room (which would clarify, if not eliminate, the constitutional questions).

Provided the Defendants agree to not enforce the Suspension Rule, the Communication Rule, or the Tally Rules until the mandatory regulations are promulgated, a stay of this case pending such regulation would resolve these dilemmas and provide for an efficient resolution of this litigation. If the Defendants will not agree to withhold enforcement, then the Court's order granting the stay should provide that it will be lifted immediately in the event of any action to enforce these rules.

Granting such a stay would be well within the Court's broad discretion to control its docket.<sup>8</sup> Appropriate regulations are highly likely to at least narrow the issues to be tried. And Defendants would not be prejudiced in the least by a stay. A stay would not be equivalent to an order requiring the State Election Board to promulgate the regulations. A stay would also not preclude the enforcement of the rules. A stay would simply give the State Election Board time – while the rules are not being enforced or litigated – to promulgate the rules and thereby “simplify the issues in the case.” *Tomco Equip. Co. v. Se. Agri-Sys, Inc.*, 542 F. Supp. 2d 1303, 1307 (N.D. Ga. 2008) (granting stay pending patent reexamination); *Barnes v. CS Mktg, LLC*, 430 F. Supp. 3d 1309, 1313 (S.D. Fla. 2020) (granting stay pending the FCC's promulgation of related regulations).

For the foregoing reasons, Plaintiffs' Motion to Stay should be granted. A proposed order is filed herewith.

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<sup>8</sup> As Justice Cardozo stated in *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936):

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. !!

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Respectfully submitted this 17<sup>th</sup> day of June 2024.

/s/ Bruce P. Brown

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CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE  
WITH LOCAL RULE 5.1

Pursuant to N.D. Ga. L.R. 5.1(C), I certify that the foregoing was prepared using Century Schoolbook 13 font. I electronically filed this using CM/ECF, thus electronically serving all counsel of record.

This 17<sup>th</sup> day of June 2024.

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