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## HB 316 - Voting System

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## ELECTIONS

*Elections and Primaries Generally: Amend Chapter 2 of Title 21 of the Official Code of Georgia Annotated, Relating to Primaries and Elections Generally, so as to Provide for Definitions; Provide for Uniform Election Equipment in this State; Provide for Ballot Marking Devices and Standards and Procedures for Such Devices; Provide for the Manner of Qualifying Presidential Elector Candidates for Independent Candidates for the Offices of President and Vice President of the United States; Provide for the Time for Filing Evidence of Nomination by Political Body Candidates; Clarify the Age for Voting; Provide for Audits of Election Results and Procedures Therefor; Revise and Clarify Procedures for Voter Registration and List Maintenance Activities; Authorize the Secretary of State to Become a Member of a Nongovernmental Entity for Purposes of Maintaining Electors Lists under Certain Conditions; Provide for Minimum Requirements and Form of Information on Electronic Ballot Markers; Provide for Confidentiality of Certain Records and Documents; Extend the Time Period Allowing for Public Comment on Precinct Realignments; Place Time Limits on Relocation of Polling Places; Provide for Additional Sites for a Registrar's Office or Place of Registration for Absentee Ballots; Provide for the Delivery of Absentee Ballots to Certain Persons in Custody; Provide for the Manner of Processing Absentee Ballot Applications and Absentee Ballots; Provide a Cure for an Elector Whose Absentee Ballot Was Rejected; Provide for the Form of Absentee Ballot Oath Envelopes; Provide for the Time for Advance Voting and Manner and Location of Advance Voting; Provide for Assistance in Voting; Provide for Ease of Reading Ballots; to Provide that a Voter Identification Card Is Valid Until an Elector Moves Out of the County in Which It Was Issued or Is No Longer Eligible to Vote; Provide for Notification Procedures for Status of Provisional Ballots; Provide for the Time for Certifying Elections; Provide for Precertification Audits; Provide for Entitlement to and Methods for Recounts; Provide for Conforming Changes; Provide for Related Matters;*

***Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A §§ 21-2-2 (amended), -2.1 (new), -4.1 (amended), -7.1 (new), -18 (amended), -19.1 (new), -32.1 (new), 50 (amended), -132.1 (new), -172 (amended), -216 (amended), -220.1 (amended), -225 (amended), -230 (amended), -231 (amended), -232 (amended), -234 (amended), -235 (amended), -262 (amended), -265 (amended), -267 (amended), -286 (amended), -293 (amended), -300 (amended), -365 (amended), -367 (amended), -369 (amended), -372 (amended), -374 (amended), -375 (amended), -377 (amended), -379.21–.26 (new), -381 (amended), -382 (amended), -383 (amended), -384 (amended), -385 (amended), -386 (amended), -388 (amended), -409 (amended), -413 (amended), -417.1 (amended), -418 (amended), -419 (amended), -482 (amended), -493 (amended), -495 (amended), -498 (amended), -499 (amended), -566 (amended), -579 (amended), -580 (amended), -582 (amended), -582.1 (amended), -587 (amended)
BILL NUMBER:	HB 316
ACT NUMBER:	24
GEORGIA LAWS:	2019 Ga. Laws 7
SUMMARY:	The Act authorizes and requires a new voting system be used in all elections, provides for auditing procedures, provides for updates to the voter list maintenance laws, and

specifies additional revisions to election processes.

EFFECTIVE DATE: April 2, 2019

### *History*

In 2016, Russia interfered with the 2016 United States (U.S.) presidential election “in sweeping and systematic fashion,”<sup>1</sup> sparking emotions ranging from mild concern to outrage from American voters.<sup>2</sup> Subsequent investigations found that Georgia, although not among the twenty-one targeted states, had several county election websites visited by Russian military spies seeking to identify vulnerabilities in Georgia’s central voting system just weeks before the 2016 election.<sup>3</sup> But identifying vulnerabilities in Georgia’s central elections server, which has been maintained at Kennesaw State University (KSU) in the Center for Election Services (CES) since 2002, did not require foreign hackers or rogue spies seeking to infiltrate and tamper with the election outcome.<sup>4</sup>

In August 2016, months before Russia tried to subvert Georgia’s election websites, professional cybersecurity expert Logan Lamb discovered the state’s database containing 6.7 million voters and instructions and passwords for election supervisors to operate the direct-recording electronic (DRE) voting machines and access the central server.<sup>5</sup> Lamb also uncovered software files for electronic poll

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1. 1 ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (2019), <https://static.c-span.org/files/Searchable+Mueller+Report.pdf> [<https://perma.cc/9D93-6RFV>].

2. Miles Parks, *NPR/Marist Poll: 1 in 3 Americans Thinks a Foreign Country Will Change Midterm Votes*, NPR (Sept. 17, 2018, 5:00 AM), <https://www.npr.org/2018/09/17/647420970/npr-marist-poll-1-in-3-americans-think-foreign-country-will-change-midterm-votes> [<https://perma.cc/3LSV-ZRCT>]; Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election: Unraveling the Russia Story So Far*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html> [<https://perma.cc/D6LV-RS5Q>].

3. Indictment at ¶ 7, *United States v. Netyksho*, No. 1:18-cr-00215-ABJ, (D.D.C. July 13, 2018), <https://www.justice.gov/file/1080281/download> [<https://perma.cc/SCK5-L52N>]; Ellen Nakashima, *In Georgia, a Legal Battle Over Electronic vs. Paper Voting*, WASH. POST (Sept. 16, 2018, 10:48 AM), [https://www.washingtonpost.com/world/national-security/in-georgia-a-legal-battle-over-electronic-vs-paper-voting/2018/09/16/d655c070-b76f-11e8-94eb-3bd52dfe917b\\_story.html?utm\\_term=.fb36f51dc484](https://www.washingtonpost.com/world/national-security/in-georgia-a-legal-battle-over-electronic-vs-paper-voting/2018/09/16/d655c070-b76f-11e8-94eb-3bd52dfe917b_story.html?utm_term=.fb36f51dc484) [<https://perma.cc/CX4Q-QDUY>].

4. *Curling v. Raffensperger*, No. 1:17-cv-2989-AT, 2019 WL 3822123, at \*21 (N.D. Ga. Aug. 15, 2019).

5. Kim Zetter, *Was Georgia’s Election System Hacked in 2016?*, POLITICO (July 18, 2018),

books and executable programs that could infect the central system with vote-changing malware, all of which were accessible on the CES's public website.<sup>6</sup> It was later determined that the server had been unsecured and exposed to the cyber world since 2014.<sup>7</sup> Although Lamb immediately reported his unnerving discovery to the Director of CES, one of Lamb's colleagues, Christopher Grayson, was able to locate and access the same unsecured server again in March 2017, at which time Grayson notified a KSU faculty member and the University Information Technology System (UITS), which was able to establish a protective firewall to isolate the server that same day.<sup>8</sup>

Although DRE voting machines have been almost entirely abandoned in the U.S. because of vulnerabilities like the ones Lamb exposed in August 2016,<sup>9</sup> Georgia had once been on the cutting-edge of voting technology when it became the first state to adopt a DRE system in 2002.<sup>10</sup> Prompted by Florida's mishandling of votes in the 2000 presidential election,<sup>11</sup> Senator Jack Hill (R-4th) sponsored legislation in February 2001 that among other things created the 21st Century Voting Commission to evaluate voting equipment alternatives and make quick recommendations to the General Assembly.<sup>12</sup> In 2002, after the Commission issued a final report later

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<https://www.politico.com/magazine/story/2018/07/18/mueller-indictments-georgia-voting-infrastructure-219018> [<https://perma.cc/QBG3-V74B>].

6. *Id.*

7. *Id.* It may be impossible to ever know if anyone other than Lamb accessed Georgia's central server system and databases, as four days after a lawsuit was filed against CES officials, the server and all backups were erased in what then-Secretary of State Brian Kemp (R) called "standard operating procedure." *Id.*; see also Frank Bajak, *Georgia Election Server Wiped After Suit Filed*, ASSOCIATED PRESS (Oct. 26, 2017), <https://www.apnews.com/877ee1015f1c43f1965f63538b035d3f> [<https://perma.cc/BM52-PZCG>].

8. Complaint at 1–10, 81, *Curling v. Kemp I*, No. 2017-CV-292233 (Fulton Co. Super. Ct. July 3, 2017).

9. NAT'L ACADS. OF SCIS., ENG'G, & MED., *SECURING THE VOTE: PROTECTING AMERICAN DEMOCRACY* 58 (2018), <https://doi.org/10.17226/25120> [<https://perma.cc/U9UX-WQAN>].

10. SECURE, ACCESSIBLE & FAIR ELECTIONS (SAFE) COMMISSION REPORT 14 (Jan. 10, 2019), [https://sos.ga.gov/admin/uploads/SAFE\\_Commission\\_Report\\_FINAL\\_\(1-10-18\).pdf](https://sos.ga.gov/admin/uploads/SAFE_Commission_Report_FINAL_(1-10-18).pdf) [<https://perma.cc/LPR3-WJ8T>] [hereinafter SAFE REPORT]; Nakashima, *supra* note 3.

11. SAFE REPORT, *supra* note 10, at 4; *SRC Study Contributes to Georgia Election Reform*, 23 J. SOUTHERN REGIONAL COUNCIL 13, 13–14 (2001), [http://southernchanges.digitalscholarship.emory.edu/sc23-1\\_1204/sc23-1\\_006/](http://southernchanges.digitalscholarship.emory.edu/sc23-1_1204/sc23-1_006/) [<https://perma.cc/7TH9-9GC3>] [hereinafter *SRC Study*].

12. *SRC Study*, *supra* note 11; Georgia General Assembly, SB 213, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20012002/SB/213>. At the time the 21st Century

that year recommending DRE voting machines for in-person voting and an optical scan system for absentee voting by mail,<sup>13</sup> Georgia became the first state in the country to use DRE voting machines.<sup>14</sup> Over seventeen years later, however, Georgia was one of the last five states to still use the antiquated and highly vulnerable DRE system.<sup>15</sup> The discoveries by Lamb and Christopher Grayson in 2016 and 2017—bolstered by concerns about Russia’s interference in the 2016 presidential election and an alarming increase in reports of the insecurities of DRE voting machines that generate no auditable paper trail—brought Georgia’s continued use of the DRE system to the forefront of both legislative and judicial attention.<sup>16</sup>

In July 2017, several voters and an election integrity advocacy organization filed a lawsuit against then-Secretary of State Brian Kemp (R) and other elections officials in state court to enjoin any future use of DRE voting machines in Georgia.<sup>17</sup> Additional lawsuits against Kemp and various elections officials ensued, challenging a range of state elections practices including both the use of DRE voting machines as well as the “exact match” rule.<sup>18</sup>

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Voting Commission began meeting. Georgia experienced a pervasive lack of uniformity, relying on four different ballot systems across its 159 counties: lever machines, paper and scanning machines, punch-out ballots, and pen and paper. SAFE REPORT, *supra* note 10, at 4. *See generally* Frances Conway Pratt, *Elections and Primaries Generally*, 18 GA. ST. U. L. REV. 96 (2001).

13. REPORT OF THE 21ST CENTURY VOTING COMMISSION 38 (2001), <https://www.sos.state.co.us/pubs/elections/VotingSystems/files/2015/21stCenturyReport.pdf> [<https://perma.cc/2EGR-6W3W>].

14. Statement from Kathy Rogers, Dir. of Election Admin., Ga. Office of Sec’y of State, to U.S. Election Assistance Commission (May 5, 2004). After DRE machines were implemented, the number of undervotes dropped from 3.5% in 2000 to 0.86% in 2002. Brit J. Williams & Merle S. King, *Implementing Voting Systems: The Georgia Method*, 47 COMMS. ACM 39, 39–42 (2004). The 2019 SAFE Report touted the successful implementation of this technology as one of the primary reasons the Commission wanted to keep an electronic ballot-marking device. SAFE REPORT, *supra* note 10, at 9. Deputy Division Director of the National Science Foundation Jeremy Epstein, in his personal capacity, offered praise to the DRE system even in 2017 before the Georgia House Committee on Science and Technology for being outstandingly accurate, albeit inexcusably vulnerable to hacking and malware, thus necessitating its immediate abandonment. Video Recording of House Committee on Science and Technology Meeting at 23 min., 27 sec. (Sept. 22, 2017) (remarks by Jeremy Epstein, Deputy Division Director, National Science Foundation), <https://youtu.be/OrnZEpyJzt4> [hereinafter House Science and Technology Committee Video].

15. *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018); Nakashima, *supra* note 3.

16. *See generally Election Security: Hearing Before the H. Comm. on H. Admin.*, 116th Cong. (2019) (statement of Lawrence D. Norden, Deputy Dir., Democracy Program, Brennan Ctr. for Justice at NYU Sch. of Law); NAT’L ACADS. OF SCIS., ENG’G, & MED., *supra* note 9, at 78.

17. Complaint at 6–8, *Curling v. Kemp I*, No. 2017-CV-292233 (Fulton Co. Super. Ct. July 3, 2017).

18. *Curling v. Raffensperger*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/amicus/voting/curling/default.html> [<https://perma.cc/6DY6-9E3G>] (last visited Sept. 18,

Shortly after *Curling I* was filed, the Georgia House of Representatives Committee on Science and Technology met to discuss suggestions for new voting machines.<sup>19</sup> Two bills, House Bill (HB) 680 and Senate Bill (SB) 403, were introduced in the following 2018 legislative session seeking to eliminate Georgia’s use of DRE voting machines before specified election years; however, despite a general consensus that DRE voting machines were outdated and vulnerable to hacking,<sup>20</sup> the state legislature failed to agree on legislation updating the state’s election system prior to the closely contested 2018 gubernatorial election.<sup>21</sup> This failure prompted the *Curling* plaintiffs to seek a preliminary injunction in August 2018 that would have required the state to switch to paper ballots at the eleventh hour.<sup>22</sup> Although a federal judge denied the preliminary injunction, she found that the state’s continued reliance on the DRE system “likely results in ‘a debasement or dilution of the weight of

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2019) (discussing various ongoing lawsuits such as *Common Cause of Georgia v. Kemp*, *Martin v. Kemp*, and *Coalition for Good Governance v. Crittenden*); see also Mark Niese, *Changes Coming to Georgia Purges, Vote Counts and Voting Machines*, ATLANTA J.-CONST. (Mar. 18, 2019), <https://www.ajc.com/news/state—regional-govt—politics/measure-would-change-georgia-purges-vote-counts-and-voting-machines/lk1muv5jrC5SX11wt29dzN/> [https://perma.cc/RF6W-NS7F] [hereinafter *Changes Coming to Georgia*]. The “exact match” rule previously disqualified a voter’s registration application if his or her first name, last name, birth date, driver’s license number, or social security number did not match the record on file with the Georgia Department of Driver Services or the federal Social Security Administration. *Id.*

19. House Science and Technology Committee Video, *supra* note 14, at 17 min., 21 sec. (remarks by Rep. Ed Setzler (R-35th)); SAFE REPORT, *supra* note 10, at 3; Kristina Torres, *Lawmakers Begin Talks About How to Replace Georgia’s Aging Vote System*, ATLANTA J.-CONST. (Sept. 22, 2017), <https://www.ajc.com/news/state—regional-govt—politics/lawmakers-begin-talks-about-how-replace-georgia-aging-vote-system/A1e4ryglB9XgSZv1Dbb2GJ/> [https://perma.cc/UF9Y-LGME].

20. House Science and Technology Committee Video, *supra* note 14, at 34 min., 42 sec. (remarks by Jeremy Epstein, Deputy Division Director, National Science Foundation).

21. State of Georgia Final Composite Status Sheet, HB 680, May 10, 2018; State of Georgia Final Composite Status Sheet, SB 403, May 10, 2018. HB 680, a bipartisan bill that died in the House, would have prohibited use of DREs after January 1, 2019. Mark Niese, *Lawmakers Propose Switching Georgia from Digital to Paper Ballots*, ATLANTA J.-CONST. (Jan. 22, 2018), <https://www.ajc.com/news/state—regional-govt—politics/lawmakers-propose-switching-georgia-from-digital-paper-ballots/DnMzFdOpB2fA52cZt8D4xO/#> [https://perma.cc/JS9K-C7XT]. Senate Bill 403 was a Republican bill that both chambers passed and would have allowed DREs to be used until January 1, 2024; however, the chambers could not agree on a single version. Mark Niese, *Bill to Replace Georgia’s Electronic Voting Machines Falls Short*, ATLANTA J.-CONST. (Mar. 30, 2018), <https://www.ajc.com/news/state—regional-govt—politics/bill-replace-georgia-electronic-voting-machines-falls-short/E3Y3rDmP3WhbtYRvKnaGGK/> [https://perma.cc/L4DY-6BKM].

22. *Curling v. Kemp*, 334 F.Supp.3d 1303, 1322 (N.D. Ga. Sept. 17, 2018) (quoting *Bush v. Gore*, 531 U.S. 98, 105 (2000)). As this matter remains ongoing at the time of this writing, this publication is not likely to reflect its current status.

[Plaintiffs'] vote[s],”<sup>23</sup> and warned the State defendants that “further delay is not tolerable in their tackling the challenges before the State’s election balloting system.”<sup>24</sup>

Simultaneously, the Secure, Accessible & Fair Elections (SAFE) Commission, commenced in April 2018 by Kemp, was meeting to evaluate options available to replace DRE voting machines and set guidelines for the General Assembly to adopt a new system in the 2019 legislative session, noting time constraints imposed by the pending *Curling* lawsuit.<sup>25</sup> Of the SAFE Commission’s eight recommendations, the one point on which the Commission was not unanimous was also its most significant—that the state should adopt ballot-marking devices (BMDs) with verifiable paper ballots.<sup>26</sup> The lone cybersecurity expert on the Commission, Dr. Wenke Lee, strongly dissented on that point, maintaining that not only are hand-marked ballots much more secure than ones marked with BMDs, but also that no studies support that voters actually verify their ballots before submitting them, which is of paramount importance in any device-generated ballot.<sup>27</sup>

Over criticism from various cybersecurity experts and election systems professionals, SAFE Commission Co-Chair and State Representative Barry Fleming (R-121st) introduced HB 316.<sup>28</sup> In accordance with the Commission’s recommendations, the bill sought to authorize and require the State to adopt a new voting system as soon as possible that would be conducted on an electronic ballot-marking device that generates a printed, human readable paper

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23. *Id.* at 1326.

24. *Id.* at 1327.

25. See generally SAFE REPORT, *supra* note 10. The final SAFE Commission report noted that it was “aware of the court order in *Curling v. Kemp* [that] strongly suggest[ed] that if Georgia does not update its voting system soon, a new system will be ordered.” *Id.* at 8. The Commission further stated that it was unanimous in its belief that “Georgia voters would be better served by a process that goes through their elected representatives in the General Assembly rather than be subjected to a system that is simply ordered by a federal judge.” *Id.*

26. SAFE REPORT, *supra* note 10, at 13.

27. *Id.* at 15–16.

28. Jim Galloway, *In HB 316, House GOP Leaders Concede that Stacey Abrams Had a Point*, Atlanta J.-Const. (Feb. 19, 2019), <https://www.ajc.com/blog/politics/316-house-gop-leaders-concede-that-stacey-abrams-had-point/dpWD8iSJ7xSoJBMbLFYi1L/#> [<https://perma.cc/B8GX-W4K2>].



ballot for scanning.<sup>29</sup> HB 316 also sought to address issues of voter eligibility and removal from the state registry due to inactivity.<sup>30</sup>

### *Bill Tracking of HB 316*

#### *Consideration and Passage by the House*

Representative Barry Fleming (R-121st) sponsored HB 316 in the House, where the bill was assigned to the House Committee on Governmental Affairs.<sup>31</sup> HB 316 was first read on the House Floor on February 15, 2019.<sup>32</sup> After three days and nearly ten hours of testimony before the Elections Subcommittee, HB 316 advanced to the House Government Affairs Committee on February 21, 2019, where it was reported out favorably by substitute with a vote of 13 to 6.<sup>33</sup>

During the course of these public deliberations, House Minority Leader Bob Trammell (D-132nd), speaking before the House Governmental Affairs Elections Subcommittee, vocalized his opposition to the bill specifically in regards to the implementation of BMDs.<sup>34</sup> In doing so, Leader Trammell relied upon and cited the opinions of cybersecurity experts who have expressed concerns about BMDs' vulnerabilities to electronic hacking.<sup>35</sup> Despite these objections, new amendments were also introduced, such as Leader Trammell's proposal to allow voter applicant registrations to still be processed, rather than placed in pendency status, when an applicant's registration does not mirror a certain state or federal database record.<sup>36</sup> Additionally, Representative Scot Turner (R-21st)

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29. Video Recording of House Governmental Affairs Election Subcommittee Meeting at 21 min., 19 sec. (Feb. 19, 2019) (remarks by Rep. Barry Fleming (R-121st)), <https://youtu.be/0eAe3YpLVbs> [hereinafter House Subcommittee Video].

30. *Id.*

31. Georgia General Assembly, HB 316, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20192020/HB/316> [hereinafter HB 316, Bill Tracking].

32. State of Georgia Final Composite Status Sheet, HB 316, May 15, 2019.

33. Stephen Fowler, *Voting Machine Bill Clears House Committee*, GPB NEWS (Feb. 21, 2019), <https://www.gpbnews.org/post/voting-machine-bill-clears-house-committee> [https://perma.cc/P83T-955E].

34. House Subcommittee Video, *supra* note 29, at 1 hr., 12 min., 18 sec. (remarks by Rep. Bob Trammell (D-132nd)).

35. *Id.*

36. *Id.*

co-authored a risk-limiting project for post-election audits.<sup>37</sup> Representative Turner, however, also unsuccessfully led a failed motion to table the bill in order to give subcommittee members more time to assess the full scope of HB 316.<sup>38</sup>

Democratic opposition continued while the bill was on the House Floor; for example, Representative Jasmine Clark (D-108th) advocated for a switch to hand-marked paper ballots that would be scanned and deposited in a box for audits and recounts.<sup>39</sup> In addition to eliminating the threat of electronic hacking, Representative Clark touted the lower implementation costs to this methodology.<sup>40</sup> Nevertheless, on February 26, 2019, after more than two hours of debate,<sup>41</sup> the House passed HB 316 by a vote of 101 to 72.<sup>42</sup> Voting was conducted predominantly along party lines.<sup>43</sup>

#### *Consideration and Passage by the Senate*

Senator William Ligon (R-3rd) sponsored HB 316 in the Senate.<sup>44</sup> After its first reading on February 27, 2019, Lieutenant Governor Geoff Duncan (R) referred HB 316 to the Senate Committee on Ethics.<sup>45</sup> On March 7, 2019, the Ethics Committee favorably reported the bill by substitute, and the bill was read for a second time the following day.<sup>46</sup> On March 13, 2019, after a successful party-line vote to engross the bill, HB 316 was read a third time and passed 35

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37. *Id.* at 1 hr., 6 min., 17 sec. (remarks by Rep. Scot Turner (R-21st)).

38. *Id.*

39. Video Recording of House Proceedings at 57 min., 9 sec. (Feb. 26, 2019) (remarks by Rep. Jasmine Clark (D-108th)), <https://www.youtube.com/watch?v=WnLGFNWwl4s> [hereinafter House Proceedings Video].

40. *Id.*

41. *Id.*

42. Georgia House of Representatives Voting Record, HB 316, Vote #78 (Feb. 26, 2019).

43. *Id.*; see also House Proceedings Video, *supra* note 29, at 1 hr., 51 min., 8 sec. (remarks by Rep. Jasmine Clark (D-108th) and Rep. James Beverly (D-143rd)). During deliberations while the Bill was on the House Floor, Democrats, such as Representative Clark, continued to express their security concerns regarding the vulnerability of bar codes and BMDs as secure tabulating and audit devices. *Id.* Further, Representative Beverly reiterated objections to the estimated \$150 million cost of acquiring these new BMDs by calling the equipment instead “ballot money devices” and implying the bill was designed to benefit a specific voting equipment vendor. *Id.* Representative Beverly further echoed previous sentiments regarding the safety measures of hand-marked paper ballots and touted the financial savings that accompany this method of election voting. *Id.*

44. HB 316, Bill Tracking, *supra* note 31.

45. State of Georgia Final Composite Status Sheet, HB 316, May 22, 2019.

46. *Id.*

to 21,<sup>47</sup> each member voting with their respective party.<sup>48</sup> The House agreed to the Senate substitute the following day by a vote of 101 to 69.<sup>49</sup>

### *The Act*

The Act amends Chapter 2 of Title 21 of the Official Code of Georgia Annotated, relating to primaries and elections, by authorizing and requiring a new voting system to be used in all elections. It also provides for auditing procedures and updates to the voter list maintenance laws. Further, the Act specifies several revisions to election processes. The purpose of the Act, according to its author, is to “move [Georgia] into the twenty-first century with commonsense reform and a straightforward voting system” by “uniformly updat[ing] Georgia’s voting system and incorporat[ing] an all new paper ballot component.”<sup>50</sup>

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47. State of Georgia Final Composite Status Sheet, HB 316, May 22, 2019; Georgia Senate Voting Record, HB 316, #183, 186 (Mar. 13, 2019). Senate Minority Leader Steve Henson (D-41st) objected that HB 316 was out of order for violating both Senate Rule 3-1.4 and O.C.G.A. § 28-5-42 in failing to be accompanied with a fiscal note. Video Recording of Senate Proceedings at 1 hr., 15 min., 56 sec. (Mar. 13, 2019) (remarks by Sen. Steve Henson (D-41st)), <https://livestream.com/accounts/26021522/events/7940809/videos/188633474> [hereinafter Senate Proceedings Video]. According to the O.C.G.A. § 28-5-42, “[a]ny bill having a significant impact on the anticipated revenue or expenditure level of any . . . state agency must be introduced no later than the twentieth day of any session,” and the sponsor must request a fiscal note on such bills “by November 1 of the year preceding the annual convening of the General Assembly in which the bill is to be introduced . . .” The Lieutenant Governor ruled, however, that HB 316’s fiscal impact had been sufficiently addressed in the state’s Fiscal Year 2020 budget. *Id.* at 1 hr., 17 min., 30 sec. (remarks by LG Geoff Duncan (R)). Senator Henson further objected to HB 316 as out of order for violating O.C.G.A. § 28-5-49, which requires a fiscal note to attach bills with local impact of greater than \$5 million. *Id.* at 1 hr., 18 min., 07 sec. (remarks by Sen. Henson (D-41st)). Although the Lieutenant Governor denied the motion, finding that no evidence was presented that would exceed the aggregate cap in O.C.G.A. § 28-5-49, Senator Henson moved to challenge the ruling of the chairperson “out of an abundance of caution” and to waive the requirements pursuant to O.C.G.A. § 28-5-49(c)(2). *Id.* at 1 hr., 18 min., 24 sec. The Senate voted along party lines to waive requirement of a local impact fiscal note. *Id.* at 1 hr., 20 min., 20 sec. Documents from the Secretary of State’s Office show that the actual costs of replacing Georgia’s voting machine system vary greatly by vendor. See Stephen Fowler, *Here’s What Vendors Say It Would Cost to Replace Georgia’s Voting System*, GPB NEWS (Mar. 13, 2019), <https://www.gpbnews.org/post/here-s-what-vendors-say-it-would-cost-replace-georgia-s-voting-system> [<https://perma.cc/F8NE-43U9>].

48. Georgia Senate Voting Record, HB 316, #186 (Mar. 13, 2019); Senate Proceedings Video, *supra* note 47, at 1 hr., 21 min., 46 sec. (remarks by Sen. William Ligon (R-3rd)).

49. Georgia House of Representatives Voting Record, HB 316, #233 (Mar. 14, 2019).

50. House Subcommittee Video, *supra* note 29, at 2 min., 15 sec. (remarks by Rep. Barry Fleming (R-121st)).

*Section 1*

Section 1 revises paragraphs (2), (4.1), and (18) of Code section 21-2-2 by adding definitions necessary to adopt and implement a new voting system, including “ballot scanner” and “electronic ballot marker.”<sup>51</sup> It also amends the definition of “official ballot” to include ballots that are read by ballot scanners, rather than by optical scanning tabulators.<sup>52</sup> Although the Act now permits an “official ballot” to include “paper,” “mechanical,” or “electronic” ballots, in the event a paper ballot is scanned by a barcode, the amended terminology does not specifically mention whether the physical paper ballot or electronic barcode will be the official source.<sup>53</sup> Opponents to the Act contend this ambiguity amounts to a fatal omission because a physical paper ballot may show an elector voted for certain candidates, yet an electronic barcode may produce an opposite selection because electronic voting equipment has been susceptible to cyber hacking or vote manipulation.<sup>54</sup>

*Section 2*

Section 2 amends paragraph (15) of subsection (a) of Code section 21-2-50 to remove “direct recording electronic (DRE),” thereby allowing the Secretary of State to implement a new type of voting system.<sup>55</sup>

*Section 3*

Section 3 adds a new Code section that details the process for independent candidates for the offices of President and Vice President to qualify Electoral College electors for President and Vice President.<sup>56</sup>

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51. 2019 Ga. Laws 7, § 1, at 8.

52. *Id.*

53. *Id.*

54. House Subcommittee Video, *supra* note 29, at 1 hr., 12 min., 18 sec. (remarks by Rep. Bob Trammell (D-132nd)).

55. 2019 Ga. Laws 7, § 2, at 8.

56. 2019 Ga. Laws 7, § 3, at 8–9.

#### *Section 4*

Section 4 revised paragraph (5) of subsection (c) of Code section 21-2-172 to require that, for the nomination of candidates by convention, a certified copy of convention minutes be filed by nominees along with a nomination petition, instead of with a notice of candidacy.<sup>57</sup>

#### *Section 5*

Section 5 amends subsections (a) and (c) of Code section 21-2-216 and states that electors who will be eighteen years old by the date of the primary or election in which they are seeking to vote will now be allowed to vote, including by mail and by early voting.<sup>58</sup> Additionally, the new language allows for registration of individuals who will be, but are not yet, eighteen years old on or before the date of a primary or election, if the person will reach eighteen years of age within six months after the day of registration.<sup>59</sup> This new provision will allow, for example, first-year college students who are not yet eighteen years old to register and request an absentee ballot if they will be eighteen years old before voting election day.<sup>60</sup>

#### *Section 6*

Section 6, known as the “exact match” policy, amends subsections (b), (c), and (d) of Code section 21-2-220.1, which previously required consistency across all state documents to verify voter identity.<sup>61</sup> Subsection (b) now allows an applicant to be registered even if his or her first name, last name, birth date, driver’s license number, or social security number does not match the records of the Georgia Department of Driver Services or the federal Social Security

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57. 2019 Ga. Laws 7, § 4, at 9.

58. 2019 Ga. Laws 7, § 5, at 9–10.

59. O.C.G.A. § 21-2-216(c) (2019).

60. James Swift, *Elections Officials Highlight Voting, Registration Changes*, DAILY TRIB. NEWS (May 21, 2019), <http://daily-tribune.com/stories/elections-officials-highlight-voting-registration-changes,22248> [https://perma.cc/N9L5-F8KE].

61. 2019 Ga. Laws 7, § 6, at 10.

Administration.<sup>62</sup> Discrepancies between documents, such as hyphenated last names, maiden names, and married names, placed approximately 50,000 voter registration applications on pending status ahead of the 2018 elections.<sup>63</sup> Consequently, reducing the strict requirements of the previous law became a focal point of the legislation. With the passage of the Act, applicants now will become active voters, and rather than disqualifying applicants immediately, any inconsistencies will be noted in voting records and will only require flagged individuals to show photo identification that meets exact-match standards before casting a vote.<sup>64</sup> Given the enormous implications that accompany election results and narrow outcome of decisions, the weakening of the “exact match” rule ensures slight discrepancies will no longer prevent voter eligibility.

### *Section 7*

Section 7 revises Code section 21-2-225 and adds a new subsection allowing the Secretary of State to join a nongovernmental entity and share and exchange registration information to improve the accuracy and efficiency of the voter registration system.<sup>65</sup> This new section further allows the Secretary of State to share confidential and exempt information once becoming a member of such a nongovernmental entity.<sup>66</sup> Membership, however, is reduced to only entities operated and controlled by the participating jurisdictions and does not extend to entities under the control of the federal government or any entity acting on behalf of the federal government.<sup>67</sup> Further, the new amendments permit the Secretary of State to terminate the membership at any time.<sup>68</sup> Moreover, upon becoming a member of such a nongovernmental entity, the Department of Driver Services is permitted to share driver’s license and identification card information related to voter eligibility to the

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62. § 21-2-220.1(b).

63. *Changes Coming to Georgia*, *supra* note 18.

64. § 21-2-220.1.

65. 2019 Ga. Laws 7, § 7, at 10–11.

66. § 21-2-225(d)(1)–(2).

67. *Id.* § 21-2-225(d)(3).

68. *Id.*

Secretary of State to further assess voter registration information.<sup>69</sup> Because of the sensitivity of personal information shared, any information received in conjunction with the Secretary of State's membership is required to be confidential and will only be made available subject to a court order.<sup>70</sup>

As a result of the amendment, Georgia joined the Electronic Registration Information Center (ERIC), which serves to share voter registration information amongst various participating states.<sup>71</sup> By sharing information, ERIC protects the accuracy and current status of state voting lists and aims to prevent election fraud.<sup>72</sup> Upon joining ERIC, Secretary of State Brad Raffensperger (R) described the newfound membership status as a “tremendous step forward for the integrity of Georgia’s voter rolls” and a move that brings Georgia “to the forefront of election security.”<sup>73</sup> Notably, ERIC does not remove individuals from any state voting registry, but rather aims to prevent individual voters from registering to vote in multiple states across the country and notifies its members of such dual registration.<sup>74</sup>

### Section 8

Section 8 amends subsection (a) of Code section 21-2-230 and removes the reference to DRE voting equipment to allow any elector of the county or municipality to challenge the right of any other elector of the county or municipality, whose name appears on the list of electors, to vote.<sup>75</sup> The new language allows for such challenges to be made under the new voting system.

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69. *Id.* § 21-2-225(d).

70. *Id.* § 21-2-225(d)(5).

71. Swift, *supra* note 60.

72. *Id.*

73. Mark Niesse, *Deeper Findings: Georgia Joins Multi-State Voter Registration and Cancellation Effort*, ATLANTA J.-CONST. (May 22, 2019), <https://www.ajc.com/news/state—regional-govt—politics/georgia-joins-multi-state-voter-registration-and-cancellation-effort/Z0yLAHuQLqH2KsmTPRh1aJ/> [https://perma.cc/8SQU-4R8P] [hereinafter *Deeper Findings*].

74. *Id.*

75. 2019 Ga. Laws 7, § 8, at 11.

*Section 9*

Section 9 amends subsection (c) of Code Section 21-2-231 and provides that the Secretary of State shall transmit the names of individuals who have been convicted of a felony to the appropriate county board of registrars.<sup>76</sup> Once received, the county board of registrars will mail a notice to the felons' last known address and alert such people that the county board of registrar has been informed of a felony and conviction and will remove the convicted felon from the electoral list thirty days after the notice date.<sup>77</sup> However, the Act provides that the thirty-day removal period may be paused if such individuals request a hearing before the board of registrars to discuss his or her removal.<sup>78</sup> This new amendment essentially creates a more streamlined process for informing convicted felons of their removal from the state voter roll but, in conjunction with the overall spirit of the Act, also seeks to prevent unauthorized or unwarranted voter removal by giving such individuals the opportunity to communicate directly with the board of registrars.

*Section 10*

Section 10 of the Act revises subsection (b) of Code section 21-2-232 and relates to the process by which the Secretary of State or the board of registrars may remove a voter from the Georgia state registry once a Georgia resident moves to another state and registers to vote in that state.<sup>79</sup> Previously, the language provided that once a former Georgian moved to another state and registered to vote in the different state, the Secretary of State or board of registrars could remove such elector's name from the list of electors without notifying the voter, so long as the new state registration officials sent a notice of cancellation reflecting the registration of the elector in the new state.<sup>80</sup> The amendment to paragraph (b)(1), however, now provides that the Secretary of State or board of registrars can only

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76. 2019 Ga. Laws 7, § 9, at 11.

77. O.C.G.A. § 21-2-231(c)(2) (2019).

78. *Id.*

79. 2019 Ga. Laws 7, § 10, at 12.

80. *Id.*



remove a voter in such a circumstance without providing a confirmation notice when the new state officials send “a notice of cancellation reflecting the registration of the elector in the other state, which includes a copy of such elector’s voter registration application bearing the elector’s signature.”<sup>81</sup> Thus, the Act effectively adds an additional requirement for removing a voter from the Georgia voting registry without notice. Additionally, this amendment effectively works in tandem with Georgia’s newfound ability to join a nongovernmental voter information agency, such as ERIC, and allows the state to actively receive and share voter registration information amongst twenty-five other states.<sup>82</sup>

Further, paragraph (b)(2) was added to provide guidance for when a state sends the Georgia Secretary of State or board of registrars notice without including a copy of an elector’s voter registration application that bears the elector’s signature.<sup>83</sup> In such instances, this subsection requires that the Secretary of State or board of registrars must send a confirmation notice to the elector.<sup>84</sup>

### *Section 11*

Section 11 of the Act amends subsection (a) of Code section 21-2-234 and increases the time for which a voter, with whom the state has had no contact, may be considered inactive for voting purposes.<sup>85</sup> Previously the Code defined the term “no contact” to mean instances where an elector: has not filed an updated voter registration card; has not filed a change of name or address; has not signed a petition required by law to be verified by the election superintendent of a county or municipality or the Secretary of State; has not signed a voter’s certificate; or has not confirmed the elector’s continuation at the same address during the preceding three calendar years.<sup>86</sup> The Act amends paragraph (a)(1) to include instances where an elector “has not submitted an absentee ballot application or voted an absentee ballot” to the list of activities that constitute “no

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81. § 21-2-232(b)(1).

82. *Deeper Findings*, *supra* note 73.

83. 2019 Ga. Laws 7, § 10, at 12.

84. § 21-2-232(b)(2).

85. 2019 Ga. Laws 7, § 11, at 12.

86. O.C.G.A. § 21-2-234(a)(1) (Supp. 2017).

contact.”<sup>87</sup> Further, paragraph (a)(1) increases the temporal requirements that constitute “no contact” from three years to five years.<sup>88</sup> Georgia is only one of a handful of states that has a “Use it or Lose it” voter rule where inactive voters are removed from state voting registries.<sup>89</sup> Previously, in July 2017, over 107,000 Georgians were removed from state voter rolls due to inactive voting histories.<sup>90</sup> Effectively, Georgia voters will now be removed from the state voter registry after nine years of inactivity, whereas the previous law allowed for removal after seven years.

### *Section 12*

Section 12 of the Act amends subsection (b) and requires an additional notice letter be sent to an elector’s address and provides a timeline for notifying inactive voters who have made no contact of their impending removal from the list of electors.<sup>91</sup> The Act provides that “not less than 30 nor more than 60 days prior to the date on which the elector is to be removed from the inactive list of electors, the board of registrars shall mail a notice to the address on the elector’s registration record.”<sup>92</sup> This amendment augments the changes made to the “Use it or Lose it” provisions in subsection (a) of Code section 21-2-234 and simply provides another mechanism for further prolonging the period for which a voter will remain on the voting rolls.

### *Section 13*

Section 13 amends subsection (c) of Code Section 21-2-262 and increases the notice time that must be provided for the “division,

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87. 2019 Ga. Laws 7, § 11, at 12.

88. § 21-2-232(a)(1).

89. Johnny Kauffman, *Georgia Governor Signs Law to Slow ‘Use It or Lose It’ Voter Purges*, APM REP. (Apr. 11, 2019), <https://www.apmreports.org/story/2019/04/11/georgia-brian-kemp-use-it-or-lose-it-voting-law-changes> [<https://perma.cc/8UYX-CF4S>].

90. Morgan Gstalter, *107,000 Purged from Georgia Voter Rolls for Not Voting in Past Elections*, HILL (Oct. 19, 2018, 9:15 AM), <https://thehill.com/homenews/campaign/412195-georgia-purged-more-than-100000-people-from-voter-rolls-because-there-didnt> [<https://perma.cc/J8RT-DWJ7>].

91. 2019 Ga. Laws 7, § 12, at 12–13.

92. § 21-2-235(b).

redivision, alteration, formation, or consolidation of precincts.”<sup>93</sup> Previously, any plan to change or consolidate the number of precincts required at least ten days’ notice in the legal organ of the county.<sup>94</sup> The amendment increases this notice period to at least thirty days and further adds the requirement that a copy of such notice shall be immediately submitted to the Secretary of State.<sup>95</sup> Instances of last-minute precinct closings occurred before the 2018 elections, which in turn raised questions concerning voter suppression. Randolph County, for example, closed seven of the county’s nine voting precincts just days before the November election.<sup>96</sup> Although the Randolph County Board of Elections claimed the closings centered on American’s with Disability Act (ADA) compliance issues and potential health hazards, voting activists claim the poll closures were an attempt to suppress voter turnout in a county with a 60% African-American population.<sup>97</sup> The increased notice time should give voters more time to prepare and coordinate their commute to available precincts and may help alleviate some concerns about voter suppression.

#### *Section 14*

Section 14 amends Code section 21-2-265 and prevents counties from changing the location of a polling place during the sixty days before a general or primary election or changing the location of a polling place in the thirty-day period preceding any special primary, special election, or runoff from such types of elections.<sup>98</sup> The Act, however, provides that in the event of an emergency or event that renders a polling place “unavailable for use,” such temporal

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93. 2019 Ga. Laws 7, § 13, at 13.

94. O.C.G.A. § 21-2-262(c) (Supp. 2017).

95. O.C.G.A. § 21-2-262(c) (2019).

96. *Legislature Takes Holistic Look at Voting System*, SAVANNAH MORNING NEWS (Feb. 21, 2019, 3:57 PM), <https://www.savannahnow.com/opinion/20190221/editorial-legislature-takes-holistic-look-at-voting-system> [<https://perma.cc/U6HY-NHVN>].

97. Ashley Bridges, *Georgia County to Close 7 of 9 Voting Precincts, Civil Rights Attorney Calls it ‘Voter Suppression’*, WJBF (Aug. 16, 2018, 4:23 PM), <https://www.wjbf.com/news/georgia-news/georgia-county-to-close-7-of-9-voting-precincts-civil-rights-attorney-calls-it-voter-suppression/> [<https://perma.cc/LS3G-85T5>].

98. 2019 Ga. Laws 7, § 14, at 13.

restrictions are inapplicable.<sup>99</sup> The closing and changing of polling locations in the weeks prior to the 2018 Georgia election cycle became a hot topic between Democrats and Republicans as thousands of polling places were closed while others suffered staffing shortages for alleged cost savings.<sup>100</sup> Although cost savings were cited as the driving force for closing many of the polling locations, critics of the former policy claimed the widespread dissolution was, on the contrary, a political tool used to prevent voting in predominately African-American neighborhoods.<sup>101</sup> This new amendment effectively locks in polling places before the election and ensures voters will not unexpectedly encounter vacant polling locations. Further, unexpected or abrupt polling closures compound voting inefficiencies by increasing wait times at active polling locations and thus effectively discourage voting.

### *Section 15*

Section 15 adds “electronic ballot markers” to provisions for polling places but does not remove the ability to have direct recording electronic units.<sup>102</sup>

### *Section 16*

Subsection (b) of Code section 21-2-286 is amended to provide that the Secretary of State will prescribe how ballots must be designed to “ensure ease of reading by electors.”<sup>103</sup> This additional language requires the Secretary of State to select a vendor for the new voting equipment that produces a ballot that is clearly and easily

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99. § 21-2-265(f).

100. Mark Nichols, *Closed Voting Sites Hit Minority Counties Harder for Busy Midterm Elections*, USA TODAY (Oct. 30, 2018, 7:06 AM), <https://www.usatoday.com/story/news/2018/10/30/midterm-elections-closed-voting-sites-impact-minority-voter-turnout/1774221002/> [https://perma.cc/HB3P-NFSG].

101. Matt Vasilogambros, *Polling Places in Black Communities Continue to Close Ahead of November Elections*, GOVERNING (Sept. 5, 2018, 9:51 AM), <https://www.governing.com/topics/politics/sl-polling-place-close-ahead-of-november-elections-black-voters.html> [https://perma.cc/F6BU-Y3JD].

102. 2019 Ga. Laws 7, § 15, at 14.

103. 2019 Ga. Laws 7, § 16, at 14.

legible for voters.<sup>104</sup> Although on the surface this new provision may seem straightforward, voter verification of the new, printed ballots was a central issue during the research and legislative drafting process.<sup>105</sup> As such, depending on the vendor that is ultimately selected, the format and readability of the new paper ballots could become contested topics in the future if electors are not comfortable with these paper receipts.

### *Section 17*

Section 17 revises Code section 21-2-293 relating to errors and omissions that occur in the printing of official ballots or in the programming display of the official ballots by adding “electronic ballot markers” to the type of voting system that election officials and courts may correct if necessary and under specified conditions.<sup>106</sup> The change in this section is merely a procedural addition necessary to ensure an election superintendent can correct any discovered mistakes or omissions occurring in the printing or programming display of electronic ballot markers.

### *Section 18*

Section 18 revises subsection (a) of Code section 21-2-300 and stipulates that once the Secretary of State certifies new voting equipment as safe and practicable for use, all federal, state, and county general primaries and general elections, as well as special primaries and special elections, must be conducted with the use of scanning ballots.<sup>107</sup> These scanning ballots must be marked by electronic ballot markers and tabulated using ballot scanners for voting at polls and absentee ballots cast in person, provided that such electronic ballot markers must produce paper ballots marked with the elector’s choices in a readable format.<sup>108</sup> Further, paragraph (a)(3) requires the state to furnish electronic ballot markers and ballot

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104. *Id.*

105. SAFE REPORT, *supra* note 10, at 15–16.

106. 2019 Ga. Laws 7, § 17, at 14–15.

107. 2019 Ga. Laws 7, § 18, at 15.

108. O.C.G.A. § 21-2-300 (2019).

scanners to each county as soon as possible.<sup>109</sup> Such equipment must be certified by the United States Election Assistance Commission prior to purchase, lease, or acquisition.<sup>110</sup> Paragraph (a)(3) also provides that the governing authorities of a county or municipality may choose to acquire, purchase, or lease additional electronic ballot markers and ballot scanners at their own expense.<sup>111</sup> Moreover, paragraph (a)(4) grants the Secretary of State the power to test and evaluate the new equipment in primaries and elections occurring in Georgia.<sup>112</sup>

In addition to their concerns about election accuracy, critics protested the Act from an economic perspective.<sup>113</sup> The Act effectively requires the Secretary of State to purchase a total of nearly 40,000 new touchscreen computers, printers, and scanners.<sup>114</sup> Further, the new BDMs will require training for new supervisors as well as ongoing software licensing renewals and upgrades.<sup>115</sup> To finance the estimated \$150 million cost of these expenditures, the House authorized for \$150 million in twenty-year bonds to cover the purchase.<sup>116</sup>

Due to concerns about verifiability and accuracy of BMDs, many critics believe the lack of improvement in voting integrity does not justify the investment in any new electronic equipment.<sup>117</sup> Rather, they contend that a return to hand-written ballots is not only a safer, more reliable voting mechanism, but additionally is a cheaper alternative.<sup>118</sup>

Moreover, opponents contend that although the state will furnish the original equipment, the Act will increase operating costs for

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109. § 21-2-300(a)(3).

110. *Id.*

111. *Id.*

112. § 21-2-300(a)(4).

113. Jeanne Dufort, *H.B. 316 Voting Machine Bill a Mistake*, INSIDERADVANTAGE (Mar. 5, 2019), <https://insideradvantage.com/2019/03/05/h-b-316-voting-machine-bill-a-mistake/> [<https://perma.cc/L25P-XX53>].

114. *Id.*

115. *Id.*

116. Wes Wolfe, *Contentious Voting Bill Passes Senate*, BRUNSWICK NEWS (Mar. 14, 2019), [https://thebrunswicknews.com/news/local\\_news/contentious-voting-bill-passes-senate/article\\_13c51cc5-7a20-5512-9f6d-bf3a0d88348c.html](https://thebrunswicknews.com/news/local_news/contentious-voting-bill-passes-senate/article_13c51cc5-7a20-5512-9f6d-bf3a0d88348c.html) [<https://perma.cc/JQ7R-XEL7>].

117. House Proceedings Video, *supra* note 39, at 1 hr., 51 min., 8 sec. (remarks by Rep. James Beverly (D-143rd)).

118. *Id.* at 57 min., 9 sec. (remarks by Rep. Jasmine Clark (D-108th)).

elections due to additional printing costs from the generation of a paper ballot, periodic software license renewals, and increased audit costs.<sup>119</sup> Traditionally, counties bear the costs of these expenditures, and the Act notably lacks any provision or guidance on who will account for these future expenses.<sup>120</sup>

Further, the Act is silent on the type of BMD that will be furnished, and instead broadly grants the Secretary of State power to contract with a voting machine company to provide the equipment.<sup>121</sup> Although no vendor has been selected, voting machine company Election Systems and Software (ES&S) is widely considered the frontrunner for the contract.<sup>122</sup> Opponents, however, have identified a potential conflict of interest between ES&S and Georgia Governor and former Secretary of State Brian Kemp's deputy chief of staff, Charles Harper.<sup>123</sup> Mr. Harper was a registered lobbyist for ES&S until June 2018, and his relationship and influence have drawn criticisms of favoritism and self-dealing.<sup>124</sup>

### *Section 19*

Section 19 amends paragraph (5) of Code section 21-2-365 to state that a ballot scanner, and not an optical scanning tabulator, shall preclude electors from voting for more candidates or more times than allowed.<sup>125</sup> This amendment updates the Code language to provide for the same preclusions for ballot scanners that were present for optical scanning tabulators as it pertains to extra-counting of votes for candidates or offices.

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119. Dufort, *supra* note 113.

120. 2019 Ga. Laws 7, § 18, at 15–16.

121. *Id.*

122. Anoa Changa, *Georgia's Voting Machine 'Reform' Is a Threat to Free and Fair Elections*, REWIRE.NEWS (Apr. 3, 2019, 4:34 PM), <https://rewire.news/article/2019/04/03/georgias-voting-machine-reform-is-a-threat-to-free-and-fair-elections/> [<https://perma.cc/6LYG-PC2X>].

123. *Id.*

124. *Id.*

125. 2019 Ga. Laws 7, § 19, at 16.

*Section 20*

Section 20 amends Code section 21-2-367 and reduces the number of voting booths per electors in a given county or municipality from one voting booth per 200 electors to one voting booth per 250 electors.<sup>126</sup> Section 20 further eliminates language that discontinued the use of paper ballots in Georgia in 2002.<sup>127</sup> The reduction in the number of voting machines per elector is notable in that it could foreseeably lead to longer waiting lines, as less machines are available to accommodate electors. Although it is unclear if the new machines will decrease the time it takes to cast a vote, this reduction in available voting machines runs somewhat counter to the Act's general themes of improving voting accuracy and efficiency, particularly as voter turnout is only expected to increase in the coming years.<sup>128</sup> Presumably, the reduction in available machines is a cost measure, as the costs associated with providing the new voting equipment is lessened by the reduction in the ratio of voter machines to registered electors.

*Section 21*

Section 21 amends Code section 21-2-372 to require ballots to be printed in a way suitable for ballot scanners instead of optical scanners.<sup>129</sup> This amendment merely updates the Code to accommodate the specific nuances that accompany ballot scanners as it relates to the printing of ballots and ballot arrangements.

*Section 22*

Section 22 further amends Code section 21-3-372 to require ballots to be of suitable size and construction so as to permit reading by ballot scanners instead of a tabulating machine.<sup>130</sup> Again, this

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126. 2019 Ga. Laws 7, § 20, at 16.

127. *Id.*

128. Mark Niese, *Voter Registration Surges in Georgia Ahead of 2020 Elections*, ATLANTA J.-CONST. (Oct. 1, 2019), <https://www.ajc.com/news/state--regional-govt--politics/voter-registration-surges-georgia-ahead-2020-elections/NVKOTit4KEsTHoXtd6ddN/#> [<https://perma.cc/3N93-29JL>].

129. 2019 Ga. Laws 7, § 21, at 16.

130. 2019 Ga. Laws 7, § 22, at 17.



amendment merely updates the Code to require ballot design, size, and stock to accommodate the processing requirements associated with ballot scanners as opposed to a tabulated machine.

### *Section 23*

Section 23 amends subsections (a) and (b) of Code section 21-2-374 to require the proper programming to be placed in each ballot scanner, instead of a tabulator, and to require the ballot scanners to be tested and approved prior to use by electors in each primary and general election.<sup>131</sup> Section 23 further provides that a ballot scanner will not be approved for use in a primary or election until it has produced an errorless count.<sup>132</sup>

### *Section 24*

Section 24 amends Code section 21-2-375 and requires election superintendents to ensure directions are prominently posted with signs reminding electors to verify their ballot choices prior to inserting the scanning ballot into the ballot scanner and stating that sample ballots are available upon request.<sup>133</sup> This additional review mechanism was a point of central contention in the drafting process, as opponents of the Act contend that embedded barcodes are still vulnerable to hacking and voters will not necessarily catch errors on the printed ballots.<sup>134</sup> These criticisms echo Dr. Wenke Lee's findings that voters have not been empirically shown to verify ballots before submission, and thus any increase in voter confidence from the switch to a paper receipt is merely illusory.<sup>135</sup> Instead, these opponents maintain hand-marked paper ballots, which would be scanned and deposited in a box for audits and recounts, represent the safest and most reliable voting mechanism.<sup>136</sup> Although the Act was

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131. 2019 Ga. Laws 7, § 23, at 17.

132. O.C.G.A. § 21-2-374(b) (2019).

133. 2019 Ga. Laws 7, § 24, at 17–18.

134. House Subcommittee Video, *supra* note 29, at 1 hr., 12 min., 18 sec. (remarks by Rep. Bob Trammell (D-132nd)).

135. SAFE REPORT, *supra* note 10, at 15–16.

136. House Proceedings Video, *supra* note 39, at 57 min., 9 sec. (remarks by Rep. Jasmine Clark (D-108th)).

passed, the language and overall requirements of this section are likely to be a point of contention going forward as critics of the Act are likely to reassert their contentions that posted signs and reminders are insufficient, impractical, or futile measures to ensure a voter accurately and thoroughly reviews every selection that was chosen.

### *Section 25*

Section 25 amends Code section 21-2-377, which provides for an election superintendent to designate a person to have custody of voting machines for storage purposes when the machines are not in use and to provide compensation to such designated person.<sup>137</sup> Additionally, Section 25 replaces “scanning tabulators” with “ballot scanners.”<sup>138</sup> Notably, however, the new language is silent as to the source of the funding for these storage costs, and also entirely neglects to detail any costs associated with transporting the new equipment to the storage locations. Critics of the Act fear local counties and municipalities will be forced to bear these operational costs which represent separate expenses not contained in the State’s estimated \$150 million budget for this new equipment.<sup>139</sup> Additionally, proponents of hand-marked paper ballots view such ancillary costs associated with the new voting equipment as entirely needless and a drain on taxpayer dollars.<sup>140</sup>

### *Section 26*

Section 26 adds Code subsections 21-2-379.21 through 21-2-379.26 to ensure voters using BMDs have the same access to information and privacy that existed under the former DRE statutes.<sup>141</sup> Additionally, subsection 21-2-379.23 now requires ballots to include a candidate’s political party or affiliation in partisan elections.<sup>142</sup> It further requires ballots to have human readable text

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137. 2019 Ga. Laws 7, § 25, at 18.

138. *Id.*

139. Dufort, *supra* note 113; *see also* House Proceedings Video, *supra* note 39, at 57 min., 9 sec. (remarks by Rep. Jasmine Clark (D-108th)).

140. Dufort, *supra* note 113.

141. 2019 Ga. Laws 7, § 26, at 18–22.

142. O.C.G.A. § 21-2-379.23(c)(5) (2019).

regarding potential voter selections and to identify instances when a voter has not voted for a particular office, constitutional amendment, or other selection appearing on a ballot.<sup>143</sup>

Importantly, subsection 21-2-379.23(d) specifies that the paper ballot marked and printed by the electronic ballot marker constitutes the official ballot and will be used for recount and audit purposes.<sup>144</sup> Because the type of BMD to be used is not specified in the Act, opponents who envision a barcode being used to tabulate votes desired more clarity and specificity as to what ballot will be used in such events, considering the Act only addresses “the paper ballot marked” and does not specifically preclude reliance on embedded barcode information.<sup>145</sup> Stemming from their concern over the security and vulnerability of barcodes to tabulate votes, opponents believe reliance on a barcode for recount in audit purposes is useless and unverifiable.<sup>146</sup> Thus, opponents lament the fact that the law does not specifically prohibit barcode data from being used in the event of a recount.<sup>147</sup>

### *Section 27*

Section 27 amends subparagraph (a)(1)(D) and subsection (b) of Code section 21-2-381.<sup>148</sup> Subparagraph (a)(1)(D) allows “electors in custody in a jail or other detention facility in the county or municipality” to request an absentee by mail ballot be mailed to an address other than the permanent mailing address of the elector.<sup>149</sup> Previously, only physically disabled electors were granted this exception.<sup>150</sup> Further, paragraph (b)(3) provides a new process for instances where an absentee ballot application contains a mismatched

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143. *Id.* § 21-2-379.25(a).

144. *Id.* § 21-2-379.23(d).

145. 2019 Ga. Laws 7, § 26, at 18–22.

146. Anjali Enjeti, *Governor Kemp is Turning Georgia into Gilead*, DAME MAG. (Apr. 1, 2019), <https://www.damemagazine.com/2019/04/01/governor-kemp-is-turning-georgia-into-gilead/> [https://perma.cc/7P4L-AX5J].

147. Gloria Tatum, *Georgia Approves New E-Voting Regime, but Will Paper Record Be Utilized?*, ATLANTA PROGRESSIVE NEWS (May 2, 2019), <http://atlantaprogressivenews.com/2019/05/02/georgia-approves-new-e-voting-regime-questions-issues-remain/> [https://perma.cc/DDP2-BRJC].

148. 2019 Ga. Laws 7, § 27, at 22–23.

149. O.C.G.A. § 21-2-381(a)(1)(D) (2019).

150. O.C.G.A. § 21-2-381(a)(1)(D) (Supp. 2017).

signature.<sup>151</sup> The amendment provides that an absentee ballot application will not be rejected due to “an apparent mismatch signature between the signature of the elector on the application and the signature of the elector on file with the board of registrars.”<sup>152</sup> When such an instance occurs, the elector will have the opportunity to cure the signature discrepancy “by submitting an affidavit to the board of registrars or absentee ballot clerk along with a copy of one of the forms of identification enumerated in subsection (c) of Code [s]ection 21-2-417 before the close of the period for verifying provisional ballots contained in subsection (c) of Code [s]ection 21-2-419.”<sup>153</sup>

### *Section 28*

Section 28 amends subsection (a) of Code section 21-2-382 to provide that counties will be able to use nongovernmental buildings as early voting locations if the buildings are used as voting locations on Election Day.<sup>154</sup> The addition of the new language will potentially allow for more physical locations to be used during the early voting process while still ensuring these locations are suitable from an occupational, safety, and privacy perspective. As voter turnout continues to grow, many electors prefer to avoid the long waiting lines that are frequently present on Election Day, and thus this amendment will allow for better accessibility to accommodate early voters.<sup>155</sup>

### *Section 29*

Section 29 amends Code section 21-2-383 to provide that in jurisdictions where electronic ballot markers are used in polling places on Election Day, persons casting absentee ballots in person at a registrar or absentee ballot clerk’s office shall use electronic ballot markers.<sup>156</sup>

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151. 2019 Ga. Laws 7, § 27, at 23.

152. O.C.G.A. § 21-2-381(b)(3) (2019).

153. *Id.*

154. 2019 Ga. Laws 7, § 28, at 24.

155. *Id.*

156. 2019 Ga. Laws 7, § 29, at 24.

*Section 30*

Section 30 amends subsections (b) and (e) and paragraph (1) of subsection (c) of Code section 21-2-384, clarifies the information appearing on the envelopes containing absentee ballots, simplifies the oath information to be provided for absentee ballots, and expands the types of elections where electronic ballot delivery is available to overseas and military voters.<sup>157</sup> From a procedural standpoint, an absentee voter receives two envelopes for each absentee ballot to permit the placing of one envelope within the other and both within the mailing envelope.<sup>158</sup> Printed on the smaller envelope includes the words “Official Absentee Ballot.”<sup>159</sup> On the back of the larger of the two envelopes to be enclosed within the mailing envelope shall be printed the form of oath of the elector and the oath for persons assisting electors.<sup>160</sup> The new language to subsection (b) now requires the larger of the two envelopes to display the elector’s name and voter registration number.<sup>161</sup>

Further, under paragraph (c)(1), the oath requirements that accompany an absentee ballot have been simplified to no longer require an elector to provide his or her residential address or year of birth, or, in the case of a person assisting an elector, the relationship between the parties.<sup>162</sup> Moreover, subsection (e) expands electronic ballot delivery to overseas and military electors to include not only federal elections, but also state and county elections, primaries, and runoffs.<sup>163</sup>

*Section 31*

Section 31 amends Code section 21-2-385, which relates to procedures for early voting and voting by absentee ballot.<sup>164</sup> It amends subsection (a) to prohibit ballot harvesting by persons

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157. 2019 Ga. Laws 7, § 30, at 24–26.

158. *Id.* at 24–25.

159. *Id.* at 24.

160. *Id.*

161. O.C.G.A. § 21-2-384(b) (2019).

162. *Id.* § 21-2-384(c)(1).

163. *Id.* § 21-2-384(e).

164. *Id.* § 21-2-385(a).

unaffiliated with the voter, and now requires the elector to personally mail or personally deliver his or her sealed official absentee ballot, provided that the elector's relatives, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of the elector may still mail or deliver the sealed ballot on the elector's behalf.<sup>165</sup> For disabled electors, however, a caregiver, regardless of whether their residence is the same as the elector's, may mail or deliver the elector's absentee ballot.<sup>166</sup> For electors in jail or other detention facilities, any employee of that jail or facility and who has custody of the elector may mail or deliver the elector's absentee ballot.<sup>167</sup>

Subsection (b) now allows any person of a physically disabled or illiterate elector's choice to assist the elector in preparing his or her ballot, so long as the person assisting is not the elector's employer or an officer or agent of the elector's union.<sup>168</sup> The elector may not receive help from anyone whose name appears on the ballot as a candidate in a primary, general election, or runoff.<sup>169</sup> This provision adopts the federal election voter assistance standard for disabled and illiterate electors to also cover state and local elections during absentee voting.

Additionally, Section 31 amends subsection (d) to set the second Monday prior to a runoff as the deadline to begin early voting.<sup>170</sup>

### *Section 32*

Section 32 revises subparagraphs (a)(1)(C) and (a)(1)(D) of Code section 21-2-386. Subparagraph (C) provides a method for an elector to cure issues with absentee ballots.<sup>171</sup> The elector may submit an affidavit to the board of registrars or absentee ballot clerk along with a form of identification to cure a failure to sign the oath, an invalid signature, or missing information.<sup>172</sup> The affidavit must affirm that

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165. *Id.*

166. O.C.G.A. § 21-2-385(a) (2019).

167. *Id.*

168. *Id.* § 21-2-385(b).

169. *Id.*

170. *Id.* § 21-2-385(d).

171. 2019 Ga. Laws 7, § 32, at 29.

172. O.C.G.A. § 21-2-386(a)(1)(C).

the rejected elector submitted the absentee ballot in question and state that the elector is registered and qualified to vote in the primary, general election, or runoff in question.<sup>173</sup> If the board of registrars or absentee ballot clerk determines the affidavit and form of identification are sufficient, then the elector's absentee ballot will be recorded.<sup>174</sup> During the November 2018 elections, election officials rejected over 7,000 absentee ballots due to signature mismatches, missing birth dates and addresses, and incorrectly marked absentee ballot envelopes.<sup>175</sup> The changes made in this section mirror those in Code section 21-2-220.1, which aimed to weaken the "exact-match" policy that was responsible for the removal of over 50,000 separate voters during the 2018 elections.<sup>176</sup> Again, given the volume of discarded absentee ballots and narrow election outcomes, this amendment better helps ensure voting outcomes represent the will of Georgia voters.

Further, subparagraph (D) adds a notification procedure for absentee ballots that are devoid of the requisite identification information and which subsequently are deemed provisional ballots.<sup>177</sup> The amendment requires the board of registrars or absentee ballot clerk to promptly notify such an elector that his or her absentee ballot has been deemed a provisional ballot and that the elector must provide information on the necessary identification forms, as well as the mechanics and timeline for providing such information to verify the ballot.<sup>178</sup>

### *Section 33*

Section 33 amends Code section 21-2-388 regarding the cancellation of absentee ballots for voters who appear at an election precinct during primaries and elections.<sup>179</sup> First, Code section

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173. *Id.*

174. *Id.*

175. Mark Niesse, *Election Battle Over Discarded Absentee Ballots Ends with New Georgia Law*, GOVERNING (July 12, 2019, 8:27 AM), <https://www.governing.com/topics/politics/tns-georgia-absentee-ballot.html> [<https://perma.cc/3U9A-5MYL>].

176. *Changes Coming to Georgia*, *supra* note 18.

177. § 21-2-386(a)(1)(D).

178. *Id.*

179. 2019 Ga. Laws 7, § 33, at 30.

21-2-388 now allows electors who have received an absentee ballot but who have not yet returned the ballot to cancel the absentee ballot and vote in person.<sup>180</sup> Second, paragraph (2) requires the elector to first have the managers of the election precinct, the registrars, or the absentee ballot clerk certify that the elector’s ballot has not yet been received by the board of registrars before the elector may vote in person at the election precinct.<sup>181</sup> It further requires the elector to surrender the absentee ballot to the poll manager or, if the elector did not bring the absentee ballot to the election precinct, the elector must destroy the absentee ballot after casting the in-person vote.<sup>182</sup>

### *Section 34*

Section 34 amends subsection (b) of Code section 21-2-409 and assists electors who cannot read English or who have disabilities.<sup>183</sup> Subsection (b) removes the criteria relating to elections in which there is a federal candidate on the ballot and now applies the federal election voter assistance standard to state and local elections on Election Day.<sup>184</sup> As amended, the Act now provides help to any elector who is entitled to receive assistance in voting under Code section 21-2-409 and removes the provision that “no person shall assist more than ten such electors in any primary, election, or runoff covered by this paragraph.”<sup>185</sup> Previously, during elections where only state candidates appeared on a ballot, voters with a limited English proficiency could only use an interpreter who was a close family member, caretaker, or voter registered in the same precinct.<sup>186</sup> The Act now allows such voters who require interpreters to bring nearly anyone to help cast a ballot and mirrors the standard that previously existed for federal elections.<sup>187</sup> Further, the amendment calls for “notice of the availability of such assistance [to] be

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180. § 21-2-388.

181. *Id.* § 21-2-388(2).

182. *Id.*

183. 2019 Ga. Laws 7, § 34, at 30–31.

184. *Id.* at 31.

185. *Id.*

186. O.C.G.A. § 21-2-409(b)(1) (Supp. 2017).

187. Mark Niese, *Lawsuit Fights Restrictions on Interpreters in Georgia Runoff*, ATLANTA J.-CONST. (Nov. 28, 2018), <https://www.ajc.com/news/state—regional-govt—politics/lawsuit-fights-restrictions-interpreters-georgia-runoff/iLVggX2SOawyVhNyC5fzyJ/> [<https://perma.cc/DEH4-59Z3>].



prominently posted at each polling place.”<sup>188</sup> The new assistance standard drastically increases the ability for a voter who requires assistance to receive help in federal, state, and local elections. Although employers and union representatives are still prevented from aiding a voter, voters who qualify for assistance can now receive familial and nonfamilial assistance.<sup>189</sup>

### *Section 35*

Section 35 amends subsection (e) of Code section 21-2-413 to extend the general prohibition of cameras or other recording devices in polling places while voting is taking place to cover instances where an elector is using an electronic ballot marker.<sup>190</sup> The Act, however, maintains the provision that allows the poll manager, at his or her discretion, to allow such devices under certain conditions and subject to certain limitations.<sup>191</sup> Additionally, poll officials are still permitted to use telephones and other monitoring devices for official purposes.<sup>192</sup>

### *Section 36*

Section 36 amends subsection (f) of Code section 21-2-417.1, and now permits a Georgia voter identification card to remain valid even if a voter moves to another address, so long as that voter still resides in the same county and otherwise remains qualified to vote.<sup>193</sup> If a voter moves to another Georgia residence outside of the county in which he or she was registered to vote, that voter must then surrender his or her voter identification card to the board of registrars of the county of his or her new residence.<sup>194</sup>

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188. O.C.G.A. § 21-2-409(b) (2019).

189. *Id.*

190. 2019 Ga. Laws 7, § 35, at 31.

191. § 21-2-413(e).

192. *Id.*

193. 2019 Ga. Laws 7, § 36, at 31–32.

194. O.C.G.A. § 21-2-417.1(f) (2019).

*Section 37*

Section 37 amends subsection (e) of Code section 21-2-418 to permit registrars to provide a free access system via internet website, in addition to toll-free telephone numbers, for electors to check whether their provisional ballot was counted and, if it was not counted, the reason that the provisional ballot was rejected.<sup>195</sup> Section 37 further requires counties timely report to the Secretary of State when they receive a provisional ballot and whether they counted it or rejected it, and, if it was rejected, the basis of that rejection.<sup>196</sup> The addition of these procedures stems partly from the 2018 gubernatorial election, where a federal judge ordered election officials to review thousands of provisional ballots that were not counted.<sup>197</sup> In the midst of the close election, the judge provided for the creation of a voter hotline where voters could call in to check if their votes were counted.<sup>198</sup> Further, the judge requested election officials to review voter registrations and ordered reports from the state government related to the uptick in provisional ballots from previous years.<sup>199</sup>

*Section 38*

Section 38 amends Code section 21-2-419 to allow provisional ballots to be cast on the same ballot type as is ordinarily used, rather than the ballot used for mail-in absentee ballots.<sup>200</sup> Section 38 also amends subsection (b), which now requires a county's board of registrars to make a good faith effort in determining whether a voter who casts a provisional ballot is entitled to vote in the primary or election, and defines what "good faith effort" shall include.<sup>201</sup> The purpose of Section 38 is to provide uniformity by clearly stating that

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195. 2019 Ga. Laws 7, § 37, at 32.

196. *Id.*

197. Mark Niese, *Judge Orders Review of Provisional Ballots in Georgia Election*, ATLANTA J.-CONST. (Nov. 13, 2018), <https://www.ajc.com/news/state—regional-govt—politics/judge-orders-review-provisional-ballots-georgia-election/ZM2yd0QGkyZ8Zi1IyVpF3H/> [https://perma.cc/3ART-S8HE].

198. *Id.*

199. *Id.*

200. 2019 Ga. Laws 7, § 38, at 32–34.

201. *Id.* at 32–33.

registrars should use all available information in reviewing whether a provisional ballot should be counted, including information from the Department of Driver Services, Department of Family and Children Services, Department of Natural Resources, public libraries, and any other government agency.<sup>202</sup>

Section 38 also adds language to subsection (d) that requires timely notification of the status of persons' provisional ballots and, if the person was found to be qualified to vote, the registrars must continue to provide the person with a voter registration form that shall add them to the electors list.<sup>203</sup> Overall, the changes made in this section parallel many of the changes contained throughout the Act, and seek to promote a more thorough, accurate, and timely voting process.

### *Section 39*

Section 39 amends Code section 21-2-482 to replace optical scanners with ballot scanners and requires superintendents sufficiently prepare absentee ballots in advance.<sup>204</sup> The section further permits the form for the ballots' labels to conform with the requirements of Article 9 of this Chapter or in such a form that will allow the ballot to be machine tabulated.<sup>205</sup> The amendments to this section are procedure-oriented and officially sync the provisions contained in the law to conform with the introduction of the new voting equipment.<sup>206</sup>

### *Section 40*

Section 40 amends subsection (k) of Code section 21-2-493 and extends the deadline for certifying elections to the second Friday following the date the election was held.<sup>207</sup> The deadline was formerly on the Monday following the date of the election, and the deadline extension will grant election officials more time to audit the

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202. *Id.* at 32–34.

203. *Id.* at 33.

204. 2019 Ga. Laws 7, § 39, at 34.

205. *Id.*

206. *Id.*

207. 2019 Ga. Laws 7, § 40, at 34.

results from an analytical perspective.<sup>208</sup> Further, the amendment grants the Secretary of State discretionary power to extend the deadline if necessary to complete a precertification audit.<sup>209</sup>

### *Section 41*

Section 41 amends subsections (a) and (c) of Code section 21-2-495, reducing the percentage threshold that triggers an automatic recount from 1.0% to 0.5% and authorizing the State Election Board (SEB) to promulgate rules and regulations for implementing and administering the recount process.<sup>210</sup> Previously, a losing candidate was permitted to request an automatic recount if the outcome was determined by 1% or less.<sup>211</sup> Now, the Act lowers the threshold for a candidate to be entitled to an automatic recount to 0.5%.<sup>212</sup> In the hotly contested 2018 gubernatorial election, the previous 1.0% automatic recount trigger was barely avoided, despite protests, as Republican candidate Brian Kemp defeated Democratic candidate Stacey Abrams by a final margin of 1.39%.<sup>213</sup> Given that this was the closest governor's race in Georgia since 1966, the reduction in the automatic trigger threshold is somewhat confounding; however, proponents of the new BMDs voting system believe the newfound audit capabilities permitted this figure to be lowered.<sup>214</sup> Critics of the Act, such as Richard DeMillo, a Distinguished Professor of Computing at Georgia Institute of Technology, maintain the cyber security vulnerabilities attributed to BMDs do not produce a trustworthy audit trail and render the automatic recount trigger irrelevant because the BMDs may not accurately capture voter intent.<sup>215</sup>

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208. O.C.G.A. § 21-2-493(k) (Supp. 2017).

209. 2019 Ga. Laws 7, § 40, at 34.

210. 2019 Ga. Laws 7, § 41, at 35–36.

211. § 21-2-495(c)(1).

212. 2019 Ga. Laws 7, § 41, at 35–36.

213. Aris Folley, *Georgia Certifies Elections Results in Bitterly Fought Governor's Race*, HILL (Nov. 17, 2018, 11:21 PM), <https://thehill.com/homenews/campaign/417292-georgia-certifies-elections-results-in-bitterly-fought-governors-race> [<https://perma.cc/5E2B-V5F9>].

214. Alan Blinder & Richard Fausset, *Stacey Abrams Ends Fight for Georgia Governor with Harsh Words for Her Rival*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/elections/georgia-governor-race-kemp-abrams.html> [<https://perma.cc/A2NB-PS3M>].

215. Electronic Mail Interview with Richard DeMillo, Distinguished Professor of Computing, Ga.

*Section 42*

Section 42 amends Code section 21-2-498 and introduces the criteria and procedural mechanisms for conducting precertification tabulation audits for any federal or state general election.<sup>216</sup> Subsection (b) calls for precertification audits to begin as soon as possible but no later than the November 2020 general election.<sup>217</sup> Local election superintendents are charged with conducting precertification tabulation audits for federal or state general elections, and the Act requires such audits be conducted via manual inspection of random samples of the official paper ballots.<sup>218</sup> Subsection (c) enumerates many functions of local election superintendents, including the requirements that such officials complete the audit prior to final certification of the contest, ensure all types of ballots—in person, absentee, and provisional—are included in the audit, provide a report of the unofficial final tabulated vote results for the contest to the public prior to conducting the audit, and provide details of the audit to the public within forty-eight hours of completion.<sup>219</sup>

Subsection (d) authorizes the SEB to promulgate rules, regulations, and procedures to implement and administer the procedural mechanisms for conducting post-election audits, including the maintenance and implementation of security procedures to ensure voter accuracy throughout the audit process.<sup>220</sup>

Subsection (e) provides that the Secretary of State shall conduct a risk-limiting audit pilot program to test the accuracy and feasibility of these risk-limiting audits.<sup>221</sup> If these risk-limiting audits test successfully within five business days following the sample election results, then all audits across the state are to be conducted in such a manner no later than November 1, 2024.<sup>222</sup>

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Inst. of Tech. (Aug. 23, 2019) (on file with the Georgia State University Law Review) [hereinafter DeMillo Interview].

216. 2019 Ga. Laws 7, § 42, at 36–37.

217. O.C.G.A. § 21-2-498(b) (2019).

218. *Id.* § 21-2-498(c).

219. *Id.*

220. *Id.* § 21-2-498(d).

221. *Id.* § 21-2-498(e).

222. *Id.*

*Section 43*

Section 43 amends subsection (b) of Code section 21-2-499 to give the Secretary of State an additional three days to tabulate, compute, and canvass the votes cast for presidential electors and lay them before the Governor and also gives an additional three days to the Governor to certify the slates of presidential electors.<sup>223</sup> As such, the Secretary of State now must certify by the seventeenth day following the presidential election, and the Governor must certify by the eighteenth day following the election.<sup>224</sup> By extending these deadlines, the Act allows more time for the audit process and permits a more thorough and exhaustive review procedure that favors accuracy over prompt declarations for presidential election outcomes. Moreover, this section still allows a superior court judge to alter these times for “just cause.”<sup>225</sup> Although instances of just cause are not specifically enumerated, this provision grants more flexibility to the timeframe that accompanies declaring the winner of a presidential election and could foreseeably extend the stated deadlines in the event presidential candidates are separated by only a few thousand votes.

*Section 44*

Section 44 amends paragraph (8) of Code section 21-2-566 to include “electronic ballot marker” in the list of items that, if willfully tampered with, will constitute interference with primaries and elections.<sup>226</sup>

*Section 45*

Section 45 amends paragraph (3) of Code section 21-2-579 and adds electronic ballot markers to the list of voting equipment and

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223. 2019 Ga. Laws 7, § 43, at 37.

224. § 21-2-499(b).

225. 2019 Ga. Laws 7, § 43, at 37.

226. 2019 Ga. Laws 7, § 44, at 37.

provides that it will constitute fraud if an individual assists or enables an unauthorized person to use such equipment.<sup>227</sup>

*Section 46*

Section 46 amends Code section 21-2-580 to include as a felonious offense any instance where a person unlawfully tampers with or damages an electronic ballot marker or tabulating machine, willfully prepares an electronic ballot marker or tabulating machine in an improper order for voting, or prevents or attempts to prevent the correct operation of such electronic ballot marker, tabulating machine, or voting machine.<sup>228</sup>

*Section 47*

Section 47 amends Code section 21-2-582 to include as a felonious offense instances where a person tampers with or damages an electronic ballot marker or tabulating machine to be used or being used in connection with any primary or general election, in addition to instances where a person prevents or attempts to prevent the correction of an electronic ballot marker or tabulating machine.<sup>229</sup>

*Section 48*

Section 48 amends Code section 21-2-582.1 relating to penalty for voting equipment modification to include electronic ballot markers in the definition of “voting equipment.”<sup>230</sup>

*Section 49*

Section 49 amends Code section 21-2-587 to include instances of poll-worker fraud where a poll worker tampers with electronic ballot markers or tabulating machines.<sup>231</sup> Additionally, this section includes

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227. 2019 Ga. Laws 7, § 45, at 38.

228. 2019 Ga. Laws 7, § 46, at 38.

229. 2019 Ga. Laws 7, § 47, at 38.

230. 2019 Ga. Laws 7, § 48, at 38–39.

231. 2019 Ga. Laws 7, § 49, at 39.

instances of poll-worker fraud where a poll worker fails to return to election officials an electronic ballot marker or tabulating machine memory card.<sup>232</sup>

### *Analysis*

Representative Barry Fleming (R-121st) introduced HB 316 in an effort to “uniformly update Georgia’s voting machines . . . incorporat[ing] an all new paper ballot component . . . [to] move us into the twenty-first century.”<sup>233</sup> As dozens of legislators noted over the course of the bill’s passage, however, the Act has left several potential consequences of the bill unaddressed, including a purported unfunded mandate, weak and widely misunderstood audit language, and vague language that would authorize the Secretary of State to join and provide voters’ personal information to nongovernmental organizations.<sup>234</sup> Further, whether the Act and the voting machines ultimately chosen by the Secretary of State adequately secure Georgia voters’ constitutional rights to due process and equal protection has yet to be determined by the federal court where constitutional challenges to the use of DRE systems are still pending.<sup>235</sup>

### *Funding for the Act*

Opponents of the bill were quick to point out that HB 316, for which \$150 million had already been appropriated in Governor Brian Kemp’s (R) proposed Fiscal Year 2020 budget, was unaccompanied by a fiscal note and therefore, they believed, in violation of state law,

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232. *Id.*

233. House Subcommittee Video, *supra* note 29, at 21 min., 19 sec. (remarks by Rep. Barry Fleming (R-121st)).

234. *See generally* Video Recording of Senate Floor Debate (Mar. 13, 2019) (remarks by Sen. Zahra Karinshak (D-48th), Sen. Elena Parent (D-42nd), Sen. David Lucas (D-26th), Sen. Steve Henson (D-41st), Sen. Nan Orrock (D-36th), Sen. Harold Jones II (D-22nd), Sen. Jennifer Jordan (D-6th), and Sen. Sally Harrell (D-40th)) <https://livestream.com/accounts/26021522/events/7940809/videos/188633474> [hereinafter Senate Floor Debate]; House Proceedings Video, *supra* note 39 (remarks by Rep. Jasmine Clark (D-108th) and Rep. James Beverly (D-143rd)).

235. *See generally* Curling v. Raffensperger, No. 1:17-cv-02989-AT, 2019 WL 3822123 (N.D. Ga. Aug. 15, 2019).



the Georgia Constitution, and the rules of the Georgia State Senate.<sup>236</sup> During floor debates in the Senate, Senator Elena Parent (D-42nd) and Minority Leader Steve Henson (D-41st) vehemently decried passage of HB 316 without an accompanying fiscal note, with Senator Henson cautioning that it sets a bad precedent for the State of Georgia and noting “[i]t is not an accident. There is a reason why we do not have a fiscal note.”<sup>237</sup>

Other legislators, including Senator Sally Harrell (D-40th) and Senator Zahra Karinshak (D-48th), joined in challenging the costs that HB 316 would impose on Georgia’s taxpayers and counties, citing several conflicting sources that estimated \$6 million per year in maintenance costs and licensing fees.<sup>238</sup> Senator Karinshak, remarking that “local governments are probably in for a rude awakening,” was particularly troubled that the cost of risk-limiting audits was not included in the budget and, based on estimates from other states, would be significant.<sup>239</sup> Additionally, both Senator Parent and Senator David Lucas (D-26th) reported having received calls from concerned local election officials about not having the necessary funding to maintain the new machines.<sup>240</sup>

Lieutenant Governor Geoff Duncan (R) overruled Senator Henson’s objection that HB 316 was out of order, finding instead that HB 316’s fiscal impact had already been sufficiently addressed by the Fiscal Year 2020 budget that calls for \$150 million in bond funds to pay for the new voting machines.<sup>241</sup> In response, Senator Henson

236. Senate Proceedings Video, *supra* note 47, at 1 hr., 53 min., 51 sec. (remarks by Sen. Steve Henson (D-41st)). O.C.G.A. § 28-5-42 requires that “[a]ny bill having a significant impact on the anticipated revenue or expenditure level of any . . . state agency must be introduced no later than the twentieth day of any session,” and that the sponsor must request a fiscal note on such bills “by November 1 of the year preceding the annual convening of the General Assembly in which the bill is to be introduced . . .” O.C.G.A. § 28-5-42 (2018); *see also* DeMillo Interview, *supra* note 213 (the lack of a fiscal note “calls into question the legitimacy of the entire legislative process and raises constitutional issues that undermine public confidence in elections”).

237. Senate Proceedings Video, *supra* note 47, at 1 hr., 53 min., 51 sec. (remarks by Sen. Steve Henson (D-41st)).

238. Senate Floor Debate, *supra* note 234, at 2 hr., 42 min., 48 sec. (Mar. 13, 2019) (remarks by Sen. Zahra Karinshak (D-48th)). Senator Karinshak noted that the original report that Election Systems & Software submitted had informed the Secretary of State that the additional costs would come to approximately \$6 million annually and that legislators “have no idea who’s paying for this.” *Id.*

239. *Id.*

240. *Id.* at 2 hr., 8 min., 1 sec. (remarks by Sen. Elena Parent (D-42nd) and Sen. David Lucas (D-26th)).

241. HB 316, as introduced, 2019 Ga. Gen. Assemb.; Danny Kanso, *Overview of Georgia’s 2020*

moved to challenge Lieutenant Governor Duncan's ruling, and pursuant to Code section 28-5-49(c)(2), the Senate voted along party lines to waive the requirement of a local impact fiscal note.

*Auditing Required by the Act*

Another unresolved consequence of HB 316 involves audit procedures and requirements under the new law. Originally touted as one of the bill's crucial features,<sup>242</sup> several legislators and experts have since criticized it for its weak language.<sup>243</sup> After noting that auditability is an "all-important" feature of HB 316 in his presentation to the Senate Committee on Ethics, Representative Fleming also stated that exact audit procedures will "have to be fleshed out once [the State] know[s] what kind of systems [it is] going to have."<sup>244</sup>

In fact, HB 316 only requires a precertification tabulation audit to be conducted, which, after an amendment by Senate Democrats was proposed to and accepted by the Senate Ethics Committee, must take place no later than November 2020.<sup>245</sup> Risk-limiting audits, however, are not required as a permanent feature; instead, the Secretary of State must conduct a risk-limiting audit pilot program with a risk limit of no more than 10% in a minimum of one county by December 31, 2021.<sup>246</sup> Within ninety days, the Secretary of State must report to the General Assembly with a plan on how risk-limited audits would be implemented statewide.<sup>247</sup>

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*Fiscal Year Budget*, GA. BUDGET & POL'Y INST. (Jan. 24, 2019), <https://gbpi.org/2019/overview-of-georgia-2020-fiscal-year-budget/> [<https://perma.cc/9SGJ-XAWB>].

242. Video Recording of Senate Ethics Committee Meeting at 37 min., 32 sec. (Mar. 6, 2019) (remarks by Rep. Barry Fleming (R-121st)), <https://livestream.com/accounts/26021522/events/8751687/videos/194387379> [hereinafter Senate Ethics Committee Video].

243. Senate Floor Debate, *supra* note 234 at 2 hr., 53 min., 50 sec. (remarks by Sen. Elena Parent (D-42nd)); Senate Ethics Committee Video, *supra* note 242, 37 min., 32 sec. (remarks by Rep. Barry Fleming (R-121st)).

244. Senate Ethics Committee Video, *supra* note 242, 37 min., 32 sec. (remarks by Rep. Barry Fleming (R-121st)).

245. *Id.*

246. See generally *Post-Election Audits*, NAT'L CONF. OF ST. LEGS. (Aug. 5, 2019), <http://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx> [<https://perma.cc/VMJ7-XEBE>].

247. O.C.G.A. § 21-2-498(e) (2019).

Senator Elena Parent sharply criticized her colleagues in the Senate for not recognizing the difference between risk-limiting audits and precertification tabulation audits, stating that:

[T]he audit language itself in this bill is extremely weak. It doesn't require any risk-limiting audit except for the pilot program, which is only in one county. It doesn't require them after that. So with all this talk about audits . . . the bill doesn't even say we're going to require them.<sup>248</sup>

Garland Favorito, founder of VOTER GA and information technology expert, confirmed this sentiment in his testimony to the Senate Ethics Committee. Favorito explained:

Experts say that the audits of [BMDs] are meaningless . . . . The bill works off of risk-limiting audit procedures, but in the bill, if you read it very carefully, the procedures are all conditional, not mandatory . . . . Essentially what it says is we *might* have some audit procedures in 2024 or later, so that puts emphasis on having a very, very secure machine. We can't rely on auditing.<sup>249</sup>

Favorito further cautioned that he believed HB 316 legalized unverifiable voting because not only is the onus for catching machine errors and alterations on the voter, but also “BMDs do not provide voters a way to demonstrate to poll workers or elections officials that a BMD has malfunctioned.”<sup>250</sup>

*Beth K. Boatright & Andrew Smith*

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248. Senate Floor Debate, *supra* note 234, at 2 hr., 53 min., 50 sec. (remarks by Sen. Elena Parent (D-42nd)).

249. Senate Ethics Committee Video, *supra* note 242, at 37 min., 32 sec. (remarks by Garland Favorito, VOTER GA).

250. *Id.* Favorito noted that this conclusion is supported by twenty-four computer scientists who wrote to the SAFE Commission in 2018 to caution against the use of BMDs because voters become entirely responsible for catching any discrepancies between the voter's intent and the printed summary of their ballot. *Id.*