

# **Statement of the National Association of Criminal Defense Lawyers & the Georgia Association of Criminal Defense Lawyers on the Georgia Election Integrity Act of 2021**

The National Association of Criminal Defense Lawyers (NACDL) and the Georgia Association of Criminal Defense Lawyers (GACDL) condemn the Georgia Election Integrity Act of 2021 for criminalizing ordinary, mundane, and harmless activity. At its heart, this Act criminalizes our humanitarianism.

Whenever government seeks to use the criminal law to promote policy objectives to shape social, personal, economic, or political behavior there is a risk of overcriminalization. The Election Integrity Act contains numerous textbook examples of this phenomenon. The law creates new criminal offenses, nearly all of which make it a crime to engage in activity that is not only routine and commonplace, but is also entirely harmless and innocuous. The law makes it a crime to:

1. Handle a completed absentee ballot application;<sup>1</sup>
2. Open a sealed absentee ballot envelope if not the voter or other authorized person;<sup>2</sup>
3. Allow a person to see a ballot being marked, even if at home and having done so voluntarily,<sup>3</sup> subject to certain exceptions;
4. Give water or food to a voter waiting in line;<sup>4</sup>
5. Intentionally observe another person casting a ballot, unless a child or providing authorized assistance;<sup>5</sup>
6. Photograph a voted ballot;<sup>6</sup>
7. Mail or deliver to the board of registrars a person's ballot if not a family or household member of that person.<sup>7</sup>

This list of new offenses criminalizes many types of everyday behavior that are harmless and unobjectionable. If a person asks a friend to take their ballot to the post office or ballot drop location, and the friend does so, that is a crime. If a person offers a drink of water to a person waiting in line to vote, that is a crime. If someone walks into another room of their home where a family member is marking a ballot, that person has potentially committed a crime. The bill also makes it a crime for a person to take a photograph of themselves (a selfie) with their voted ballot. This intrudes on free speech rights while providing no increase to election security or integrity. Criminalization of such routine and innocuous actions should never be permitted in a free society. When conduct that is affirmatively beneficial, such as helping a friend transport their ballot or

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<sup>1</sup> Election Integrity Act of 2021, 2021 Ga. Laws Act 9 (S.B. 202), lines 979-81.

<sup>2</sup> *Id.* at lines 1305-09.

<sup>3</sup> *Id.* at lines 1339, 1347-49.

<sup>4</sup> *Id.* at lines 1873-75.

<sup>5</sup> *Id.* at lines 2449-54.

<sup>6</sup> *Id.* at lines 2456-62.

<sup>7</sup> *Id.* at lines 2442-44.

providing food and water while standing in a long line, is criminalized, it disconnects the criminal law from its moral anchor and further erodes public trust in the criminal legal system.

Criminal statutes should include clearly defined intent (*mens rea*) requirements, which are woefully inadequate in this law. It is doubtful that any person seeking to help someone engage in the lawful act of voting, providing sustenance to cast a ballot, or proudly taking a selfie of their own votes, would reasonably foresee that such an act is unlawful. While there might be scenarios where some of the proscribed behavior could occur as part of an intentional scheme to defraud, as the statute is written there is no such requirement and it is permissible to prosecute people who are entirely blameless and have no intent to commit fraud or undermine the integrity of an election.

Additionally, it is well established that when new crimes are introduced, particularly those that involve the unnecessary criminalization of unobjectionable, everyday activities, enforcement of these laws will fall disproportionately on communities of color.<sup>8</sup>

The United States already suffers from severe overincarceration of its citizens. More Americans are imprisoned, both in absolute and per capita numbers, than the citizens of any other country in the world. While mass incarceration has many causes, one of them is undoubtedly the proliferation of criminal offenses at both the federal and state levels, especially offenses that criminalize conduct that is not inherently wrong or harmful.

Organizations across the political spectrum have spoken out against this trend of overcriminalization. Along with NACDL and GACDL, the ACLU and Human Rights Watch have fought against overcriminalization. Groups on the right have been just as vigilant. The Heritage Foundation says, “The criminal law should be used only to redress blameworthy conduct, actions that truly deserve the greatest punishment and moral sanction.”<sup>9</sup> Right on Crime notes that “thousands of harmless activities are now classified as crimes.”<sup>10</sup> The Manhattan Institute says that overcriminalization “puts even well-meaning citizens in very real danger of being prosecuted for seemingly innocuous conduct.”<sup>11</sup>

The Election Integrity Act could turn well-meaning Georgians who are engaging in harmless, everyday activities into criminals. NACDL and GACDL condemn this Act and urge that these provisions be repealed.

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<sup>8</sup> See Radley Balko, There’s overwhelming evidence that the criminal justice system is racist. Here’s the proof., Washington Post, June 10, 2020, available at <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/> (collecting and summarizing studies showing race-based disparate impact of criminal laws and their enforcement); Elizabeth Hinton, LeShae Henderson & Cindy Reed, An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System, Vera Institute of Justice, May 2018, available at <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (showing that even facially neutral laws are disproportionately enforced against Black Americans).

<sup>9</sup> Heritage Foundation, *Overcriminalization*, <https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization> (accessed April 16, 2021).

<sup>10</sup> Right on Crime, *Overcriminalization*, <http://rightoncrime.com/issue/overcriminalization/> (accessed April 16, 2021).

<sup>11</sup> Manhattan Institute, *Overcriminalizing America*, <https://www.manhattan-institute.org/overcrim> (accessed April 16, 2021).