

No. 23-11738

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In the United States Court of Appeals  
For the Eleventh Circuit

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Brian D. Swanson

*Plaintiff – Appellant,*

v.

Brad Raffensperger,

Secretary of State for the State of Georgia

*Defendant – Appellee.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA**

**THE HONORABLE J. RANDAL HALL**

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**APPELLANT'S OPENING BRIEF**

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**CERTIFICATE OF INTERESTED PARTIES**  
*Bran Dean. Swanson v. Brad Raffensperger, Case No. 23-11738*

Pursuant to 11<sup>th</sup> Circuit Rule 26.1-1, Appellant Brian D. Swanson furnishes a complete list of the following:

1. Brad Raffensperger, Georgia Secretary of State
2. Christopher M. Carr, Georgia Attorney General
3. Russell D. Willard, Senior Assistant Attorney General
4. Honorable J. Randall Hall, Chief Judge United States District Court

## **STATEMENT REGARDING ORAL ARGUMENT**

The proceeding involves a constitutional question of exceptional importance that has never been asked or decided: Does the Seventeenth Amendment deprive the State of Georgia of its equal suffrage in the United States Senate, requiring the State's consent under Article 5 of the Constitution?

For the foregoing reasons, an oral brief is justified in this case.

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## STATEMENT OF JURISDICTION

The courts of appeals have jurisdiction of appeals from all final decisions of the district courts of the United States. 28 U.S.C. § 1291. Appeals from reviewable decision of the district courts are taken to the court of appeals for the circuit embracing the district. 28 U.S.C. § 1294.

## STATEMENT OF THE ISSUES

This appeal presents these distinct legal questions:

- (i) Does the Seventeenth Amendment deprive the State of Georgia of its equal suffrage in the United States Senate, requiring its consent under Article 5 of the Constitution?
- (ii) Is a popular election for United States Senator unconstitutional in the State of Georgia?
- (iii) Does Appellant suffer an injury claim on which relief may be granted when the Georgia Secretary of State invites him to cast an illegal vote in an unconstitutional popular election in violation of 52 U.S.C. § 10307(c) placing Appellant in fear of prosecution?
- (iv) Did the District Court err when it dismissed Appellant's claim for lack of standing?

## STATEMENT OF THE CASE

### Procedural History

The Appellant filed his complaint on December 7, 2022 (Doc 1), and Defendant filed a Motion to Dismiss on January 9, 2022 (Doc 7). Appellant opposed the motion on January 17, 2022. (Doc 9) The District issued its Order on the Motion to Dismiss (Doc 14) and the final judgment (Doc 15) on May 16, 2023. Appellant filed an amended Notice of Appeal on May 24, 2023. (Doc 18)



### **Statement of the Facts**

The following facts are submitted in support of this appeal:

1. At the time of the Georgia runoff election on December 6, 2022, Appellant was a resident of Evans, Ga.
2. Appellant cast a vote in the Georgia runoff election for United States Senator on December 6, 2022.
3. The State of Georgia has not ratified the Seventeenth Amendment.

### **Standard of Review**

For dismissal of a complaint for lack of standing, review is *de novo*. *Smith v. Shook*, 237 F.3d 1322, 1324 (11th Cir. 2001).

For questions of law, review is *de novo*, *Collier v. Trupin*, 177 F.3d 1184, 1193 (11<sup>th</sup> Cir. 1999). The Appeals Court owes no deference to any lower court decision on questions of law. *Horton v. Zant*, 941 F.2d 1449 (11<sup>th</sup> Cir 1991).

### **SUMMARY OF ARGUMENT**

The State of Georgia did not ratify the Seventeenth Amendment. The Seventeenth Amendment deprives the State of its equal suffrage in the Senate and requires its consent under Article 5 of the Constitution. The Constitution originally provided that the State Governments, through their legislatures, were represented

and had suffrage in the United States Senate. The people of the State were represented and had suffrage in the United States House of Representatives. The Seventeenth Amendment alters this relationship. After the Seventeenth Amendment, the people of the State elect the Senate, which means the people have suffrage in the Senate, not the State. The State has been deprived of all of its suffrage in the Senate, which means that it has been deprived of its equal suffrage as well. This cannot happen without the State's consent; the State of Georgia did not consent. Popular elections for United States Senator are unconstitutional in the State of Georgia.

Appellant is a registered voter in the State of Georgia, but he is not eligible to vote for a United States Senator because the State did not ratify the Seventeenth Amendment. Appellant suffers a concrete and particularized injury when Brad Raffensperger, Georgia Secretary of State, issues to Appellant an illegal ballot for United States Senator and encourages Appellant to cast an illegal vote in violation of 52 U.S.C. § 10307(c). When Appellant follows the Secretary of State's instructions and votes for a United States Senator he becomes guilty of violating 52 U.S.C. § 10307(c) and is legal jeopardy of a \$10,000 fine and five year of imprisonment. This threat of fine and imprisonment affects Appellant in a personal way and puts Appellant at risk of real harm that is not hypothetical or conjectural.

Appellant is in violation of the law and subject to prosecution because of the Secretary's actions.

The District Court erred when it dismissed Appellant's complaint for lack of standing and lack of subject matter jurisdiction. Appellant has demonstrated that he has suffered a concrete and particularized injury-in-fact and that injury is traceable to the Georgia Secretary of State. This injury can be addressed by a favorable decision by the courts.

The decision of the District Court should be reversed.

### ARGUMENT

The District Court has dismissed Appellant's suit for lack of standing. The Court's Order states, "Therefore, Appellant's alleged injuries are insufficient to establish standing, and thus, the Court lacks subject matter jurisdiction over this case. Accordingly, Appellant's claims are DISMISSED." (Order at 5) For the reasons set forth in this brief, the District Court's Order should be reversed.

I. **The Seventeenth Amendment Deprives The States Of Their Equal Suffrage In The Senate And Requires Their Consent.**

Article 5 of the Constitution contains an exception to the amendment process. Normally, an amendment is valid upon all states after three-fourths of the states

have ratified it.<sup>1</sup> But, Article 5 states that, “no State, without its consent shall be deprived of its equal suffrage in the Senate.” The Seventeenth Amendment triggers this exception to this process because the popular election of Senators authorized by the Amendment deprives the State of its equal suffrage in the Senate.

Our federal system of government has a dual nature. In “The Federalist #39,” James Madison describes our system as being partly national and partly federal, explaining the difference this way:

The difference between a federal and national government, as it relates to the operation of the government, is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities

Our system combines the federal and national principles of government in Congress so that both the people, in their individual capacities, and the States, in their political capacities, are represented in Congress. Both the people and the States are subject to federal law, and so in a just system they must both be represented in Congress. This dual representation is accomplished by the different methods for electing the House and Senate. In #39 Madison observes:

The House of Representatives will derive its powers from the people of America...So far the government is NATIONAL, not FEDERAL. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies...So far the government is FEDERAL, not NATIONAL.

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<sup>1</sup> U.S. Constitution, Art 1, Sec 5.

The House of Representatives is elected by the people, in their individual capacities, which represents the national principle of government. The Senate is elected by the States, in their political capacities, which represents the federal principle of government. These two principles are combined to create a just system of representation in which both the States, as political entities, and the people, as individuals, are subject to federal law. Electing the Senate by the State legislature is what gives the State suffrage in the Senate. In “Federalist #62,” Madison explains:

It is equally unnecessary to dilate on the appointment of senators by the State legislatures...It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems.

It is clear that “the State governments” are meant to be a constituent part of the federal system by granting them suffrage in the Senate. In our political system, as originally designed, the State governments have suffrage in the Senate, while the people of the State have suffrage in the House of Representatives.

The Seventeenth Amendment alters this relationship. After the Seventeenth Amendment, the people elect the Senators, not the State. This means that the people have suffrage in the Senate, not the State. If the State of Georgia ratifies the Seventeenth Amendment, the people of Georgia will have two Senators, but the

State of Georgia will have no Senators. If the State of Georgia has no suffrage in the Senate, then it does not have equal suffrage either. The popular election of Senators unexpectedly triggers the exception to the ratification process found in Article 5 of the Constitution because the Seventeenth Amendment deprives the State of all of its suffrage in the Senate and as a consequence, the Amendment deprives the State of its equal suffrage as well. The State cannot be deprived of its suffrage in the Senate without its consent. The State of Georgia did not consent.

The Secretary admits in his motion to dismiss that the State of Georgia did not ratify the Seventeenth Amendment. He states, “It is inconsequential that Georgia did not ratify the Seventeenth Amendment, because (1) the Seventeenth Amendment was passed in accordance with Article V absent Georgia’s vote” (Doc. 7 at 12) and therefore this is a factual matter that is not in dispute. The dispute is whether the Seventeenth Amendment deprives the State of Georgia of its equal suffrage in the Senate requiring its consent and whether Mr. Swanson suffers an injury claim upon which relief may be granted if The Secretary has coerced him to cast an illegal vote in violation of 52 U.S.C. § 10307(c).

There are nine States remaining that have not ratified the Seventeenth Amendment and which must appoint their Senators from their legislatures unless

the State ratifies the Seventeenth Amendment: Alaska, Hawaii, Utah, Mississippi, Georgia, Florida, South Carolina, Kentucky and Virginia.<sup>2</sup>

**II. Appellant Has Satisfied The Three Essential Elements Of Article III Standing To Bring This Suit.**

**A. Appellant suffered an injury in fact.**

The illegal actions of Secretary Raffensperger have placed Mr. Swanson in legal jeopardy including a possible \$10,000 fine and five years of imprisonment for casting an illegal vote. This is a concrete and particularized injury traceable to the Secretary.

Mr. Swanson is a registered voter in the State of Georgia, but the State of Georgia did not ratify the Seventeenth Amendment, which means Mr. Swanson is not eligible to vote for United States Senator in the State of Georgia. Thus, when the Secretary conducts a popular election for Senator on his own authority in violation of Article 1 Section 3 of the Constitution by issuing illegal ballots and encouraging Mr. Swanson to cast an illegal vote in violation of 52 U.S.C. § 10307(c) he puts Mr. Swanson in legal jeopardy of a fine and imprisonment.

The threat of fine and imprisonment constitutes “an invasion of a legally protected interest that is both concrete and particularized and actual or imminent,

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<sup>2</sup> Amendments (Exhibit 1)

not conjectural or hypothetical.” *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11thCir. 2020). This injury in fact was committed by the Secretary of State when he conducted an unconstitutional popular election for United States Senator and issued illegal ballots to Mr. Swanson in violation of both the Constitution and 52 U.S.C. § 10307(c).

Mr. Swanson is not required to wait until he is prosecuted to claim an injury-in-fact from a fear of prosecution. The Supreme Court explained in *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) that:

But, as we have noted, when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative, a Appellant need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Steffel v. Thompson*, 415 U.S. at 415 U. S. 459.

This case is about an unconstitutional election, not an unconstitutional statute, but the principle is the same. Fear of prosecution and being in danger of a \$10,000 fine and five years of imprisonment for casting an illegal vote is an injury in fact.

**B. Appellant suffered an actual concrete and particularized injury.**

“For an injury to be ‘particularized,’ it ‘must affect the Appellant in a personal and individual way.’”<sup>3</sup> The fear of being fined \$10,000 and being sent to

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<sup>3</sup> *Spokeo, Inc. v. Robins*, 578 U.S. \_\_\_\_ (2016)



prison for five years is a deeply personal consequence of Secretary Reffensperger's illegal activity.

The District Court attempts to write off Appellant's concerns as a generalized grievance because other voters may suffer the same fate. The Court states,

However, Appellant's allegation that the Runoff Election was unconstitutional is a generalized grievance because he cannot explain how his interest in upholding the Constitution is different from that of any other person. See e.g., Gill, 138 S. Ct. at 1923. Moreover, even assuming the Runoff Election was unconstitutional and subjected Appellant to possible criminal prosecution. Appellant still cannot explain how the possible criminal prosecution is "undifferentiated and common to all members of the public" who voted in the Runoff Election. (Order at 5)

Appellant's primary interest is in avoiding prosecution not in upholding the Constitution. The Court's opinion seems to suggest that Appellant's injury must be unique to him and that others members of the public may not share a similar fate.

Numerous decisions have held that an injury which is shared by other members of the public may still be judged to be particularized for the purpose of standing. "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion." (*United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 688 (1973)).

The fact that other voters may suffer the same injury does not negate the concrete and particularized injury suffered by Mr. Swanson or make his complaint a generalized grievance. “Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’” *Federal Election Commission v. Akins*, 542, U.S. 11 (1998). See *Public Citizen v. Department of Justice*, 491 U. S. 440, 449-450. (“The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure ... does not lessen [their] asserted injury.”) The Secretary cited *Wood v. Raffensperger*, 981 F.3d 1307 1314 (11<sup>th</sup> Cir. 2020) (Doc 7 at 6) as an example of a generalized grievance, but Mr. Wood was not in danger of legal prosecution. Mr. Swanson may be subject to prosecution based on the Secretary’s actions, and even if other voters might share the same fate, it does not lessen his asserted injury and thus, Mr. Swanson has suffered a particularized injury and not a generalized grievance as the District Court has decided.

**C. The injury is fairly traceable to the Georgia Secretary of State.**

According to the Secretary’s website,<sup>4</sup> “The Elections Division of the Secretary of State’s Office organizes and oversees all election activity for the State

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<sup>4</sup> <https://sos.ga.gov/elections-division-georgia-secretary-states-office>

of Georgia.” This includes organizing the U.S. Senate election, authorizing the use of ballots and certifying the election. If the election for U.S. Senator is unconstitutional and if the ballots are illegal, then the errors can be traced directly to the Secretary.

Under Georgia law, O.C.G.A. § 21-2-50, (Exhibit 2) the Secretary is responsible for issuing correct ballots to be used in elections. When the Secretary places an election on Appellant’s ballot in which he is not constitutionally or legally eligible to participate, then the Secretary invites Appellant to cast an illegal vote, which places Appellant in legal danger. The ballot that the Secretary provided to Appellant is defective and has caused him to violate federal law. The error that places Appellant in legal danger is traceable to the Secretary.

The Secretary has no constitutional authority to conduct a popular election for United States Senator in the State of Georgia under Article 1 Section 3 of the Constitution and the Secretary has no legal authority to issue ballots for United States Senator for the purpose of encouraging illegal voting under 52 U.S.C. § 10307(c). The Secretary’s illegal activity is placing Appellant in fear of prosecution.

**D. Chilling effect on voter participation.**

Appellant has submitted two previous suits in attempt to correct this constitutional error and stop the Secretary of State from issuing illegal ballots, 1:21-cv-20 and 1:22-cv-11. Appellant made an attempt to expedite the most recent case to get a decision before the election in hopes of avoiding the conundrum of either: Vote and perhaps go to jail or don't vote and surrender his suffrage. Both cases were dismissed. This is the third case.

As Appellant has researched and gained more knowledge on this issue he has become aware of his legal jeopardy in violating 52 U.S.C. § 10307(c). Appellant has no intention of willfully violating the law, but whether he is in violation of the statute is dependent on whether the Seventeenth Amendment is applicable to the State of Georgia and whether the Secretary is encouraging him to cast an illegal ballot.

Appellant's fear of violating 52 U.S.C. § 10307(c) affected his behavior on election day, November 8, 2022. Appellant was aware that he may violate the statute if he voted for United States Senator. This fear and uncertainty resulted in his refusal to cast a vote for Senator. He cast a vote for every other office on the ballot, but left the box for United States Senator empty for fear of violating the law.

However, the importance of the runoff election on December 6, 2022 compelled him to cast a vote in spite of his fear and uncertainty. The consequence

is that Appellant may now be in danger of a \$10,000 fine and five years of imprisonment.

Appellant’s civic duty to support our free institutions and his legal duty to obey the law should not be in conflict with each other. Casting a vote should not put him in legal jeopardy. Appellant fears that his vote was illegal and that he is now liable for a \$10,000 fine and possible imprisonment.

The legal ambiguity surrounding the election of United States Senators, in those States that have not ratified the Seventeenth Amendment, may have a chilling effect on voter turnout among those voters who strive to obey the law. How can a voter obey the law when the law has become uncertain? As more voters learn of the potential pitfalls of failing to ratify the Seventeenth Amendment, more may choose to abstain from voting to avoid the perils of prosecution.

**III. This Case Is Not Moot**

The Secretary argued in his motion to dismiss that the case is moot because the election has already been certified. The Secretary asserts that, “Swanson seeks to have Georgia’s most recent senate election declared void after it has already been certified, he cites no authority whatsoever to support the notion that this Court could order such relief” (Doc 7 at 10). This statement is inaccurate. The District Court has the authority to declare the senate election unconstitutional, “a

law repugnant to the Constitution is void, and the courts, as well as other departments, are bound by that instrument.” *Marbury v. Madison* 5 U.S. 137 (1803). If the popular election for United States Senator in the State of Georgia violates the Constitution, then the election is void. The authorities cited by the Secretary to support his mootness claim are inapplicable to this case because Appellant is not challenging the certification of the election. Appellant is challenging the constitutionality of the election because the State of Georgia has refused to ratify the Seventeenth Amendment. The certification of an unconstitutional election cannot be a defense to overthrowing the Constitution itself. If the election is unconstitutional, then to this date, no Senators from the State of Georgia have been constitutionally selected and the controversy remains.

The Supreme Court has declined to deem cases moot that present issues or disputes that are “capable of repetition, yet evading review.” *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Spencer v. Kemna*, 523 U.S. 1, 17–18 (1998). This exception to the mootness doctrine applies “only in exceptional situations” in which (1) “the challenged action is in its duration too short to be fully litigated prior to cessation or expiration;” and (2) “there is a reasonable expectation that the same complaining party will be subject to the same action again.” *See Spencer v. Kemna*. In the Court’s opinion, if this exception to mootness did not exist, then certain types of time-sensitive controversies would become unreviewable by the

courts. Mr. Swanson's complaint satisfies both of these requirements. First, the time between an election and the certification of an election is too short to litigate Mr. Swanson's constitutional complaint. If the certification of an unconstitutional election foreclosed the complaint, then Mr. Swanson's dispute could never be reviewed by the courts. Second, Mr. Swanson will suffer the same injury during the next Georgia election for U.S. Senator and he will be in jeopardy again of a \$10,000 fine and five years of imprisonment for casting an illegal vote.

Mr. Swanson's complaint is not moot.

### CONCLUSION

Appellant has satisfied all of the Article III elements of standing: He has suffered an injury in fact; he has suffered a concrete and particularized injury that is not hypothetical or conjectural; and finally, he has established that his injury is traceable to the Georgia Secretary of State.

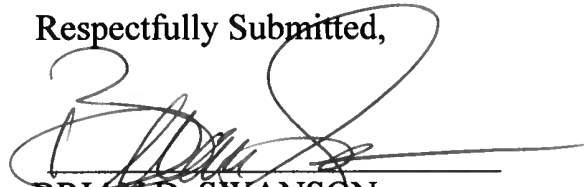
The Seventeenth Amendment deprives the State of Georgia of its equal suffrage in the Senate and requires the State's consent under Article 5 of the Constitution before the Amendment is valid in the State of Georgia. The State of Georgia did not ratify the Amendment and did not consent to be deprived of its equal suffrage in the Senate and therefore, popular elections for United States Senator are unconstitutional in the State of Georgia. The Secretary has injured Mr.

Swanson by enabling his participation in an unconstitutional popular election for United States Senator in violation of 52 U.S.C. § 10307(c). He has issued to Mr. Swanson an illegal ballot and encouraged him to cast an illegal vote. The Secretary's actions put Mr. Swanson in jeopardy of legal prosecution, which constitutes an injury claim upon which relief may be granted. Mr. Swanson has established that he has standing and that the District Court has subject-matter jurisdiction to hear this case.

For the foregoing reasons, Appellant respectfully requests that this Court enter a judgment in his favor or remand this case to the District Court for further consideration.

Dated: June 12, 2023

Respectfully Submitted,



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## **CERTIFICATE OF COMPLIANCE**

This is to certify that this petition complies with Federal Rule of Appellate Procedure 32(a)(7)(b)(i). This petition is submitted in 14-point Times New Roman font, and it contains 3,760 words.

**CERTIFICATE OF SERVICE**

I Hereby certify that on this 12<sup>th</sup> day of June, 2023, a copy of this brief was served on the following individuals by United States Postal Service:

Russell D. Willard  
Senior Assistant Attorney General  
40 Capitol Square SW  
Atlanta, GA 30334



**BRIAN D. SWANSON**  
Appellant, pro se