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Legal Work Ahead: Potential Potholes for the Hands-Free Georgia Act

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LEGAL WORK AHEAD: POTENTIAL POTHOLES FOR THE HANDS-FREE GEORGIA ACT

*Hunter Glenn Smith**

Georgia's statutory regulation of distracted driving, the Hands-Free Georgia Act, went into effect in July 2018. The Act is rife with ambiguous and uncertain language that fails to apprise drivers of the legal and practical consequences of their actions. But in the three years since the Act's passage, neither the legislature nor the courts have addressed these issues.

With its many exceptions, the Act neither protects drivers' constitutional rights nor adequately curtails dangerous driving. Vagueness in the Act's numerous exceptions, Fourth Amendment concerns, and the potential for pretextual stops and racial profiling present potential legal issues on which litigants may base challenges to the Act in the future. To ensure the safety of Georgia's roads, the Act must carefully balance the dangers of distracted driving with the rights of drivers. This Note presents possible solutions for the legislature or courts to implement to improve the Act, clarify its future interpretation, and achieve this precise balance.

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I. INTRODUCTION

On July 1, 2018, the Hands-Free Georgia Act (the Act)¹ went into effect, and Georgia became one of twenty-five states and four territories to enact a hands-free law.² Though states continue to implement distracted-driving statutes in an effort to prevent dangerous driving, these statutes do little more than raise awareness of the dangers of distracted driving; they are difficult to enforce, and they often operate inconsistently across a range of activities.³ This Note focuses on Georgia's distracted-driving statute, the Hands-Free Georgia Act, and on select legal questions that remain unanswered more than three years into the Act's enforcement. This Note analyzes the difficulty of enforcing the Act and advocates for reforms that can more appropriately prevent distracted driving.⁴ Though the Act attempts to curtail distracted

¹ Hands-Free Georgia Act, 2018 Ga. Laws 127 (codified as amended at O.C.G.A. §§ 40-5-57, 40-6-165, 40-6-241 (West, Westlaw through Laws 2021, Act 6)).

² "Hands-free" laws prohibit handheld use of cell phones but allow phone use so long as a driver is not holding the phone or supporting it with any part of their body. *Distracted Driving: Cell Phone Use*, NAT'L CONF. ST. LEGISLATURES (Oct. 5, 2020), <https://www.ncsl.org/research/transportation/cellular-phone-use-and-texting-while-driving-laws.aspx> (outlining the general provisions of hands-free laws). As of July 2020, the governments that have implemented hands-free laws were Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Nevada, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, District of Columbia, Guam, Puerto Rico, and the Virgin Islands. *Id.*

³ See, e.g., Alan Lazerow, *Near Impossible to Enforce at Best, Unconstitutional at Worst: The Consequences of Maryland's Text Messaging Ban on Drivers*, 17 RICH. J.L. & TECH. 1, 5–6 (2010) (suggesting that distracted-driving laws could be unconstitutional because of "the chilling effect stemming from [such statutes'] ambiguity" and the ensuing "potentially unconstitutional curtailment of constitutionally protected speech"); *Motor Vehicle Safety: Distracted Driving*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/motorvehiclesafety/distracted_driving/index.html (last reviewed Dec. 4, 2020) ("While the effectiveness of cell phone and texting laws requires further study, high-visibility enforcement (HVE) efforts for distracted driving laws can be effective in reducing cell phone use while driving. . . . These projects increased police enforcement of distracted driving laws and increased awareness of distracted driving . . .").

⁴ This Note neither advocates for distracted driving nor condones texting and driving or any other conduct that distracts from driving and endangers the lives of others. Each day distracted-driving accidents kill eight people on average and injures more than 1000 people. *Motor Vehicle Safety: Distracted Driving*, *supra* note 3 (detailing the dangers of distracted driving and providing statistics related to these dangers); see also NAT'L HIGHWAY TRAFFIC

driving, it creates several exceptions—notably, for cognitive distractions—that are inconsistent with the Act’s stated goal of improving safety. Additionally, the police may use the Act as pretext to conduct racially motivated traffic stops, implicating drivers’ Fourth Amendment rights. Future legislation should focus on balancing the state’s interest in traffic safety with ancillary ramifications on drivers’ constitutional rights.

In Part II, this Note provides a brief background on the development of distracted-driving statutes and outlines the Act’s legislative history. In Part III, this Note presents several vignettes to illustrate lurking legal questions and flaws in the Act. In Part IV, this Note discusses challenges related to the Act’s enforcement, including the comparative dangers of hands-free technology and handheld use, the disparity between prohibited conduct and the danger of that conduct, and the broad scope of the Act’s exceptions. Part V raises potential constitutional challenges to the Act, including language that may be void for vagueness under the Due Process Clause; the risk of unconstitutional searches that violate drivers’ Fourth Amendment rights; and the potential for law enforcement officers to racially profile drivers when enforcing the Act. Part VI concludes.

II. BACKGROUND

In 1997, the National Highway Traffic Safety Administration (NHTSA) released a report on the safety issues posed by wireless communication devices while driving.⁵ After this report, states soon began regulating the use of cell phones in vehicles.⁶ A state

SAFETY ADMIN., U.S. DEP’T OF TRANSP., DISTRACTED DRIVING IN FATAL CRASHES, 2017, at 1 (2019), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812700> (presenting a 2017 research study finding that distracted driving accounts for nine percent of fatal crashes).

⁵ NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., AN INVESTIGATION OF THE SAFETY IMPLICATIONS OF WIRELESS COMMUNICATIONS IN VEHICLES 3 (1997) (“The extensive growth in the wireless communications industry . . . has been accompanied by growing concern for the potential hazards of drivers using wireless communication devices from moving vehicles.”).

⁶ In 2001, New York was the first state to ban the use of phones while driving. *See* N.Y. VEH. & TRAF. LAW § 1225-c (McKinney, Westlaw through L.2021, chs. 1–49, 61–76) (prohibiting drivers from holding a phone to their ear to make a call while driving); *see also*

may theoretically ban all phone use while driving, but as of December 2020, no state has done so.⁷ Thirty-six states and the District of Columbia, however, do ban all cell phone use by “novice” drivers, a category defined by age, license type, or years of driving experience.⁸ Additionally, almost every state bans texting while driving, with only two lacking an outright ban on texting.⁹ Finally, the strictest regulations of cell phone use are hands-free laws.¹⁰ Twenty-five states, three U.S. territories, and the District of Columbia prohibit handheld use while driving, and all have implemented “primary enforcement” mechanisms that allow law enforcement to “cite a driver for using a handheld cellphone without any other traffic offense taking place.”¹¹ “Secondary enforcement,” in contrast, refers to a traffic infraction that may only be cited in conjunction with another citable traffic violation.¹²

James C. McKinley Jr., *New York to Be First State to Ban Holding Cell Phone While Driving*, N.Y. TIMES (June 26, 2001), <https://www.nytimes.com/2001/06/26/nyregion/new-york-to-be-first-state-to-ban-holding-cell-phone-while-driving.html> (“New York will become the first state to ban talking on a hand-held cellular telephone while driving”); Matthew C. Kalin, Note, *The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use by Drivers*, 39 SUFFOLK U. L. REV. 233, 240–45 (2005) (discussing challenges to New York’s law).

⁷ See *Distracted Driving: Cell Phone Use*, NAT’L CONF. ST. LEGISLATURES, *supra* note 2 (“No state bans all cellphone use for all drivers”).

⁸ *Id.*; see also *Distracted Driving*, GOVERNORS HIGHWAY SAFETY ASS’N, <https://www.ghsa.org/state-laws/issues/Distracted-Driving> (last visited Mar. 16, 2021) (compiling distracted driving laws from across the United States); *Teen and Novice Drivers*, GOVERNORS HIGHWAY SAFETY ASS’N, <https://www.ghsa.org/state-laws/issues/teen%20and%20novice%20drivers> (last visited Mar. 16, 2021) (showing how state laws regulate novice drivers).

⁹ Only Montana and Missouri do not fully ban texting while driving, but Missouri does prohibit the activity for novice drivers. *Distracted Driving*, GOVERNORS HIGHWAY SAFETY ASS’N, *supra* note 8.

¹⁰ See *supra* note 2 for a definition of “hands-free” and a list of states with hands-free laws.

¹¹ See *Distracted Driving*, GOVERNORS HIGHWAY SAFETY ASS’N, *supra* note 8 (noting which distracted-driving laws around the country opt for a primary-enforcement mechanism).

¹² See, e.g., *Seat Belts*, GOVERNORS HIGHWAY SAFETY ASS’N, <https://www.ghsa.org/state-laws/issues/seat%20belts> (last visited Mar. 16, 2021) (“Primary seat belt laws allow law enforcement officers to ticket a driver or passenger for not wearing a seat belt, without any other traffic offense taking place. Secondary seat belt laws state that law enforcement officers may issue a ticket for not wearing a seat belt only when there is another citable traffic infraction.”). In the context of distracted driving, a secondary enforcement law would mean that an officer would have to observe the driver commit some other citable infraction in conjunction with the use of a wireless device, such as failure to maintain lane or obey

The Centers for Disease Control and Prevention (CDC) has identified three types of distractions while driving: (1) “visual” distractions, which include anything that causes you to take your eyes off the road; (2) “manual” distractions, which involve removing your hands from the wheel; and (3) “cognitive” distractions, which are distractions of the mind, such as speaking with passengers, singing along with the radio, or ticking boxes on your mental to-do list.¹³ Notably, texting while driving involves all three distractions.¹⁴ A driver who is using their phone—whether to text, speak, or surf the web—is visually, manually, and cognitively distracted. If a driver is looking at their phone and not the road—even if just for a second—they are visually distracted from the task of driving.¹⁵ Holding and manipulating a phone is a manual distraction not only because it leaves only one hand on the wheel, but also because it involves multitasking as the driver steers and scrolls.¹⁶ Finally, when a driver is reading, comprehending, or composing the digital images and text on their phone, they are not paying full attention to the road and to their safety.¹⁷

The uniformity in form and substance of state distracted-driving laws may lead the casual observer to believe that these laws are the most effective method of preventing distracted driving. However, their prevalence may actually be the result of economic incentives from the federal government rather than the result of their efficacy in preventing distracted driving. In 2012, Congress created grants to encourage states to adopt laws prohibiting texting and driving, and “[thirty-eight] states eagerly applied for the funding.”¹⁸ These grants required the following: (1) a ban on

traffic signals. Under a secondary enforcement law, an officer could not merely stop a person who was holding a cell phone in a way that did not affect their driving.

¹³ See *Motor Vehicle Safety: Distracted Driving*, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 3.

¹⁴ *Cf. id.* (“Sending a text message, talking on a cell phone, using a navigation system, and eating while driving are a few examples of distracted driving. Any of these distractions can endanger you, your passengers, and others on the road.”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Larry Copeland, *States Lose Out on Federal Distracted-Driving Grants*, USA TODAY (Sept. 10, 2013, 6:18 PM), <https://www.usatoday.com/story/news/nation/2013/09/10/distract>

text messaging, including reading or manually entering any written communication; (2) a prohibition on drivers under eighteen using a cell phone; (3) a primary enforcement mechanism; and (4) a minimum fine of \$25 for violations.¹⁹ In December 2015, the Fixing America's Surface Transportation Act (FAST Act) created a Special Distracted Driving Grant only for Fiscal Years (FY) 2017 and 2018;²⁰ these grants had similar conditions to those that were codified for the 2012 grants.²¹ Whether this new grant motivated Georgia to pass the Hands-Free Georgia Act is unclear. Georgia did apply for a Special Distracted Driving Grants in FY 2018, but the U.S. Department of Transportation denied Georgia's application because the Act did not prohibit drivers under eighteen from using a cellular device.²²

Georgia began regulating distracted driving before the advent of these federal grants, though. Georgia has had some version of a distracted-driving statute since 1974,²³ and a provision prohibiting

ed-driving-us-grants/2785757/ (discussing the creation of these grants as well as some of the reasons why states were unsuccessful in attaining them).

¹⁹ 23 C.F.R. § 1300.24(c)(2)(i)–(ii) (2019) (providing the criteria that a state must meet to qualify for a “Comprehensive Distracted Driving Grant”); 23 U.S.C. § 405(e)(2)–(3) (2018) (codifying the grant qualification requirements). Additionally, because Congress defined “driving” to include temporary stops, states must also prohibit cell phone use when the car is stationary at a stop sign or traffic light. 23 U.S.C. § 405(e)(9)(A) (“The term ‘driving’ . . . means operating a motor vehicle on a public road; and . . . does not include operating a motor vehicle when the vehicle has pulled over to the side of, or off, an active roadway and has stopped in a location where it can safely remain stationary.”).

²⁰ Fixing America's Surface Transportation Act, Pub. L. No. 114–94, § 4005(d), 129 Stat. 1312, 1506 (2015) (codified as amended at 23 U.S.C. § 405(e)(6)).

²¹ These grants were previously codified at 23 C.F.R. § 1300.24(e) and (f), but the NHTSA removed these sections in 2018 once the grants were no longer available. Uniform Procedures for State Highway Safety Grant Programs, 83 Fed. Reg. 3466, 3477 (Jan. 25, 2018) (codified at 23 C.F.R. § 1300.24).

²² *FY 2018 State Grant Determinations*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (2018), <https://www.nhtsa.gov/highway-safety-grants-program/fy-2018-grant-funding-table>. Georgia did not qualify for a FY 2019 Comprehensive Distracted Driving Grant for similar reasons. *FY 2019 State Grant Determinations*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (2019), <https://www.nhtsa.gov/highway-safety-grants-program/fy-2019-grant-funding-table> (explaining that Georgia's application was deficient for not prohibiting cell phone use by youth under eighteen and for not requiring a minimum fee of \$25 for such activity).

²³ See generally Uniform Rules of the Road Act, 1974 Ga. Laws 633.

texting and driving was added to this statute in 2010.²⁴ This previous version of Georgia’s distracted-driving statute required that the prohibited actions “distract such driver from the safe operation of such vehicle.”²⁵ This language was often interpreted as requiring the state to prove a link between an allegedly distracting activity and unsafe driving caused by that distraction.²⁶

In March 2017, the Georgia House of Representatives created the House Study Committee on Distracted Driving to determine if “legislative changes [were] warranted to Georgia’s rules of the road to further restrict the use of technologies while driving.”²⁷ After just four meetings, the Committee released a final report in December 2017.²⁸ The Committee found that fatal crashes had increased in the last two years and that “[o]f the [fifteen] states plus the District of Columbia . . . that have enacted ‘hands-free’ laws, [thirteen] of these states saw an average 16% decrease in traffic fatalities within two years after passing and enforcing their new laws.”²⁹ Additionally, the Committee recognized an issue with the 2010 ban on texting: drivers could claim permissible use of a cell phone if caught holding one while driving,³⁰ thus diminishing

²⁴ See Caleb Sorohan Act for Saving Lives by Preventing Texting While Driving, 2010 Ga. Laws 1158, 1159 (adding a provision “to prohibit writing, sending, or reading a text based communication . . . while operating a motor vehicle”).

²⁵ *Id.* at 1160.

²⁶ See, e.g., *Charges Dropped Against Man Cited for Eating While Driving*, WSB-TV (Feb. 6, 2015, 4:37 PM), <https://www.wsbtv.com/news/local/charges-dropped-against-man-cited-eating-while-dri/53776589> (discussing the dismissal of charges against a driver who was eating a hamburger while driving because there was no clear link between his eating and any distracted driving); *Williams v. State*, 778 S.E.2d 820, 823 (Ga. Ct. App. 2015) (applying the 2010 law and noting that defendant violated O.C.G.A. § 40-6-241 because the officers observed him “manipulating ‘some sort of device in his hands’” and the officers believed this contributed to his failure to obey an order to stop).

²⁷ H.R. 282, 154th Gen. Assemb., Reg. Sess. (Ga. 2017).

²⁸ HOUSE STUDY COMM. ON DISTRACTED DRIVING, REPORT OF THE COMMITTEE, 154th Gen. Assemb., Reg. Sess., at 5 (Ga. 2017), http://www.house.ga.gov/Documents/CommitteeDocuments/2017/Distracted_Driving/Final_Report_DistractedDriving.pdf (presenting the Committee’s findings and its recommendations for addressing distracted driving).

²⁹ *Id.* at 5.

³⁰ Under the 2010 version of the statute, “the proper use of a radio, citizens band radio, *mobile telephone*, or amateur or ham radio” does not constitute a violation. Caleb Sorohan Act for Saving Lives by Preventing Texting While Driving, 2010 Ga. Laws 1158, 1160 (emphasis added). Because the Caleb Sorohan Act only prohibited adult drivers from

the 2010 law's efficacy and posing significant enforcement difficulties.³¹ The Committee cited confusion among the governing statutes, changing technology, and ambiguous prohibitions as reasons to change Georgia's distracted-driving statute.³² Just ten days after the report was published, H.B. 673 (the Hands-Free Georgia Act) was submitted to the House Hopper and began the legislative process.³³ In April 2018, the bill went to Governor Nathan Deal's desk, and in May, he signed it into law.³⁴

The Hands-Free Georgia Act amended three sections of the Official Code of Georgia.³⁵ First, it changed the point system used for license revocation³⁶ to assess one point to a driver's license for the first violation of the handheld ban, two points for a second violation, and three points for a third and subsequent violations.³⁷ Second, the Act amended a provision of the code relating to school bus drivers and distracted driving.³⁸ Third, the Act amended Georgia's general distracted-driving statute³⁹ by prohibiting

“writ[ing], send[ing], or read[ing] any text based communication,” drivers could still make phone calls with the device. *Id.*

³¹ See HOUSE STUDY COMM. ON DISTRACTED DRIVING, *supra* note 28, at 5 (“Public safety personnel [in Georgia] . . . have made it clear that our laws against texting and driving are unenforceable because law officers cannot determine whether a driver is texting or simply dialing a telephone number.”).

³² See *id.* at 13 (noting “several issues [that] have evolved since passage of [Georgia’s 2010 ‘no-texting’ law]”).

³³ Hands-Free Georgia Act, 2018 Ga. Laws 128; *HB 673*, GA. GEN. ASSEMBLY, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/673> (last visited Mar. 16, 2021) (detailing the timeline of H.B. 673 from bill to law).

³⁴ *HB 673*, GA. GEN. ASSEMBLY, *supra* note 33; see also David Wickert, *Governor Deal Signs Georgia Distracted Driving Bill in Emotional Ceremony*, ATLANTA J.-CONST. (May 5, 2018), <https://www.ajc.com/news/state--regional-govt--politics/deal-signs-georgia-distracted-driving-bill-emotional-ceremony/KfMiMnXzPk33L8TpExWsJN/> (describing the passage of H.B. 673).

³⁵ Those code sections are O.C.G.A. §§ 40-5-57, 40-6-165, 40-6-241 (West, Westlaw through Laws 2021, Act 6).

³⁶ See O.C.G.A. § 40-5-57(b) (West, Westlaw through Laws 2021, Act 6) (“For the purpose of identifying habitually dangerous or negligent drivers . . . , the department shall assess points, as provided in subsection (c) . . .”).

³⁷ *Id.* § 40-5-57(c)(1)(A)(xv)–(xvii).

³⁸ See *id.* § 40-6-165(d), -165(e) (“The driver of a school bus shall not use or operate a wireless telecommunications device . . .”). This Note does not discuss this provision because it pertains exclusively to the operation of school buses.

³⁹ *Id.* § 40-6-241.

drivers from “[p]hysically hold[ing] or support[ing], with any part of [their] body a . . . [w]ireless telecommunications device”;⁴⁰ from viewing or recording a video-based communication;⁴¹ and from “[w]rit[ing], send[ing], or read[ing] any text based communication” from a prohibited device.⁴² The Act also prohibits drivers of commercial vehicles from reaching for any device such that the driver is no longer in a seated position⁴³ and from using “more than a single button . . . to initiate or terminate a voice communication” on a wireless device.⁴⁴ The Act provides exceptions for voice-based communication and control,⁴⁵ navigation,⁴⁶ use when “lawfully parked,”⁴⁷ and “reporting a traffic accident, medical emergency, fire, an actual or potential criminal . . . act, or road condition which causes an immediate and serious traffic or safety hazard.”⁴⁸ By prohibiting use of “[w]ireless telecommunications device[s],” the legislature encapsulated more than just cell phones; the Act covers

⁴⁰ *Id.* § 40-6-241(c)(1).

⁴¹ *Id.* § 40-6-241(c)(3)–(4).

⁴² *Id.* § 40-6-241(c)(2).

⁴³ *Id.* § 40-6-241(d)(2).

⁴⁴ *Id.* § 40-6-241(d)(1).

⁴⁵ *See id.* § 40-6-241(c)(1)(A) (“[S]uch exclusion shall not prohibit the use of an earpiece, headphone device, or device worn on a wrist to conduct a voice based communication”); *id.* § 40-6-241(c)(2)(A) (“[S]uch prohibition shall not apply to . . . [a] voice based communication which is automatically converted by such device to be sent as a message in a written form”).

⁴⁶ *See id.* § 40-6-241(c)(2)(B) (“[S]uch prohibition shall not apply to . . . [t]he use of such device for navigation of such vehicle or for global positioning system purposes”); *id.* § 40-6-241(c)(3) (stating that drivers can “watch[] data related to the navigation of [their] vehicle”).

⁴⁷ *Id.* § 40-6-241(g)(4). The statute does not define “lawfully parked,” though it likely does not include being temporarily stopped at a stop sign or traffic light. *Id.*; *see also* David Wickert, *Georgia’s New Distracted Driving Law: What’s Legal, What’s Not?*, ATLANTA J.-CONST. (July 2, 2018), <https://www.ajc.com/news/state--regional-govt-politics/georgia-just-passed-distracted-driving-bill-what-legal-what-not/PZXchE0AqAi1H8r7X8XrZNI/> (“You can also use your hands if you’re lawfully parked (not at a stoplight – ‘lawfully’ means off or beside the road in an area open to parking).”).

⁴⁸ O.C.G.A § 40-6-241(g)(1) (West, Westlaw through Laws 2021, Act 6).

any wireless communications device.⁴⁹ The Act does, however, expressly exclude smartwatches, radios, and in-vehicle systems.⁵⁰

III. VIGNETTES OF APPLICATION

Despite the state legislature's efforts to craft a law with less enforcement confusion than its 2010 predecessor, the following hypothetical situations demonstrate that these efforts may have fallen short. The Hands-Free Georgia Act poses new, unanswered questions. The following vignettes illustrate the Act's purpose, its internal logic, its enforcement challenges, and the inconsistency of its exceptions.⁵¹

A. DONNA DRAPER: HANDHELD BANS DO NOT PREVENT COGNITIVE DISTRACTIONS

As traffic completely backs up on Georgia State Route 400, Donna Draper yells at her secretary to stall the board meeting for which she is now late. Donna has placed her phone on a hands-free mount, and she is berating her employee through the Bluetooth feature of her car. Her phone, though on the mount, displays a barrage of text messages and notifications that constantly pop up on the screen. Donna keeps her eyes on the road but occasionally looks over to catch a glimpse of the notifications to ensure that she has not missed anything important. She also glances in her rearview mirror to check on her infant daughter, who is in a car seat in the back. Traffic begins to pick up again, and Donna steps on the gas. Just then, the president of the company calls, and she quickly fumbles to answer it. Her daughter begins to cry in the backseat, and Donna reaches back to ensure her well-being. In her fluster, Donna fails to notice traffic has stopped again, and she rear-ends the car in front of her.

⁴⁹ See *id.* § 40-6-241(a)(3) (defining “[w]ireless telecommunications device” to include devices other than cell phones).

⁵⁰ See *id.* § 40-6-241(c)(1)(A) (excluding “use of an earpiece, headphone device, or device worn on a wrist to conduct a voice based communication”); *id.* § 40-6-241(a)(3) (stating what “[w]ireless communications device” does not include).

⁵¹ These vignettes are an amalgamation of the author's own thoughts, experiences, and observations while driving on Georgia's roads but are in no way based on real-life events.

B. SID STUDENTSON: NAVIGATION SYSTEMS CAN BOTH GUIDE AND DISTRACT

Sid Studentson is en route to a job interview with his dream firm in Atlanta. He is originally from southern Georgia and has never driven to Atlanta. He did not review the directions before getting in his vehicle, and he is now lost among the city's myriad of exits and turnpikes. His phone is in a hands-free mount on the dash, where it is displaying his navigation route. Fearing that he has missed the exit and that the digital map has not yet updated, he uses one finger to slide the map and get a better view. Sid takes his eyes off the road for a brief second to locate the exit number. Traffic stops abruptly, and he rear-ends the car ahead of him.

C. RONNIE RURALMAN: SAFE DRIVING MAY STILL BE "ILLEGAL"

Ronnie Ruralman is driving in rural Georgia one afternoon. He enters a stretch of road with fields on both sides. Although the speed limit is fifty-five miles per hour, he is driving leisurely at forty-five miles per hour. He hits a bump, which causes his phone to fall out of its hands-free mount and into a cupholder. Without taking his eyes off the road, Ronnie reflexively grabs the phone and pushes it back into the mount. He stays in his lane of traffic, and his actions have no adverse effect on his driving. A state patrol officer sees Ronnie pick up his phone, pulls him over, and cites him for violating Georgia's distracted-driving statute.

D. ALY ALLERGICSON: WHAT IS AN "EMERGENCY"?

Aly Allergicson is driving home from lunch when she begins to have a mild allergic reaction to something she ate. Her throat is not closing, but she begins to get hives and knows that her condition will soon worsen her breathing. She realizes that she left her EpiPen at home. Aly decides to call her mom and ask her to prepare the medicine because she is close to home. Aly does not have a hands-free mount, so she holds the phone to her ear. A police officer pulls her over. She eventually goes into anaphylactic shock and needs emergency medical attention because of the delay.

IV. ENFORCEMENT ISSUES

Notably, only one of these hypothetical drivers, Ronnie Ruralman, violated the Hands-Free Georgia Act, even though his actions arguably caused the least amount of harm or risk to himself or others. These vignettes highlight the issues with the Act, which are ripe for judicial or legislative review.

A. HANDS-FREE TECHNOLOGY CAN BE JUST AS DANGEROUS AS HANDHELD PHONE USE

Though Donna Draper's irate phone call was a dangerous distraction, it is legal because the Act allows drivers to take phone calls if initiating the call with a voice command rather than manually.⁵² Trying to comply with these intricate rules may be just as distracting as the activities they proscribe.⁵³ Prior to the advent of hands-free technology, a driver's phone likely rested on a seat, on a console, or in a cupholder. Now, a phone might be placed on a mount, putting the distraction directly in the driver's line of sight: the driver may be more aware of incoming calls, texts, or other distractions because of hands-free technology.⁵⁴ By proscribing some activities as dangerous but omitting others, the Act tacitly approves of behaviors not expressly prohibited by law.⁵⁵ Even in 1997, NHTSA foresaw the potential impact of hands-free legislation:

⁵² O.C.G.A. § 40-6-241(d)(1) (West, Westlaw through Laws 2021, Act 6).

⁵³ See Doug Turnbull, *Gridlock Guy: Why Being Hands-Free Can Still Be So Distracting*, ATLANTA J.-CONST. (Aug. 27, 2018), <https://www.ajc.com/news/local/why-being-hands-free-can-still-distracting/pIaiuuY9k0WV7iUXAyvmKI/> ("Following the rules can sometimes become another distraction behind the wheel.").

⁵⁴ See, e.g., *id.* ("[T]he convenience of having my incoming text and email suddenly at eye level makes the temptation far greater to interact with them.").

⁵⁵ See *id.* ("My human nature leads me to thinking that briefly answering that text at a light or when I am in stopped traffic is okay — because my phone [is] not in my hands. I think that trying to adjust and setup the Bluetooth transmitter behind the wheel is justified, because I eventually will be safer. Outside of any laws, all of these things are indisputably distracting."); see also Robert Rosenberger, *The Problem with Hands-Free Dashboard Cellphones*, COMM. ACM, Apr. 2013, 38, 39 ("[W]hen only handheld—and not hands-free—devices are subject to regulation, a message is inadvertently sent that hands-free phone usage while driving is safe. But . . . the research shows this to be untrue.").

[H]ands-free designs will do nothing to mitigate the distraction potential of cellular telephone conversation. Proposed legislation may inadvertently promote greater use of cellular telephones among drivers who currently limit or altogether avoid cellular telephone use while driving by implying that hands-free designs must be safe, thus increasing exposure to other potential risks that may still exist.⁵⁶

NHTSA has continued to advocate for a complete ban on cell phone use while driving, but no state has passed such legislation.⁵⁷ Additionally, some have argued that hands-free laws do not deter distracted driving and instead encourage drivers to attempt to use their devices discreetly, which may be even more dangerous.⁵⁸

Further complicating matters, drivers may commit another traffic violation or engage in other dangerous driving behavior when attempting to comply with the Act. Georgia law prohibits drivers from operating a vehicle when “nontransparent material” is placed on the front windshield or any other car window such that the material “obstructs the driver’s clear view of the highway or any intersecting highway.”⁵⁹ By its terms, this prohibition may include hands-free devices mounted on windshields. By attempting to comply with the Act, many drivers may be inadvertently violating a different statute.⁶⁰ Because the Act tacitly promotes

⁵⁶ NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 5, at 16.

⁵⁷ See *Distracted Driving*, GOVERNORS HIGHWAY SAFETY ASS’N, *supra* note 8 (discussing different distracted driving laws across the United States); see also *supra* note 7.

⁵⁸ See HIGHWAY LOSS DATA INST., TEXTING LAWS AND COLLISION CLAIM FREQUENCIES 8 (2010), https://www.iihs.org/media/fc495300-6f8c-419d-84d7-c3b94d178e5a/enPLrA/HLDI%20Research/Bulletins/hldi_bulletin_27.11.pdf (“[T]here appears to have been a small increase in claims in the states enacting texting bans, compared to neighboring states. . . . This . . . suggests that texting drivers have responded to the law, perhaps by attempting to avoid fines by hiding their phones from view. . . . [T]he bans may make texting more dangerous rather than eliminating it.”); Mary Francis Hoots, *Tennessee Lawmaker Files Bill to Repeal Hands-Free Driving Law*, WRcBTv (Jan. 24, 2020, 10:59 PM), <https://www.wrcbtv.com/story/41610251/tennessee-lawmaker-files-bill-to-repeal-handsfree-driving-law> (“[P]eople are still using their phones and . . . it’s much more dangerous to hide the phone below the steering wheel than to hold it in front of their face.”).

⁵⁹ O.C.G.A. § 40-8-73(a) (West, Westlaw through Laws 2021, Act 6).

⁶⁰ Lawmakers have caught this conflict and have introduced legislation to clarify the discrepancy. See H.B. 165, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (amending O.C.G.A.

hands-free use as safe, drivers may use mounted devices or keep their phones in more precarious locations, such as a cupholder or seat, which only encourages longer glances away from the road and increases the risk of dangerous distractions.⁶¹

B. INCONSISTENCIES BETWEEN THE CONDUCT PROSCRIBED AND THE DANGERS OF DISTRACTED DRIVING

The vignette featuring Ronnie—the driver who merely repositioned his phone without taking his eyes off the road—highlights the inconsistencies in enforcing the Act, as well as the manner in which these inconsistencies frustrate the Act’s purpose of safety. An individual picking up the phone without looking at it is less dangerous than other activities that the Act allows, such as focusing on navigation data on a hands-free mounted phone. Additionally, Ronnie’s actions did not constitute a present danger to highway safety; no other drivers were on the road, he was moving at an appropriate speed, and his vehicle did not cross over into the other lane. Yet, despite his minor misconduct, the officer still cited him. This situation is the outcome of the Act’s “primary enforcement” mechanism; if the Act instead had a “secondary enforcement” mechanism, the police could not have cited Ronnie.⁶²

The Act is rife with inconsistencies between the danger of the conduct and the prohibition of that conduct. Notably, the Act allows voice communication,⁶³ though distractions like phone calls and passenger conversations are often cited as being just as dangerous as manual and visual distractions.⁶⁴ Additionally, anyone who has

§ 40-8-73 to exempt “mount[s] for the support of a wireless telecommunications device or stand-alone electronic device”). This bill has not yet passed. *HB 165*, GA. GEN. ASSEMBLY, <https://www.legis.ga.gov/legislation/59087> (last visited Mar. 16, 2021).

⁶¹ See *supra* notes 55–56, 58 and accompanying text.

⁶² See *supra* notes 11–12 and accompanying text.

⁶³ See *supra* note 45 and accompanying text.

⁶⁴ Cognitive distractions can be just as tolling on our abilities as manual and visual distractions. One study suggests that “drivers using hands-free and handheld cell phones have a tendency to ‘look at’ but not ‘see’ objects,” and, accordingly, they “look at but fail to see up to [fifty] percent of the information in their driving environment.” NAT’L SAFETY COUNCIL, UNDERSTANDING THE DISTRACTED BRAIN 9 (2012), <https://www.nsc.org/getmedia/2ea8fe8b-d7b7-4194-8ea5-306d30a73972/cognitive-distraction-white-paper.pdf>; see also *id.* at 3 (“Although texting is clearly a serious distraction, [National Safety Council] data show

used voice-command technology has surely experienced the frustration of misunderstood language, which likewise poses a dangerous distraction.⁶⁵ Further, inconsistency exists between the conduct proscribed and the potential damage such conduct may cause. As the vignettes demonstrate, the Act may penalize an individual for picking up their device without creating a risk of danger, while it permits other conduct that is more dangerous, like taking one's eyes and mind off the road and focusing on a map or conversation. One of the presentations made to legislators in lobbying for this Act highlighted this inconsistency: "Drivers are distracted by things other than cellphones, so prohibiting phone use alone will not eliminate distracted driving."⁶⁶

Through the Act's uneven approach to risky conduct while driving, the legislature has assigned a social utility to some conduct and not others, at an unknown cost to personal freedom and safety. At times distinguishing among certain forms of conduct seems arbitrary, except when doing so increases law enforcement's ability to enforce the prohibition on handheld use while driving. For example, a driver "operating a commercial motor vehicle" is not allowed to tap the "skip" button on their favorite music streaming service, because that one-finger motion is not initiating or

drivers talking on cell phones are involved in more crashes."). One presentation to the Georgia House Committee included as examples of "[d]istracted [d]riving" whenever "a driver adjusts a radio, tends to an irritable child, adjusts A/C or heating, applies make up, shaves, talks to passengers, eats, or reads a map (paper or electronic)." Robert P. Hartwig, Assoc. Professor, Univ. of S.C., Presentation to the Georgia House Distracted Driving Committee: Distracted Driving Trends, Challenges, Solutions 38 (Aug. 28, 2017), http://www.house.ga.gov/Documents/CommitteeDocuments/2017/Distracted_Driving/Univ_South_Carolina_presentation.pdf.

⁶⁵ See, e.g., Kylie Mohr, *Even After Hanging Up, Hands-Free Isn't Risk-Free for Distracted Drivers*, NPR (Oct. 22, 2015, 5:29 PM), <https://www.npr.org/sections/alltechconsidered/2015/10/22/450871544/even-after-hanging-up-hands-free-isnt-risk-free-for-distracted-drivers> (noting that mental distraction could continue for "up to 27 seconds after using voice commands"); Abby's Angels Found., Presentation to the Georgia House Distracted Driving Committee (Sept. 25, 2017), http://www.house.ga.gov/Documents/CommitteeDocuments/2017/Distracted_Driving/Warner_Robbins/Abbys_Angels.pdf (using a graphic from the American Automobile Association that lists "[u]sing voice-activated texting or email feature[s]" as a "High Danger").

⁶⁶ Hartwig, *supra* note 64, at 47.

terminating a voice communication.⁶⁷ They could, though, change the song on their radio.⁶⁸ In fact, drivers may engage with their radio and other on-board systems as much as they desire without running afoul of the Act.⁶⁹ Permitting a driver to skip a song on a radio, but not on their phone, seems arbitrary and unrelated to safety goals. The rationality and coherence of the Act—i.e., its regulation of some forms of conduct but not others—are potential issues that litigation must resolve. By proscribing a larger swath of behaviors behind the wheel, the Act permits law enforcement officers to conduct more traffic stops. This increased enforcement has been marketed as a means of curtailing distracted driving, but when combined with the inconsistency of the actual danger posed by the prohibited conduct, such enforcement leaves drivers vulnerable to infringement of their rights.

C. THE TROUBLE WITH EXCEPTIONS

A woman in Gwinnett County was moving about six miles per hour when another vehicle traveling at sixty-eight miles per hour struck her vehicle from behind.⁷⁰ The crash was so impactful that items in the woman's trunk ended up in the colliding vehicle, and the woman was left in a four-week coma and suffered a traumatic brain injury.⁷¹ The driver who collided with the woman was distracted by multiple internet screens on a laptop in his vehicle.⁷² Surprisingly, his distracted driving was not a clear violation of the

⁶⁷ See O.C.G.A. § 40-6-241(d)(1) (West, Westlaw through Laws 2021, Act 6) (prohibiting more than one button push on a wireless telecommunications device, which do not include radios, to initiate or terminate voice communication).

⁶⁸ *Id.*

⁶⁹ See *id.* § 40-6-241(a)(3) (defining “[w]ireless telecommunications device” to include a cell phone but not a radio).

⁷⁰ Zachary Hansen, *Investigation: YouTube Video Was Playing When Gwinnett Officer Rear-Ended Woman's SUV*, ATLANTA J.-CONST. (Nov. 19, 2019), <https://www.ajc.com/news/crime--law/investigation-youtube-video-was-playing-when-gwinnett-officer-rear-ended-woman-suv/oYrEgvP7KTafO3IZkaChpN/> (describing the crash and its aftermath).

⁷¹ *Id.*

⁷² *Id.*

Hands-Free Georgia Act because he was a police officer using his on-board computer.⁷³

One of the Act's many exceptions is that the prohibition on device use does not apply to "law enforcement officer[s], firefighter[s], emergency medical services personnel, ambulance driver[s], or other . . . first responder[s] during the performance of his or her official duties."⁷⁴ It is unclear, however, whether this officer was distracted by official work or by a YouTube video of *Grand Theft Auto* gameplay that was playing at the time of the crash.⁷⁵ It is also uncertain whether the exception only applies to handheld use that is related to performance of those official duties. In this situation, the officer may not have violated the Act if he was using his device to run a license while on patrol. But if he was watching a YouTube video, would he still be exempt from the Act? These events make clear that the law-enforcement exception does not promote public safety in every instance, which suggests that it may be too broad. Moreover, many of the Act's other exceptions also frustrate its intended public safety purpose or its enforceability.

The Sid Studentson hypothetical also highlights one of the exemption issues.⁷⁶ The Act carves out an exemption for navigation.⁷⁷ This exemption, though, does not clearly state how much physical contact one may have with a device while using it for its GPS capabilities. The Act prohibits "[w]rit[ing], send[ing], or read[ing] any text based communication . . . on a wireless telecommunications device or stand-alone electronic device" except for "the use of such device for navigation of such vehicle or for global positioning system purposes."⁷⁸ It is unclear, however, if this language means that a driver may merely read navigational data off their device, or if they are also allowed to "write" and "send" that data. If the exception is broad enough to encompass the writing and

⁷³ *Id.*

⁷⁴ O.C.G.A. § 40-6-241(g)(3) (West, Westlaw through Laws 2021, Act 6).

⁷⁵ See Hansen, *supra* note 70 (noting that "[a]n internal investigation found that [the] . . . officer was playing a YouTube video in his patrol car" at the time of the crash).

⁷⁶ See *supra* Section III.B.

⁷⁷ See O.C.G.A. § 40-6-241(c)(2)(B) (West, Westlaw through Laws 2021, Act 6) ("[S]uch prohibition [on writing, sending, or reading a text-based communication while driving] shall not apply to: . . . The use of such device for navigation of such vehicle or for global positioning system purposes . . .").

⁷⁸ *Id.*

sending of data for the purpose of navigation, then a driver may be permitted to type an address in their navigation system while driving or send their location coordinates via SMS.⁷⁹

The crux of this issue will fall on the scope of the word “use” in reference to navigation services: does “use” mean typing in addresses, sharing locations, and moving the map with your finger; or is it merely referring to looking at the map and reading the next direction on a navigation system? Complicating matters, the Act further clarifies that “watching data related to the navigation of such vehicle” is not a violation of the Act,⁸⁰ which implies that the earlier navigation exception is not limited only to viewing data on a map. If it were, then this latter exception would be unnecessary.⁸¹

Another exception allows drivers to use headphones and earpieces only to take phone calls, but not, presumably, to listen to music.⁸² If, however, the true purpose of the Act is to improve enforcement of distracted-driving laws, how should police officers discern between lawful and unlawful use of headphones? This exception creates the same enforcement confusion that was present in the 2010 law, which ultimately prompted the creation of the Hands-Free Georgia Act.⁸³

⁷⁹ See David Wickert, *Safety Advocates: Georgia’s Distracted Driving Law a ‘First Step’*, ATLANTA J.-CONST. (June 27, 2018), <https://www.ajc.com/news/state--regional-govt-politics/safety-advocates-georgia-distracted-driving-law-first-step/MwdEUWLF6BfGITzdL16zkI/> (noting ambiguity as to “whether you can type an address into a GPS app while driving”). The Governor’s Office of Highway Safety has clarified that drivers must either type any address into their phone before driving or use voice-to-text features to input the address if doing so while driving. *Id.* Although the Office is “responsible for educating” the public about the Act, interpreting the law will be the charge of either Georgia courts, through litigation, or the legislature, through any future amendments. *Id.* (noting that “[c]larity may be months or even years away,” pending judicial interpretation or legislative action).

⁸⁰ O.C.G.A. § 40-6-241(c)(3) (West, Westlaw through Laws 2021, Act 6).

⁸¹ *Cf. Berryhill v. Ga. Cmty. Support & Sols., Inc.*, 638 S.E.2d 278, 281 (Ga. 2006) (“Courts should give a sensible and intelligent effect to every part of a statute and not render any language superfluous.”).

⁸² See O.C.G.A. § 40-6-241(c)(1)(A) (West, Westlaw through Laws 2021, Act 6) (stating that the Act does “not prohibit the use of an earpiece, headphone device, or device worn on a wrist to conduct a voice based communication”); *id.* § 40-6-250 (“No person shall operate a motor vehicle while wearing a headset or headphone which would impair such person’s ability to hear . . . provided, however, that a person may wear a headset or headphone for communication purposes.”).

⁸³ See *supra* notes 30–31 and accompanying text.

Additionally, the Act creates an exception allowing drivers to report other dangerous situations.⁸⁴ The Act does not apply if “the prohibited conduct occurred . . . [w]hile reporting a traffic accident, medical emergency, fire, an actual or potential criminal or delinquent act, or road condition which causes an immediate and serious traffic or safety hazard.”⁸⁵ This language is ambiguous: it is unclear whether the phrase “which causes an immediate and serious traffic or safety hazard” modifies only “road condition,” or whether that phrase applies to all of the examples that precede “road condition.”⁸⁶ Presumably, the lack of a comma indicates that the modifier only applies to “road condition.”⁸⁷ This construction, however, leaves the other categories open to interpretation, both to courts interpreting and officers enforcing the Act. The danger of these unclear exceptions is threefold. The Act may be applied inconsistently throughout the state; it may fail to provide drivers with adequate notice of prohibited conduct;⁸⁸ and its broad language may be exploited for invidious discriminatory purposes.⁸⁹

The vignette on Aly Allergicson demonstrates this interpretive issue:⁹⁰ what constitutes a “medical emergency” under the Act? Must a “medical emergency” involve severe bodily harm to the driver, a passenger, or another member of the roadway? Must an injury already have occurred, or may it merely be imminent or potential? Aly’s allergic reaction put her at a high risk of potential harm. But if, as her conduct suggests, she commonly experiences allergic reactions, then the danger presented was minimal because she was equipped with the knowledge and medicine to act appropriately. However, even if an allergic reaction is not a true “medical emergency” to Aly, would such a reaction be an emergency to a driver that had never experienced their throat tightening? If the definition of “medical emergency” is subjective to the individual driver, then police officers will have difficulty enforcing the laws,

⁸⁴ O.C.G.A. § 40-6-241(g)(1) (West, Westlaw through Laws 2021, Act 6).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *J. Kinson Cook, Inc. v. Weaver*, 556 S.E.2d 831, 833 (Ga. Ct. App. 2001) (“[T]he absence of offsetting commas suggests that a phrase modifies only the language immediately adjoining.” (citing *Amica Mut. Ins. v. Bourgault*, 429 S.E.2d 908 (Ga. 1993))).

⁸⁸ See *infra* Section V.A.

⁸⁹ See *infra* Section V.C.

⁹⁰ See *supra* Section III.D.

and courts will have difficulty interpreting them in a manner that balances the legitimate concerns of preventing unlawful distracted driving and managing medical emergencies.

An open question also remains regarding to whom a driver must report “a traffic accident, medical emergency, fire, . . . criminal or delinquent act, or road condition” for the exception to apply.⁹¹ Is Aly’s call to her mom enough to prevent her from violating the Act, or does the exception only apply if she is calling law enforcement or Emergency Medical Services? If the definition of “medical emergency” and to whom it is reported will be based on the reasonable person standard, then must a driver risk a jury trial to seek help?

These questions highlight that the legislature has not clearly defined the exceptions in the Act, leaving them subject to broader enforcement discretion and interpretation by police officers, prosecutors, and judges than they otherwise might have been.⁹² As highlighted in the Aly vignette, this ambiguity can intensify emergencies as police response may unduly delay necessary medical attention. One potential solution in the emergency context would be for the legislature to add an immunity provision as they

⁹¹ O.C.G.A. § 40-6-241(g)(1) (West, Westlaw through Laws 2021, Act 6).

⁹² In *Marinello v. United States*, the U.S. Supreme Court discussed the dangers of “rely[ing] upon prosecutorial discretion to narrow [a] statute’s scope.” 138 S. Ct. 1101, 1108 (2018). The Court held:

[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute’s . . . language places great power in the hands of the prosecutor. Doing so risks allowing “policemen, prosecutors, and juries to pursue their personal predilections,” which could result in the nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we “cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly.’”

Id. at 1108–09 (citations omitted) (first quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974); then quoting *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016)); *see also Smith*, 415 U.S. at 575 (“Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.”).

have done in the self-defense⁹³ and medical amnesty⁹⁴ contexts, thus allowing drivers a chance to be granted immunity from prosecution without risking a jury trial verdict.

V. CONSTITUTIONAL CHALLENGES UNDER THE U.S. CONSTITUTION AND GEORGIA CONSTITUTION

Litigation likely will identify at least three different challenges to the Act. First, the Act's terms may be overly vague. Second, the act raises Fourth Amendment concerns about how police and prosecutors will prove cell phone use in violation of the Act and related to additional searches and seizures following stops based on alleged violations of the Act. Third, the potential for pretextual stops and racial profiling, which the Act may encourage, may be a subject of future litigation.

A. VAGUENESS CHALLENGES

Georgia courts presume that challenged statutes are constitutional, so the burden falls on the party challenging the statute to prove that it is unconstitutional—either facially or as applied to their case.⁹⁵ Although the Hands-Free Georgia Act likely is facially constitutional, an as-applied challenge could potentially threaten the Act's validity. In an as-applied challenge, courts “address[] whether ‘a statute is unconstitutional on the facts of a particular case or to a particular party.’”⁹⁶ The Hands-Free Georgia Act may not be unconstitutional as applied to everyone, but the Act as applied to certain individuals in certain factual scenarios could violate the U.S. or Georgia Constitutions. With its numerous

⁹³ See O.C.G.A. § 16-3-24.2 (West, Westlaw through Laws 2021, Act 6) (granting immunity from prosecution where use of threat or force is justified).

⁹⁴ See *id.* § 16-13-5 (providing legal immunity from prosecution for drug violations for individuals who, in good faith, seek medical assistance for themselves or others believed to be experiencing drug overdose).

⁹⁵ See *Buice v. Dixon*, 157 S.E.2d 481, 483 (Ga. 1967) (“It is an established rule that all presumptions are in favor of the constitutionality of an Act of the legislature . . .”).

⁹⁶ *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) (quoting *As-Applied Challenge*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

exceptions and undefined terms,⁹⁷ the Act is at least ambiguous and may even be unconstitutionally vague.

The Due Process Clauses of both the U.S. and Georgia Constitutions require statutes to provide persons of ordinary intelligence with notice of what conduct is prohibited such that they may alter their conduct to act lawfully.⁹⁸ While the Hands-Free Georgia Act may have attempted to clarify and improve the enforcement of distracted-driving regulation, the Act actually permits a great deal of discretion by police officers and by the courts when enforcing and interpreting the Act.⁹⁹ This discretion creates an atmosphere in which individual drivers must guess whether their conduct will be lawful. Statistics from the first years of the Act's enforcement suggest that those guesses may have been incorrect.

While distracted driving is linked to an increased risk of a crash or other dangerous driving behavior,¹⁰⁰ the question is still out on

⁹⁷ See *supra* Section IV.C.

⁹⁸ U.S. CONST. amend. XIV, § 1; GA. CONST. art. I, § I, para. I; see, e.g., *Parker v. City of Glennville*, 701 S.E.2d 182, 184 (Ga. 2010) (“The void for vagueness doctrine of the due process clause requires that a challenged statute or ordinance give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated and provide sufficient specificity so as not to encourage arbitrary and discriminatory enforcement.”).

⁹⁹ This discretion is evidenced by the Act's inconsistent prohibition of behavior that causes distracted driving, by the ambiguity concerning what conduct is lawful, and the exceptions that give rise to justified use of otherwise unlawful conduct. See *supra* notes 55–56, 58, 64–65, 92 and accompanying text.

¹⁰⁰ See, e.g., JUSTIN M. OWEN, THOMAS A. DINGUS, FENG GUO, YOUJIA FANG, MIGUEL PEREZ & JULIE MCCLAFFERTY, CRASH RISK OF CELL PHONE USE WHILE DRIVING: A CASE-CROSSOVER ANALYSIS OF NATURALISTIC DRIVING DATA 20 (2018), https://aaafoundation.org/wp-content/uploads/2018/01/CellPhoneCrashRisk_FINAL.pdf (“[V]isual-manual interaction with a cell phone was associated with nearly double the odds of crash involvement when compared with driving without performing any observable secondary tasks; texting in particular was associated with more than double the odds of crash involvement.”); Thomas A. Dingus, Feng Guo, Suzie Lee, Jonathan F. Antin, Miguel Perez, Mindy Buchanan-King & Jonathan Hankey, *Driver Crash Risk Factors and Prevalence Evaluation Using Naturalistic Driving Data*, 113 PROC. NAT'L ACAD. SCI. 2636, 2639–40 (2016) (finding that 68.3% of the observed crashes in a naturalistic study were caused by distracted driving; handheld cell phone use created a risk of crash that was 3.6 times higher than not interacting with a phone); Alva O. Ferdinand & Nir Menachemi, *Associations Between Driving Performance and Engaging in Secondary Tasks: A Systematic Review*, AM. J. PUB. HEALTH, Mar. 2014, at e39, e41 (finding that of the 350 studies of distracted driving reviewed, 80% “reported a statistically significant detrimental relationship between secondary tasks and driving performance”). *But see Distracted Driving*,

the effectiveness of distracted driving laws.¹⁰¹ That same question remains for the Hands-Free Georgia Act. The Georgia State Patrol (GSP) issued nearly 25,000 citations in the first year of the Act's implementation; from January to June 2019, GSP issued an average of 2746 citations a month, or more than 75 tickets a day on average.¹⁰² The second year of enforcement showed a rise to 49,535 citations as of June 2020.¹⁰³ The Atlanta Police Department alone issued 17,043 citations in the Act's first year.¹⁰⁴

These statistics prompt questions regarding the Act's ability to curb distracted driving: are the punishments too light, are drivers

INS. INST. FOR HIGHWAY SAFETY, <https://www.iihs.org/topics/distracted-driving> (last updated Feb. 2020) (noting that, in 2018, only 8% of fatal crashes were deemed to be caused by distracted driving and only about 1% of all fatal crashes involved cell phone distractions but acknowledging that this "data almost certainly underestimate the role of distraction in fatal crashes").

¹⁰¹ Empirical studies on the effectiveness of distracted driving laws have produced mixed results. Compare Anne T. McCartt, Laurie A. Hellinga, Laura M. Strouse & Charles M. Farmer, *Long-Term Effects of Handheld Cell Phone Laws on Driver Handheld Cell Phone Use*, 11 TRAFFIC INJ. PREVENTION 133, 138 (2010) ("For all three jurisdictions [in the study], there were substantial declines in driver handheld phone use immediately after the ban. When observed several years after the ban, phone use still was lower than would have been expected without the ban . . ."), and Keli A. Braitman & Anne T. McCartt, *National Reported Patterns of Driver Cell Phone Use in the United States*, 11 TRAFFIC INJ. PREVENTION 543, 547 (2010) ("Laws banning handheld phone use seem to reduce the frequency of phoning while driving and increase hands-free use among drivers who talk, but laws banning texting while driving seem to have little effect."), with Rebecca E. Trepel, Sergey Y. Kyrychenko & Matthew J. Moore, *Does Banning Hand-Held Cell Phone Use While Driving Reduce Collisions*, 24 CHANCE, no. 3, 2011, at 6, 11 ("Insurance collision loss experience does not indicate a decrease in crash risk when handheld cell phone laws are enacted. . . . One explanation may be that people simply switch to hands-free cell phones, which have been found to have the same harmful effect on driving performance as handheld cell phones."), and *supra* note 58 and accompanying text.

¹⁰² Adrienne Haney, *Georgia's Hands-Free Driving Law 1 Year Later*, 11 ALIVE (July 2, 2019, 12:36 AM), <https://www.11alive.com/article/traffic/georgias-hands-free-driving-law-1-year-later/85-fac53ea0-0fa4-4b1a-9adf-1d84b81be735>.

¹⁰³ David Wickert, *Distracted Driving: 50,000 GSP Tickets in Two Years*, ATLANTA J.-CONST. (June 30, 2020), <https://www.ajc.com/blog/commuting/distracted-driving-000-tickets-two-years/mN7fmAVtXxv8HdjOzkEQLO/>. These statistics only cover citations issued by state patrol officers and do not "include citations issued by local police departments." *Id.*

¹⁰⁴ David Wickert & Kristal Dixon, *Georgia's Distracted Driving Law Turns 1: Has Anything Changed?*, ATLANTA J.-CONST. (June 28, 2019), <https://www.ajc.com/news/state--regional-govt--politics/georgia-distracted-driving-law-turns-has-anything-changed/3u2fgUriLW7lsQhbT80iGN/>.

struggling to align their conduct to the Act's many exceptions, or do drivers just assume that they will not be caught? In one regard, the increasing rate of citations tracks with the legislature's intention to make distracted-driving citations easier to issue, but the increase also suggests that the Act is failing to meaningfully curtail distracted driving. At this time, no studies explain this failure, but the broadly drafted language in the Act likely has caused some confusion among the general public about what conduct is and is not prohibited.¹⁰⁵ While early estimates claimed that the Hands-Free Georgia Act led to a 2.2% drop in fatal crashes, the Act's overall effectiveness remains an open question.¹⁰⁶ Though the increase in citations may indicate that the Act is not curtailing handheld phone use, the decrease in fatal crashes may demonstrate some progress. But the decrease in fatal crashes is statistically minor and may instead suggest that cell phone use was not a major reason for these crashes in the first place or that the Act is underinclusive in preventing them.¹⁰⁷

¹⁰⁵ Despite the high number of citations, a survey of 702 registered voters found that 45% of people said that they always obeyed the Act, and another 40% said they did most of the time. David Wickert, *AJC Poll: Georgians Say They Obey Distracted Driving Law Most of the Time*, ATLANTA J.-CONST. (Jan. 22, 2019), <https://www.ajc.com/news/state--regional-govt--politics/ajc-poll-georgians-obey-distracted-driving-law-most-the-time/9OV3m68bpe9cMdh0l7hDJ/>; cf. *supra* notes 30–31 and accompanying text.

¹⁰⁶ Wickert & Dixon, *supra* note 104 (“[I]t may be years before a clear picture of the law’s impact emerges.”). *But see* Wickert, *supra* note 105 (“Preliminary figures show traffic fatalities were down 7 percent last year.”). In 2019, the total number of traffic fatalities dropped by only 14. *2019 Georgia Traffic Fatality Data*, GA. GOVERNOR’S OFF. HIGHWAY SAFETY, <https://gahighwaysafety.org/research/2019-georgia-traffic-fatality-data/> (last visited Mar. 17, 2021). Data from 2020 will be difficult to assess given the effects of the coronavirus pandemic on traffic patterns, but, as of now, the decrease in traffic does not seem to have decreased traffic fatalities. *See* David Wickert, *Traffic Down, but Not Fatalities on Georgia Highways*, ATLANTA J.-CONST.: COMMUTING BLOG (Oct. 16, 2020), <https://www.ajc.com/news/commuting-blog/traffic-down-but-not-fatalities-on-georgia-highways/EL75IMVFFVEWBI6X7PBQOQOEAM/> (noting that traffic fatalities have increased to 1202 from 1200 at the same time in 2019).

¹⁰⁷ In comparison, of the fifteen states that had a hands-free law at the time Georgia passed its own, nine experienced decreases in traffic fatalities greater than 10% within the first two years: California (-31.1%), Hawaii (-26.6%), Maryland (-13.1%), New Jersey (-21.6%), New Mexico (-12.1%), Vermont (-19.6%), Washington (-22.3%), and West Virginia (-23.3%). HOUSE STUDY COMM. ON DISTRACTED DRIVING, *supra* note 28, at 16. Only three states experienced decreases less than 5%: Connecticut (-1.1%), Delaware (-3.1%), and New York (-1.8%). *Id.*

Because the Act has generated thousands of citations without meaningfully improving traffic safety, one must question whether the Act can survive a vagueness challenge. The Fourteenth Amendment to the U.S. Constitution guarantees that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”¹⁰⁸ The Due Process Clauses of the U.S. Constitution and Georgia Constitution require statutes to provide fair notice to the public about what conduct is criminalized.¹⁰⁹ The “void-for-vagueness doctrine” ensures that statutes are defined with enough detail so that “ordinary people can understand what conduct is prohibited” and have standards clear enough such that it “does not encourage arbitrary and discriminatory enforcement” by police and prosecutors.¹¹⁰ For example, in *Kolender v. Lawson*, the U.S. Supreme Court struck down a loitering statute that required individuals to provide “credible and reliable” identification because the statute was unconstitutionally vague.¹¹¹ Similarly, in another case, the Court struck down a Massachusetts law that criminalized “contemptuous treatment” of the U.S. flag because the statute did not adequately define that term.¹¹²

The Hands-Free Georgia Act’s exceptions for navigation and for reporting certain conditions are similarly vague for two reasons.¹¹³ First, the Act does not give ordinary people notice of what behavior is prohibited. The Act does not clearly define what the word “use”

¹⁰⁸ U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”); GA. CONST. art. I, § I, para. I.

¹⁰⁹ See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”); *supra* note 98.

¹¹⁰ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“Vague laws offend several important values. First, . . . [v]ague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” (footnote omitted)); *Santos v. State*, 668 S.E.2d 676, 678 (Ga. 2008) (noting the two “bases” for invalidating a statute for vagueness: fair notice and the potential for “arbitrary and discriminatory enforcement”).

¹¹¹ 461 U.S. at 353–54 (“[T]he statute as it has been construed is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a ‘credible and reliable’ identification.”).

¹¹² *Smith v. Goguen*, 415 U.S. 566, 579, 582 (1974).

¹¹³ O.C.G.A. § 40-6-241(c)(2)(B), -241(g)(1) (West, Westlaw through Laws 2021, Act 6).

means in the navigation exception,¹¹⁴ so drivers must guess at which actions are appropriate and which actions are prohibited. Similarly, the Act does not define what each of the reporting exceptions entails.¹¹⁵ Citizens lack fair notice of which behaviors are prohibited or allowed and of when these exceptions kick in, just as the *Kolender* plaintiffs had to guess at what would be “credible and reliable” identification¹¹⁶ and the Massachusetts citizens had to speculate at what would be considered “contemptuous treatment” of the flag.¹¹⁷ The Court has recognized that people are “free to steer between lawful and unlawful conduct,” but to do so they must have fair notice of what conduct is not allowed.¹¹⁸

Second, the Act provides “insufficient standards for enforcement.”¹¹⁹ The Act’s language is broad enough such that police and prosecutors enforcing it have seemingly unfettered discretion in determining whether the exceptions will apply. In *Kolender*, the U.S. Supreme Court recognized that discretion need not be unlimited; police could not arrest an individual who produced a driver’s license as “credible and reliable” identification,¹²⁰ but police would have discretion in the case of a library card.¹²¹ Similarly, the Act’s exceptions clearly allow a person to look at a navigation device on a hands-free mount and clearly prohibit a person from composing a text message while driving, but varying degrees of conduct will require the police and prosecutors to decide if the Act applies. In its current state, the Act is lacking standards to guide that discretion and is thus vulnerable to “arbitrary and discriminatory enforcement.”¹²² Aly’s plight may

¹¹⁴ See *supra* notes 77–81 and accompanying text.

¹¹⁵ For examples of these questions, see generally *supra* Section IV.C.

¹¹⁶ *Kolender*, 461 U.S. at 353–54.

¹¹⁷ *Goguen*, 415 U.S. at 579.

¹¹⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see also *Jenkins v. State*, 670 S.E.2d 425 (Ga. 2008) (“A criminal statute must give ‘fair warning’ of what constitutes criminal conduct.” (quoting *Rozier v. State*, 383 S.E.2d 113, 114 (Ga. 1989))).

¹¹⁹ *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 503 (1982).

¹²⁰ *Kolender v. Lawson*, 461 U.S. 352, 353 (1983).

¹²¹ See Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1156 (2016) (“Carrying a valid state driver’s license . . . would doubtlessly satisfy the standard But an individual who could . . . only produce a library card would be at the mercy of police discretion.” (footnote omitted)).

¹²² *Goguen*, 415 U.S. at 573. Notably, the Court has “recognized . . . that the more important aspect of the vagueness doctrine ‘is not actual notice, but . . . the requirement

be treated differently in Jesup than it would be in Atlanta, or even by different officers within the same department. “A vague law impermissibly delegates basic policy matters”—such as whether a driver can input navigation data while driving or what constitutes a sufficient medical emergency to warrant device use—“to policemen, judges, and juries for resolution on an ad hoc and subjective basis.”¹²³ It should be noted, though, that Georgia courts favor construing statutes to be constitutional, so a state court will likely interpret the Act narrowly to maintain its constitutionality.¹²⁴

One potential solution to resolving the lack of clarity in the Hands-Free Georgia Act is new legislation: a complete ban on both handheld and hands-free cell phone use.¹²⁵ Such bold legislative action would best prevent distracted driving dangers and would be the easiest to enforce, so long as it includes narrow and clear exceptions.¹²⁶ Conversely, the Act could be re-written to prevent cell phone use that *actually* causes a distraction.¹²⁷ Under this scheme, merely holding a phone would be legal so long as it does not cause distraction as evidenced by other illegal and dangerous activity, such as failure to maintain one’s lane.

The legislature should not wait for courts to review these vague provisions and should instead clarify these sections in future legislation.¹²⁸ This approach would provide the public with

that a legislature establish minimal guidelines to govern law enforcement.” *Kolender*, 461 U.S. at 358 (quoting *Goguen*, 415 U.S. at 574).

¹²³ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *see also* *Roemhild v. State*, 308 S.E.2d 154, 157–78 (Ga. 1983) (holding that a statute’s failure to define “private school” did not provide minimum guidelines to inform the discretion of those enforcing the compulsory schooling law).

¹²⁴ *See* *Rodriguez v. State*, 671 S.E.2d 497, 499 (Ga. 2009) (“The rules of statutory construction require this court to construe a statute as valid when possible.” (quoting *Gravely v. Bacon*, 429 S.E.2d 663, 665 (Ga. 1993))).

¹²⁵ NHTSA has made such a proposal, but no state has endeavored to adopt such an all-encompassing prohibition. *See* *Distracted Driving*, GOVERNORS HIGHWAY SAFETY ASS’N, *supra* note 8; *see also* *supra* note 7 and accompanying text.

¹²⁶ *See, e.g.*, O.C.G.A. § 40-6-241(g)(3) (West, Westlaw through Laws 2021, Act 6); *supra* Section IV.C.

¹²⁷ This approach would change the Act from containing a primary enforcement mechanism to a secondary enforcement mechanism. *See* *supra* note 12.

¹²⁸ For example, the legislature could clarify what constitutes an emergency or to whom emergencies must be reported for the exception to apply. *See, e.g.*, MASS. GEN. LAWS ANN.

adequate notice about what behaviors are prohibited and prevent the need for litigation that may void the Act or hobble its effect on public safety.

B. FOURTH AMENDMENT ISSUES WITH PROVING DEVICE USE

Once a police officer has pulled over an individual for a suspected violation of the Act, how will the officer prove device use? The House Committee on Distracted Driving noted that there were “significant [Fourth] Amendment privacy issues [and] concerns with accessing a driver’s mobile phone data and usage.”¹²⁹ The Fourth Amendment prohibits “unreasonable searches and seizures.”¹³⁰ Until 2014, lower courts were split as to whether cell phones were merely electronic containers and thus subject to search without a warrant if found in a search incident to arrest or in a search of a vehicle.¹³¹ In *Riley v. California*, though, the U.S. Supreme Court ruled that, by virtue of the information that cell

ch. 90, §13B(b) (West, Westlaw through ch. 3 of 2021 1st Ann. Sess.) (providing examples of what constitutes an emergency); CONN. GEN. STAT. ANN. § 14-296aa(b)(4)(A) (West, Westlaw through 2020 Reg. Sess., July Spec. Sess. & Sept. Spec. Sess.) (permitting handheld use of a cell phone for the “purpose of communicating with any of the following regarding an emergency situation: An emergency response operator; a hospital, physician’s office or health clinic; an ambulance company; a fire department; or a police department”). The legislature could also add language to make clear that exempted officials under O.C.G.A. § 40-6-241(g)(3) must be engaging in use that is related to their official duties. *See, e.g.*, CONN. GEN. STAT. ANN. § 14-296aa(b)(4)(B) (West, Westlaw through 2021 Reg. Sess.) (exempting certain enumerated and defined officials who are acting “in the performance of their official duties and within the scope of their employment”). Finally, the legislature could amend the navigation exception in O.C.G.A. § 40-6-241(c)(2)(B) to clarify that addresses must be preprogrammed. *See, e.g.*, IDAHO CODE ANN. § 49-1401A(2)(c) (West, Westlaw through ch. 23 of 1st Reg. Sess. of 66th Idaho Legis.) (exempting navigation “provided that the operator of the vehicle is not manually entering information” into the navigation system of the device); ALA. CODE § 32-5A-350(e)(3) (West, Westlaw through Act 2021-19) (exempting use of a navigation device “to receive driving directions which has been pre-programmed with the desired coordinates” and clarifying that programming coordinates while operating the vehicle is a violation).

¹²⁹ HOUSE STUDY COMM. ON DISTRACTED DRIVING, *supra* note 28, at 14.

¹³⁰ U.S. CONST. amend. IV.

¹³¹ The seminal case on searching containers incident to arrest, *United States v. Robinson*, held that containers, such as a carton of cigarettes, found on a person during a search incident to arrest may be searched without a warrant. 414 U.S. 218, 235–36 (1973).

phones contain in the modern age, police must obtain a warrant to search a cell phone in a search incident to arrest.¹³²

Though the *Riley* Court foreclosed the search-incident-to-arrest exception for cell phones,¹³³ it noted that “other case-specific exceptions may still justify a warrantless search of a particular phone.”¹³⁴ The Court pointed out that the exigent circumstances exception may apply, but evidence of phone use while driving likely does not meet the high standards for the exigency exception,¹³⁵ given the relatively low probative value of information on the cell phone when compared to the important privacy interests in cell phones.¹³⁶ While the exigency exception may apply in some hypothetical situations,¹³⁷ courts should avoid making it generally applicable to search a cell phone every time a driver is alleged to have used it in violation of the Act.

Police enforcing the Act may argue that the automobile exception allows warrantless searches of cell phones to discover evidence of use while driving.¹³⁸ Under the automobile exception,

¹³² See 573 U.S. 373, 393 (2014) (“[Comparing the search of cell phone data to the search of physical items] is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together.”); see also *id.* at 385 (noting that cell phones “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy”).

¹³³ *Id.* at 403 (“Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”).

¹³⁴ *Id.* at 401–02.

¹³⁵ See *id.* at 402 (citing exigencies such as “the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury” as justifying a warrantless search (citing *Kentucky v. King*, 563 U.S. 452, 460 (2011))).

¹³⁶ See *id.* at 393 (“Modern cell phones . . . implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”).

¹³⁷ See *id.* at 391 (stating that officers “may be able to rely on exigent circumstances to search the phone immediately” if “circumstances suggest[] that a defendant's phone will be the target of an imminent remote-wipe attempt”); *id.* at 402 (“[T]here is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone.”).

¹³⁸ See Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Detering Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577, 599–603

police may search a vehicle and its containers without a warrant, in light of a vehicle's mobility, the possibility that drivers may hide or destroy evidence, and the decreased expectation of privacy in vehicles.¹³⁹ After *Riley*, these rationales do not support the warrantless search of a cell phone. Although vehicles on public roads carry decreased expectations of privacy, *Riley* makes clear that individuals have a heightened privacy interest in cell phones.¹⁴⁰ When reviewing any warrantless searches conducted under the Act, courts should reaffirm the balance struck in *Riley* and require law enforcement to obtain warrants to search cell phones to detect device use that potentially violates the Act. The Georgia Supreme Court would likely agree with this analysis. In 2019, the court ruled that searches of on-board automobile systems required a warrant.¹⁴¹ Therefore, in enforcing the Hands-Free Georgia Act, officers likely cannot search drivers' phones for evidence of use while driving if they lack a warrant.¹⁴²

(2012) (discussing how the automobile exception could allow warrantless searches of cell phones for evidence of use while driving).

¹³⁹ See *Carroll v. United States*, 267 U.S. 132, 153–62 (1925) (establishing the automobile exception); *California v. Acevedo*, 500 U.S. 565, 576 (1991) (“[T]he Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle.”).

¹⁴⁰ See *Riley*, 573 U.S. at 403 (“Modern cell phones . . . hold for many Americans ‘the privacies of life.’” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))). The U.S. Supreme Court reaffirmed these principles in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). In that case, the Court held that law enforcement officers were required to obtain a warrant for historical cell phone data, reasoning that use of this data—which includes the phone user’s location and movements—constituted warrantless, around-the-clock tracking of an individual. See *id.* at 2217 (“Whether the Government employs its own surveillance technology . . . or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information].”).

¹⁴¹ See *Mobley v. State*, 834 S.E.2d 785, 793 (Ga. 2019) (holding that “the retrieval of data from the [airbag control module] in the [car] at the scene of the crash without a warrant was an unreasonable search and seizure that violated the Fourth Amendment”); see also *id.* at 792 n.9 (noting that “accessing data through an onboard data port may implicate the Fourth Amendment, regardless of whether anyone has a reasonable expectation of privacy in [airbag control module] data alone”).

¹⁴² They may, of course, ask for consent to do so. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (holding that consent to search is an exception to the warrant requirement so long as police gain that consent voluntarily).

Amending the Act to clarify how searches may be conducted would help prevent Fourth Amendment issues from arising. Georgia should look to other states' handheld bans for guidance. For example, Florida's statute specifically requires officers to inform a driver of the right to decline a search of their cell phone before asking for consent.¹⁴³ The Florida law also prohibits the police from accessing the phone without a warrant and clarifies that police may not confiscate the device while awaiting that warrant.¹⁴⁴ South Carolina has gone a step further, requiring law enforcement to have probable cause—rather than merely reasonable suspicion—that a violation of its distracted-driving statute occurred prior to conducting a stop.¹⁴⁵ The law also prohibits officers from searching or requesting to search the vehicle, driver, passenger, or device based on a violation of the statute alone.¹⁴⁶

Georgia can also look to its own regulation of seatbelts for statutory language that better balances the needs for safety with Fourth Amendment rights. Georgia's seatbelt law provides that an officer must have a "clear and unobstructed view of a person not restrained" to have probable cause that a violation occurred.¹⁴⁷ The legislature should consider adding analogous language to the Act to ensure that only clear violations of the Act permit traffic stops

¹⁴³ See FLA. STAT. ANN. § 316.305(3)(c) (West, Westlaw through 2020 2d Reg. Sess. of 26th Legis.) ("A law enforcement officer who stops a motor vehicle for a violation . . . must inform the motor vehicle operator of his or her right to decline a search of his or her wireless communications device . . .").

¹⁴⁴ See *id.* § 316.305(3)(c)(1)–(2). Several other state statutes also clearly prohibit seizing or confiscating the device based on a violation of a handheld ban alone. See, e.g., CONN. GEN. STAT. ANN. § 14-296aa(b)(3) (West, Westlaw through 2020 Reg. Sess., July Spec. Sess., & Sept. Spec. Sess.) (stating that the state handheld ban does not "authoriz[e] the seizure or forfeiture of a hand-held mobile telephone . . . unless otherwise provided by law"); S.C. CODE ANN. § 56-5-3890(E)(2) (West, Westlaw through 2021 Act No. 1) ("A law enforcement officer shall not: . . . seize, search, view, or require the forfeiture of a wireless electronic communication device because of a violation of this section . . .").

¹⁴⁵ See S.C. CODE ANN. § 56-5-3890(E)(1) (West, Westlaw through 2021 Act No. 1) ("A law enforcement officer shall not: (1) stop a person for a violation of this section except when the officer has probable cause that a violation has occurred . . .").

¹⁴⁶ See *id.* § 56-5-3890(E)(3) ("A law enforcement officer shall not: . . . search or request to search a motor vehicle, driver, or passenger in a motor vehicle, solely because of a violation of this section . . .").

¹⁴⁷ O.C.G.A. § 40-8-76.1(f) (West, Westlaw through Laws 2021, Act 6).

and that subsequent searches are based on a more rigorous standard than reasonable suspicion alone.¹⁴⁸

The state legislature should also consider changing the Act to a “secondary enforcement” mechanism, meaning that police could only conduct a traffic stop for phone use if that use resulted in dangerous driving behavior, as evidenced by some other traffic violation.¹⁴⁹ This change, along with the others suggested in this Section, would balance the need to prevent *dangerous* distracted driving with Fourth Amendment rights.¹⁵⁰

¹⁴⁸ South Carolina has similar language in its own handheld band. See S.C. CODE ANN. § 56-5-3890(E)(1) (West, Westlaw through 2021 Act No. 1) (stating that probable cause must be “based on the officer’s clear and unobstructed view of a person who is using a wireless electronic communication device to compose, send, or read a text-based communication while operating a motor vehicle on the public streets and highways of this State”).

¹⁴⁹ See *supra* note 12 and accompanying text.

¹⁵⁰ One additional issue that could emerge concerns the potential use of “textalyzers.” These devices function like breathalyzers, but for phone use: they retrieve “the timestamp[s] of when the driver was swiping or typing,” but not the personal information contained in those communications. Press Release, Shelley B. Mayer, N.Y. State Senator, Senator Mayer and Distracted Driving Prevention Advocates Host “Textalyzer” Round Table Exploring New Technology (Apr. 29, 2019), <https://www.nysenate.gov/newsroom/press-releases/shelley-b-mayer/release-senator-mayer-and-distracted-driving-prevention>. The head of Georgia’s House Study Committee on Distracted Driving has “not rul[ed] out [use of] the Textalyzer.” Jim Strickland, *Texting and Driving? Cops Could Have a New Tool on Their Side: A Textalyzer*, WSB-TV (Nov. 1, 2017, 11:46 AM), <https://www.wsbtv.com/news/local/textalyzer-for-texting-drivers-new-tech-aims-to-cut-down-on-distracted-drivers/630926836/>.

These devices may skirt Fourth Amendment because they do not retrieve drivers’ personal information. Textalyzers may, though, run afoul of drivers’ right against self-incrimination as provided by the Georgia Constitution. See GA. CONST. art I, § I, para. XVI (“No person shall be compelled to give testimony tending in any manner to be self-incriminating.”). In *Olevik v. State*, the Georgia Supreme Court reaffirmed the right to refuse breathalyzer testing as a protection of the right against compelled incriminatory acts. 806 S.E.2d 505, 518 (Ga. 2017) (“[The Georgia Constitution] prohibits compelling a suspect to perform an act that itself generates incriminating evidence . . .”). By extension, a refusal to submit to a warrantless textalyzer search may be protected by the Georgia Constitution. *But see id.* (stating that this right “does not prohibit compelling a suspect to be present so that another person may perform an act generating such evidence,” a situation that may be more analogous to a textalyzer, which does not require the suspect to take any action, such as blowing into a machine). Because Georgia has not yet implemented this technology, further legal analysis of this question must wait for another day.

C. PRETEXTUAL STOPS AND THE POTENTIAL FOR RACIAL PROFILING

The Act's vagueness provides police officers a tremendous amount of enforcement discretion,¹⁵¹ which may enable racial profiling and pretextual traffic stops. In *Whren v. United States*, the U.S. Supreme Court held that an officer's true motivation for a traffic stop was irrelevant so long as they have reasonable suspicion for *any* criminal act, including petty traffic infractions.¹⁵² This holding left the door open to pretextual stops—those where an officer asserts a legal reason for a stop to hide their true motivations.¹⁵³ In *Whren*, police officers pulled over the defendants for allegedly turning at an unreasonable speed, but the defense argued that the traffic stop was actually pretext to investigate for potential drug activity.¹⁵⁴ Scholars have argued that the Court's holding in *Whren* allows racial profiling because police may follow a minority driver until they have observed a traffic violation, or because officers may at any time claim to have probable cause as a pretext for constitutionally suspect motivations.¹⁵⁵

The Hands-Free Georgia Act may allow police to use their discretion to conduct distracted-driving traffic stops as pretext for more insidious motivations.¹⁵⁶ People of color are more likely to be the subject of investigatory stops¹⁵⁷ and more likely to be searched

¹⁵¹ See *supra* notes 119–123 and accompanying text.

¹⁵² 517 U.S. 806, 813 (1996) (“We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

¹⁵³ See *Pretextual Stop*, BLACK’S LAW DICTIONARY (11th ed. 2019), Westlaw (“A police stop of a person or vehicle for fabricated reasons that are calculated to forestall or preclude constitutional objections.”).

¹⁵⁴ See *Whren*, 517 U.S. at 808–09 (describing the events leading up to the traffic stop and the defendants’ argument that the officer’s “asserted ground for approaching the vehicle . . . was pretextual”).

¹⁵⁵ See M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109, 114 (2009) (“The Supreme Court case *Whren v. United States* is not explicitly about racial profiling, but it insidiously legitimates the practice.” (footnotes omitted)).

¹⁵⁶ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 66 (2010) (discussing how pretextual stops may further racial injustice).

¹⁵⁷ See Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jensen, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi

in those stops.¹⁵⁸ Given this data, the state legislature should be concerned that police officers may abuse their discretion provided by the Act. Violations of the Act are likely to be premised on an officer's individualized observations and determinations, making these stops potentially pretextual. In other words, a charge under the Act rests almost exclusively on the credibility and veracity of the officer.¹⁵⁹ If a driver denies the allegations, the courts will likely defer to the word of the law enforcement officer rather than to word of the driver.¹⁶⁰ Even if the driver avoids the hands-free violation, the officer will have nonetheless succeeded in stopping and gaining a plain-view search of the vehicle, when they would not have otherwise had the reasonable suspicion required to conduct such a search.¹⁶¹

Switching to a secondary enforcement mechanism may help curtail the potential for pretextual stops and racial profiling; with a secondary enforcement mechanism in place, handheld phone use alone would not constitute a traffic violation.¹⁶² The state legislature, though, could address the risk of pretextual stops more specifically in the following ways. First, it could require law enforcement to undergo comprehensive implicit bias training.¹⁶³

Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737 (2020) (“Relative to their share of the residential population, we found that black drivers were, on average, stopped more often than white drivers.”).

¹⁵⁸ See *id.* at 739 (“[S]topped black and Hispanic drivers were searched about twice as often as stopped white drivers.”).

¹⁵⁹ Cf. Megan Quattlebaum, *Let's Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 14 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 32 (2018) (“[O]fficers have significant discretion to stop and search any driver whom they find suspicious, so long as the stop can be connected to a traffic violation.”).

¹⁶⁰ See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1998 (2017) (noting that there is a “judicial tendency to relax constitutional scrutiny of police tactics based on an officer's professional insight”); Barry Friedman, Response, *Why Do Courts Defer to Cops?*, 130 HARV. L. REV. F. 323, 329 (2017) (“Judges are in fact overdeferring to the police.”).

¹⁶¹ See Quattlebaum, *supra* note 159, at 32 (“*Whren* ushered in a world in which officers may stop motorists whom they deem suspicious—on the pretext of enforcing the traffic code—and then . . . request consent to search the stopped car even if they do not have probable cause to believe that evidence of a crime will be found therein.”).

¹⁶² See *supra* note 12 and accompanying text.

¹⁶³ A recent study found that implicit bias training was important in recognizing the concept and changing attitudes of policing, but the study was unable to show a clear link

Second, the state legislature could amend the Act to require that allegations under the Act be proven by more than officer testimony. This evidentiary burden could be met by non-police witness testimony or non-testimonial evidence, such as dashcam or traffic camera footage. Under this scheme, defendants could affirmatively defend against a citation by providing phone records or passenger testimony. Third, the legislature could limit searches when a stop is made.¹⁶⁴ Finally, the legislature could require law enforcement to collect data on racial demographics to detect racial profiling in the Act's enforcement.¹⁶⁵ For example, Massachusetts was concerned that their handheld ban could lead to racial profiling, so the legislature required law enforcement agencies to document the race of the individuals cited.¹⁶⁶ If the Georgia legislature adopts a

between changes in behavior and the training. See ROBERT E. WORDEN, SARAH J. MCLEAN, ROBIN S. ENGEL, HANNAH COCHRAN, NICHOLAS CORSARO, DANIELLE REYNOLDS, CYNTHIA J. NAJDOWSKI & GABRIELLE T. ISAZA, *THE IMPACTS OF IMPLICIT BIAS AWARENESS TRAINING IN THE NYPD* 157 (2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/impacts-of-implicit-bias-awareness-training-in-%20the-nypd.pdf (“[W]e could detect little evidence that the effects of training extended to the reduction of racial and ethnic disparities in enforcement . . .”).

¹⁶⁴ See, e.g., *supra* notes 145–146 and accompanying text.

¹⁶⁵ In the 2020 legislative session, the Georgia General Assembly considered at least three bills that would require law enforcement to collect data on the gender and race or ethnicity of individuals involved in traffic stops. See Georgia Justice Act, S.B. 513, 155th Gen. Assemb., Reg. Sess. (Ga. 2020) (“[E]ach time a state or local law enforcement officer stops a motor vehicle, such officer shall document the following information [including the gender and race or ethnicity of the driver] in a public record”); Police Accountability Act, H.B. 1206, 155th Gen. Assemb., Reg. Sess. (Ga. 2020) (requiring data collection on the demographics of drivers stopped and requiring the Attorney General to prepare an annual report aggregating the data); End Racial Profiling Act, H.B. 1207, 155th Gen. Assemb., Reg. Sess. (Ga. 2020) (requiring data collection as determined by regulations issued by the Attorney General).

¹⁶⁶ See Bob Salsberg, *House Approves Cellphone Driving, Racial Profiling Bill*, ASSOCIATED PRESS (May 15, 2019), <https://www.apnews.com/b87c6cac76f54c16a30f2ec4c85aa43a> (“The bill would require the Registry of Motor Vehicles to collect the data from police departments and submit it annually to state public safety officials. The data would then be studied and made public.”). South Carolina and Florida also require data collection as a part of their distracted driving statutes. See S.C. CODE ANN. § 56-5-3890(F) (West, Westlaw through 2021 Act No. 1) (“The Department of Public Safety shall maintain statistical information regarding citations issued pursuant to this section.”); FLA. STAT. ANN. § 316.305(5) (West, Westlaw through 2020 2d Reg. Sess. of 26th Legis.) (“When a law enforcement officer issues a citation for a violation of this section, the law enforcement officer must record the race and ethnicity of the violator.”).

similar measure, it should require data collection for *every* traffic stop related to distracted driving—regardless of whether a citation is issued—because pretextual stops motivated by racial profiling may avoid detection if data is only collected on citations issued and not on all stops made. Officers motivated by racial animus may ultimately choose not to cite drivers for a pretextual traffic violation in order to avoid recording the data, yet that officer would still have engaged in racial profiling.

VI. CONCLUSION

The Hands-Free Georgia Act has a noble motivation, but it is not effective in application. In writing distracted-driving statutes, state legislatures must take caution not to infringe upon the constitutional rights of drivers, while also drafting laws that address dangerous conduct. Courts must do the same when interpreting these statutes. In this regard, the Hands-Free Georgia Act is a step in the right direction, but several important legal questions remain. Georgia's legislature should proactively review these issues before they become the subject of future litigation.¹⁶⁷

Georgia's legislature and courts must work together to curb the potentially negative effects of the Hands-Free Georgia Act. They can do so in a manner that curtails the social ills of distracted driving while preserving drivers' constitutional rights. The legislature and courts are the only entities that may answer them. Only time will demonstrate the efficacy or failure of the bill's outcomes and effects, both on safety and individual constitutional rights, unless Georgia's legislature and courts answer these legal questions sooner rather than later.

¹⁶⁷ Notably, the state legislature recently, albeit unsuccessfully, attempted to expand the Act. Representative John Carson presented H.B. 247, which would have eliminated a provision in the Act permitting first-time offenders to have their citation dismissed upon presenting evidence that they had purchased a hands-free mount. H.B. 247, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); *see also* David Wickert, *Distracted Driving Legislation Advances in Georgia House*, ATLANTA J.-CONST. (Feb. 17, 2021), <https://www.ajc.com/politics/georgia-state-legislature/distracted-driving-legislation-advances-in-georgia-house/ASC4U6USMRCPXD2ZUGVSNBJGU/> (noting that H.B. 247 “would eliminate a loophole that allows thousands of first offenders to avoid fines for violating the state’s distracted driving law”).

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