SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ETERNAL VIGILANCE ACTION, INC., SCOT TURNER, and JAMES HALL, Plaintiffs, v. STATE OF GEORGIA, Defendant.	Civil Action File No. 24CV011558

GEORGIA STATE CONFERENCE OF THE NAACP and GEORGIA COALITION FOR THE PEOPLE'S AGENDA, INC. JOINT MOTION TO INTERVENE AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to O.C.G.A. § 9-11-24, the Georgia State Conference of the NAACP ("Georgia NAACP") and the Georgia Coalition for the People's Agenda, Inc. ("GCPA" or "People's Agenda") move to intervene as plaintiffs in this action. This lawsuit concerns the proper administration of elections in Georgia. As civil rights membership organizations with substantial numbers of registered Georgia voters, the Georgia NAACP and GCPA have direct interests in this suit that are not otherwise adequately represented. Consequently, the Georgia NAACP and GCPA are entitled, and in the alternative should be permitted, to intervene in this action.

INTRODUCTION AND BACKGROUND

In a flurry of last-minute rulemaking, the Georgia State Election Board ("SEB") passed a hand counting rule that distorts the role of poll officers and makes it much more difficult for them to do their job. Instead of certifying and conveying the number of cast

ballots, the rule requires, upon the close of the polls, "three sworn precinct poll officers to independently count the total number of ballots removed from the scanner, sorting into stacks of 50 ballots, continuing until all of the ballots have been counted separately by each of the three poll officers." Then, only "[w]hen all three poll officers arrive at the same total ballot count independently, they shall each sign a control document containing the polling place, ballot scanner serial number, election name, printed name with signature and date and time of the ballot hand count." If the number of ballots "do not reconcile with the hand count ballot totals, the poll manager [must] immediately determine the reason for the inconsistency; correct the inconsistency, if possible; and fully document the inconsistency or problem along with any corrective measures taken." Amendment to Rule 183-1-12.12(a)(5) [hereinafter "Hand Counting Rule"]. Beyond the near impossibility of smooth closing of the polls under these requirements, the Hand Counting Rule has been passed very close to the election, when many of the poll officers who are now charged with carrying out this new process have already been trained on the pre-existing poll closing rules.

The Hand Counting Rule is not the first attempt by the SEB to undermine the upcoming election—it is just part of the latest overreach by the SEB. Throughout the summer and now into the fall, the SEB has hurriedly issued a wide array of rules without statutory authority supporting their issuance. In response to an initial set of rules related to certification, Plaintiffs in the instant case and another set of litigants in *Abhiraman v. State Election Board* filed suit seeking declaratory judgment that the rules in question exceed the SEB's authority and accompanying injunctions preventing their application.

See No. 24CV010786 (Super. Ct. Fulton Cnty.). Then, on September 20, 2024, a mere 46 days before the November 5, 2024 General Election, the SEB issued its latest tranche of rules outside its statutory grant of authority, attempting to throw the mechanics of running the election and the counting of votes into disarray.

Through rulemaking the SEB has tried to unlawfully expand its authority by re-writing Georgia's election laws. The Hand Counting Rule is part and parcel of the SEB's re-writing—it requires hand counting ballots at the precinct level *before* the tabulation of votes. This lawless rule not only threatens to prevent the timely tabulation of election results, but also decreases ballot security by requiring multiple poll officers to repeatedly handle ballots prior to their tabulation. The late-issued rule also threatens orderly election administration because it contravenes the training that many poll officers have already received ahead of the upcoming election.

Indeed, the SEB's flagrant disregard of the legal advisory furnished by the Attorney General's Office that its latest foray into rulemaking was unlawful demonstrates that the SEB was fully aware that by passing the Hand Counting Rule it was improperly legislating. Despite possessing this knowledge, it deliberately passed a rule that it knew to be untethered from the plain text of Georgia's statutes. Not only that, the SEB's indifference to the admonishments of election officials, members of the public, and even the Chair of the SEB indicates that the members that voted to pass this rule had made up their minds. Nothing could thwart their persistent attempts to destabilize the election through the passage of yet another rule. In fact, the Georgia Association of Voter Registration and Election Officials (GAVREO), which comprises hundreds of election

workers across the state, urged the SEB to reject the proposed rule, warning the SEB that "dramatic changes at this stage will disrupt the preparation and training processes already in motion for poll workers, absentee voting, advance voting and Election Day preparation." *See* Ex. C to Proposed Compl. Beyond the public, the Attorney General, the chief legal officer of the State and counsel to the SEB, O.G.C.A. § 45-15-12, informed the SEB that the Official Code of Georgia did not authorize the changes to administrative rules that the SEB sought to make. Ex. D to Proposed Compl. The SEB ignored the legal guidance of the Office of the Attorney General and went on to undertake one of the more brazen attempts at disrupting the upcoming election by passing these amendments anyway. There is no basis in law for the Hand Counting Rule.

On September 25, 2024, Plaintiffs in this action amended their Complaint aimed at the certification rules to add challenges to the Hand Counting Rule in addition to the other rules passed at the September 20, 2024 SEB meeting. First Am. Compl. (Sept. 25, 2024). That same day, the Court issued an order setting two hearings during the week of September 30, 2024, and a list of preliminary legal issues to be taken up at those hearings. Order (Sept. 25, 2024).

Proposed Intervenor-Plaintiffs differ in many respects from Plaintiffs in this action, and for those reasons the Court should grant intervention. They are civil rights organizations dedicated to protecting the voting rights of their members and all Georgians—particularly those of Black voters and other voters of color. They seek to intervene on behalf of their members and on behalf of themselves. Proposed Intervenor-Plaintiffs have thousands of members across the state of Georgia who plan to vote in the

upcoming election. Furthermore, these organizations have been conducting voter registration, get-out-the-vote, and other voter mobilization activities and now have to redirect their limited staff resources to troubleshoot problems arising from the application and administration of the Hand Counting Rule. The Hand Counting Rule threatens to destabilize the voting process in Georgia, injects confusion and uncertainty into the election administration, particularly the tabulation of results, and ultimately risks the State missing mandatory state and federal statutory deadlines. The rule therefore risks the disenfranchisement of members of the Intervenor-Plaintiffs organizations.

Proposed Intervenor-Plaintiffs are not adequately represented by the current parties to the suit, as Plaintiffs challenge the Hand Counting Rule, in addition to the other rules, on broad grounds, arguing that the delegation of any rulemaking authority to the SEB necessarily violates Georgia's Constitution. Proposed Intervenor-Plaintiffs do not make this claim, instead arguing the unlawfulness of the Hand Counting Rule specifically.

LEGAL STANDARD

O.C.G.A. § 9-11-24(a) provides that after "timely application," a prospective party must be permitted to intervene "[w]hen the applicant claims an interest relating to the property or transaction which is the subject matter of the action" and "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." This is a three-part inquiry, consisting of "(1) interest, (2) potential impairment, and (3) inadequate representation." *Buckler v. DeKalb Cnty.*, 290 Ga. App. 190, 193

(2008) (quoting *DeKalb Cnty. v. Post Props*., 245 Ga. 214, 219 (1980)). If a prospective party satisfies these requirements, the party "shall be permitted to intervene." O.C.G.A. § 9-11-24(a).

In lieu of intervention as of right, O.C.G.A. § 9-11-24(b) provides that upon "timely application," any party may be granted permissive intervention "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." *Id.* In deciding whether to allow permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

ARGUMENT AND CITATION OF AUTHORITY

I. Proposed Intervenor-Plaintiffs Are Entitled to Intervention as of Right.

Under the terms of O.C.G.A. § 9-11-24(a), the Georgia NAACP and the GCPA are entitled to intervention as of right, as they meet each of the components of the statutory standard.

A. Intervenor-Plaintiffs' Motion Is Timely.

Intervenor-Plaintiffs moved quickly in seeking to intervene, filing just 11 days after the rules issued from the SEB, and 6 days after the operative Complaint was amended to challenge the Hand Counting Rule, which impairs the interests of Intervenor-Plaintiffs and their members. Upon learning of the amendment and this Court's Order setting hearings for October 2 and October 4, Intervenor-Plaintiffs filed with all deliberate speed. "[W]hether a motion to intervene is timely is a decision entrusted to the sound discretion of the trial court," *AC Corp. v. Myree*, 221 Ga. App. 513, 515 (1996),

and Georgia courts have routinely found much later filed motions for intervention to be timely, *see, e.g.*, *Liberty Mut. Fire Ins. v. Quiroga-Saenz*, 343 Ga. App. 494, 499 (2017) (determined timely when intervenor "waited a month after hiring counsel to move to intervene"); *Stephens v. McGarrity*, 290 Ga. App. 755, 758 (2008) (finding that trial court abused its discretion in concluding that motion to intervene was untimely when filed 21 days after intervenor learned of proposed settlement and before the settlement hearing). The instant motion is timely.

B. Intervenor-Plaintiffs Have Interests Related to This Action.

Proposed Intervenor-Plaintiffs have significant interests at stake in this litigation both on behalf of their members and as to their organizational missions and related work. These organizations have thousands of members who are registered to vote in Georgia and intend to vote on November 5, 2024. *See* Decl. of Gerald Griggs ("Griggs Decl.") ¶¶ 7-9, 11; Decl. of Helen Butler ("Butler Decl.") ¶¶ 6, 10. The Hand Counting Rule attempts to torpedo the secure and well-vetted ballot counting system in place across the state. It mandates that multiple poll officials will hand count ballots before they are conveyed to the superintendent for tabulation. Griggs Decl. ¶¶ 15-17; Butler Decl. ¶¶ 13-15. With so many cooks in the kitchen, discrepancies are bound to occur and resolving them may lead to ballots being thrown out. Griggs Decl. ¶ 17; Butler Decl. ¶ 15. Hand counting also risks delaying tabulation and ultimately the certification process, which not only disrupts the election process but also shakes the confidence of members who have cast ballots and expect those ballots to be counted. Griggs Decl. ¶¶ 17-18; Butler Decl. ¶¶ 14-16; *see also* Ex. B to Proposed Compl. And all of this is contrary to the Election

Code and contrary to guidance issued by the Secretary of State, the state's chief elections officer, O.G.C.A, § 21-2-210. *See* Ex. A to Proposed Compl. at 10 (Ballot Security Post, Blake Evans, Elections Director (Oct. 6, 2022) attached to Petition for Amendment to Election Rules).

The right to vote necessarily includes the right to have that vote counted, *see, e.g.*, *Schmitz v. Barron*, 312 Ga. 523, 524 (2021); *Griffin v. Trapp*, 205 Ga. 176, 181 (1949), and the Hand Counting Rule risks the counting of Intervenor-Plaintiffs' members' votes. *See Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 687 (7th Cir. 2023) (finding a direct interest where organization had associational interest on behalf of members to ensure votes counted). Courts grant intervention as of right where voters seek to protect their fundamental right to the franchise. *See, e.g.*, *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1307 (N.D. Ga. 2018) (finding intervention as of right to be appropriate where voter intervenors would be potentially disenfranchised).

Beyond the interests of their members, Proposed Intervenor-Plaintiffs have organizational interests that will be impaired if the Hand Counting Rule goes into effect. Proposed Intervenor-Plaintiffs are civil rights organizations that work to ensure the right to vote for all Georgians, and particularly for Georgians of color. *See* Griggs Decl. ¶¶ 3-4; Butler Decl. ¶¶ 4-5. They have dedicated their limited staff time to registering voters and now plan to mobilize voters to the polls, and after the election, help voters who cast provisional ballots to cure those ballots in time. Griggs Decl. ¶¶ 19-22; Butler Decl. ¶¶ 18-22. Now, they have to divert their limited resources to troubleshooting any issues that arise because of the Rule, which risks the votes of every Georgian being timely

counted and the final results being timely certified. Griggs Decl. ¶ 20; Butler Decl. ¶ 19. Courts routinely find that public interest organizations, like Proposed Intervenor-Plaintiffs, should be granted intervention in voting cases when they can demonstrate harm to their core missions and activities. *See, e.g.*, *Kobach v U.S. Election Assistance Comm'n*, No. 13-4095, 2013 WL 6511874, at *4 (D. Kan. Dec. 12, 2013) (allowing advocacy groups to intervene where interests broadly articulated as "either increasing participation in the democratic process, or protecting voting rights, or both, particularly amongst minority and underprivileged communities").

C. Disposition of the Case Without Intervention Will Likely Impair Intervenor-Plaintiffs' Interests.

If this case proceeds without Proposed Intervenor-Plaintiffs, their interests will likely be impaired. O.C.G.A. § 9-11-24(a)(2). Notably, Intervenor-Plaintiffs need not establish that their interests definitively will be impaired. *See, e.g.*, *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014). Rather, the law requires only that the case "*may* as a practical matter impair or impede [Intervenor-Plaintiffs'] ability to protect [their] interest." O.C.G.A. § 9-11-24(a)(2) (emphasis added). This language mirrors Federal Rule of Civil Procedure 24, which was "designed to liberalize the right to intervene." *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967).

Should the Hand Counting Rule govern the conduct of the 2024 election, the interests of Intervenor-Plaintiffs and their members will be harmed. The Rule requires Intervenor-Plaintiffs to redirect time and resources from other election-related efforts to efforts to prepare for this Rule and its potential impacts, and to support its members in

doing the same. The Rule also impacts the interests of Intervenor-Plaintiffs' members by unnecessarily complicating the tabulation and certification process and mandating that their cast ballots will be repeatedly handled by various poll officers, as opposed to having them delivered "immediately" for tabulation as required by law. *See* O.G.C.A. § 21-2-240(a). And the Hand Counting Rule risks causing substantial delay in the tabulation and certification of the 2024 election, risking disenfranchisement of members of the organizations. Proposed Intervenor-Plaintiffs have an interest in ensuring that votes cast by their members are properly counted and certified. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (recognizing that organization had standing to challenge a law that would impose voting requirements on its members).

As the November 2024 election will occur only once, Intervenor-Plaintiffs are "not assured of an opportunity" to defend their interests "in any future action." *Liberty Mut. Fire Ins. Co. v. Quiroga-Saenz*, 343 Ga. App. 494, 500 (2017). Because the "purpose of intervention is to allow interested parties to air their views . . . before making potentially adverse decisions," *Brumfield*, 749 F.3d at 345, the "best" course is to give "all parties with a real stake in [the] controversy . . . an opportunity to be heard." *Hodgson v. UMWA*, 473 F.2d 118, 130 (D.C. Cir. 1972). Proposed Intervenor-Plaintiffs and their members have "a real stake" in this action, and for that reason, should be heard.

D. Proposed Intervenor-Plaintiffs' Interests Are Not Adequately Represented by the Existing Parties.

Proposed Intervenor-Plaintiffs' interests are not adequately represented by any of the existing parties in the action. Defendant, the State of Georgia, through its agency the

SEB, is the entity that promulgated the lawless Hand Counting Rule. There is no reason to think that Defendant will adequately represent Intervenor-Plaintiffs' interests in ensuring that the votes of their predominately Black membership are not thrown out during the hand counting process. Nor do Plaintiffs adequately represent Intervenor-Plaintiffs' interests because their challenge is focused on the ability of the SEB to engage in any rulemaking under any circumstances, *see* Compl. ¶ 60, as opposed to focusing on how and why the Hand Counting Rule conflicts with provisions of the Georgia Election Code. Where an intervenor's "'interest is similar to, but not identical with, that of one of the parties,' that normally is not enough to trigger a presumption of adequate representation." *Berger v. N.C. State Conference of the NAACP*, 597 U.S. 179, 197 (2022) (quoting 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1909 (3d ed. Supp. 2022)). Unlike Plaintiffs, Intervenor-Plaintiffs are not seeking to challenge the entire delegation of rulemaking authority to the SEB. Rather Intervenor-Plaintiffs' interest is in the specific lawlessness of the Hand Counting Rule and the manner in which this Rule burdens Intervenor-Plaintiffs' members in the upcoming election. Both Plaintiffs and Intervenor-Plaintiffs take issue with the Hand Counting Rule, but their interest in and grounds for their challenges, while overlapping, are not identical. *See Berger*, 597 U.S. at 197 (presumption of adequacy only where interests "overlap fully" (alteration omitted)).

Adequacy of representation can be assessed early in a proceeding from the pleadings and representations of the parties. *Sloan v. S. Floridabanc Fed. Sav. & Loan Ass'n*, 197 Ga. App. 601, 602 (1990). Here, with respect to the Hand Counting Rule, the

pleadings suggest that Plaintiffs will not adequately represent Intervenor-Plaintiffs, as the operative Complaint does not detail the statutory provisions that the SEB invoked in support of the Hand Counting Rule nor plead why those provisions do not provide authority for the Rule's enactment. *Compare* First Am. Compl. ¶¶ 87-92 *with* Int.-Pls.' Proposed Compl. ¶¶ 28-33, 37-45. Moreover, "the inadequate representation requirement is satisfied if the proposed intervenor shows that representation of his interest may be inadequate and that the burden of making that showing should be treated as minimal." *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (internal quotation marks and alteration omitted). Here, based on the difference in the pleadings, it is evident that Intervenor-Plaintiffs meet that "minimal" burden that the representation of the existing parties "may be inadequate." *Id.*

II. In the Alternative, Proposed Intervenor-Plaintiffs Should Be Granted Permissive Intervention.

Even if the Court determines that Proposed Intervenor-Plaintiffs are not entitled to intervene as a matter of right, the Court should exercise its broad discretion to grant permissive intervention under O.C.G.A. § 9-11-24(b)(2). *See Allgood v. Georgia Marble Co*., 239 Ga. 858, 859 (1977). Proposed Intervenors represent a large number of Georgians whose votes are at risk if the lawless Hand Counting Rule is in effect for the 2024 election. Ensuring that the interests of these voters are advanced is a critical perspective that would serve the interests of the Court. Indeed, a court "'can consider almost any factor rationally relevant but enjoys very broad discretion in granting or denying the motion [to intervene].'" *In re Martinez*, No. 24-CV-20492, -- F. Supp. 3d --,

2024 WL 2873137, at *6 (S.D. Fla. June 7, 2024). As such, this is an ideal instance for the Court to exercise its "sound discretion" and grant permissive intervention. *Sloan*, 197 Ga. App. at 603.

Permissive intervention is appropriate "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." O.G.C.A. § 9-11-24(b). Here, Proposed Intervenor-Plaintiffs' claim against the Hand Counting Rule has questions of law and fact in common with the main action, which also challenges this Rule, among others. "Although not the sole factor to be considered, '[t]he most important factor is whether intervention will prejudice existing parties in the case.'" *Sloan*, 197 Ga. App. at 603 (quoting *Sta-Power Indus. v. Avant*, 134 Ga. App. 952, 958 (1975)). Here, given that the Rule in question was passed just 11 days ago and added to this action just 6 days ago, and thus the case remains in an early stage, intervention will not delay or prejudice the adjudication of the rights of the original parties. *See, e.g.*, *Ga. Aquarium, Inc. v. Pritzker*, 309 F.R.D. 680, 691 (N.D. Ga. 2014) (finding intervention would not prejudice parties where ""litigation is in a relatively nascent stage and none of the deadlines" had yet passed). Proposed Intervenor-Plaintiffs are prepared to proceed in accordance with any schedule the Court sets—including attending the scheduled hearings on October 2 and October 4—and have an interest in moving as expeditiously as possible, for the good of their members and all Georgia voters. Their intervention will only serve to contribute to the full development of the factual and legal issues before the Court.

CONCLUSION

For the foregoing reasons, the Court should grant Intervenor-Plaintiffs' motion to intervene as a matter of right under O.C.G.A. § 9-11-24(a) or, in the alternative, for permissive intervention under O.C.G.A. § 9-11-24(b).

Respectfully submitted this 1st day of October 2024,

/s/ Caitlin May

Cory Isaacson (Ga. Bar No. 983797)
Caitlin May (Ga. Bar No. 602081)
Akiva Freidlin (Ga. Bar No. 692290)
ACLU FOUNDATION OF GEORGIA, INC.
P.O. Box 570738
Atlanta, GA 30357
(678) 310-3699
cisaacson@acluga.org
cmay@acluga.org
afreidlin@acluga.org

Theresa J. Lee*
Sophia Lin Lakin*
Sara Worth*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
tlee@aclu.org
slakin@aclu.org
sw_vrp@aclu.org

Ezra D. Rosenberg*
Julie M. Houk*
Pooja Chaudhuri*
Alexander S. Davis*
Heather Szilagyi*
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, D.C. 20005
(202) 662-8600
erosenberg@lawyerscommittee.org
jhouk@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
adavis@lawyerscommittee.org
hszilagyi@lawyerscommittee.org

Raechel Kummer (Ga. Bar No. 269939)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, D.C. 20004
(202) 373-6235
raechel.kummer@morganlewis.com

Katherine Vaky (Ga. Bar No. 938803)
MORGAN, LEWIS & BOCKIUS LLP
One Oxford Centre, Floor 32
Pittsburgh, PA 15219-6401
(412) 560-3300
katherine.vaky@morganlewis.com

Gerald Weber (Ga. Bar No. 744878)
LAW OFFICES OF GERRY WEBER, LLC
P.O. Box 5391
Atlanta, Georgia 31107
(404) 522-0507

wgerryweber@gmail.com

* motion for admission *pro hac vice* forthcoming

Attorneys for Intervenor-Plaintiffs