Case Nos. S25A0362, S25A0490

In the

# Supreme Court of Georgia

STATE OF GEORGIA,

*Appellant*,

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

*Appellants*,

v.

ETERNAL VIGILANCE ACTION, INC., et al.,

*Appellees*.

On Appeal from the Superior Court of Fulton County
Civil Action File No. 24CV011558

## OPENING BRIEF OF APPELLANTS THE REPUBLICAN NATIONAL COMMITTEE AND THE GEORGIA REPUBLICAN PARTY

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## Introduction

The Georgia State Election Board is tasked with creating rules for election officials across the State. Those rules ensure that election officials are operating uniformly and complying with the law. Plaintiffs brought a wide-ranging challenge to seven rules adopted by the State Election Board that ensure the efficiency, security, and integrity of Georgia elections. The rules promote orderly elections by requiring election superintendents to act reasonably before they certify results, allowing county board members to assess election-related documents, and giving poll watchers reasonable access to areas in which election processing is taking place (among other things). The trial court declared *all* the rules unlawful and enjoined their enforcement.

Plaintiffs' primary argument is an aggressive theory of the nondelegation doctrine. But their theory is misguided. The Election Board regulates public officials, not private parties. And when an executive agency tells a public official how to perform her duties, it's ordinarily exercising executive power, not legislative power. Plaintiffs fixate on the Board's discretion and rulemaking guidelines. But if the type of power the executive agency is wielding is executive in nature, the Court need not ask whether the agency has too much discretion or not enough guidelines. Even if this Court were to overturn its nondelegation precedents as Plaintiffs demand, their nondelegation claims fail as a matter of first principles.

The trial court erred in ruling that the Election Board's rules conflict with Georgia law. The court's reasoning for invalidating each rule amounted to nothing more than opining that the statute doesn't provide for each rule. Yet

the General Assembly gave the Election Board rulemaking authority—to fill gaps in the statutory scheme and further the General Assembly's aims. The trial court erred by requiring each rule to be duplicated verbatim in the Georgia Code.

The Court need not reach the constitutional issues, because the trial court lacked jurisdiction over Plaintiffs' vague constitutional claims. Plaintiffs didn't specify which laws they thought were unconstitutional. That vagueness led the trial court to confuse constitutional issues with statutory issues, and to erroneously grant relief on an Elections Clause claim that Plaintiffs never included in their complaint.

For these reasons, this Court should reverse the trial court's judgment.

**Jurisdictional Statement**

This Court has jurisdiction under O.C.G.A. §5-6-34. The Superior Court entered a final judgment granting a permanent injunction on October 16, 2024. (V1-16). Appellants timely noticed an appeal the next day. (V1-2). This Court has jurisdiction over this appeal because it presents issues "of gravity and great public importance." Ga. Const. art. VI, §VI, ¶V; *see also* Order of October 18, 2024 (granting writ of certiorari on that basis).

**Enumeration of Errors**

1. The trial court erred by failing to dismiss Plaintiffs' claims as non-justiciable because they are too vague to draw into question the constitutionality of state law.

2. The trial court erred by holding that each rule violates the Georgia Constitution's nondelegation doctrine.

3. The trial court erred by holding that each rule violates the federal Constitution's Elections Clause.

4. The trial court erred by holding that each rule is contrary to the Election Code.

## **Statement of the Case**

The Georgia General Assembly tasked the State Election Board with the duty to "promulgate" such "rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct" of "elections." O.C.G.A. §21-2-31(2). It is also the Board's duty to "promulgate rules and regulations" to ensure "uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections." *Id.* §21-2-31(1). Acting under these statutory duties, the Board approved several rules to ensure that state elections would be conducted in a "fair, legal, and orderly" manner. *Id.* §21-2-31(2).

The Reasonable Inquiry Rule defines the phrase "certify the results" of an "election." Ga. Comp. R. & Regs. 183-1-12-.02(1)(c.2). Under Georgia law, each election superintendent has a duty "[t]o receive" the "returns" of all "elections, to canvass and compute the same, and to certify the results thereof." O.C.G.A. §21-2-70(9). But "certify the results" is not defined by statute. To "explicitly define certification," the Board amended its rules to clarify that to "certify the results" means "to attest, after reasonable inquiry that the tabulation and canvassing of the election are complete and accurate and that the results are a true and accurate accounting of all votes cast in that election." Revisions to Subject 183-1-12-.02, *Definitions* (proposed July 3, 2024).

The Examination Rule affirms existing Georgia law requiring superintendents to examine election documents. By statute, whenever there is "a discrepancy and palpable error" related to "excess" votes, election superintendents "shall" be able to "examine all" the "election documents whatever." O.C.G.A. §21-2-493(b). The rule likewise permits county board members to "examine all election related documentation created during the conduct of elections prior to certification of results," since county boards are superintendents. Ga. Comp. R. & Regs. 183-1-12-.12(f)(6). The purpose of the rule is to ensure that "county superintendents and boards of elections" can "reconcile the number of ballots to the number of voters so that certification of election results accurately reflects the will of the voters in every county." Revisions to Subject 183-1-12-.12, *Tabulating Results* (proposed July 18, 2024).

The Drop-Box ID Rule provides a mechanism to ensure that Georgia's drop-box laws are followed. State law generally requires absentee voters "personally mail or personally deliver" their absentee ballot "to the board of registrars or absentee ballot clerk," which includes drop-box delivery. O.C.G.A. §21-2-385(a). There's an exception to the personal-delivery rule, "provided that mailing or delivery may be made by the elector's mother, father, grandparent" and similar household or family members. *Id.* The law provides no mechanism to ensure that the person performing a drop-box delivery is actually the voter or a family member permitted by the statute. The Board's rule fills that gap by requiring "an absentee ballot form with written documentation, including absentee ballot elector's name, signature and photo ID of the person delivering the absentee ballot, and approved relation to the elector's name on the

absentee ballot" for drop-box deliveries. Ga. Comp. R. & Regs. 183-1-14-.02(18). The purpose is "to ensure accountability and security for absentee ballots." Revisions to Subject 183-1-14-.02, *Advance Voting* (proposed July 3, 2024).

Similarly, the Drop-Box Surveillance Rule provides another method to ensure compliance with state law. The drop-box statute requires that all "drop box location[s] shall have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement official, or licensed security guard." O.C.G.A. §21-2-382(c)(1). The Board's rule requires "video surveillance" of drop boxes at "early voting location[s]" after polling hours each day. If a drop box is not under constant surveillance, it must be "locked or removed." Ga. Comp. R. & Regs. 183-1-14-.02(19). "The purpose of the rule is to ensure accountability and security for absentee ballots, and to maintain the security of drop boxes through mandatory video surveillance." Revisions to Subject 183-1-14-.02, *supra*. Together, "[t]he video surveillance and the absentee ballot forms are specifically aimed to deter and document any attempts to tamper with the drop boxes, ensure ballots are deposited properly, provide evidence of any security incidents, and promote trust in the election process by demonstrating the protection of ballots." *Id.*

The Board's Poll Watcher Rule clarifies that poll watchers must be allowed to observe all parts of the tabulation process. State law provides political parties the right to "appoint two poll watchers in each primary or election … to serve in the locations designated by the superintendent within the tabulating center." O.C.G.A. §21-2-408(c). Those "designated locations shall include the check-in area, the computer room, the duplication area, and such other

areas as the superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center." *Id.* The rule clarifies that those "other areas" must include "other areas that tabulation processes are taking place," including the "provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing of mail in ballots, memory card transferring, regional or satellite check-in centers and any election reconciliation processes as the election superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center." Ga. Comp. R. & Regs. 183-1-13-.05. "The purpose of the rule is to clarify the existing election code and to ensure poll watchers may fairly observe all processes of the tabulation center." Revisions to Subject 183-1-13-.05, *Poll Watchers for Tabulating Center* (proposed Aug. 21, 2024).

The Board's Daily Reporting Rule adds additional specificity to the reporting duties of county election officials. State law requires that "[o]n each day of an absentee voting period," county election officials "shall report … to the Secretary of State and post on the county or municipal website … the number of persons to whom absentee ballots have been issued, the number of persons who have returned absentee ballots, and the number of absentee ballots that have been rejected." O.C.G.A. §21-2-385(e). The statute requires similar rules for "advance voting." *Id.* The new rule requires election officials to delineate those numbers to report "the total number of voters who have participated," the "method by which those voters participated (advance voting or absentee by mail)," the "number of political party or nonpartisan ballots cast," and "the date on which the information was provided." Ga. Comp. R. & Regs.

183-1-12-.21(1)(a). "The purpose of the rule is to ensure ongoing transparency in elections," and "it serves to continuously keep the public informed on the voting process and election information." Promulgation of Subject 183-1-12-.21, *County Participation and Totals Reporting* (proposed Aug. 21, 2024).

Finally, the Hand-Count Rule creates a system for organizing, counting, packaging, and reporting the ballots voted on election day. State law provides that after polls close, "the poll officials in each precinct shall complete the required accounting and related documentation for the precinct and shall advise the election superintendent of the total number of ballots cast at such precinct and the total number of provisional ballots cast." O.C.G.A. §21-2-420(a). The new rule requires the "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." Ga. Comp. R. & Regs. 183-1-12-.12(a)(5). The three poll officers then cross-check their counts, resolve any discrepancies, and "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." *Id.* "The purpose of the rule is to ensure the secure, transparent, and accurate counting of ballots by requiring a systematic process where ballots are independently hand-counted by three sworn poll officers." Revisions to Subject 183-1-12-.12, *Tabulating Results* (proposed Aug. 21, 2024). This brief contains arguments for six of the seven rules; the Republican National Committee and Georgia Republican Party have nothing to add to the State's brief or the arguments on the record of the Hand-Count Rule.

The Election Board adopted these rules after noticing proposed rulemaking and accepting public comments. (V1-65-83). Plaintiffs Eternal Vigilance Inc., Scot Turner, and James Hall filed suit in Superior Court against the seven rules described above. (V1-17, 39-42, 57-62). Plaintiffs alleged that each rule is unlawful and sought declaratory and injunctive relief to stop enforcement of the rules. (V1-41-43, 62). The Republican National Committee and the Georgia Republican Party moved to intervene as defendants, (V1-169-181), and the Georgia NAACP and Georgia Coalition for the People's Agenda, Inc. moved to intervene as plaintiffs, (V1-89-104). The trial court granted both motions to intervene. (V1-241-244).

After briefing and a hearing, the trial court entered an order on October 16, 2024. (V1-6-16). The order declared the rules unlawful and enjoined their enforcement. (V1-14-16). The trial court held that each rule is contrary to the Election Code, (V1-8-13), that the rules violate the Georgia Constitution's non-delegation doctrine, (V1-13), and that the U.S. Constitution forbids "the SEB's rules affecting the time, place and manner" of congressional elections, (V1-14).

The RNC and Georgia Republican Party timely noticed this appeal on October 17, 2024. (V1-1-4). On October 22, 2024, this Court denied Appellants' Emergency Supersedeas motion but explained that the appeal "will proceed in the ordinary course." *Order Denying Motion for Emergency Supersedeas*, No. S25M0259 (Oct. 22, 2024). Later, the State filed a timely notice of appeal, and this Court consolidated the two appeals. *See Order Consolidating Cases*, Nos. S25A0362 & S25A0490 (Dec. 17, 2024). The trial court's errors are now before the Court for review.

## **Summary of the Argument**

**I.** Plaintiffs' constitutional claims fail at the outset because their complaint fails to specify the statutory provisions that they believe are unconstitutional. Plaintiffs allege that the "delegation" of rulemaking authority to the State Election Board is unconstitutional, without specifying *which* delegations they believe are unconstitutional. This defect led the trial court to confuse the issues, and it deprives the court of jurisdiction over Plaintiffs' claims.

**II.** Plaintiffs' claims also fail on the merits. Their primary argument was that the Board lacks rulemaking authority. But since the Founding, the most basic form of rulemaking was one executive officer telling other public officials how to do their jobs. That's not ordinarily an exercise of legislative power—it's just the executive doing its job. Plaintiffs' nondelegation arguments fail for that basic reason.

**A.** The Election Board does not govern the private rights of citizens. The General Assembly did not give the Board authority to take property, to put people in prison, or to otherwise regulate private behavior. The rules that Plaintiffs challenge almost exclusively regulate how registrars, election boards, and superintendents do their jobs. To the extent they apply at all to private citizens, they regulate privileges (such as absentee voting), not private rights. And at its core, the legislative power regulates citizens' private rights. The Election Board doesn't wield legislative power, so Plaintiffs' nondelegation claims fail as a matter of first principles.

**B.** Plaintiffs' nondelegation claims also fail under Georgia precedents. This Court has consistently upheld agencies' rulemaking authority. And the Election Board's rulemaking duties are some of the most specific that the

General Assembly has legislated. The Board is also constrained by a detailed election code, and each rule they pass must be consistent with that statutory scheme. Plaintiffs argued that the detailed election scheme implicitly *deprives* the Board of rulemaking power. But this Court has said the opposite: the greater the statutory detail, the more likely the delegation is constitutional.

**III.** The federal Elections Clause does not render the rules unconstitutional. Plaintiffs never asserted in their complaint that the rules violate the Elections Clause. That omission didn't stop the trial court from granting relief on that basis. The trial court provided little reasoning, but to the extent that it held that only the General Assembly can make election-related rules, its order overlooked that the Elections Clause "does not preclude a State from vesting" authority over the manner of elections "in a body other than the elected group of officials who ordinarily exercise lawmaking power." *Moore v. Harper*, 600 U.S. 1, 25 (2023).

**IV.** Finally, the rules are not contrary to law. The trial court incorrectly opined that a rule is contrary to law unless it appears in the Election Code. But because there is no delegation problem, the only questions should have been whether the rules were within the Board's statutory authority to promulgate, and whether they contradict any part of the Election Code. But the rules promote election integrity, uniformity, and purity in elections, which makes them exactly the kinds of rules the General Assembly allowed the Board to promulgate. O.C.G.A. §21-2-31. And they are consistent with all relevant requirements in the Election Code.

## <u>Argument</u>

As the trial court explained, the "questions presented are legal ones regarding whether SEB had the authority to promulgate the rules at issue and whether these rules are legally enforceable." (V1-6). This Court reviews the trial court's conclusions of law de novo. *Cooksey v. Landry*, 295 Ga. 430, 431 (2014). This Court should reverse the trial court's order for four reasons: Plaintiffs' constitutional claims aren't justiciable, the Board's rulemaking is consistent with the nondelegation doctrine, there is no Elections Clause violation, and the rules discussed below are not otherwise contrary to law.

### I. Plaintiffs' constitutional claims are not justiciable.

Plaintiffs' constitutional claims are too vague to be justiciable. Any complaint alleging the unconstitutionality of a law must specify the "particular part" of "the statute which the party would challenge" with "fair precision." *Wallin v. State*, 248 Ga. 29, 30 (1981) (cleaned up). Plaintiffs' complaint fails to specify the statutory provision or provisions Plaintiffs believe to be unconstitutional. "In order to raise a question as to the constitutionality of a 'law,'" the "statute or the particular part or parts of the statute which the party would challenge must be stated or pointed out with fair precision." *Id.* (cleaned up). Nowhere in Plaintiffs' complaint do they point to the statutory provision that they want declared unconstitutional. Instead, Plaintiffs generally reference "the delegation" of authority by the General Assembly to the State Election Board throughout various counts of their complaint. (V1-40-41, 57-62). It's unclear whether the complaint sought a judgment declaring all of the State Election Board's rulemaking powers unconstitutional, or just some of them.

The trial court's judgment didn't cure these vagueness problems—it suffered from them. The trial court recognized that the "General Assembly may delegate some rulemaking authority to an executive agency" so long as the delegation contains "'sufficient' and 'realistic' guidelines constraining the executive agency's rulemaking." (V1-13) (quoting *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 49-50 (2020)). But the court then concluded that "there are no guidelines providing for the challenged SEB Rules." (V1-13). That conclusion confuses two issues: whether the State Election Board's statutory rulemaking power violates the nondelegation doctrine, and whether the rules exceed the Election Board's rulemaking authority. The former asks whether the *statute* granting the Election Board rulemaking power "is accompanied by sufficient guidelines," and thus constitutional. *Premier Health Care*, 310 Ga. at 49-50 (cleaned up). But the latter asks whether each *rule* is "authorized by statute" and "not contrary to law." *Ga. Real Est. Comm'n v. Accelerated Courses in Real Est.*, 234 Ga. 30, 35 (1975). The sufficient-and-realistic-guidelines test applies to statutes, not to rules, because "the promulgation of rules authorized by statute is not an unconstitutional usurpation of legislative power." *Id.* But the trial court mixed up the tests, concluding that "there are no guidelines" for the "Rules." (V1-13).

It is unclear whether the trial court ruled that the statute granting the State Election Board rulemaking power is unconstitutional, or whether each promulgated rule is simply unauthorized by statute. The trial court tried "to make clear" that it was "not making a determination on the Constitutionality of the [Election Board] itself, simply that the rules listed above lacked

delegated authority." (V1-13 n.2). But that footnote further confuses matters. Plaintiffs didn't attack "the Constitutionality" of the Election Board as a whole. Their complaint discusses only the Board's rulemaking authority, not the Board's other non-rulemaking duties such as "the power to issue orders" directing compliance with the election code, to impose civil penalties, and to file complaints in the superior court. O.C.G.A. §21-2-33.1. None of those powers were ever at issue in this case. Presumably, the trial court was clarifying that its order does not invalidate all *rulemaking* power of the Election Board. (*See* V1-13 n.1). But then the trial court's application of the sufficient-and-realistic-guidelines test to the challenged rules is plain error, and the court should have asked simply whether the rules were authorized by statute and consistent with the election code. *See Accelerated Courses in Real Est.*, 234 Ga. at 35.

The root of this confusion is Plaintiffs' complaint. The trial court guessed at which of the Election Board's rulemaking powers Plaintiffs want invalidated. Section 21-2-31(1), for example, delegates to the State Election Board the authority to "promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections." Plaintiffs *might* be asking the Court to nullify that statutory provision. Or they might be referring to O.C.G.A. §21-2-31(7), which delegates to the Board the authority to "promulgate rules and regulations" concerning "what constitutes a vote and what will be counted as a vote for each category of voting system used in this state." Or perhaps they challenge O.C.G.A. §21-2-31(10), which delegates to the Board the authority to take

"action[s]" that are "conducive to the fair, legal, and orderly conduct of primaries and elections." *Id*. Or perhaps Plaintiffs want all three provisions nullified. The trial court didn't know what Plaintiffs wanted, which is why it never addressed any of these provisions.

These vagueness problems are jurisdictional defects that plague the trial court's judgment. That Plaintiffs failed to plead with specificity "the particular part or parts of the statute" they challenge makes their complaint "too vague and indefinite to draw into question the constitutionality of the act" or "any part thereof." *Dade Cnty. v. State*, 201 Ga. 241, 241 (1946). Since Plaintiffs' complaint does not specify the provisions they want declared unconstitutional, it fails to raise "a constitutional question of which this court has jurisdiction." *Ledford v. J. M. Muse Corp.*, 224 Ga. 617, 617 (1968).

## II. The State Election Board's rulemaking does not violate the nondelegation doctrine.

Even if Plaintiffs claims were justiciable, this Court should reverse the trial court's nondelegation ruling because the court misapplied the nondelegation test. As explained, the trial court confused nondelegation with statutory authorization. The court actually rejected Plaintiffs' claim that the nondelegation doctrine "precludes the [State Election Board] from engaging in any rulemaking at all." (V1-13 n.1). Plaintiffs didn't appeal that ruling, so it's not properly before this Court. But the trial court's reasoning that the seven "Rules" lack any "guidelines" applies to any rule, not just the seven rules at issue here. It would mean that the General Assembly acted unconstitutionally when it granted the Election Board rulemaking power. *See* O.C.G.A. §21-2-31(1), (2). But the trial court disclaimed that conclusion. (V1-13 n.1). These

contradictory conclusions stem from the trial court applying the wrong test, which is reason alone to reverse.

Even under the proper test, the State Election Board's rulemaking powers are consistent with the Georgia Constitution. "The courts of this country, including the Supreme Court of the United States, have long recognized the right of an administrative agency of government to make rules and regulations to carry into effect a law already enacted." *Glustrom v. State*, 206 Ga. 734, 736 (1950). The State Election Board fits comfortably in this tradition.

While most Georgia agencies rely on a broad grant of rulemaking power "necessary for the implementation of [an] article" of the Georgia Code, *e.g.*, O.C.G.A. §26-5-43, the Election Board has three distinct rulemaking duties. It must "promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections." *Id.* §21-2-31(1). It must "promulgate rules and regulations to define uniform and nondiscriminatory standards concerning what constitutes a vote and what will be counted as a vote for each category of voting system used in this state." *Id.* §21-2-31(7). And the Board must "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." *Id.* §21-2-31(2).

Neither the trial court nor Plaintiffs distinguish these distinct rulemaking authorities. Plaintiffs lump all three together as broad "rulemaking authority," which they allege do "not provide any guidance or parameters regarding" the Board's rulemaking. (V1-21-22). The trial court rejected Plaintiffs'

contention that the Georgia Constitution "precludes the SEB from engaging in any rulemaking at all." (V1-13 n.1). But it held that the General Assembly didn't delegate "rulemaking authority" with sufficient "guidelines providing for the challenged" rules. (V1-13 & n.1). That conclusion is wrong for two independent reasons. First, the Election Board doesn't regulate private conduct, a point the trial court completely ignored. Second, the General Assembly cabined the Board's rulemaking with sufficient guidelines, a point the trial court got wrong.

### A. The Election Board doesn't regulate private conduct.

The nondelegation doctrine prohibits the legislature from transferring *legislative* power to an executive agency. "[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct." *Dep't of Transp. v. Ass'n of Am. Railroads* [*AAR*], 575 U.S. 43, 76 (2015) (Thomas, J., concurring in the judgment). That is, "the legislative power amounts to the enactment of 'generally applicable rules' that govern behavior." Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 Geo. Mason L. Rev. 1, 2 (2018) (citing *AAR*, 575 U.S. at 76). The first step in any nondelegation case is to "distinguish between regulations governing the conduct of government officials and regulations directing the actions of nongovernment parties in the private sector." Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc'y Rev. 238, 248 (2022). And "as long as" the legislature "makes the policy decisions when regulating private conduct, it may authorize another branch to

'fill up the details'" of executive enforcement. *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 43 (1825)).

This Court's precedents agree with these first principles. That's why the General Assembly cannot delegate to an agency the power to promulgate new misdemeanors through rulemaking. *See Howell v. State*, 238 Ga. 95, 95 (1976). A statute that "'authorizes an executive board to decide what shall and what shall not be an infringement of the law,'" *Sundberg v. State*, 234 Ga. 482, 483 (1975) (citation omitted), grants the executive the power to proscribe "private conduct," *AAR*, 575 U.S. at 76 (Thomas, J., concurring). So when the General Assembly punishes the possession of drugs but says that a drug is "anything the State Board of Pharmacy says it is," it impermissibly "delegate[s] to the State Board of Pharmacy the authority to determine what acts (the possession of such substances) would constitute a crime." *Sundberg*, 234 Ga. at 484; *see also Long v. State*, 202 Ga. 235, 237 (1947) ("[T]he act attempted to authorize the county commissioners to make a law, by defining the act, the violation of which would be a misdemeanor, and was a plain attempt to [delegate] the legislative authority of the General Assembly to the county commissioners."). In contrast, the General Assembly can "adopt as part of a statute, a regulation presently in force and to make the violation thereof a crime." *Howell*, 238 Ga. at 95. The latter circumstance does not present a delegation problem because even though another branch has described the private conduct, the General Assembly is the one *proscribing* it.

The Election Board's rulemaking is not an exercise of legislative power. The Board doesn't set "generally applicable rules of private conduct." *AAR*, 575 U.S. at 77 (Thomas, J., concurring). The Board doesn't create crimes. *Cf. Sundberg*, 234 Ga. at 484. It doesn't tax private citizens, which "has always been an exclusively legislative function." *Consumers' Rsch. v. FCC*, 109 F.4th 743, 767 (5th Cir. 2024). It doesn't take private property. *Cf. Dep't of Transp. v. City of Atlanta*, 260 Ga. 699, 703 (1990). It doesn't restrict private contracts. *Cf. Premier Health Care*, 310 Ga. at 49-54. And it doesn't restrain trade. *Cf. Ga. Franchise Pracs. Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800, 801 (1979).

Instead, the Election Board sets rules governing other executive actors. Larkin, *supra* at 249. In that regard, the Board's powers are more like Founding-era delegations that "authorized the executive to create rules that were only 'binding' on executive officials, not members of the public." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 788 n.17 (6th Cir. 2023) (Nalbandian, J., dissenting) (citing Philip Hamburger, *Is Administrative Law Unlawful?* 89 (2014)). In fact, the Board's first rulemaking power is explicitly limited to rules that ensure "uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials." O.C.G.A. §21-2-31(1). Most of the rules that Plaintiffs challenge fall in this category: they instruct public officials on how to certify an election, maintain documents, monitor drop boxes, report to other public officials, etc. They bind public officials and are not "generally applicable rules of conduct governing future actions by private persons." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting).

Even when the challenged rules touch on the conduct of private citizens, they regulate privileges, not private rights. The distinction "between 'public rights' and 'private rights'" most often appears when courts consider an agency's adjudicatory power. *Oil States Energy Servs. v. Greene's Energy Grp.*, 584 U.S. 325, 334 (2018). But the distinction is also relevant in cases that concern an agency's rulemaking power. The private use of public lands, for example, is a "privilege" that the government can bestow on citizens. *United States v. Grimaud*, 220 U.S. 506, 521 (1911). So when an agency conditions the use of public land on "comply[ing] 'with the rules and regulations,'" it regulates not the private rights of citizens, but the exercise of a public privilege. *Id.* Even when the statute "makes it an offense to violate those regulations," the agency is not creating new crimes but conditioning "the implied license under which the United States had suffered its public domain to be used." *Id.* In that circumstance, "the authority to make administrative rules is not a delegation of legislative power." *Id.*

The distinction between public and private rights illuminates some of the Election Board's other rulemaking powers. Poll-watching, for example, is a privilege the General Assembly has provided to "each political party and political body" in an election. O.C.G.A. §21-2-408(b)(1). Poll-watching is a public right (i.e., a privilege) because it "involves a matter 'arising between the government and others,'" not between private parties. *Oil States Energy Servs.*, 584 U.S. at 335. Absentee and mail voting, too, are "privileges" afforded to voters, not "fundamental right[s]." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). Many of the Board's rules that are "conducive to the

fair, legal, and orderly conduct of primaries and elections" regulate election privileges, to the extent they affect private parties at all. O.C.G.A. §21-2-31(2). The poll-watcher rule and the drop-box identification rule are good examples. Both rules regulate legislatively "created public rights." *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 456 (1977). Plaintiffs' claims don't account for the "distinction between 'rights' and 'privileges,'" even though that distinction is "relevant to the nondelegation doctrine." Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164, 180 (2019).

In sum, the Board doesn't wield legislative power because it doesn't regulate private rights. The trial court completely ignored this threshold issue. Plaintiffs overlooked it too. They complain of "broad" rulemaking discretion. (V1-36). But they overlook that even "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'" *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting) (citation omitted). Most of the Board's rulemaking concerns internal government operations—the Board adopts rules concerning how public officials do their jobs, not how private citizens live their lives. Some rules incidentally affect private citizens, but only for the exercise of a privilege, not a private right. In both instances, the Board isn't enacting "generally applicable rules of private conduct." *AAR*, 575 U.S. at 76 (Thomas, J., concurring). So there's no delegation problem.

### B. The General Assembly cabined the Board's rulemaking with sufficient guidelines.

Even if the General Assembly had delegated legislative powers to the Election Board, this Court has "approved numerous delegations of legislative authority, provided the General Assembly has provided sufficient guidelines for the delegatee." *Dep't of Transp.*, 260 Ga. at 703. When the General Assembly has provided sufficient guidelines, "the delegatee is not performing a legislative function, that is, it is not making a purely legislative decision, but is acting in an administrative capacity by direction of the legislature." *Pitts v. State*, 293 Ga. 511, 517 (2013). For example, directing an agency to "determine whether the taking of public property is in the public interest" provides "sufficient guidelines" for the agency's decisionmaking. *Dep't of Transp.*, 260 Ga. at 703. Directing the Board of Education to consider "'sickness and other emergencies which may arise in any school community'" when "promulgating its general policies and regulations" is likewise "realistic guidance." *Pitts*, 293 Ga. at 517.

In contrast, laws that "fail[] to set up guidelines" for agency discretion raise delegation problems. *Massey-Ferguson*, 244 Ga. at 802. In *Sundberg*, for example, this Court held that a statute violated the nondelegation doctrine by effectively ceding the definition of drug crimes to a state board "without any real guidelines." 234 Ga. at 484. Similarly, in *Massey-Ferguson*, this Court held that the Franchise Practices Act unlawfully delegated legislative power to a state commission to determine licensing and monopoly conduct in the motor vehicle industry. 244 Ga. at 800-01. The act "grant[ed] to the Commission the

power to define instances in which the Act will apply," but it "fail[ed] to set up guidelines for making these determinations." *Id.* at 802.

The Georgia election code does not "fail[] to set up guidelines" for the Election Board's rulemaking. *Id.* To start, the General Assembly did not give the Board blanket authority to adopt "such rules and regulations as may be necessary to carry out" the election code, although it has used that language for other agencies' rulemaking authority. *E.g.*, O.C.G.A. §8-3-206(d)(5) (Commission on Equal Opportunity). Instead, the General Assembly demarcated three areas of rulemaking: rules that "obtain uniformity in the practices and proceedings" of election officials and ensure "the legality and purity in all primaries and elections," rules that are "conducive to the fair, legal, and orderly conduct of primaries and elections," and rules that "define uniform and nondiscriminatory standards concerning what constitutes a vote and what will be counted as a vote." *Id.* §21-2-31. The Board's rulemaking power covers only these three limited subjects. Its rules must be directed to particular ends. And the rules must be "consistent with law." *Id.*

The trial court didn't explain why those guidelines aren't enough. It concluded, with virtually no explanation, that "there are *no* guidelines providing for the challenged SEB Rules." (V1-13) (emphasis added). The guidelines the trial court overlooked show that the Election Board "is not granted unlimited authority to promulgate rules." *Scoggins v. Whitfield Fin. Co.*, 242 Ga. 416, 417 (1978).

Instead of alleging specific deficiencies, Plaintiffs try out a new nondelegation theory: "where the General Assembly has set forth in over 500 pages of

the Georgia Code Annotated the rules by which votes of our citizens must be counted," the "conveyance of a gap-filling role to cover items the General Assembly did not specifically legislate is constitutionally impermissible." (V1-30). But within those 500 pages is the "duty of the State Election Board" to "promulgate rules and regulations" for a variety of election-specific functions. O.C.G.A. §21-2-31. The same election code "amply establishes the power of the authority to make rules and regulations." *Rich v. State*, 237 Ga. 291, 298 (1976).

Plaintiffs' argument turns nondelegation on its head. The election code's detail undercuts Plaintiffs' claim that the Election Board lacks "'sufficient' and 'realistic' parameters" for its rulemaking. (V1-32). This Court "look[s] to the number and type of conditions the General Assembly has imposed on a delegatee to guide its exercise of authority." *Premier Health Care*, 310 Ga. at 50. And by Plaintiffs' own admission, the General Assembly cabined the Election Board's rulemaking with numerous conditions. Plaintiffs cite no support for their novel theory that when the General Assembly "painstakingly details" a statutory scheme, (V1-29), the Georgia Constitution bars it from granting an agency rulemaking authority. The Election Board's rulemaking is sufficiently constrained, and the trial court erred in holding otherwise.

## III. The trial court erred by finding an Elections Clause violation.

The trial court erred by granting relief on a claim Plaintiffs never even pleaded. The court ruled that the State Election Board's rules "are unconstitutional and void" because they violate the Elections Clause of the U.S. Constitution. (V1-14). Plaintiffs first introduced an Elections Clause argument in

their trial brief, filed simultaneously with the other parties' trial briefs. *See* (V2-441-442). But even there, Plaintiffs didn't demand that the court outright invalidate the rules as violating the Elections Clause. Instead, Plaintiffs argued merely that the rules are "in tension" with the federal Constitution's "Elections Clause." (V2-441). At most, that argument is a constitutional-avoidance claim that buttresses Plaintiffs' nondelegation argument. Plaintiffs didn't plead or brief the Elections Clause as an independent claim against the challenged rules. The trial court erred by granting independent relief on a claim Plaintiffs didn't plead. (V1-14).

Even if Plaintiffs had pleaded an Elections Clause claim, it would have been foreclosed by precedent. The Elections Clause provides that the "Times, Places and Manner of holding Elections … shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, §4, cl. 1. Relying exclusively on dissents and concurrences, the trial court asserted that "[t]his federal constitutional duty may not be delegated by a state legislature to any other state body." (V1-14). To be sure, the Elections Clause grants power "to the 'Legislature'" of each State. *Moore v. Harper*, 600 U.S. 1, 25 (2023). But just last year, the U.S. Supreme Court explained that the clause "does not preclude a State from vesting" authority over the manner of elections "in a body other than the elected group of officials who ordinarily exercise lawmaking power." *Id.* For that reason, a State can establish a redistricting commission that's independent of the Legislature to apportion congressional districts. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015). Georgia "retain[s] autonomy to establish [its] own governmental processes." *Id.* at 816. It did so by

creating the State Election Board. And binding precedent says the creation of that Board is consistent with the Elections Clause.

## IV. The rules are not contrary to law.

The trial court also erred by invalidating each rule as contrary to the Georgia election code. (V1-8-12). The trial court did not ask whether the rules and the statutes could operate together. *See Accelerated Courses in Real Est.*, 234 Ga. at 34-35. Instead, the trial court concluded that a rule is invalid if it "is not part of" the statute. (V1-10). That reasoning ignores the authority the General Assembly gave the Election Board to make rules that work alongside the relevant statutes. O.C.G.A. §21-2-31(1), (2), (7). And the reasoning eviscerates the purpose of rulemaking: under the trial court's view, a rule would be permissible only if it duplicates what the statute already requires.

This Court has not endorsed the trial court's view, and it would be error to do so. *Cf. Premier Health Care*, 310 Ga. at 32 (holding that an agency rule was inconsistent with the plain meaning of the statute because it added terms to an exhaustive list). To the extent there are any doubts, "all presumptions are in favor of the constitutionality of a statute or regulation." *Ga. Dep't of Cmty. Health v. Northside Hosp.*, 295 Ga. 446, 448 (2014) (cleaned up). The trial court didn't engage in any meaningful statutory analysis, let alone resolve uncertainties in the Board's favor. It erred in holding that the rules discussed below are inconsistent with Georgia law.

### A. The Reasonable Inquiry Rule is not contrary to law.

The Reasonable Inquiry Rule reasonably defines a term the General Assembly didn't define for itself. "'Certify the results'" of an election "means to

attest" to the completion and accuracy of the tabulation, canvassing, and results of an election "*after reasonable inquiry*." Ga. Comp. R. & Regs. 183-1-12-.02(1)(c.2) (emphasis added). The trial court held that defining certification to include reasonable inquiry "is inconsistent with" Georgia's certification statute. (V1-9-10); *see also* O.C.G.A. §21-2-493. The trial court neither suggested that the statute expressly prohibits election officials from engaging in a reasonable inquiry, nor did it suggest that the statute requires other duties that are incompatible with engaging in a reasonable inquiry. An election official can both conduct a reasonable inquiry into the accuracy of a count *and* certify election results. The trial court identified no contradiction between the rule and the statute.

Instead, the trial court incorrectly asserted that the Rule "adds an additional and undefined step into the certification process." (V1-10). But the court ignored that section 21-2-493 doesn't define "certify" or "certification," as Plaintiffs admit. (V1-29). And because the plain meaning of "certify" is "[t]o attest as being true or as meeting certain criteria," Certify, *Black's Law Dictionary* (12th ed. 2024), the word at least implies a foundation for that knowledge. Nor does requiring the superintendent to attest to that requirement violate section 21-2-493. The statute already requires that the superintendent "sign, announce, and attest" to tabulation of "the figures for the entire county or municipality" after "completion of … computation and canvasing." *Id.* §21-2-493(a). Requiring that the superintendent attest to the completion and accuracy of "the tabulation and canvassing" is hardly inconsistent with the statute's

requirement, Ga. Comp. R. & Regs. 183-1-12-.02(1)(c.2), especially given the Board's statutory authority to make rules, O.C.G.A. §21-2-31.

### B. The Examination Rule is not contrary to law.

The Examination Rule allows board members to "examine all election related documentation created during the conduct of elections prior to certification of results." Ga. Comp. R. & Regs. 183-1-12-.12(f)(6). The trial court held that the rule conflicts with section 21-2-493 because it allows "superintendents" to "consider unauthorized materials when tabulating, canvassing, and certifying election results." (V1-10). But the court didn't explain why "election related documentation" is "unauthorized." On the contrary, Georgia law already says that superintendents "shall" be able to "examine all" "election documents whatever" whenever there is "a discrepancy and palpable error," related to "excess" votes. O.C.G.A. §21-2-493(b). And the definition of "superintendent" includes the "county board[s] of elections." *Id.* §21-2-2(35)(A). Ensuring that all board members can examine election-related documents is consistent with those provisions.

Without explanation, the trial court also suggested that the Rule conflicts with section 21-2-70. But that statute gives superintendents the authority "to inspect systematically and thoroughly the conduct of primaries and elections in the several precincts of his or her county" and "to receive from poll officers the returns of all primaries and elections" before certification. *Id.* §21-2-70(8)-(9). Given their duties to "inspect" and receive "returns," county boards—as superintendents—already have statutory authority to view election-related documents. Perhaps the trial court meant that because the

statute provides that superintendents can "receive from poll officers the returns of all primaries and elections," *id.* §21-2-70(9), the statute implicitly prohibits inspection of documents that aren't "returns," (V2-429-430). But section 21-2-493 defeats that implication by providing that superintendents "shall" be able to "examine all" "election documents whatever" whenever there is "a discrepancy and palpable error." Or perhaps the trial court meant that the statute gives viewing authority only to the board, not to individual board members. *See* O.C.G.A. §21-2-2(35). But granting document access to the county boards doesn't prohibit a rule that gives access to individual board members. If anything, the boards' statutory power to examine all "election documents whatever" implies that the individuals who comprise those boards also have access to the documents. *Id.* §21-2-493(b).

By permitting board members to examine election-related documents, the Examination Rule doesn't conflict with any statutory provision. And the rule promotes "uniformity" by giving all individuals involved in fulfilling that the role of superintendent authority to inspect election materials. O.C.G.A. §21-2-31(1). The trial court erred in holding otherwise.

### C. The Drop-Box ID Rule is not contrary to law.

The Drop-Box ID Rule ensures that Georgia's drop-box laws are followed. Those laws allow a limited exception to the requirement that absentee voters "personally mail or personally deliver" their ballots for "the elector's mother, father," and other family members. O.C.G.A. §21-2-385(a). The statute does not provide any mechanism for election officials to ensure that the person delivering the absentee ballot is the voter or a member of his family. The Drop-

Box ID Rule helps ensure compliance with section 21-2-385 by requiring a "photo ID of the person delivering the absentee ballot, and approved relation to the elector's name on the absentee ballot." Ga. Comp. R. & Regs. 183-1-14-.02(18).

With almost no reasoning, the trial court held that a rule meant to ensure compliance with a law instead violates the law. All it could say in support was that the section 21-2-385 does not "requir[e] presentment of a signature or photo ID by the authorized person delivering the ballot." (V1-10-11). But since there's no delegation problem, *see supra* Section II, the General Assembly lawfully gave the Board the authority to "promulgate rules and regulations" to ensure "legality and purity" in all elections. *See* O.C.G.A. §21-2-31(1). The General Assembly also lawfully authorized the Board to promulgate regulations that "will be conducive to the fair, legal, and orderly conduct of primaries and elections. *Id.* §21-2-31(2). The Board acted within those guidelines by ensuring that people who deliver absentee ballots comply with section 21-2-385.

### D. The Drop-Box Surveillance Rule is not contrary to law.

The trial court also incorrectly held that the Drop-Box Surveillance Rule conflicts with the drop-box statute. (V1-11). The drop-box statute requires that drop-box locations "be under constant surveillance by" officials. O.C.G.A. §21-2-382(c)(1). The Board reasonably implemented that provision by requiring "video surveillance and recording" of drop boxes after "the close of the polls." Ga. Comp. R. & Regs. 183-1-14-.02(19). The trial court invalidated that rule, but it failed to explain how video surveillance when voting isn't allowed is contrary to (instead of complimentary of) the "constant surveillance" the drop-box

statute already requires. O.C.G.A. §21-2-382. The trial court asserted that the Election Board "cannot by rule require something the General Assembly both did not legislate and specifically considered and declined to enact." (V1-11). But it cited no authority for the idea that the General Assembly's failure to adopt a requirement bars agencies from adopting a similar rule. If that reasoning were correct, any legislator could tie the hands of an agency by introducing legislation she knew would fail.

The Drop-Box Surveillance Rule also ensures compliance with other parts of the drop-box statute. "[D]rop boxes shall be closed when advance voting is not being conducted" or "when the advance voting period ends." *Id.* §21-2-382(c)(1). To implement that mandate, the Drop-Box Surveillance Rule requires officials to "loc[k] or remov[e]" drop boxes that are "not under constant and direct surveillance" after "the close of the polls." Ga. Comp. R. & Regs. 183-1-14-.02(19). The trial court asserted that the drop-box statute does not require "closure of authorized drop boxes that are not video monitored." (V1-11). But it didn't explain how that requirement is inconsistent with the statutory mandate to "clos[e]" drop boxes outside of voting periods. O.C.G.A. §21-2-382(c)(1). The statute does not define what it means to be "closed," *id.*, and requiring concrete steps implementing that mandate is a reasonable exercise of the Board's duty to promulgate rules that ensure the "fair, legal, and orderly conduct of primaries and elections," *id.* §21-2-31(2).

**E. The Poll Watcher Rule is not contrary to law.**

The Poll Watcher Rule reasonably implements state law. Political parties have the right to "appoint two poll watchers in each primary or election"

to observe "the check-in area, the computer room, the duplication area, and such other areas as the superintendent may deem necessary" to ensure "fair and honest procedures." *Id.* §21-2-408(c). The rule identifies some of the "other" areas where poll watchers may observe, including "other areas that tabulation processes are taking place." Ga. Comp. R. & Regs. 183-1-13-.05. Again, the trial court said virtually nothing to support its ruling that the rule and statute conflict. (V1-11-12).

There is no conflict. Section 21-2-408(c) says that poll watchers can be in "other areas" not expressly identified. Nothing in that section prohibits poll watchers from observing "other areas that tabulation processes are taking place," such as the "closing of advanced voting equipment, verification and processing of mail in ballots," and similar processes. Ga. Comp. R. & Regs. 183-1-13-.05. Section 21-2-408 gives superintendents authority to identify other areas where poll watchers may observe, but the General Assembly gave the Board authority to "promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents." O.C.G.A. §21-2-31(1). The rule ensures "uniformity" among "superintendents" by requiring several mandatory poll-watching areas. *Id.*

**F. The Daily Reporting Rule is not contrary to law.**

The Daily Reporting Rule enhances transparency in elections by supplementing the existing reporting duties of county officials. Georgia law already requires them to report on "the county or municipal website" the total "number of persons to whom absentee ballots have been issued, the number of persons who have returned absentee ballots, and the number of absentee ballots that

have been rejected." O.C.G.A. §21-2-385(e). The rule requires that they report daily "the total number of voters who have participated," whether they voted early or by mail, "the number of political party or nonpartisan ballots cast," and "the date on which the information was provided." Ga. Comp. R. & Regs. 183-1-12-.21.

The trial court faulted the Election Board for ensuring more transparency than the statutory minimum. (V1-12). That's the same mistake that runs through the rest of its order: there's no contradiction between the statute and the rule, and absent a conflict or a delegation problem, the trial court should've asked whether the Rule was within the Board's rulemaking authority. *See Polo Golf & Country Club Homeowners Ass'n v. Cunard*, 310 Ga. 804, 814 (2021) (a rule is unlawful if it "'exceeds the scope of or is inconsistent with the authority of the statute upon which it is predicated'"). Ensuring transparency is within the Board's authority to promulgate rules that "will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. §21-2-31(2). The rule is a lawful exercise of the Board's duties.

* * *

The trial court committed the same fundamental error for each rule. It reasoned that because the General Assembly didn't provide for each rule, the Election Board couldn't promulgate each rule. This Court has never endorsed that approach. For good reason: if the General Assembly has already provided the rule by statute, there's no need for the Election Board to duplicate it in the regulatory code. The trial court didn't even discuss whether each rule is

authorized by the Election Board's rulemaking duties. O.C.G.A. §21-2-31. That alone is reason to reverse the trial court's judgment.

## Conclusion

For the foregoing reasons, the Court should reverse the trial court's judgment.

This submission does not exceed Rule 20's word-count limit.

Respectfully submitted this 8th day of January, 2025.

*<u>/s/ William Bradley Carver, Sr.</u>*

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## Certificate of Service

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This 8th day of January, 2025,

*/s/ William Bradley Carver, Sr.*