In the Supreme Court of Georgia

Case Nos. S25A0362 & S25A0490

State of Georgia,
Republican National Committee, and
Georgia Republic Party

Consolidated Appellants,

v.

Eternal Vigilance Action, Inc., et al.

Appellee

ON APPEAL FROM THE SUPERIOR COURT OF FULTON COUNTY
CASE NO. 24CV011558

APPELLANT STATE OF GEORGIA'S PRINCIPAL BRIEF

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Introduction

Eternal Vigilance Action, Inc. ("EVA"), Scot Turner, and James Hall (as to Turner and Hall, "Individual Appellees") (collectively, "Appellees") brought one of numerous lawsuits challenging election rules passed by the State Election Board ("SEB") in advance of the November 5, 2024, general election.[1] Appellees alleged that seven specific challenged rules contradicted the Election Code and were not within the scope of the authority granted to the SEB by the Legislature. Unlike the litigants in the other cases, Appellees had an additional agenda: to convince a court to invalidate *all SEB rules* and declare all rulemaking by the SEB unconstitutional. Although the matter was litigated on an expedited timeline because, and only because, of the fast approaching election, the trial court accepted Appellees' invitation to rule in broad strokes on consequential constitutional issues. In doing so, the Trial Court abandoned judicial restraint and ignored the doctrine of constitutional doubt.

[1] The evidentiary hearing was held 34 days after the initial complaint and 21 days after the amended complaint was filed. The final order was issued within an hour after the hearing's conclusion.

The Order's expansive nature aside, the trial court also decided the issues presented incorrectly. To begin, the court erred in finding standing based on the Individual Appellees' speculative and hypothetical claims about how the challenged rules *might* impact them, and EVA's similarly vague assertions it was forced to divert resources and had its organizational mission frustrated.

Similarly, the court erred in finding that Appellees presented a justiciable controversy concerning the challenged rules sufficient to entitle it to a declaratory judgment. Appellees' "uncertainty" and "concern" about the *potential* impacts of the SEB Rules are simply insufficient to warrant declaratory judgment.

In perhaps its most expansive holding, the Trial Court determined that the Elections Clause to the U.S. Constitution prevents the delegation of rulemaking power to the SEB. The Trial Court thus overlooked the binding precedent of *Moore v. Harper*, 600 U.S. 1, 26 (2023), which holds precisely otherwise.

The Trial Court also incorrectly concluded that the Election Code provides no guidelines governing the SEB's rulemaking authority, a holding that ignores completely the relevant language of the Election

Code. And finally, the Court erred in that the challenged rules contradict the Election Code and exceed the authority granted to the SEB by the General Assembly.

Jurisdictional Statement

The final order of the Fulton County Superior Court was entered on October 16, 2024 (V1-669-679) ("Order"). The notice of appeal was filed on November 15, 2024. (V1-1-19). This Court, and not the Court of Appeals, has jurisdiction under Ga. Const. Art. VI, Sec. VI, Par. V because appeal "presents issues of gravity and public importance." (V1-18).

Enumeration of Errors

Set forth below are each enumeration of error relied upon pursuant to this consolidated Appeal:

1. The trial court erred in finding that the Individual Appellees and EVA have standing to challenge the state action at issue here;

2. The trial court erred in finding Appellees presented a "justiciable controversy" warranting declaratory judgment;

3. The trial court erred in holding that that the General Assembly failed to provide any guidelines for the SEB rulemaking authority;

4. The trial court erred in failing to exercise judicial restraint;

5. The trial court erred in holding that the General Assembly violated the U.S. Const. art. I, § 4, cl. 1; and

6. The trial court erred in holding the SEB Rules "contradict" the election code.

Statement of the Case

I. Georgia Election Code and the SEB

In 1964, the Georgia Legislature passed the first unified Election Code to

> . . . provide for the comprehensive regulation of federal, state and county elections, and of primaries to nominate candidates for federal, state and county offices, and to provide for the comprehensive regulation of any federal, state and county primary or election, for any other purpose whatsoever; [and] *to create a State Election Board and to define its powers and duties concerning primaries and elections.*

See 1964 Ga. Laws Ex. Sess. 26-220 (emphasis added). The General Assembly conferred on the SEB the authority "to 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 . . . ." *See* 1964 Ga. Laws Ex. Sess. 26, 33-34. Although the General Assembly amended the Election Code numerous times in the 60 years since its passage, it never changed a word of the original language conferring rulemaking authority to the SEB.

In Act 76 of 2008, the General Assembly conferred additional rulemaking authority to the SEB, requiring it "[t]o 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." 2008 Georgia Laws Act 706 (H.B. 1112). The language of O.C.G.A. § 21-2-31(1) has not been amended since 2008.

II. Proceedings Below

On September 12, 2024, Appellees filed this action against the State of Georgia, seeking declaratory relief that four recently passed SEB Rules, 183-1-12.02(c.2), 183-1-12.12, 183-1-14.02(18), 183-1-14.02(19), were unconstitutional and contrary to the Election Code, and seeking injunctive relief preventing them them from going into effect. (V1-28-30) (Compl. ¶ 23-27). Respondents further sought declaratory relief that all SEB rules were unconstitutional (V1-28-30) (Compl. ¶ 23-27). On September 23, 2024, Appellees filed an emergency motion to expedite the matter. (V1-52-58). On September 25, 2024, Appellees amended their complaint seeking the same relief regarding three newly passed SEB rules: 183-1-13.05, 183-1-21.21, and 183-1-12-.12(a)(5). (V1-59-66) (Am. Compl).

On September 25, 2024, the Fulton County Superior Court issued a Rule Nisi and Administrative Order requiring the parties to brief the

legal issues raised, file proposed orders, and file a joint list of the legal issues by October 3, 2024, and further setting an in-person evidentiary hearing on October 4, 2024. (V1-88-91). On October 2, 2024, the court issued an Amended Scheduling Order, rescheduling the evidentiary hearing for October 16, 2024. (V1-165-168).

The evidentiary hearing was conducted on October 16, 2024. Shortly after the hearing had concluded, the court issued its order granting Appellees' declaratory and injunctive relief. (V1-669-679) (Order).

Summary of the Argument

I. All Appellees Lack Standing.

Because neither the Individual Appellees nor EVA demonstrated a "particularized injury," Appellees lack standing to pursue their claims challenging the State Election Board rules. The Trial Court improperly applied a "community stakeholder" standing analysis limited to challenges to local government actions when it held that the Individual Appellees had standing. In doing so, the Trial Court misinterpreted this Court's rulings in both *Sons of Confederate Veterans v. Henry Cnty. Bd. Of Comms., 315 Ga. 39, 54 (2022)* and *Cobb County v. Floam, 319 Ga. 89, 91 (2024)*, cases in which this Court expressly limited the "community stakeholder" standing analysis to challenges to local government action.

The Individual Appellees failed to show that the SEB Rules injured or imminently threatened to injure their right to vote or have their votes counted. The Individual Appellees do not articulate any concrete imminent injury that is not dependent on future contingencies or mere possibilities, and their affidavits reveal only "concern" and "uncertainty." But "concern alone does not standing confer," and generalized interests like the right to vote or have a vote counted cannot be "contingent upon

future events[.]" *Board of Natural Resources v. Monroe Cnty.*, 252 Ga. App. 555, 558 (2001).

EVA likewise lacks organizational standing. Appellee, a non-profit corporation, is not a voter, and therefore cannot argue it has a right to vote or have its vote counted to challenge the SEB Rules. The fact that EVA advocates for voters and has professes an interest in votes being counted is not sufficient. *See Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 381 (2022). Additionally, that EVA diverted resources to combat the SEB Rules is likewise insufficient, as this Court has previously rejected similar "diversion of resources" arguments in favor of standing.

II. Appellees Fail to Present a Justiciable Controversy Warranting Declaratory Judgment.

Superior courts may declare rights and other legal relations of any interested party in cases of actual or justiciable controversy. *Baker v. City of Marietta*, 271 Ga. 210, 215 (1999). Courts may not, however, issue declaratory relief "when a declaration of rights would not direct the plaintiff's" conduct in the future. *See*, *e.g.*, *Floam*, 319 Ga. at 97. Rather, there must be "some immediate legal effect on the parties' conduct, rather

than simply burning off an abstract fog of uncertainty." *Perdue v. Barron*, 367 Ga. App. at 163 (emphasis added) (citation omitted).

Here, Appellees presented nothing further than "uncertainty" and "concern" that the SEB Rules *might* cause some future harm if certain contingencies were to take place. In other words, Appellees asked the Trial Court to "burn[] off an abstract fog of uncertainty," rather than issue guidance as to their future conduct. *Id.* In providing that relief, the Trial Court issued an illegal advisory opinion that should be reversed.

III. The Trial Court Ignored the Election Code's Guidelines Establishing the Scope of the SEB's Rulemaking Authority.

The Trial Court incorrectly held, without analysis, that "there are no guidelines providing for the challenged SEB Rules above." (Order, p. 8). This is simply false, and ignores the explicit guidelines set forth in O.C.G.A. § 21-2-31, O.C.G.A. § 21-2-33.2, O.C.G.A. § 21-2-35, and others. The guidelines include the duty 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." O.C.G.A. § 21-2-31(1). These guidelines constrains the SEB to rulemaking for the purpose of making election activities uniform and

legal, and to help guide election officials in their duties. The Trial Court's holding thus has no basis.

IV. The Trial Court did not Exercise Requisite Judicial Restraint when Unnecessarily Ruling on Constitutional Issues.

Once the Trial Court held that the SEB exceeded its authority when it passed its Rules, its analysis should have ended there. Instead, it issued a consequential, far-reaching order that calls into question actions of the General Assembly, the existence of the SEB, and the ability of the General Assembly to delegate rulemaking authority at all. In doing so, the Trial Court ignored "the cardinal principle of judicial restraint . . . if it is not necessary to decide more, it is necessary not to decide more . . . ." *Chrysler Grp., LLC v. Walden*, 303 Ga. 358, 372 (2018) (Peterson, J., concurring).

V. Legislative Delegations of Rulemaking Authority Concerning Elections Do Not, as a Rule, Violate Article I, Section 4, Clause 1 of the United States Constitution.

The Trial Court, relying upon a dissenting opinion by Justice Alito in a binding case holding precisely the opposite, held that *any* delegation of election related rulemaking authority violates the United States Constitution. In *Moore v. Harper*, the Supreme Court held that "although the Elections Clause expressly refers to the "Legislature," it does not

preclude a State from vesting [election related] authority in a body other than the elected group of officials who ordinarily exercise lawmaking power. States . . . retain autonomy to establish their own governmental processes. 600 U.S. 1, 10 (2023).

VI. The SEB Rules do not "Contradict" the Election Code.

The Trial Court holds that each of the challenged SEB Rules contradict the language of the Election Code. In attacking the SEB Rules, the Trial Court most often relies upon the mere lack of language in the Election Code addressing the topic of the SEB Rules as evidence of these supposed contradictions. In this sense, the Trial Court adopts an "absolute standard" that is neither practical nor reflective of the state of administrative law in Georgia. In so doing, the Trial Court also runs afoul of the general proposition that "there are many matters as to methods or details which the Legislature may defer to some designated ministerial officer or board . . . leaving to [them] the making of subordinate rules within prescribed limits." *Calhoun v. N. Ga. Elec. Membership Corp.*, 233 Ga. 759, 768–769 (1975).

Argument

I. The Trial Court Erred in Finding that the Individual Appellees and EVA have Standing to Challenge the State Action at Issue Here.

The Trial Court misapplied the "community stakeholder" standard reserved for challenges to local government action in holding that the Individual Appellees have standing to pursue their challenges to the SEB Rules. The Trial Court likewise erred in holding that EVA showed a "particularized injury," and that its alleged "diversion of resources" resulting from issuance of the SEB Rules was sufficient injury to establish organizational standing.

At the court below, the Individual Appellees failed to show how the SEB Rules caused a concrete injury or imminent threat of a concrete injury to their ability to register to vote, cast their vote, have their votes counted, or their purported right to have the election certified. Instead, they argue that as "community stakeholders," they were "injured for purposes of establishing standing by the SEB's failure to 'follow the law[.]" (V1-447) The Trial Court agreed, holding that the Individual Appellees met their burden under the more relaxed "community stakeholder" standing analysis recently addressed by this

Court in both *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comms.*[2] and *Cobb County v. Floam*.[3] (V1-670) That standard is, however, limited to cases challenging *local* government action.

EVA, whom the Trial Court held satisfied "organizational standing" requirements, also fails to establish a "particularized injury" for two reasons. First, EVA failed to demonstrate how the SEB Rules caused an actual injury to EVA's own interests, and, second, this Court has previously rejected the "diversion of resources" argument EVA relied upon below.

Because none of the Appellees can show a "particularized injury," and because a "particularized injury" is required to confer standing for challenges to state action, the Order should be reversed.

a. Georgia's Applicable Standing Jurisprudence.

Standing is a "threshold question . . . [a] "jurisdictional prerequisite necessary to invoke a court's judicial power under the Georgia Constitution." *Perdue v. Barron*, 367 Ga. App. 157, 160 (2023); *Floam*, 319 Ga. at 91. In this context, a Trial Court's "application of law to the

[2] *Sons of Confederate Veterans v. Henry Cnty. Bd. Of Comms.*, 315 Ga. 39, 54 (2022) ("*SCV*").
[3] *Cobb County v. Floam*, 319 Ga. 89, 91 (2024) ("*Floam*").

facts is subject to de novo appellate review." *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 381 (2022) ("*BVMF*").

A litigant must show a "particularized injury" to challenge a state action. *Floam*, 319 Ga. at 91. The "particularized injury" threshold for judicial review "is akin to the Article III injury-in-fact requirement," and it is "rooted in principles of separation of powers." *Id.* at 92. In this vein, this Court has long held that "Georgia courts may not decide the constitutionality of statutes absent an individualized injury to the plaintiff." *SCV*, 315 Ga. at 54.

Here, in a case involving a challenge to *state* action, Appellees must demonstrate that each challenged regulation injures each Appellee's alleged right, and that each alleged injury is not "contingent upon future events[.]" *Board of Natural Resources v. Monroe Cnty.*, 252 Ga. App. 555, 558 (2001). In addition, standing is not dispensed "in gross," and each plaintiff must demonstrate standing as to each claim pursued. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006).

Organizational standing, upon with EVA relies, permits an organization to sue in its own right if it meets the same standing test applicable to individuals. *BVMF*, 313 Ga. at 382. The organization "itself

[must] suffer an actual, concrete, and particularized injury as a result of a defendant's actions," and "when the plaintiff is not [itself] the object of the government action or inaction [it] challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id.* at 387.

b. *The Trial Court Erred in Applying the Community Stakeholder Standing Analysis in this Case involving State—not Local Government—Action.*

The Trial Court held that "[the Individual Appellees] . . . are voters, taxpayers, and community stakeholders who have an interest in their government following the law . . . and are injured when their governments do not follow the law." (V1-670). The Court, concluding that this alleged injury conferred standing on the Individual Appellees, thus misapplied the holdings of both *SCV* and *Floam* to this action challenging state government conduct.

In *SCV*, this Court held that "where a public duty is at stake, a plaintiff's membership in the community provides the necessary standing to bring a cause of action." *SCV*, 315 Ga. at 61. The Court did not extend its holding in *SCV*, however, beyond actions challenging local conduct: "[w]e reiterate that when a local government owes a legal duty to

community stakeholders, the violation of that legal duty constitutes an injury that our case law has recognized as conferring standing to those stakeholders, even if the plaintiff at issue suffered no individualized injury." *Id.* at 67.[4] This Court then clarifies:

> We have long held that Georgia courts may not decide the constitutionality of statutes absent an individualized injury to the plaintiff . . . This kind of individualized injury appears similar to the injury-in-fact required federally . . . And nothing in this opinion should be understood to undermine in any way our longstanding case law articulating this requirement.

Id. at 54, n. 13. The Court applied this logic at the outset of its analysis of each plaintiff in *SCV*, stating "[s]ince they are not challenging the constitutionality of a statute, the Plaintiffs do not need to have alleged an individualized injury." *Id.* at 63.

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[4] This Court has applied a "less-individualized kind of injury as satisfying the standing requirement" to enforce public rights within the context of voting cases. *See BVMF*, 313 Ga. 375, 955-96 (2022) (Petersen, J., concurring) (*citing Barrow v. Raffensperger*, 308 Ga. 660 (2020); *Manning v. Upshaw*, 204 Ga. 324 (1948)); *see Bd of Comm'rs of City of Manchester v. Montgomery,* 170 Ga. 361 (1930); *see generally SCV*, 315 Ga. at 59-60 (citing cases applying standard from *Montgomery* codified in O.C.G.A. § 9-6-24 regarding standing based in some cognizable injury; citations incorporated herein by reference). But this exception is limited to mandamus actions under O.C.G.A. § 9-6-24 challenging a local or municipal bodies failure to enforce a public right. *See SCV*, 315 Ga. at 60 (citing *Barrow,* 308 Ga. at 667; *Rothschild v. Columbus Consol. Govt*, 285 Ga. 477, 479-480, 678 S.E.2d 76 (2009); *Manning*, 204 Ga. at 326).

In *Floam*, this Court again emphasized the distinction between challenges to local government and state government action, explaining that in *SCV*:

> We arrived at that conclusion based precedent showing that for nearly 100 years prior to the adoption of the 1983 Georgia Constitution, Georgia had allowed citizen, taxpayer, resident, or voter suits to challenge various county and city actions without demonstrating a particularized injury because those community stakeholders had a cognizable interest in having their government follow the law.

Floam, 319 Ga. at 91. This Court then addressed the salient differences between local and state government for standing purposes:

> A county commission is not part of a State government, much less a branch co-equal with the State's judicial branch. For that matter, the constitutional separation of powers principle does not even apply to counties or municipalities . . . [c]onsequently, the animating reason to require a particularized injury to challenge *state* legislative actions is not present for challenges to county or municipality legislative actions.

Id. at 92.

Both *SCV* and *Floam* affirmed long-standing case law in this State that challenges to State action requires a showing of a "particularized injury," and merely being a "community stakeholder" with an interest in his or her government following the law does not suffice in this context.

c. *The Trial Court Erred in Holding that the Individual Appellees Demonstrated Harm Beyond Speculative or Hypothetical "Concerns" or "Uncertainty*"

Because no Individual Appellee can demonstrated a "particularized injury" to an individual right, no Individual Appellee had standing to challenge the SEB Rules. Rather, the Individual Appellees argued below that, if certain hypothetical unfortunate acts occur, they might suffer harm. But "concern alone does not standing confer," and Appellees therefore failed to demonstrate any sufficient "particularized injury." *Perdue*, 367 Ga. App. at 161.

The Individual Appellees each share nearly identical purported injuries, which amount to nothing more than speculative "concerns" or "uncertainty" premised entirely upon hypotheticals:

1. "However, I am currently uncertain regarding the method in which I will vote . . . ." (V1-651, 660);

2. "I am uncertain whether the State, the SEB, Cherokee County election workers, officials, and superintendents will follow the specific and mandatory dictates of the Election Code, or whether they will follow the SEB's contrary rules in conducting the upcoming election." (V1-652, 662);

3. " . . . I am uncertain whether election workers, officers, officials, and superintendents, will be confused regarding the proper rules governing the election and whether deviation from the proper rules will lead to an invalidation, not counting, or non-certification of my vote or the votes of others in my community." (V1-652, 662).

4. "I am further concerned and uncertain whether the rules passed by the SEB will cause local election officials, poll workers, and superintendents to conduct the election in a manner inconsistent with the terms outlined by the General Assembly, and that my votes, and the votes in my community, will not be accurately counted or certified." (V1-652, 662-663).

5. ". . . I am uncertain as to whether my vote, and the votes of others in my community, will survive a 'reasonable inquiry' and be certified at all by the local election officials . . . ; whether my vote, and the votes of others in my community will survive and be certified; whether I, or a person in my community, can lawfully transmit their absentee ballots . . . and whether those votes will be accepted by local voting workers . . . ; whether legislative approved ballot boxes will be available for the November 2024 election . . . ; whether votes, including mine, will be

counted and certified if the poll watchers are not allowed into the areas that SEB now requires . . . ; whether my local election officials will follow the new SEB rule or the law and whether failure to follow that daily reporting rule will affect the votes counted and certified, including my own; [and] I am concerned that the hand counting of ballots, rather than the methodology set forth in the Election Code, will lead to the non-counting or miscounting of votes, the delay of certification, if the hand counting results in a disagreement among those counting the votes or results in the mishandling of properly cast ballots. " (V1-653-656, 663-666).

6. "I am concerned that if left unresolved prior to the November 2024 election, then it is possible all election results in Georgia would be subject to legal and other challenges, and that new counting or a new vote may be required . . . ." (V1-657, 666-667).

As can be seen, the Individual Appellees couch their purported injuries in terms of "concerns" or "uncertainty" as to the impact of the SEB Rules on their right to vote or have their vote counted. The Individual Appellees thus fundamentally premise each "concern" upon a mere *potential* that the purported injuries *might* happen, presenting

nothing imminent or concrete. As such, any potential injury alleged is explicitly "contingent upon future events," and therefore insufficient to establish a standing. *Board of Natural Resources*, 252 Ga. App. at 558.

Nor do the Individual Appellees explain why their *individual* right to vote or have their vote counted has suffered or will suffer harm. The Individual Appellees do not distinguish any harm they might suffer beyond that which *might* be suffered by the voting public at large. As such, they fail to demonstrate a "particularized injury."[5] *See Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1320 (N.D. Ga. 2020), aff'd, 981 F.3d 1307 (11th Cir. 2020) ("To be 'particularized,' the alleged injury must affect the plaintiff in a personal and individual way.") (internal quotations omitted); *see also Lance v. Coffman,* 549 U.S. 437, 442 (2007) ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind

[5] This Court held that Georgia's "particularized injury" requirement in challenges to state action is akin to that at issue in federal Article III standing cases. *Floam*, 319 Ga. at 92 ("This Court early on recognized that our judicial review was sometimes precluded in a way that is akin to the Article III injury-in-fact requirement.") As such, citation to federal standing jurisprudence in this context is appropriate.

of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.").

The Trial Court also erred in holding that Mr. Hall established an injury due to his "concer[n] about his role as a member of the Chatham County Board of Elections regarding whether to follow the SEB Rules or the Election Code," and further that "Hall is concerned that absent clarification on this issue, he is exposing himself personally to legal liabilities and public opprobrium or score related to the actions he takes." (V1-670) These alleged injuries likewise merely reflect "concern," and again reflect concerns about hypothetical events that *might* happen. Mr. Hall further provides no evidence that these risks actually do, in fact, exist, or why. Finally, and again as before, Mr. Hall does not articulate how his alleged injury is distinct from any other member of a superintendent in Georgia.

d. The Trial Court Erred in Holding EVA Satisfied the Requirements to Confer Organizational Standing.

The Trial Court held that EVA established organizational standing for two reasons: (1) "[t]he loss of public confidence will directly impact and impair Eternal Vigilance Action's efforts and mission to ensure clarity and public confidence in those institutions" and (2) the "loss of

public confidence . . . has already caused and will continue to cause a diversion of" EVA's resources. (V1-671). Neither of these purported injuries satisfy the "particularized injury" standard.

In *BVMF*, the Black Voters Matter Fund filed a suit alleging that that Senate Bill 9, which converted the Augusta Judicial Circuit into two new judicial circuits, had discriminatory intent, and would negatively impact black voters in those circuits. 313 Ga. at 375-376. In support of its argument for standing, the organization alleged that it was a "nonprofit organization registered in the State of Georgia whose purpose and mission is to promote and protect the voting rights of Black voters in Georgia through grass roots campaigning, public relations, political endorsements, lobbying, and litigation." *Id.* at 377.

This Court held that BVMF lacked standing because "BVMF is a nonprofit corporation . . . not a person entitled to vote in the Augusta Judicial Circuit." *Id.* at 382. The purported harm was suffered by the voter—*not* the organization advocating on behalf of the voter. This Court then held that "the fact that BVMF's corporate mission includes an interest in advocating for the rights of Georgia voters by engaging in

litigation does not, in and of itself, give it direct standing to challenge SB 9, as if it were a voter." *Id.* at 383.

The Court's rationale applies equally here. The Trial Court held that "the loss of public confidence in election institutions" harms EVA's "efforts and mission to ensure clarity and public confidence in those institutions." (V1-671). This logic mirrors that rejected by this Court in *BVMF*, as the actual injury alleged is the amorphous "loss of public confidence in election institutions," not any alleged right enjoyed individually by EVA. Setting aside that EVA provided no evidence the SEB Rules actually did create a "loss of public confidence," EVA's efforts to respond to the rules do not create a concrete injury necessary to confer standing.

Turning again to *BVMF*, this Court applied the rationale set forth in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) ("*Havens*"), to reject an organization's standing argument nearly identical to that relied upon by the Trial Court here. 313 Ga. at 384-387. This Court held that "an organization suffers an injury in fact for purposes of standing when the defendant's actions impair the organization's ability to provide its services or to perform its activities and, as a consequence of that

injury, require a diversion of an organization's resources to combat that impairment." *Id.* The Court refused to read *Havens* to hold that an organization's diversion of resources to litigation suffices to confer standing. *Id.* Emphasizing this point, the Court held that "when the plaintiff is not itself the object of the government action or inaction it challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id.* at 385.

Since *BVMF*, the United States Supreme Court in *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 393–96 (2024) clarified the scope of *Havens* consistent with this Court's adoption of a narrow reading of that case:

> The medical associations respond that under *Havens* . . . standing exists when an organization diverts its resources in response to a defendant's actions. That is incorrect. Indeed, that theory would mean that all organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies. *Havens* does not support such an expansive theory of standing.

Id.

In short, EVA failed to demonstrate how the SEB Rules directly injured rights that it, itself, enjoys. Further, EVA cannot spend its way

into standing by diverting its resources to contest the SEB Rules. As such, the Trial Court erred in holding EVA established standing.

II. The Trial Court Erred in Finding Appellees Presented a "Justiciable Controversy" Warranting Declaratory Judgment.

As with standing, the justiciability of a declaratory judgment action presents a threshold question. *Perdue*, 367 Ga. App. at 163. Because the Appellees sought neither relief nor clarification as to the propriety of their own future conduct, the Order constitutes an illegal advisory opinion.

As discussed in depth *supra*, the Trial Court noted with approval Appellees "concern" that the SEB Rules are invalid, and their "concern" and "uncertainty" regarding the impact the SEB Rules *might* have had in the recent election. A court, however, "has no province to determine whether or not a statute, in the abstract, is valid." *Fourth Street Baptist Church of Columbus v. Bd. of Registrars*, 253 Ga. 368, 369 (1984) (*citing Cooks v. Sikes*, 210 Ga. 722 (1954)). Furthermore, to enter a declaratory judgment based on the alleged *possibility* of a "future contingency" like those alleged by Appellees and relied upon by the Trial Court results in "an erroneous advisory opinion" that "must be vacated." *Baker v. City of*

Marietta, 271 Ga. 210, 215 (1999) ("Declaratory Judgment will not be rendered based on a possible or probable future contingency.").

Under the Declaratory Judgment Act, superior courts may "declare rights and other legal relations of any interested party" seeking such declaration either in "cases of actual controversy" or "justiciable controversy." *Id.* at 214. A justiciable controversy requires "circumstances showing a necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct . . . ." *U-Haul Co. of Az. v. Rutland*, 348 Ga. App. 738, 747 (2019); *see also* O.C.G.A. § 9-4-1.

Furthermore, a claim for declaratory relief is not proper "when a declaration of rights would not direct the *plaintiff's*" conduct in the future. *See Floam*, 319 Ga. at 97 (emphasis added). Put differently, and using language akin to that employed by Appellees and the Trial Court, there must be "some immediate legal effect on the parties' conduct, *rather than simply burning off an abstract fog of uncertainty*." *Perdue*, 367 Ga. App. at 163 (emphasis added) (citation omitted).

Appellees failed to allege or demonstrate that "*they* [were] at risk of taking some undirected future action incident to their rights and that

such action might jeopardize their interests." *Floam*, 319 Ga. at 520 (emphasis in original). Appellees did not state that the rules actually did infringe upon their right to vote or have their votes counted. And "because [Appellants] do not allege or argue that [they] face[] any uncertainty or insecurity as to [their] own future conduct . . . a declaratory judgment is merely advisory and dismissal of a claim for such relief is required." *Williams v. Dekalb Cnty.*, 308 Ga. 265, 271 (2020).

III. The Trial Court Erred in Holding that Holding that the General Assembly Failed to Provide Any Guidelines for the SEB Rulemaking Authority.

Without *any* explanation, the Trial Court found that ". . . there are no guidelines providing for the challenged SEB Rules above." (V1-676). In this respect, the Trial Court is simply wrong, and ignored the relevant guidelines governing the SEB's authority.[6]

[6] Further, the Trial Court's conclusory opinion that the Election Code must be the beginning and end of election lawmaking rests on the false premise that the SEB Rules are laws, as opposed to administrative regulations, and misapprehends the fundamental of administrative law. *See Wood*, 501 F. Supp. 3d at 1328 (interpreting similar grant of regulatory authority to the Secretary of State, "Wood does not articulate how the Settlement Agreement is not 'consistent with law' other than it not being a verbatim recitation of the statutory code. Taking Wood's argument at face value renders O.C.G.A. § 21-2-31(2) superfluous. A state official …could never wield his or her authority to make rules for

The non-delegation doctrine "is 'rooted in the principle of separation of powers' and 'mandates that the General Assembly not divest itself of the legislative power granted to it by Art. 3, Sec. 1, Para. 1, of our Constitution' by delegating legislative powers to (for example) executive agencies." *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 49 (2020). This Court has emphasized, however, "that the General Assembly's 'delegation of legislative authority is permissible when it is accompanied by sufficient guidelines for the delegatee.'" *Id.* Or, stated differently, "legislation need delineate only an intelligible principle to which the agency or delegatee is to conform." *See Banks v. Georgia Power Co.,* 267 Ga. 602, 603 (1997).[7] This Court has afforded flexibility to the Legislature on the terms on which its authority is delegated, stating

> [W]hile it is necessary that a law, when it comes from the law-making power shall be complete, still there are many matters as to methods or details which the Legislature may defer to some designated ministerial officer or board. The

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conducting elections that had not otherwise already been adopted by the Georgia General Assembly.")

[7] This Court has found decisions of the United States Supreme Court on separation of powers to be persuasive authority. See *Perdue v. Baker*, 277 Ga. 1, 13, 586 S.E.2d 606, 615 (2003) ("Because the Supreme Court's exposition of separation of powers is consistent with this Court's prior rulings on the issue, we find federal precedent persuasive in considering the question before us.").

> constitutional prohibition, therefore, does not deny to the lawmaking body the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.

City of Calhoun v. N. Georgia Elec. Membership Corp., 233 Ga. 759, 768–69 (1975) (cleaned up); *see also Pearle Optical, Inc. v. State Bd. of Examiners*, 219 Ga. 364 (1963). This legislative deference makes sense, because, "in our complex society," the Legislature "cannot find all facts and make all applications of legislative policy." *Dep't of Transp*, 260 Ga. at 703.

While the SEB does have flexibility, the Trial Court is incorrect to say the Legislature has given the SEB no guidance. The enabling legislation provides "sufficient guidelines" or an "intelligible principle" for the SEB to base its conduct. *See, e.g.*, O.C.G.A. § 21-2-31(1) (SEB has the "duty" 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*.") (emphasis added); § 21-2-31(2) (SEB shall "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 ….” O.C.G.A (emphasis added); § 21-2-31(7) (SEB shall “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.”); *see also* O.C.G.A. §§ 21-2-33.2; 21-2-35.

Most critically, the Legislature requires that the SEB rules be “consistent with law.” A delegation only violates the separation of powers provision when it “mix[es] the legislature's power to make the laws, with the executive's power to enforce them ….” *Albany Surgical, P.C. v. Georgia Dep't of Cmty. Health*, 278 Ga. 366, 368 (2004). In other words, the SEB cannot itself make laws, but it is authorized to fill in the blanks and administer the laws the Legislature has made. This Court consistently upholds delegations explicitly constrained by the the law. See *Banks*, 267 Ga. at 603–04 (delegatees’ “discretion is not unfettered … in that it must act in good faith and *within the powers conferred upon it by law*”) (emphasis added)

Indeed, the language governing the SEB’s rulemaking authority is echoed in other agencies’ enabling legislation, of which there are far too

many examples to include here. *See, e.g.*, O.C.G.A. § 2-6-7(b) ("The Cooperative Extension Service shall have the authority to make such rules and regulations consistent with this article and to do any and all other acts consistent with this article which it finds to be necessary or proper for the effective administration of this article."); § 2-23-12 ("The department [of agriculture] may promulgate rules and regulations as necessary to implement the provisions of this chapter."); § 3-4-153 ("The [state revenue] commissioner shall have the authority to adopt such regulations as are consistent with this article."); § 3-5-30(c) ("The [state revenue] commissioner shall have the authority to promulgate such regulations as are consistent with the stated policies of this article."); § 3-11-5 ("The [state revenue] commissioner shall be authorized to promulgate rules and regulations to implement and carry out the provisions of this chapter."); § 4-5-10 ("The Commissioner of Agriculture is authorized to promulgate rules and regulations to implement and accomplish the purposes of this chapter."); § 7-1-61(a) (The department [of banking and finance] shall have the authority to promulgate rules and regulations to effectuate the objectives or provisions of this chapter. Without limiting the generality of the foregoing, the department is

expressly authorized to make rules and regulations, consistent with this chapter, relating to organization, operations, and powers of financial institutions to: (1) Enable financial institutions existing under the laws of this state to compete fairly with financial institutions and others providing financial services in this state existing under the laws of the United States, other states, or foreign governments; or (2) Protect financial institutions jeopardized or challenged by new economic or technological conditions or by significant changes in the legal environment.); § 33-13A-13 ("The [Insurance] Commissioner shall have the authority to promulgate rules and regulations to implement and enforce the provisions of this chapter.")

To conclude, the Trial Court erred in finding that the Election Code does not contain guidelines constraining the SEB's rule making authority. That the SEB Rules reflect appropriately constrained rulemaking is explored further below.

IV. The Trial Court Erred in Failing to Exercise Judicial Restraint.

Regardless of the merits of these questions of the constitutional questions decided by the Trial Court, the Trial Court should not have decided these issues in the first place.

The gravamen of Appellees' suit is that specific SEB Rules are invalid because they exceed the parameters of the authorizing legislation. Not content to enjoin the *challenged rules*, the Trial Court instead issued a broad and consequential ruling on, among other constitutional questions, the manner in which *the General Assembly* granted rule-making authority to the SEB. If not reversed, the Order implicates every rule promulgated by the SEB (not only the challenged rules*)* and calls into question the SEB's very existence (to say nothing of other agencies whose enabling legislation echoes the SEB, of which there are many).

"[T]he cardinal principle of judicial restraint" is "if it is not necessary to decide more, it is necessary not to decide more …." *Chrysler Grp., LLC v. Walden*, 303 Ga. 358, 372 (2018) (Peterson, J., concurring) (*citing Moore v. McKinney*, 335 Ga. App. 855, 857 (2016)).[8] "[I]t is not the role of [courts] to formulate new law in the abstract," but "the law as it exists should be applied to the realities of the case presently before the Court." *Bragg v. Oxford Const. Co.*, 285 Ga. 98, 100 (2009).

[8] *See also* 21 C.J.S. Courts § 179 ("Cases should be decided on the narrowest legal grounds available, and a court should avoid unnecessary decisions.") (internal footnote omitted).

Moreover, the Trial Court's far-reaching decision ruling also went to novel and complex questions of constitutional law that should not have been addressed once the Trial Court held that the SEB exceeded its authority, and certainly not on the expedited timeline of this case. As this Court has repeatedly reaffirmed, "[p]roperly enacted statutes carry a presumption of constitutional validity, and inquiry into the constitutionality of a statute generally should not be made by the Trial Courts if a decision on the merits can be reached without doing so." *State v. Randall*, 318 Ga. 79, 81 (2024) (*Randall II*); *State v. SisterSong Women of Color Reprod. Just. Collective*, 317 Ga. 528, 550 (2023) (same). *State v. Randall*, 315 Ga. 198, 200 (2022) (*Randall I*) (same). As this Court further explained in *Randall II*,

> [W]e do not unnecessarily decide the constitutionality of statutes. As early as 1884, we recognized that principles underlying the separation of powers should also limit occasions on which we determine whether statutes violate the Georgia Constitution to those where such a decision was truly necessary. Comity to a co-ordinate department of the government requires, according to many decisions of this and other courts, that causes shall not be disposed of upon constitutional grounds when it is possible to avoid such questions, without a sacrifice of the rights of the parties. And it is especially so in cases where the constitutional merits are important, novel, and difficult.

Randall II, 318 Ga. at 81–82.

Applying these principles, this Court does not hesitate to vacate Trial Court orders wading into constitutional issues when a decision on the merits could have been reached without reaching that constitutional question. See *Randall I*, 315 Ga. at 200. The same rule should apply here, and the Court should – at minimum – vacate the portions of the Trial Court order which unnecessarily reached the delegation issues.

V. The Trial Court Erred in Holding that the General Assembly Violated the U.S. Const. art. I, § 4, cl. 1.

The Elections Clause to the United States Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof …." U.S. Const., art. I, § 4, cl. 1.[9] "The Clause imposes on state legislatures the duty to prescribe rules governing federal elections." *Moore v. Harper*, 600 U.S. 1, 10 (2023).

The General Assembly often exercises it Elections Clause power in passing legislation affecting elections,[10] such as it did in 1964 when the

[9] The Elections Clause also provides "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., art. I, § 4, cl. 1.

[10] Many election-related regulations are found in the Georgia Constitution, thus they are not subject to legislative control.

Georgia Legislature passed the first unified Election Code and created the State Election Board. Although the General Assembly amended the Election Code numerous times since 1964, it has never changed a word of the original language conferring rulemaking authority to the SEB. *Cf.* Ga. Code Ann. § 21-2-31(2).[11]

The Trial Court misapprehends the Elections Clause to make illegal the Legislature's delegation to the SEB (which presumably would mean it has been illegal since it existed in 1964). This holding reflects the "independent state legislature" ("ISL") theory, "the idea that the federal Constitution singularly delegates the authority to regulate federal elections to state legislatures, to the exclusion of state courts and state executive branches, and regardless of state constitutional provisions." *Ball v. Chapman*, 289 A.3d 1, 15 (Pa. 2023).

However, the Trial Court failed to address the unbroken line of cases from the United States Supreme Court holding otherwise, including *Moore v. Harper,* which soundly rejected the ISL theory and the

[11] In 2008 and continuously ever since, the Legislature has conferred additional rulemaking authority on the SEB. O.C.G.A. § 21-2-31(1).

Trial Court's position.[12] *Green v. State*, 318 Ga. 610, 611 (2024) ("[R]elevant United States Supreme Court precedent . . . binds our Court as to questions of federal law.").

As explored in a holding by Judge Steven D. Grimberg in the U.S. District Court for the Northern District of Georgia:

> Wood argues Defendants usurped the role of the Georgia General Assembly—and thereby violated the United States Constitution—by enacting additional safeguards regarding absentee ballots not found in the Georgia Election Code.
>
> …
>
> State legislatures—such as the Georgia General Assembly—possess the authority to delegate their authority over elections to state officials in conformity with the Elections and Electors Clauses. *Ariz. State Legislature*, 576 U.S. at 816 ("The Elections Clause [ ] is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands ... it is characteristic of our federal system that States retain autonomy to establish their own governmental processes.").

Wood, 501 F. Supp. 3d at 1327–28 (N.D. Ga.).

Here, the Trial Court relied upon a *dissenting* opinion from Justice Alito from denial from an application to vacate stay at an earlier stage of

[12] Although the words "Independent State Legislature" are not contained in the *Moore*, the case was widely understood to be an attempt to get the United States Supreme Court to accept the ISL theory. *See., e.g.*, § 2:71. Rejection of the independent state legislature theory of the Elections Clause in *Moore v. Harper*, 1 Federal Civil Rights Acts (3d ed.) § 2:71.

the *Moore* litigation, and does not address the holding of *Moore* itself.[13] Under the binding precedent, Georgia "retain[s] autonomy to establish [its] own governmental processes." *See Harper*, 143 S. Ct. at 2083 (*citing AIRC*, 576 U.S. at 792). Thus, this Court cannot sustain the Trial Court's position that the Georgia Legislature has an *exclusive* duty to make *rules* regarding elections.[14]

VI. The Trial Court Erred in Holding the SEB Rules "Contradict" the Election Code.

Lastly, the Trial Court erred in determining that each of the SEB Rules at issue "contradicted" the Election Code. Each of the SEB Rules will be addressed in turn below, in the order presented by the Trial Court.

a. SEB Rule 183-1-12.02(c.2) – The "Reasonable Inquiry Rule"

[13] The Trial Court also cites to a concurring opinion from Justice Gorsuch in another denial from an application to vacate stay in *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020), and a concurring opinion from Justice Thomas in a South Carolina redistricting dispute in *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 66 (2024). None of these decisions stand for the nondelegation principle the Trial Court claims.

[14] Additionally, as this Court has made clear, Georgia is "entitled to broad leeway in enacting reasonable, even-handed legislation to ensure that elections are carried out in a fair and orderly manner," it has "a major role to play in structuring and monitoring the election process," and it is "afforded significant flexibility in implementing [its] own voting systems." *Rhoden v. Athens-Clarke Cnty. Bd. of Elections*, 310 Ga. 266, 272-273, 278 (2020) (internal citations and quotation marks omitted).

The Reasonable Inquiry Rule defines "certify the results of a primary, election, or runoff," or words to that effect, to mean "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." Ga. Comp. R. & Regs. 183-1-12-.02(c.2). The Trial Court holds that this rule "is not part of O.C.G.A. § 21-2-493's certification process and it adds an additional and undefined step into the certification process." (V1-673).

First, the word "certify" is not defined in the Election Code, and this definition does not, therefore, conflict with any competing definition. Second, the Reasonable Inquiry Rule does not contain any provisions altering the certification process or that permit election officials "to delay certification" as alleged by Appellees. (V1-32-33, ¶ 36). Indeed, no Party disputes that certification *must* occur when required by the Election Code itself. Thus, contrary to the Trial Court's ruling, the Reasonable Inquiry Rule does not "contradict" the O.C.G.A. § 21-2-493.

b. SEB Rule 183-1-12.12 – "Examination Rule"

The Examination Rule permits members of the superintendents 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). Like the Reasonable Inquiry Rule, the Examination Rule does not grant election officials the authority to delay certification. *See id.* 183-1-12-.12(g). The Trial Court, however, holds that the Examination Rule is contrary to O.C.G.A. § 21-2-493, which it asserts "provides the time, manner, and method in which election-related documentation must be produced and maintained." (V1-34-35,¶ 41) (*citing* O.C.G.A. § 21-2-493)

Here, the Examination Rule can be read not to exceed the scope or be otherwise inconsistent with O.C.G.A. § 21-2-493 because it does not **require** individual board members to do anything; it merely provides that they "shall be **permitted** to examine all election related documentation created . . . ." Ga. Comp. R. & Regs. 183-1-12-.12(f)(6) (emphasis added). In other words, they shall be permitted to examine documents if they so choose, but whether they choose to or choose not to, they *must* certify by the statutory deadline. This is to say nothing of the fact that neither O.C.G.A. § 21-2-493 nor O.C.G.A. § 21-2-70(9) limits who can review such documents and when they can be reviewed. Thus, the

Trial Court erred in holding that the Examination Rule conflicts with the Election Code.

c. SEB Rule 183-1-14-.02(18) – "Absentee Drop Box Rule"

The Trial Court held that because O.C.G.A. § 21-2-385(a) does not address whether to require presentment of a "photo ID" by an individual delivering third party absentee ballots, the Absentee Drop Box Rule therefore conflicts with that statute and is void. But the mere absence of legislation on this particular administrative topic does not prevent the SEB from regulating in that space. To hold otherwise would mean that no SEB regulation is valid if the Election Code is silent on that topic, and thereby effectively undermining the purposes of all administrative agencis. The Trial Court's rationale is thus premised on the notion that the General Assembly's silence on *any* topic reflects an intent not to regulate in the space provided by that silence, and any agency regulation in that space contradicts the General Assembly's intent.

Moreover, requiring presentment of the photo ID by the third party delivering absentee ballots is entirely consistent with the SEB's mandate to draft rules promoting "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." O.C.G.A. § 21-2-31(1). It further serves the SEB's mandate to promulgate rules "as will be conducive to the fair, legal, and orderly conduct of primaries and elections . . . ." O.C.G.A. § 21-2-31(2). The rule ensures that election officials can verify that *only* the individuals the General Assembly permits to deliver third party absentee ballots—an elector's family member or "an individual residing in the household of such elector"—actually does deliver the absentee ballot. The regulation therefore serves, rather than conflicts with, O.C.G.A. § 21-2-385.

d. SEB Rule 183-1-14-.02(19) – the "Video Surveillance Rule"

The Video Surveillance Rule requires video surveillance and recording of a drop box "at any early voting location" at the close of the polls "each day during early voting and after the last voter has cast his or her ballot." Ga. Comp. R. & Regs. 183-1-14-.02(19). The Trial Court held that the rule contradicts the Election Code because "[n]othing in the Election Code permits the video surveillance and recording of a drop box." (V1-40, ¶ 54.) O.C.G.A. § 21-2-382(c)(1), however, expressly requires drop box locations to "have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement

official, or licensed security guard." The Video Surveillance Rule can be read not to exceed the scope of O.C.G.A. § 21-2-382(c)(1) because video surveillance is but one mechanism of "constant surveillance." If anything, in an era when recording devices are ubiquitous and inexpensive, requiring video surveillance *after the polls close* is less burdensome and more efficient than requiring constant surveillance by a human being.

e. SEB Rule 183-1-13-.05 – the "Poll Watcher Rule"

Nothing in the old or the new version of SEB Rule 183-1-13-.05 (or its authorizing statute, Ga. Code Ann. § 21-2-408(c)) impacts in any way the manner in which a poll watcher exercises his or her duties.

The changes from the previous version of the regulation and the new version are limited to additional language in one sentence:

> Such designated places shall include the check-in area, the computer room, the duplication area, and such other areas **that tabulation processes are taking place including but not limited to 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. r. 183-1-13-.05 (emphasis added). *Cf.* O.C.G.A. § 21-2-408(c) ("Such 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.").

The substance of the prior version of the regulation, the regulation as amended, and the authorizing statute is the same. The number of poll watchers does not change, who appoints the poll watchers does not change, and in the statute and both versions of the regulation, the poll watchers can enter "locations designated by the election superintendent within the tabulating center." The additional language in the regulation was intended by the Board to clarify existing law, not add to or alter it, regarding the discrete issue of the location *within the tabulating center* these poll watchers can be situated. (V1-74-77).

In promulgating the new regulation, the Board set forth additional illustrative but not exhaustive examples of locations within the tabulating center where superintendents can situate these poll watchers. Because where the poll watchers are situated is within the discretion of the superintendent in any event, the impact of the clarifying language in

the regulation is negligible. *See McCall v. Finley*, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Regardless, the regulation fits within, and does not conflict with, the language of § 21-2-408(c).

f. SEB Rule 183-1-12-.21 – the "Daily Reporting Rule"

The Daily Reporting Rule does not prevent any voter from exercising his or her franchise, nor does it relate to the counting of actual votes. This rule simply requires the reporting of certain statistical information on voter participation—information that *does not* include for whom the votes were cast. Thus, this rule does not affect voters in any way. It is, at most, an additional task required of election administrators, and one that closely tracks and is consistent with the requirements of the Election Code.

The Election Code (O.C.G.A. § 21-2-385) requires reporting on (1) the number of persons to whom absentee ballots have been issued; (2) the number of persons who have returned absentee ballots: (3) the number of absentee ballots that have been rejected; (4) the number of persons who have voted at the advance voting sites in the county or municipality; (5) the number of persons who have voted provisional ballots; (6) the

number of provisional ballots that have verified or cured and accepted for counting; and (7) the number of provisional ballots that have been rejected.

The regulation only reiterates the statutory requirement to report the total number of voters who have participated. It further requires reporting of "the method by which those voters participated (advance voting or absentee by mail)," and "the date on which the information was provided." These requirements help fulfill the statutory mandate of transparency and are, therefore, not contrary to the statute. Beyond that, for the general election, registrars are required to establish a *method* of daily reporting by the beginning of the advanced voting period, which again helps fulfill the statutory mandate and is squarely within the Board's regulatory authority.

g. SEB Rule 183-1-12-.12(a)(5) – the "Hand Count Rule"

Finally, and as with each of the prior Rules, the "Hand Count Rule" does not and cannot be read to delay certification of the votes. Again, all Parties agree, *including the entity that created the Hand Count Rule*, that certification must occur by the date specified, and the hand counting of ballots cannot and does not interfere with that requirement. To argue

that it *may* do so is entirely speculative, and precisely the type of "abstract" or "hypothetical" alleged harm that can neither confer standing on the Appellees, nor create a "justiciable controversy" that permits a court to issue a declaratory judgment.

It is imperative to note, contrary to allegations by the Appellees and as apparently accepted by the Trial Court, that the "ballots" referred to in the Hand Count Rule are paper receipts of the actual votes cast by each voter – *not the votes themselves*. The Hand Count Rule has nothing to do with the counting of *votes*. The Hand Count Rule simply requires counting of the paper receipts of the votes cast to ensure the number of paper receipts corresponds with the number of votes cast on the voting machine that day. The entire purpose of the Hand Count Rule is to reconcile those numbers, and ensure no paper receipt is missing.

The *actual votes cast* are recorded on a memory card in each voting machine, each memory card is then provided to the corresponding superintendent after the polls close, and the tabulation of votes occurs from the electronic information presented on the memory card. Nothing in the Hand Count Rule affects this process and, therefore, nothing in the Hand Count Rule involves the counting of *votes*.

In ruling the Hand Count Rule is contrary to the election code, the Trial Court again relies on the fact that the Election Code does not require the hand counting of the paper ballots. This logic suffers the same flaw as that previously addressed supra in Section VI.c. Nothing in the Hand Count Rule conflicts with or otherwise contradicts anything in the Election Code, and the Trial Court identified no such conflict or contradiction.

Rule 20 Certification

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted this 8th day of January, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2025, I served the foregoing on the following counsel via the United States Postal Service, postage prepaid, to the addresses as listed below:

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EXHIBIT A

SUPREME COURT OF GEORGIA
Case Nos. S25A0362 & S25A0490

December 17, 2024

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

S25A0362. REPUBLICAN NATIONAL COMMITTEE et al. v. ETERNAL VIGILANCE ACTION, INC. et al.
S25A0490. STATE OF GEORGIA v. ETERNAL VIGILANCE ACTION, INC. et al.

The State of Georgia has filed a motion to consolidate the appeals in Case Nos. S25A0362 and S25A0490 for purposes of oral argument and decision and to extend the time for appellants in each case to file their principal briefs to January 8, 2025. Upon consideration, the motion is hereby granted.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk