Case No. S25M0259

In the

Supreme Court of Georgia

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

EMERGENCY MOTION FOR SUPERSEDEAS

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EMERGENCY MOTION FOR SUPERSEDEAS AND BRIEF IN SUPPORT

The Republican National Committee and Georgia Republican Party Inc. (Appellants) through undersigned counsel, respectfully submit this emergency motion for a stay of the injunction entered below pending disposition of this appeal.

In enjoining enforcement of several new regulations adopted by the State Elections Board, the trial court misread the Election Code and misapplied clear principles of administrative and constitutional law. Thus, the State and respondent-intervenors are likely to prevail on the merits of the appeal. And no equities support leaving the injunction in place pending full briefing and disposition of the appeal. Accordingly, the injunction should be stayed pending resolution of the appeal.

Jurisdictional Statement

The Superior Court entered a final judgment granting a permanent injunction on October 16, 2024. Appellants timely noticed an appeal the next day. In moving for expedited review, Appellants asserted that the trial court's Order is directly appealable to this Court under Georgia Constitution Article VI, Section VI, Paragraphs II(1) and III(2) and O.C.G.A. § 5-6-34(a)(1). However, this Court granted a writ of certiorari on the basis that the appeal presents issues of gravity and public importance.

Statement of Facts

As the trial court noted, Order at 1, the pertinent facts are undisputed. For present purposes, GRP accepts the statement of following statement of facts as found by the trial court:

In September 2024, the State Election Board promulgated a number of rules challenged by the Plaintiffs. In particular, Plaintiffs challenge SEB Rules 183-1-12.02(c.2), 183-1-12.12(.1)(6), 183-1-14-.02(18), 183-1-14-.02(19), 183-1-13-.05, 183-1-12-.21, and 183-1-12-.12(a)(5). The 2024 Election is to take place on November 5, 2024, and early voting started on October 15, 2024. The SEB Rules at issue were passed approximately a month before early voting began.

Procedural History

Plaintiffs Eternal Vigilance Inc., Scot Turner, and James Hall filed a suit in Superior Court seeking declaratory and injunctive relief that seven election administration regulations promulgated by the State Elections Board were unlawful. Appellants were granted intervention as of right in the trial court to defend the regulations.

The trial court, after full briefing and a hearing, agreed and entered an order on October 16, 2024 declaring the regulations unlawful and enjoining their enforcement. Appellants timely noticed an appeal on October 17, 2024.

Argument

I. The Injunction Should be Staying Pending Appeal.

Stays of an injunction pending appeal are authority by O.C.G.A. § 9-11-62(c), which provides that:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. O.C.G.A. § 9-11-62(c).

In adjudicating an application for a stay pending appeal, a court must "weigh all of the pertinent equities, including the likelihood that the appellant will prevail on the merits of his appeal, the extent to which the applicant will suffer irreparable harm in the absence of a stay or injunction, the extent to which a stay or injunction would harm the other parties with an interest in the proceedings, and the public interest." *Green Bull Georgia Partners LLC v. Register*, 301 Ga. 472, 473, 801 S.E.2d 843 (2017). The likelihood of success on the merits is the most important factor. *Id.*

Finally, although *Green Bull* recognizes that a motion for stay should ordinarily be directed to the trial court in the first instance, appellants have not done so here because this is not an ordinary case. Early voting for the upcoming election is ongoing, and some of the regulations at issue affect early voting procedures, such as the chain of custody for absentee ballot drop boxes and requirements for delivery of absentee ballots. The public interest benefits from a more expedited resolution from the court of last resort. This court's ruling on the

stay issue effectively decides whether these new regulations will be in effect for early voting, and possibly for the 2024 election altogether. Moreover, had GRP been denied a stay in Superior Court, it would have made the same request here, but several days later. This would potentially have created creating greater disruption if a stay was granted later in the early voting process, after a several period of adjustment to the trial court's ruling by election administrators. This court has discretion to enter a stay despite GRP not seeking one in the trial court, and the public interest in obtaining final resolution of the stay motion as soon as possible militates in favor of exercising that discretion here.

II. The Public Interest Favors a Stay, and Appellants Will Suffer Irreparable Harm In Its Absence, Because the Chance to Fully Enforce the Laws and Buttress Public Confidence in the Election Will Have Been Irretrievably Lost.

Appellants will suffer irreparable harm, and the public interest favors a stay, for two reasons.

First, federal precedent correctly establishes that enjoining a state from enforcing its election laws per se inflicts a form of irreparable harm. When a trial court "bars the State from conducting this year's elections pursuant to a statute enacted by the Legislature, unless the statute is unconstitutional, an injunction would seriously and irreparably harm the State." *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) (internal citations and quotations omitted). "Prohibiting the State from enforcing a statute properly passed as part of its broad authority to regulate elections, particularly where the

State has shown a strong likelihood that the statute is not constitutionally infirm, would irreparably harm the State." *Organization for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) (cleaned up). This reasoning is no less true of regulations than of statutes. *Cf. A. Phillip Randolph Inst. of Ohio v. Larose*, 831 Fed. App'x 188 (6th Cir. Oct. 9, 2020) (staying, pending appeal, trial court's injunction against state administrative agency action regulating drop box locations and delivery of ballots).

Second, the regulations the trial court enjoined were intended as a means of ensuring greater public confidence in the fairness of the upcoming election (indeed, given early voting, the *ongoing* election) and the subsequent certification of the results. Public confidence cannot be regained by a post-election, post-certification ruling that an enjoined rule was indeed lawful all along. And "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our democracy." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006).

III. Equities Prohibit Judicial Interference in Election Policy on the Eve of the Election.

The Superior Court's relief is inappropriate because "there is not sufficient time left" before the "general election for the parties to present their arguments and the trial court to research and rule upon this difficult issue." *O'Kelley v. Cox*, 278 Ga. 572, 576 (2004) (Hunstein, J., concurring) (refusing to grant injunction in state ballot amendment close to election). Indeed, voters and the democratic process "suffer when time constraints compel" a trial court to issue "rushed rulings" that

"can serve only to undermine the public's faith in the legitimacy and accuracy of the judicial process." *Id.* at 576-77.

The Supreme Court has recognized these costs through the *Purcell* principle. *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring) (citing *Purcell*, 549 U.S. 1 (2006)). *Purcell* instructs that federal courts "should ordinarily not alter the election rules on the eve of an election." *RNC v. DNC*, 589 U.S. 423, 424 (2020) (per curiam). It recognizes that "[c]ourt orders affecting elections" can themselves "result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5. For these reasons, the Supreme Court has "repeatedly emphasized" that federal courts "should ordinarily not alter the election rules on the eve of an election." *RNC*, 589 U.S. at 424 (collecting cases). Although *Purcell* is not binding on State courts, many have adopted this sensible rule. *E.g.*, *Moore v. Lee*, 644 S.W.3d 59, 65-66 (Tenn. 2022); *In re Hotze*, 627 S.W.3d 642, 645-46 (Tex. 2020).

The Superior Court did not even address these equitable considerations. But they bar relief here. The Plaintiffs argued that their lawsuit seeks to revive the status quo of the election. The Sixth Circuit rejected that argument earlier this month. The status quo is not just whatever rule the Plaintiffs prefer—it's the policy adopted by the policymakers responsible for administering the election. *See OPAWL - Bldg. AAPI Feminist Leadership v. Yost*, __ F.4th__, 2024 WL 4441458, at *3 n.1 (6th Cir. Oct. 8, 2024). And judicial interference with "election rules on the eve of an

election," *RNC*, 589 U.S. at 424, produces the same problems whether those rules are legislative or executive. *See, e.g.*, *Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 890 (6th Cir. 2024) (applying *Purcell* to election rule promulgated by Tennessee's "Coordinator of Elections"). This Court can reverse the Superior Court's judgment on this ground alone.

IV. The Appeal is Likely to Succeed on the Merits.

The trial court enjoined seven regulations promulgated by the State Board of Elections. And it did so on both statutory and constitutional grounds, finding each one to be (i) inconsistent with the Georgia Election Code. In a more summary portion of its order, the trial court found that all seven regulations also (ii) violated the Georgia Constitution's nondelegation doctrine, and (iii) as to Congressional elections, violated the U.S. Constitution.

Below, GRP addresses each of the trial court's several errors in turn. The trial court's cramped view of the State Board's authority overlooks the breadth of the State Board's organic act, and the trial court's resolution of the non-delegation issue is plainly wrong. After explaining why the trial court resolved these global issues of law erroneously, GRP addresses the trial court's statutory rulings one by one, showing why each will not survive plenary review on appeal. Finally, GRP will show why the federal constitutional rulings are also unlikely to survive appeal.

a. The State Board of Elections Has Authority to Promulgate Rules To Ensure Uniform Practices Among Election Officials and Fair Elections Worthy of Public Confidence.

The State Board of Elections' organic act grants the State Board broad authority to regulate election administration, consistent with the statute. The statute provides, in pertinent part, that "[i]t shall be the duty of the State Election Board:

> (1) 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;
> (2) 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; and, upon the adoption of each rule and regulation, the board shall promptly file certified copies thereof with the Secretary of State and each superintendent;
> (7) To 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;
> (10) To take such other action, consistent with law, as the board may determine to be conducive to the fair, legal, and orderly conduct of primaries and elections.

O.C.G.A. § 21-2-31.

As this suggests, the Election Code does not preempt the entire field of election administration. The Code contemplates that the State Board will issue rules that constrain the discretion of local administrators. To be sure, rules must not be inconsistent with a statute, but the trial court's approach went too far by functionally insisting that every jot and tittle of a regulation must appear in the Election Code or be void. But regulations that merely duplicated a statute would

serve little purpose.

And while (as explained below) the nondelegation doctrine is not properly at issue in this case, judicial deference is. When the General Assembly intentionally grants an agency rule-making and enforcement authority by statute, and the agency's regulation interprets ambiguous provisions of that statute, Georgia courts defer to that agency's interpretation, so long as its interpretation is lawful and reasonable in light of the statutory text. *Tibbles v. Teachers Ret. Sys. of Ga.*, 297 Ga. 557, 558-559, 775 S.E.2d 527 (2015).

b. This Case Does Not Present A Non-Delegation Issue.

The trial court plainly erred in ruling that the regulations at issue, en masse, violate the Georgia Constitution's nondelegation doctrine. Plaintiffs' non-delegation claims, as adopted by the trial court, lack merit. This is so for three reasons.

*Firs*t, plaintiffs do not have standing to raise this argument. Their complaints amount to nothing more than a "generalized grievance shared in substantially equal measure by all or a large class of citizens." *Id.* at 792-93 (cleaned up). Such generalized grievances do not confer constitutional standing upon Georgia citizens. *Id.* Otherwise, any Georgia citizen could file a suit tomorrow challenging the constitutionality of the administrative authority that the Georgia General Assembly has delegated to any state agency—from the Department of Revenue to the Department of Transportation to the Governor's office. Under Plaintiffs' standing theory, any Georgia citizen could pick their least favorite rule

promulgated by a state agency and sue. Because Plaintiffs cannot establish the basic "prerequisite to attacking the constitutionality of a statute" by showing that the statute is "hurtful" to them, their case must be dismissed. *Perdue v. Lake*, 282 Ga. 348, 348 (2007) (cleaned up).

Second, Georgia's nondelegation doctrine does not apply to rules that direct the internal affairs of government agencies, rather than private conduct. "[T]he core of the legislative power" is the power to make "generally applicable rules of private conduct." *Dep't of Transp. v. Ass'n of Am. R.Rs*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring in the judgment). 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 so "long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details'" of executive implementation. *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 45 (1825)).

Georgia Supreme Court decisions accord 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," *Ass'n of Am. R.Rs*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). Thus, 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 (citing *Johnston v. State*, 227 Ga. 387, 392 (1971)). 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 State Election Board's rulemaking powers do not pose a delegation problem because the Board does not set "generally applicable rules of private conduct." *Ass'n of Am. R.Rs*, 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, *Consumers' Rsch. v. FCC*, 109 F.4th 743, 767 (5th Cir. 2024), or take private property, *Cf. Dep't of Transp. v. City of Atlanta*, 260 Ga. 699, 703 (1990), or restrict

private contracts. *Cf. Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 49-54 (2020).

Instead, the Election Board sets rules governing "public conduct." Larkin, *supra* at 249. 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).

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—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 public "privileges" afforded to voters, not "fundamental right[s]." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). So when a State conditions absentee voting, "[i]t is thus not the right to vote that is at stake … but a claimed right to receive absentee ballots." *Id.* 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. *See* Compl. ¶47; 1st Am. Compl. ¶76. Both rules regulate "congressionally created public rights," *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 456 (1977), and thus do not wield legislative power.

In sum, the Election Board doesn't wield legislative power because it doesn't regulate private conduct. The Plaintiffs complain of "broad" rulemaking discretion, but they haven't explained why that power is *legislative*. Compl. ¶51. "[W]hen 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 is internal to the executive branch—the Board adopts rules concerning how public officials do their jobs, not how private citizens live their lives. Some of the Board's rules incidentally affect private citizens, but only for the exercise of a public privilege, not a private right. In both instances, the Board isn't enacting "generally applicable rules of private conduct." *Ass'n of Am. R.Rs*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). So there's no delegation of legislative power here.

Third, as explained in more detail below, the trial court's non-delegation ruling relies on an unusually aggressive view of what constitutes a delegation of legislative power. Even if the General Assembly had delegated some legislative-type powers to the Election Board, the Georgia Supreme 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 to an agency, the agency "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. In contrast, laws that "fail[] to set up guidelines" for agency discretion raise delegation problems. *Massey-Ferguson*, 244 Ga. at 802.

As explained in greater detail below, the regulations at issue here are either plainly consistent with the statutes they implement, or fill in details in ambiguous provisions of those statutes. The General Assembly imposed sufficient guardrails to permit intelligent judicial review of whether the regulations at issue contravene the statutes they implement.

In short, these rules do not constitute or reflect a delegation of lawmaking authority; they are routine rulemaking and administration of the law. The trial

court's delegation ruling is wrong, and does not justify the injunction entered below.

c. The Trial Court Erred in Ruling That the Regulations Were Contrary to Law.

The trial court's statutory analysis rests on a fundamental error. For each regulation, the court did not identify a single conflict. Instead, it reasoned that because the statute didn't provide for a given rule, the rule was inconsistent with the statute. But that transforms statutory conflict into statutory preemption. Regulations are by nature gap-fillers, and they don't "conflict" with the statute just because they don't duplicate the statute. This Court can reverse each statutory holding on that error.

1. The Election Certification Regulation Is Not Contrary to Law.

The first new regulation at issue, new Ga. Comp. R & Regs. R.183-1-12.02(c.2), is a definitional provision. It provides that to "certify" election results means that an election superintendent (usually a county board of elections) must "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."

The trial court enjoined this regulation because the court thought the regulation is inconsistent with O.C.G.A. § 21-2-493, which addresses the process for certifying election results. The trial court ruled that the regulation's "reasonable inquiry" requirement was illegal and in excess of the State Board's authority

because such a requirement does not appear explicitly in § 21-2-493. [1] But even if the words "reasonable inquiry" do not appear in the statute, the *concept* plainly does; the regulation is therefore consistent with the statute.

In particular, section 493 requires the superintendent to investigate several types of errors and discrepancies that can occur at polling places or during tabulation and canvassing of the votes. Some of these inquiries are discretionary, some mandatory. For example:

- Before counting the votes for any precinct, the superintendent must check for an "excess" – that is, compare the number of voters registered with the poll officers' records showing the number of votes cast. If more people voted than are registered at that precinct, the superintendent cannot record any votes from that precinct until an investigation and (if necessary) recount is complete. § 21-2-493(b).
- The superintendent can order a recount a recount of all ballots from a particular precinct if a discrepancy or error "not apparent on the face of the returns" has been made. § 21-2-493(d), 21-2-495
- Superintendents may, in their discretion, "inspect systematically and thoroughly the conduct of primaries and elections in the several precincts of

[1] Notably, neither that statute nor any other provision of the Election Code, defines "certify" or "certification," and the term is used in different ways in different portions of the Elections Code to refer to different certifications by different individuals. See, e.g., O.C.G.A. § 21-2-154 (political parties' state and county executives must "certify" a list of candidates for partisan primary); O.C.G.A. § 21-2-587 (making it a felony for a poll officer to willfully "certify" as correct a false return of ballots).

his or her county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted" – in other words, make a general investigation of elections in their jurisdiction. § 21-2-70(8).

And perhaps most importantly, section 493 requires that if "any error or fraud is discovered, the superintendent shall compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented to him or her, and shall report the facts to the appropriate district attorney for action." § 21-2-493(i). ("Returns" in this context means data from each precinct about the votes for each candidate from that precinct.) In other words, the superintendent must decide whether to throw out returns for fraud – a weighty decision that should not be undertaken lightly, without reasonable inquiry. If fraud or an uncorrectable error is discovered, the regulations leave the county board to its own devices to "determine a method to compute the votes justly." Ga. Comp. R & Regs. R. 183-1-12-.12(f)(5).[2]

As this makes clear, tabulating and canvassing the votes – steps that occur prior to certification – are not just a ministerial exercise in mathematics. Election officials must make judgment calls whether to investigate a discrepancy in tabulation, whether a discrepancy represents honest error or fraud, and if fraud (or an uncorrectable error) is detected, and how to "compute and certify the votes

[2] This "determine a method" language confirms that the superintendent's duty to "compute the votes justly" does not mean "count every ballot, fraud or no, and let the prosecutors sort things out." Counting every ballot regardless of doubts about its provenance does not require "determin[ing] a method."

justly." Indeed, if fraud or an uncorrectable error requires an adjustment to the election returns, the pertinent statute and its implementing regulation leave the decision of how to make that adjustment – how to "determine a method to compute the votes justly" – entirely to a county board's good judgment based on the totality of the circumstances.

Thus, contrary to the trial court's reasoning, the Election Code and its regulation already require superintendents to make a "reasonable inquiry" into discrepancies, errors, and fraud in the tabulation and canvassing of votes before certification. In some cases, the law even specifies how that inquiry should be made; in other cases, local officials have more discretion. That being so, the regulation requiring superintendents to attest that they made a "reasonable inquiry" before certifying the vote didn't establish a novel burden – it's just a summation of what existing law already requires.

2. The Document Access Regulation Is Not Contrary To Law.

The second regulation at issue, new Ga. Comp. R & Regs. R. 183-1-12.12(f)(6) provides that "[County] Board members shall be permitted to examine all election related documentation created during the conduct of elections prior to certification of results." The trial court held that this rule was inconsistent with O.C.G.A. §§ 21-2-493 and 21-2-70(9).

Under that latter statute, county Election Boards, when acting as "superintendent" of elections, have authority:

> (8) To instruct poll officers and others in their duties, calling them together in meetings whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several precincts of his or her county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted;
> and
> (9) To receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to such authorities as may be prescribed by law.

O.C.G.A. § 21-2-70(8)-(9).

The trial court erred by ruling that the document access regulation was inconsistent with the former statutory provisions, and by overlooking the latter one. Between their right to "inspect" any facet of the conduct of elections in the county, and their duty receive the "returns" of elections, County Boards, as superintendents, already have statutory authority to view any election-related document within their jurisdiction. It would be a bizarre rule indeed if a County Board as a whole was legally entitled to inspect election related documents, but the Board's constituent members were not, as the trial court seemed to suggest.[3]

And *contra* the trial court's ruling, nothing in § 493 restricts the authority granted to superintendents under § 70. Section 493 contains some requirements for

[3] A recent trial court decision recognizes that individual Board members are entitled to such access: "If, in performing her responsibility set forth in O.C.G.A. § 21-2-70(8) 'to inspect systematically and thoroughly the conduct of primaries and elections in the several precincts of his or her county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted,' an election superintendent (*or member of a board of elections* and registration) determines a need for election information from the staff of the superintendent's office (or of the board), that information, if not protected from disclosure by law, regulation, or rule, should be promptly provided. *See* Ga. Comp. R. & Regs. Rule 183-1-12-.12(f)(6)." *Adams v. Fulton Cty.*, 24cv11584 (Fulton Cty. Super. Oct 14, 2024) (emphasis added).

disseminating information to the public, but not to a County Board or its members.

As with the "certification" regulation, the document-access regulation imposes no novel duties not already contemplated by the statute. It merely codifies a proposition implicit in the existing statutory responsibility assigned to Board members, ensuring that individual Board members will be able to faithfully carry out the duties already assigned to them by statute in § 21-2-70(8)-(9).

3. The Regulation Requiring Photo ID to Deliver Absentee Ballots Is Not Contrary to Law.

Next, the trial court enjoined Ga. Comp. R & Regs. R. 183-1-14-.02(18), which requires that any person delivering an absentee ballot to a ballot drop box for another voter must, with some exceptions, provide the voter's name, and the deliverer's signature, photo identification, and the deliverer's relationship to the voter.[4] The trial court determined that the rule is inconsistent with O.C.G.A. § 21-2-385(a), which supplies rules for the completion and return of absentee ballots. The court erred in so finding because the rule does not conflict with the statute, but instead provides a complementary procedure that is "designed to accomplish the purpose of the act." *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Examiners in Optometry*, 219 Ga. 364, 375, 133 S.E.2d 374, 381 (1963).

Section 385(a) permits certain listed relatives of any voter and other specific

[4] The pertinent portion of the regulation reads in full: Any absentee ballot drop location, other than the United States Postal Service or authorized and defined drop box under Georgia Law, that receives absentee ballots shall require 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.

categories of individuals to mail or return an absentee ballot for the voter. By specifying which categories of individuals may mail or return absentee ballots, the General Assembly clearly communicated its intent to prohibit the harvesting of absentee ballots. The SEB's rule "reflects the intent of the General Assembly" by providing a process for ensuring that only those specified individuals return absentee ballots on behalf of voters. *See Georgia Dep't of Revenue v. Georgia Chemistry Council, Inc.*, 270 Ga. App. 615, 618, 607 S.E.2d 207, 209 (2004). Without such a process, the statute's limitation cannot be practically applied, and persons returning absentee ballots on behalf of voters are guided entirely by the "honor system." This cannot have been the General Assembly's intent. To the contrary, the General Assembly authorized the SEB to promulgate administrative rules – like this one – that implement Section 385(a)'s provisions and further the "legality and purity" of Georgia elections. O.C.G.A. § 21-2-31(1).

4. The Drop Box Surveillance Regulation is Not Contrary to Law.

The trial court next enjoined Ga. Comp. R & Regs. R. 183-1-14-.02(19), which provides that "[a]t the close of the polls each day during early voting and after the last voter has cast his or her ballot, the poll officials shall initiate video surveillance and recording of a drop box at any early voting location." Alternatively, if a drop box cannot be surveilled, the regulation provides it must be locked or removed from use.

The trial court held that this regulation was contrary to law because it was inconsistent with O.C.G.A. § 21-2-382(c)(1), governing the use of drop boxes. That

provision provides in relevant part that a drop box location must "have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement official, or licensed security guard." *Id.*

Video surveillance is plainly consistent with the statute's requirement that drop boxes be "under constant surveillance by an election official or his or her designee." *Id.*

Notably, the statutory provision requiring constant surveillance of drop boxes does not have a time limitation – the statute does not say the drop box must be under surveillance "only while it is open." (The drop box statute requires drop boxes to be "closed" while not in use, that is, while early voting is not occurring at the location where the drop box is stationed. O.C.G.A. § 21-2-382(c)(1).) Thus, the video surveillance contemplated by the new regulation actually makes local officials' job easier, providing additional flexibility by preventing the need for 24-hour presence by Board employees (or hiring off-duty police and private security guards) to watch drop boxes even while they are not available to receive ballots.

The trial court also believed that the regulation's requirement that a drop box which could not be set up for video surveillance must be locked or removed from use is inconsistent with O.C.G.A. § 21-2-382(c)(1). But the statute provides that drop boxes must be "closed" when early voting is not occurring, *id.*, and "closed" is not defined by the statute. Locking or removing a box to "close" it is plainly a reasonable administrative interpretation consistent with the purpose of the

provision – to ensure drop boxes remain inaccessible to new ballots outside the prescribed hours.

Agencies are entitled to adopt regulations that reasonably interpret the statutes they administer, and courts defer to their interpretation when they do so. *See, e.g., Pruitt Corp. v. Ga. Dept. of Community Health*, 284 Ga. 158, 159, 664 S.E.2d 223, 225 (2008) (citing authority) The State Board's "videotape or remove" regulation for drop boxes is an eminently reasonable interpretation of § 21-2-382's language requiring drop boxes to be "constantly" surveilled and "closed" outside early voting hours. This regulation does not add requirements to the statute, but instead interprets and implements the requirements already present in the statutory text.

In short, even if the plaintiffs have standing, the trial court's injunction against the drop-box chain of custody regulations was wrong on the merits, and should be stayed accordingly.

5. The Regulation about Poll Watcher Access at Vote Tabulation Centers Is Not Contrary to Law.

The trial court also enjoined enforcement of new Ga. Comp. R & Regs. R. 183-1-13-.05, which specifies that poll watchers at a vote tabulation center should have access to 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."

The trial court held that this rule was inconsistent with O.C.G.A. § 21-2-408(c), which provides that poll watchers at a vote tabulation center must have access to the "check in area, computer room, duplication area, and *such other areas as the election superintendent may deem necessary to the assurance of fair and honest procedures in the tabulation center*." (emphasis added)

As the italicized portion makes clear, the statute governing poll watchers does not envision that they will be strictly limited to only the check in area, computer room, and duplication area. They should be permitted to go anywhere in a tabulation center necessary to gain assurances of fair and honest procedures.

To be sure, the statute on its face grants local superintendents discretion whether or not to expand poll watcher access at tabulation centers beyond the enumerated areas. But the State Board has authority to "promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents ... as well as the [sic] legality and purity in all primaries and elections." O.C.G.A. § 21-2-31(1). The State Board's regulation specifying that poll watchers should have access to "any…other area that tabulation processes are taking place" is precisely the sort of "uniformity" in local practice that the State Board could reasonably establish by rule. If poll watchers can observe all tabulation processes in some counties but only some tabulation processes in other counties, it will undermine public confidence that "fair and honest procedures" are

occurring in the latter locations.

Thus, in short, the trial court erred by reading the statute as limiting poll watchers' access to check in areas, computer rooms, and duplication areas. The State Board's regulation expanding poll watcher access is both consistent with the text of the poll watcher statute and the State Board's organic act. The poll watcher statute plainly contemplates poll watcher access beyond the enumerated areas. And the State Board's organic act authorizes the State Board to make regulation to promote uniformity, fairness, and the public perception of fairness. Ensuring poll watcher access to all areas where vote tabulation is occurring, on a uniform statewide basis, will do just that. The appellants are likely to prevail on this point of the appeal, so the injunction should be stayed.

custody regulations was wrong on the merits, and should be stayed accordingly.

6. Plaintiffs Lack Standing to Challenge the Regulation Requiring Registrars to Post Data About Absentee Voting.

The trial court also enjoined enforcement of new Ga. Comp. R & Regs. R. 183-1-21-.21, set forth fully in the margin,[5] which addresses county registrars' duty to

[5] (1) For each primary election and general election and any associated runoffs, no later than the beginning of the advance voting period set by O.C.G.A. 21-2-385(d), each registrar shall establish a method of daily reporting to the public the total number of voters who have participated in the election or runoff.

(a) For each primary election and associated runoff, the registrar shall report (1) the total number of voters who have participated, (2) the method by which those voters participated (advance voting or absentee by mail), (3) the number of political party or nonpartisan ballots cast, and (4) the date on which the information was provided.

(b) For each general election and associated runoff, the registrar shall report (1) the total number of voters who have participated, (2) the method by which those voters participated (advance voting or

report on absentee votes. As pertinent here, the new rule requires the county boards of registrars to report daily on the total number of voters who participated, whether they voted early by mail, the number of party or nonpartisan ballots cast, and the effective date of the information. *Id.* R. 183-1-21-.21(1)(a)(1)-(4). That information must be updated each day in which early voting occurs. *Id.* R. 183-1-21-.21(6). Since early voting occurs on weekends, the regulation necessarily implies that registrars must update their data over weekends, not just business days.

The trial court held that this rule was inconsistent with O.C.G.A. § 21-2-385(e), which is set forth in full in the margin.[6] That statute addresses reporting of

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absentee by mail), and (3) the date on which the information was provided.

(2) For each primary election and general election and any associated runoffs, at the conclusion of the canvass and computation of votes cast provided for in O.C.G.A. 21-2-493(a), with the exception of the processing of UOCAVA ballots, provisional ballots, and ballots requiring adjudication, the election superintendent shall create a report indicating the vote totals for all contests on the ballot by precinct.

(3) The registrar must post the daily reporting information required by paragraph (1) on the internet website operated by the registrar or county election superintendent.

(4) The election superintendent must post the information required by paragraph (2) on the internet website operated by the county election superintendent.

(5) If a registrar and/or county election superintendent does not operate an internet website, the registrar must post the daily reporting information required by paragraph (1) and the report required by paragraph (2) in a public place in its office, accessible 24 hours a day to the public.

(6) The daily reporting information required by paragraph (1) must be updated each day on which advance voting occurs in the county prior to any primary election, general election, and/or associated runoffs.

[6] On each day of an absentee voting period, each county board of registrars or municipal absentee ballot clerk shall report for the county or municipality to the Secretary of State and post on the county or municipal website, or if the county or municipality does not maintain such a website, a place of public prominence in the county or municipality, not later than 10:00 A.M. on each business day 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. Additionally, on each day of an advance voting period, each county board of registrars or municipal absentee ballot clerk shall report to the Secretary of State and post on the county or municipal website, or if the county or municipality does not maintain such a website, a place of public prominence in the county or municipality, not later than 10:00 A.M. on each business day the number of persons who have voted at the advance voting sites in

absentee ballot and advance voting data by county boards. The trial court faulted the regulation for four purported inconsistencies with the statute it implements.

The trial court erred in its standing ruling on this issue. "A trial court's determination on the issue of standing will not be disturbed unless its factual determinations are clearly erroneous; however, the trial court's application of law to the facts is subject to de novo appellate review." *Black Voters Matter Fund Inc. v. Kemp*, 313 Ga. 375, 381, 870 S.E.2d 430, 437 (2022). The challenged portions of the regulation imposes reporting duties on county boards of registrars and county boards of election, not voters or the general public. Neither individual plaintiff is a member of a county board of registrars.[7] The regulation thus imposes no new legal duty or cognizable burden on them at all. Indeed, they would benefit to the same extent as other members of the public from the more timely information provided to their local registrars.

The trial court's resolution of the organizational plaintiff's standing is equally erroneous. If standing doctrine means anything, it's that the cost of litigation challenging a law cannot give rise to the standing necessary to engage in that

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the county or municipality. During the absentee voting period and for a period of three days following a primary, election, or runoff, each county board of registrars or municipal absentee ballot clerk shall report to the Secretary of State and post on the county or municipal website, or if the county or municipality does not maintain such a website, a place of public prominence in the county or municipality, not later than 10:00 A.M. on each business day the number of persons who have voted provisional ballots, the number of provisional ballots that have verified or cured and accepted for counting, and the number of provisional ballots that have been rejected.

[7] Plaintiff Hall is a member of the Chatham County Board of Elections, and the regulation also imposes information reporting requirements as to the Board of Elections. Mr. Hall does have standing to challenge whether the regulation imposes new duties on the Board of Elections not authorized by statute.

litigation. In any event, precedent establishes that organizations must establish standing in their own right, and to the same extent as individuals. *Black Voters Matter Fund Inc.*, 313 Ga. at 381-83. Diverting an organization's resources to engage in litigation, standing alone, is not an injury in fact sufficient to support standing. *Id.* "If simply choosing to engage in litigation were sufficient to confer standing to sue, then any special interest group could manufacture standing to sue by simply asserting an organizational purpose contrary to the issue being litigated and then filing a lawsuit." *Id.* (citation omitted). The trial court's theory of organization standing does not hold water.

The plaintiffs have suffered no injury in fact, and thus lack standing to challenge the regulation to the extent it places an ostensibly novel or statutorily-unauthorized duty on Boards of Registrars. Plaintiffs are not simply harmed by regulations that require third-party government officials to provide more information to the public than plaintiffs believe is appropriate.
wrong on the merits, and should be stayed accordingly.

7. The Regulation Requiring Hand Counting of Ballots is Not Contrary to Law.

Defendants are also likely to establish the legality of the Hand Count requirement. To be clear, this rule requires a hand count to ascertain and confirm the number of ballots in the ballot box(es), not a count of votes cast in races or for candidates. Ga R & R 183-1-12.12(a)(5) (requiring "three sworn precinct poll officers to independently count the total number of ballots removed from the

scanner") (emphasis added). The purpose is simply to confirm that the number of physical ballots in the scanner(s) match the number that the other election records from that precinct indicate should be there. This is a common-sense measure to further the "legality and purity" of Georgia elections. CGA 21-2-31(1); see Revisions to Subject 183-1-12.12 Tabulating Results (proposed Aug. 21, 2024) ("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.").

The trial court, biting on Plaintiffs' superficial argument, appears to have simply re-stated Plaintiffs' argument as the foundation of its ruling without recognizing that the statutory provisions Plaintiffs relied upon are inapplicable. The district court's specific holding is that the Hand Count Rule is "inconsistent with the statutory framework" because sections "21-2-240 [sic], 21-2-436, and 21-2-483 all proscribe [sic] the duties of poll officers after the polls close" and "[h]and counting is not among them." Op. at 7. Section 21-2-436, however, only governs precincts using paper ballots (of the old-school variety, tabulated by hand, see Ga. Code § 21-2-437(a) (directing poll officers at precinct to "read aloud" and tally votes on "tally papers"). These ballots are now largely irrelevant, because since 2020, all balloting in primaries and elections in Georgia is now conducted using "Optical Scanning Voting Systems." Ga. R & R 183-1-12-.01 ("Beginning with the 2020 Presidential Preference Primary, all federal, state, and county general primaries

and elections, special primaries and elections, and referendums in the State of Georgia shall be conducted via an Optical Scanning Voting System as defined by O.C.G.A. 21-2-1 (19.1).”). Section 21-2-483 is also inapposite, because it governs “[p]rocedures at the tabulation center.” The Hand Count is not tabulation of votes, but a simple accounting of the number of ballots conducted at the precinct and not at the tabulation center (which tabulates based on data from memory cards).

The only provision of the three cited by Plaintiffs that actually applies—§ 21-2-420(a)—supports the State Election Board’s authority here. The Hand Count Rule clarifies the “required accounting and related documentation for the precinct” regarding ballots cast, see 21-2-420(a), which furthers the Board’s specific charge to ensure not just “uniformity” across jurisdictions but “the legality and purity in all primaries and elections.” Ga. Code 21-2-31(1). Plaintiffs readily acknowledged the Board’s authority to promulgate rules facilitating “uniformity” and “consistency” in their filings below, but never acknowledge the duty to foster legality and purity, which appears in the same statutory provision.

Plaintiffs’ argument that the Hand Count requirement will cause delays in tabulation and reporting of results (Plfs’ Tr. Br. at 10-11) is also misplaced. The Hand Count will not affect the schedule for tabulation whatsoever, because tabulation is conducted using electronic data from the scanner memory cards, which the Rule specifically allows to be transported for tabulation before the ballots or other materials are delivered. Ga. R & R 183-1-12-.12(7) (“The election

superintendent, in his or her discretion, may allow a designee of the poll manager to deliver the envelopes or containers containing the ballot scanner tabulation tapes and memory cards to be used for unofficial reporting of results prior to the delivery of the other polling place materials provided that the same procedures for transit and delivery set forth herein are followed."). Therefore, there need be no delay of tabulation and reporting, even in those precincts where a large number of ballots at a precinct could implicate the manager's authority to complete the Hand Count after Election Day. See 183-1-12.12(a)(5)(a) (regarding scanners with more than 750 ballots on Election Day).

d. The Trial Court's Federal Constitutional Holding is Contrary to Supreme Court Precedent.

The trial court also erred by granting relief on a claim the Plaintiffs never even brought. The court held that all of the rules violate the Elections Clause of the U.S. Constitution, art. I, §4. *See* Op. 9. But the Plaintiffs never asked for that relief. They didn't claim in their Complaint or Amended Complaint that the rules violate the Elections Clause. In fact, they don't cite the U.S. Constitution at all in their pleadings. And when they brought up the Elections Clause in the statement of issues, the Plaintiffs said the issue is only whether the clause "further prevents the General Assembly from delegating its duties under the Federal Constitution to state executive agencies." Statement of Issues at 3. At most, that's another nondelegation argument, not a unique claim. The court erred by granting

independent relief on a claim not included in the Complaint.

Even had the Plaintiffs raised the claim, it is foreclosed by Supreme Court precedent. Indeed, that much is clear from the face of the Superior Court's opinion, which relies exclusively on dissents and concurrences. *See* Op. 9. However persuasive those opinions might be, this Court must apply the Elections Clause as the U.S. Supreme Court applies it. And the Supreme Court has held that "although the Elections Clause expressly refers to the 'Legislature,' it 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). That's why the Supreme Court held that Arizona could establish an independent redistricting commission 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.

Conclusion

For the reasons explained above, the trial court's injunction should be stayed pending resolution of the appeal. On full review, the trial court's judgment should be reversed on the merits.

RULE 20 CERTIFICATION

[This submission exceeds the word-count limit imposed by Rule 20, but I have filed a motion for relief from the page limitations contemporaneously herewith.]

Respectfully submitted this the 19th day of October, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and accurate copy of the foregoing document to all parties and counsel of record via United States mail. In view of the expedited nature of this appeal, I have also sent same by electronic mail to below-listed counsel:

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This 19th day of October, 2024.

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