

**SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

**ETERNAL VIGILANCE ACTION,** )  
**INC., SCOT TURNER, and** )  
**JAMES HALL,** )  
 )  
**Plaintiffs,** )  
 )  
**v.** )  
 )  
**STATE OF GEORGIA,** )  
 )  
**Defendant.** )  
 )

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**Civil Action File No.** \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Comes now Plaintiffs Eternal Vigilance Action, Inc., Scot Turner and James Hall and file this Complaint for Declaratory and Injunctive Relief against the Defendant State of Georgia as follows:

**INTRODUCTION**

1.

The right of Georgians to vote and to have their votes counted is one of the most important rights secured by our State Constitution. With that Constitutional guarantee in mind, the General Assembly has—in more than 500 pages of the Georgia Code Annotated—statutorily proscribed which votes can be cast and how those votes must be counted and certified by local and State authorities. The State Board of Elections (“SEB”) is precluded from altering voting rights and the processes of counting and certifying election results in a manner inconsistent with the General Assembly’s statutory scheme. Additionally, the General Assembly is precluded by Ga. Const. Art. I, Sec. II, Par. III, from delegating legislative authority regarding voting rights and vote tabulation and certification to the SEB. An unconstitutional legislative delegation occurs when the General

Assembly empowers a State executive body, like the SEB, to promulgate rules without “sufficient” and “realistic” guidelines limiting the executive’s rulemaking authority. Moreover, *any* delegation of authority by the General Assembly to a state executive body, including the SEB, violates Ga. Const. Art. I, Sec. II, Par. III’s express requirement that the legislative and executive powers shall “forever” remain separate.

Here, the SEB has promulgated rules that contravene the Election Code and violate our Constitution’s separation-of-powers and non-delegation mandates. The SEB’s rules changed how votes are counted and certified by local election boards (superintendents) and therefore fundamentally altered Georgians’ voting rights. These rules must therefore be declared unconstitutional, and the Court should enjoin their enforcement or use.

## PARTIES

2.

Plaintiff Eternal Vigilance Action, Inc. is a Georgia Domestic Nonprofit Corporation 503(c)(4) corporation. organized under 26 U.S.C. § 501(c)(4). Eternal Vigilance Action is a multi-issue advocacy organization with a significant focus on election policy. Its board of directors are a group of activists, scholars, and former elected officials. A core function and activity of Eternal Vigilance Action is to defend the institution of elections from attacks that erode public faith in electoral outcomes and are often based on misinformation and disinformation. In pursuit of its mission, Eternal Vigilance Action educates communities, coordinates efforts and resources, and lobbies elected officials. As such, Eternal Vigilance Action has organizational standing to challenge the enforceability of the SEB Rules at issue, because the resulting damage and uncertainty – and the loss of public confidence in our election institutions – stemming from the illicit creation and exercise of the SEB Rules (as described in detail below) will directly impact

and impair Eternal Vigilance Action's efforts and mission to ensure clarity and public confidence in those institutions. Furthermore, attempting to minimize and correct this damage, uncertainty and loss of public confidence in the election institutions has caused and will continue to cause a diversion of Eternal Vigilance Action's time and resources in order to analyze and create remedies to attempt to combat and correct the negative public impact stemming from the illicit creation and exercise of the SEB Rules at issue through education of the public and local and state officials.

3.

Plaintiff Scot Turner is a Georgia citizen, registered voter, and taxpayer. Plaintiff Turner is President of Plaintiff Eternal Vigilance. As such, Plaintiff Turner has standing to challenge the enforceability of the SEB Rules at issue.

4.

Plaintiff James Hall is a Georgia citizen, registered voter, and taxpayer. As such, Plaintiff Hall has standing to challenge the enforceability of the SEB Rules at issue.

5.

Defendant State of Georgia can be served through its Chief Executive Officer, Governor Brian Kemp at 205 Washington Street, Suite 203, State Capitol, Atlanta, Georgia 30334. The State of Georgia is the proper Defendant in this matter under Ga. Const. Art. I, Sec. II, Par. V(b)(2) ("Actions filed pursuant to this Paragraph against this state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof shall be brought exclusively against the state in the name of the State of Georgia.") This action is brought to declare the rules of the State Board of Elections ("SEB") void and to enjoin their enforcement. Pursuant to Ga. Const. Art. I, Sec. II, Par. V(b)(2) this action must be filed

against the State of Georgia and not against the SEB directly. However, for the purposes of the relief requested, any relief should be enforced against the SEB and the State of Georgia.

### **SUBJECT MATTER JURISDICTION**

6.

The Court has subject matter jurisdiction over this matter pursuant to Ga. Const. Art. I, Sec. II, Par. V, Ga. Const. Art. VI, Par. IV, Sec. IV, and O.C.G.A. §§ 9-4-2(a), 9-4-3(a), and 9-5-1.

### **VENUE AND PERSONAL JURISDICTION**

7.

Personal jurisdiction over the State and venue are proper pursuant to Ga. Const. Art. VI, Sec. II, Par. VI.

### **FACTUAL AND LEGAL BACKGROUND**

#### **A. THE GEORGIA CONSTITUTION PROHIBITS LEGISLATIVE DELEGATION OF RULEMAKING AUTHORITY TO THE SEB AND PROHIBITS THE SEB FROM ENACTING RULES CONTRARY TO THE ELECTION CODE**

8.

The State Elections Board (“SEB”) is a Board of the State of Georgia created pursuant to O.C.G.A. § 21-2-30(a).

9.

SEB consists of a Chairperson chosen by the General Assembly, electors chosen by the Georgia Senate and the Georgia House of Representatives, and a member of each political party. O.C.G.A. § 21-2-30(a). None of SEB’s members are elected directly by the people of the State of Georgia.

10.

The Georgia Secretary of State is now an *ex officio* nonvoting member of the SEB.

O.C.G.A. § 21-2-30(d).

11.

Pursuant to O.C.G.A. § 21-2-31, the SEB is authorized to:

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;
3. To publish in print or electronically and furnish to primary and election officials, from time to time, a sufficient number of indexed copies of all primary and election laws and pertinent rules and regulations then in force;
4. To publish in print or electronically and distribute such explanatory pamphlets regarding the interpretation and application of primary and election laws as in the opinion of the board should be distributed to the electorate;
5. To investigate, or authorize the Secretary of State to investigate, when necessary or advisable the administration of primary and election laws and frauds and irregularities in primaries and elections and to report violations of the primary and election laws either to the Attorney General or the appropriate district attorney who shall be responsible for further investigation and prosecution. Nothing in this paragraph shall be so construed as to require any complaining party to request an investigation by the board before such party might proceed to seek any other remedy available to that party under this chapter or any other provision of law;
6. To make such recommendations to the General Assembly as it may deem advisable relative to the conduct and administration of primaries and elections;
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;
8. To employ such assistants as may be necessary;

9. Subject to funds being specifically appropriated by the General Assembly, to formulate and conduct a voter education program concerning voting procedures for voting by absentee ballot and at the polls with particular emphasis on the proper types of identification required for voting; and
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.

(emphasis added). Other provisions of the Election Code broadly allow the SEB to promulgate regulations.

The rules and regulations authorized by the General Assembly emphasize, *inter alia*, that the SEB is to promulgate rules that promote consistency in the manner in which votes are counted by, *inter alia*, county superintendents and county Boards of Elections. Those rules must be consistent with the existing Election Code and the Georgia Constitution, if they are permitted at all.

12.

Other than providing broad rulemaking authority to the SEB in O.C.G.A. § 21-2-31, the General Assembly did not provide any guidance or parameters regarding how the SEB must promulgate its rules.

13.

Ga. Const. Art. I, Sec. II, Par. III provides: “The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others . . . .” (hereinafter the “nondelegation clause”).<sup>1</sup>

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<sup>1</sup> Ga. Const. Art. I, Sec. II, Par. III does provide certain “exceptions” to this rule, none of which are applicable here.

14.

“The constitutional 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 by Art. 1, Sec. 2, Para. 3 of our Constitution by delegating legislative powers to (for example) executive agencies.” *Premier Health Care Invs. LLC v. UHS of Anchor, LP*, 310 Ga. 32, 49 (2023).

15.

The Georgia Supreme Court holds that where the General Assembly empowers Georgia executive entities with rulemaking authority, but without “sufficient” or “realistic” guidelines constraining the executive’s rulemaking, this constitutes an impermissible legislative delegation. *See, e.g., id.* at 49–50.

16.

The Georgia Supreme Court has not yet provided explicit guidance on what constitutes “sufficient” or “realistic” guidance from the General Assembly or the precise boundaries of permissible rulemaking delegations. *See id.* at 51. However, the Georgia Supreme Court has stated that “where the General Assembly fails to establish guidelines for the delegatee’s exercise of authority or where it delegates such broad discretion that an agency is permitted to decide what violates a law passed by the General Assembly,” then such an assignment violates the separation-of-powers and non-delegation doctrines. *Id.* at 50.

17.

Additionally, the Georgia Supreme Court has indicated its prior holdings—including that in *Department of Trans. v. City of Atlanta*, 260 Ga. 699 (1990), which permitted delegation of some constrained rulemaking delegation to executive entities—may have been incorrectly decided and that *any* such rulemaking delegations may run afoul of the nondelegation and separation of powers

clause of the Georgia Constitution. *See id.* at 49 n.18; *see also Kennestone Hosp. Inc. v. Emory University*, 318 Ga. 169, 183 n.7 (2024); *Cazier v. Georgia Power Co.*, 315 Ga. 587, 593 n.5 (2023) (Peterson, J. concurring); *State v. Almanza*, 304 Ga. 553, 556 n.2 (2018); *accord Gundy v. United States*, 588 U.S. 128, 1555 (2019) (Gorsuch, J. dissenting) (invoking federal non-delegation doctrine); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari) (same).

18.

In addition, and in conformity with the foregoing constitutional limitations, state executive entities are without authority to promulgate regulations that are inconsistent with or in excess of the statutory authority from which they are derived. In other words, state executive agencies may not expand their authority or the law beyond the explicit proscriptions set forth in the statute. *Premier Health*, 310 Ga. *passim*; *North Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 544 (1998); *Tabletop Media*, 346 Ga. App. 498, 504 (2018).

**B. THE ELECTION CODE STRICTLY LIMITS THE MANNER OF VOTE COUNTING AND VOTE CERTIFICATION**

19.

The General Assembly has promulgated detailed statutes regarding the tabulation and certification of votes—for local, State, and federal elections, including Presidential elections. *See* O.C.G.A. § 21-2-1, *et seq.*

20.

The right to vote for an elected official is one of the most treasured and important rights of any Georgia citizen. It therefore follows that the prompt and unbiased counting and certification of those votes is essential for the protection of a citizen’s voting rights.

21.

The Georgia Secretary of State is vested with the power to, *inter alia*, “receive from the superintendent [of local elections] the returns of primaries and elections and to canvass and compute the votes cast for candidates and upon questions, as required by this chapter.” O.C.G.A. § 21-2-50(a)(6).

22.

Local superintendents of elections are authorized, *inter alia*, “[t]o 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(a)(9). “Superintendents” are the local board of elections for almost all purposes (except for limited instances in which probate judges are “superintendents.”) O.C.G.A. § 21-2-2(35). When superintendents are local boards of elections, the “superintendent” as used in the statute means the entire board, not just any of its members. *Id.*

23.

The procedures for the computation, canvassing, and tabulation of votes by the superintendent are set forth in O.C.G.A. § 21-2-493(a)-(b). The superintendent shall calculate the votes. O.C.G.A. § 21-2-493(a). If “it appear[s] that the total vote returned for any candidate or candidates for the same office or nomination or on any question exceed the total number of persons who voted in such precinct or the total number of ballots cast therein, such excess shall be deemed a discrepancy and palpable error and shall be investigated by the superintendent; and no votes shall be recorded from such a precinct until such an investigation shall be had.” O.C.G.A. § 21-2-493(b); *see also* O.C.G.A. § 21-2-493(c), (e), (g) (regarding paper ballots); O.C.G.A. § 21-2-493(d), (f), (h) (regarding voting machines). 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.” O.C.G.A. § 21-2-493(i).

24.

Once the votes have been computed and canvassed “the superintendent shall tabulate the figures for the entire county or municipality and sign, and attest the same, as required by this Code section.” O.C.G.A. § 21-2-493(a). The counted correct returns shall be duly recorded and certified by the superintendent “not later than 5:00 P.M. on the Monday following the date on which such election was held, and such returns shall be immediately transmitted to the Secretary of State.” O.C.G.A. § 21-2-493(k). If an *election contest* changes the returns so certified, a corrected return shall be certified and filed by the superintendent which makes such corrections *as the court orders.*” O.C.G.A. § 21-2-493(l) (emphasis added).

25.

Again, even if during its canvassing and review of the votes “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.” O.C.G.A. § 21-2-493(i) (emphasis added). Thus, even if any fraud or errors are discovered, certification is still required pursuant to the Election Code.

26.

The foregoing and O.C.G.A. § 21-2-495 permit the superintendent to recanvass or recount ballots.

27.

Consolidated returns certified by the superintendent are posted and also submitted to the Secretary of State per the procedures in O.C.G.A. §§ 21-2-496 and 21-2-497.

28.

In the event of an “incorrect outcome” there are procedures to conduct a risk limiting audit to determine “acceptable levels of the risk of certifying a preliminary election outcome that constitutes an incorrect outcome.” O.C.G.A. § 21-2-498.

29.

“Upon receiving the certified returns from any election from the various superintendents, the Secretary of State shall immediately proceed to tabulate, compute and canvass the votes casts for all candidates . . . . In the event an error is found in the certified returns presented to the Secretary of State . . . the Sectary of State shall notify the county submitting the incorrect returns and direct the county to correct and recertify such returns . . . .” O.C.G.A. § 21-2-499.

30.

“The Secretary of State shall also, upon receiving the returns for presidential electors, proceed to tabulate, compute, and canvass the votes cast for each slate of presidential electors and shall immediately lay them before the Governor. Not later than 5:00 P.M. on the seventeenth day following the date on which such election was conducted, the secretary of State shall certify the votes cast for all candidates described in subparagraph (a)(4)(A) of Code Section 21-2-487 and upon all questions voted for by the electors of more than one county and shall no later than that same time lay the returns for presidential electors before the Governor. The Governor shall enumerate and ascertain the number of votes for each person so voted and shall certify the slates of presidential electors receiving the highest number of votes. The Governor shall certify the slates

of presidential electors no later than 5:00 P.M. on the eighteenth day following the date on which such election was conducted. Notwithstanding the deadlines specified in this Code section, such times may be altered for just cause by an order of a judge of superior court of this state.” O.C.G.A. § 21-2-499. Thus, absent an order from a superior court, these deadlines must be conducted within the times set forth in this code provision. And again, certification is required pursuant to O.C.G.A. § 21-2-493(i).

31.

The provisions for election contests in Georgia’s superior courts are detailed in Article 13 of Title 21. The contests can include claims of “misconduct, fraud or irregularity by any primary or election official or officials sufficient to change or place in doubt the result.” O.C.G.A. § 21-2-522(1). As noted above, if after this judicial review, a court determines that the election results are incorrect, the court will order, and the superintendent will, recertify the votes based upon this order. O.C.G.A. § 21-2-493(l)

32.

The limitations of the superintendent’s role in calculating, canvassing, and certifying election results are thus clearly set forth in the Election Code, as are the proper methods of reporting and challenging election certifications.

33.

Superintendents are required to tabulate the votes, canvass them, and flag issues. But the Election Code limits the scope of these reviews and requires timely certification of the vote computations. Certification is mandatory pursuant to the language of the Election Code and is a ministerial function that the superintendent must complete per the Election Code.

### **C. THE NEW SEB RULES**

34.

Despite the foregoing, the State Board of Elections promulgated a series of new rules that are inconsistent with the Election Code, in excess of the SEB’s rulemaking authority, and constitute an exercise of an unconstitutionally delegated legislative power. The promulgation and enactment of these rules occurred following a divided 3-2 vote of the SEB.

#### **1. SEB Rule 183-1-12.02(c.2) Is Unconstitutional and Contrary to the Election Code**

35.

New SEB Rule 183-1-12.02(c.2), effective September 4, 2024, creates a new definition of the term “certify” that is not set forth in the Election Code. The new rule defines “certify” as follows: “Certify the results of a primary, election, or runoff,” or words to that effect, means to attest, after reasonable inquiry that the tabulation and canvassing of the election are complete and accurate and that the results are a true and accurate accounting of all votes cast in that election.”

36.

“Certify” can only mean what the General Assembly says it means in the context of the Election Code. And the General Assembly has specifically set forth the certification requirements in O.C.G.A. § 21-2-493. The SEB has no constitutional authority to expand or circumscribe that definition or alter the role or authority of any superintendent regarding the certification of election results. While the General Assembly did not specifically define “certify”, it did provide express limited authority to superintendents regarding their certification duties. The General Assembly painstakingly details what certification requires. Nowhere in the Election Code, or the General Assembly’s grant of rulemaking authority to the SEB, does the General Assembly permit or allow members of a county election board, either collectively or individually, to delay certification based

on a “reasonably inquiry into the tabulation and canvassing” of the election results. The results must be certified per the Election Code and within the timeframes and parameters set. And thus Rule 183-1-12.02(c.2) is void as it is inconsistent with the statutory framework.

37.

Additionally, the General Assembly’s delegation of rulemaking authority to the SEB is broad and undefined—and thus unconstitutional. It does not contain “sufficient” and “realistic” parameters that would allow the SEB to further define “certify” by rule the term as used in the Election Code. To the extent that any guidance is given, which Plaintiffs contend is insufficient, the Election Code merely advises that the SEB can promulgate rules that provide “consistency” and “uniformity” in the certification process. The SEB new rule that superintendents can, unguided and based solely on their “reasonable inquiry” (another undefined term), determine which votes should be certified introduces an element of inconsistency and lack of uniformity. Indeed, this novel scheme empowers the individual superintendents to determine what is a “reasonable inquiry” and what is not. This unguided and discretionary ability to count votes will sow chaos—as the 2020 Presidential Election certifications in various Georgia counties, including Coffee County, evidence.

38.

Finally, the General Assembly has no authority to delegate its legislative role to the SEB at all, as any such legislative delegation violates Ga. Const. Art. I, Sec. II, Par. III. This is particularly true where the General Assembly has set forth in over 500 pages of the Georgia Code Annotated the rules by which votes of our citizens must be counted. The conveyance of a gap-filling role to cover items the General Assembly did not specifically legislate is constitutionally impermissible.

39.

But, even if the General Assembly *could* broadly delegate unbounded authority to the SEB, the requisite specificity is utterly lacking. The General Assembly “does not, one might say, hide elephants in mouseholes.” *State v. Hudson*, 303 Ga. 348, 353 (2018) (quoting *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001)). And “[t]he importance of the issue of [voting and voting rights], which has been the subject of an earnest and profound debate across the country ..., makes the oblique form of the claimed delegation all the more suspect.” *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quotation omitted). Simply put, the General Assembly “could not have intended to delegate a decision of such ... political significance to an agency in so cryptic a fashion.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Rather, this Court should presume that the General Assembly “intends to make major policy decisions itself, not leave those decisions to agencies.” *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

**2. SEB Rule 183-1-12.12 Is Unconstitutional and Contrary to the Election Code**

40.

New SEB Rule 183-1-12.12, effective September 16, 2024, provides that county boards shall make available to any individual member of a county board of election “all election related documentation created during the conduct of elections prior to certification results.”

41.

New SEB Rule 183-1-12.12(.1)(6) is inconsistent with the Election Code which otherwise provides the time, manner, and method in which election-related documentation must be produced and maintained. *See, e.g.*, O.C.G.A. § 21-2-493. The superintendent (or election board members) are authorized to be provided with the information set forth in the Election Code to do their job,

nothing more. For instance, O.C.G.A. § 21-2-70(9) provides that superintendents can “receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to authorities as may be prescribed by law.” Nothing in the statutory grant provides more. The “all documentation created” is undefined and would introduce into the consideration of certifications materials that the superintendents are not authorized to consider in tabulating, canvassing, and certifying vote counts. Moreover, the rule authorizing individual “board members” to receive such information, is contrary to the statutory language that the materials statutorily considered are to be reviewed by the superintendent (the entire board), and not by any individual election board members alone.

42.

The materials that can be considered by superintendents in their certification review are outlined by the Election Code. The SEB has no constitutional authority to expand or add to those materials in a way that would change the role or authority of any superintendent regarding the certification of election results. The General Assembly painstakingly details what certification is required and what materials are to be considered. Nowhere in the Election Code, or the General Assembly’s grant of rulemaking authority to the SEB, does the General Assembly permit or allow members of a county election board, either collectively or individually, to have more. The results must be certified per the Election Code and within the timeframes and parameters set. Thus, SEB Rule 183-1-12.12(1)(6) is void as it is inconsistent with the statutory framework.

43.

Additionally, the General Assembly’s general delegation of rulemaking authority to the SEB is broad and undefined—and therefore unconstitutional. It does not contain “sufficient” and “realistic” parameters for the SEB to permit superintendents or any election board member to

introduce into a certification decision “all election related documentation created during the conduct of elections prior to certification results”—whatever that might be. The non-statutory materials are irrelevant to the certification inquiry and thus may not, and should not, be considered. To the extent any guidance is given, which Plaintiffs contend is insufficient, the Election Code merely advises that the SEB can promulgate rules that provide “consistency” and “uniformity” in the certification process. The SEB providing by rule that superintendents can, unguided and based solely on their request for “all election related documentation,” determine which votes should be certified and which should not, introduces an element of inconsistency and lack of uniformity in the manner in which votes are certified in this State, as it leaves to the individual superintendents the ability to determine what non-statutory information might be considered or that they individually might consider. This unguided and discretionary ability to request and utilize, pre-certification, such information will sow chaos as the materials considered pre-certification would clearly not be uniform or consistent.

44.

Finally, the General Assembly has no authority to delegate its legislative role to the SEB at all, as any such legislative delegation violates Ga. Const. Art. I, Sec. II, Par. III. This is particularly true where the General Assembly has set forth in over 500 pages of the Georgia Code Annotated the rules by which votes of our citizens must be counted. The conveyance of a gap-filling role to cover items the General Assembly did not specifically legislate is constitutionally impermissible.

45.

But, again, even assuming the General Assembly was permitted to broadly delegate legislative power, it did not do so here. Nothing is more politically sensitive and hotly debated than voting rights. As such, any delegation of legislative power concerning voting rights must be

exceedingly specific so that courts can be confident that the General Assembly actually meant to cede its authority on such an important issue.

46.

Here, the General Assembly has made numerous changes to the Election Code since the last Presidential election in 2020. Yet, it saw no need to implement any change(s) resembling the SEB's recent misadventure. That means the General Assembly either (1) forgot and delegated its authority to the SEB or (as is far more likely) or(2) never foresaw the SEB's recent rules. In the face overwhelming legislative silence, the SEB cannot credibly claim any delegated authority to cause a sea change in Georgia election law. Assuming the General Assembly could delegate authority to cause such a transformation, it must be absolutely clear.

**3. SEB Rule 183-1-14-.02(18) Is Unconstitutional and Contrary to the Election Code**

47.

New Rule 183-1-14-.02(18) purports to proscribe the manner in which absentee votes are received. It says:

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. An absentee ballot form provided by the Secretary of State shall be completed by the registrar, clerk, deputy, or election official. The form shall serve as a written record of the name of the elector, the name of the person delivering the absentee ballot, the relation to voter, signature of the person depositing the ballot, and type of ID of the person delivering the absentee ballot. The absentee ballot form shall be returned with the absentee ballots and chain of custody forms to the superintendent. Any ballot not included on the recorded absentee ballot form or any ballot delivered without a signed chain of custody shall be considered a provisional absentee ballot. The superintendent shall notify any elector with a provisional ballot immediately and provide information and instructions of how to cure the provisional absentee ballot.

48.

New Rule 183-1-14-.02(18) requires, *inter alia*, the photograph ID of the absentee voter and requires the person who delivers the absentee ballot to a drop box location to provide a signature and photo ID, and approved relation to the elector's name on the absentee ballot. This requirement is nowhere to be found in the Election Code. *See* O.C.G.A. § 21-2-385.

49.

O.C.G.A. § 21-2-385 only requires that the absentee voter “shall print the number of his or her Georgia’s drive license or identification card issued pursuant to Article 5 of Chapter 5 of Title 40 in the space provided on the outer oath envelope.” No copy of an ID is required. O.C.G.A. § 21-2-385 also provides that such envelope shall then be securely sealed and the elector shall then personally mail or personally deliver same to the board of registrars or absentee ballot clerk, provided that mailing or delivery may be made by the elector's mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector.” No signature and photo ID of the person delivering the ballot is required. The SEB has no constitutional authority to expand or add to these requirements in a way that would change the role or authority of any superintendent or other person counting and accepting absentee ballots. The General Assembly painstakingly details what certification is required and what materials are to be considered. Nowhere in the Election Code, or the General Assembly’s grant of rulemaking authority to the SEB, does the General Assembly permit or allow members of a county election board, either collectively or individually, to have more. The results must be certified per the Election Code and within the timeframes and parameters set. And thus SEB Rule 183-1-14-.02(18) is void as it is inconsistent with the statutory framework.

50.

Further, the timing of the SEB's new rules weighs in favor of the injunctions requested below. It would be one thing for the SEB to propose new rules in January 2023 (or even January 2024) without the specter of an impending Presidential election. But to propose such sweeping new rules mere months before such an important election suggests bad faith and worst and clumsiness at best. The SEB simply cannot be allowed to promulgate drastic changes on the eve of an election that accomplish little more than sowing discord and confusion amongst voters.

51.

Additionally, the General Assembly's general delegation of rulemaking authority to the SEB is broad and undefined—and thus unconstitutional. It does not contain “sufficient” and “realistic” parameters to the SEB to permit superintendents or any election board member to introduce into a requirement for absentee ballots that is not proscribed by statute. The non-statutory materials and information are irrelevant to absentee ballot validity and thus may not, and should not, be required. To the extent that any guidance is given, which Plaintiffs contend is insufficient, the Election Code merely advises that the SEB can promulgate rules that provide “consistency” and “uniformity” in the certification process. The SEB providing by rule that absentee voters or those who deliver absentee ballots must provide additional non-statutory information introduces an element of inconsistency and lack of uniformity in the way votes are certified in this State and is unconstitutional.

52.

Finally, the General Assembly has no authority to delegate its legislative role to the SEB at all, as any such legislative delegation violates Ga. Const. Art. I, Sec. II, Par. III. This is particularly

true where the General Assembly has set forth in over 500 pages of the Georgia Code Annotated the rules by which votes of our citizens must be counted. The conveyance of a gap-filling role to cover items the General Assembly did not specifically legislative is constitutionally impermissible.

**4. SEB Rule 183-1-14-.02(19) Is Unconstitutional and Contrary to the Election Code**

53.

New Rule 183-1-14-.02(19) provides:

At 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. Such surveillance shall include visual recording of the drop box if there is one located at that site. Any drop box that is not under constant and direct surveillance shall be locked or removed and prohibited from use. Video surveillance may be live-streamed but must be recorded and will be considered part of the election documents and retained as provided in Code Section 21-2-390.

54.

Nothing in the Election Code permits the video surveillance and recording of a drop box. And nothing in the Election Code permits votes placed into a drop box that is not video surveilled to *not* be counted. Rather the Election Code says only that “[t]he drop box location shall have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement official, or licensed security guard.” O.C.G.A. § 21-2-382(c)(1).

55.

It should be noted that the SEB, in creating its emergency rules during the 2020 COVID pandemic, provided in Rule 183-1-14-.06-.14(4) (2020) that “[d]rop box locations must have adequate lighting and use a video recording device to monitor each drop box location. The video recording must either continuously record the drop box location or use motion detection that records one frame, or more, per minute until detection of the motion triggers continuous recording.” *See also* SEB Rule 183-1-14-.06-.14(5) (2020) (discussing retention of drop box

videos). In 2021, the General Assembly, in SB 202, statutorily provided that drop boxes would be available for absentee ballots. As to drop boxes, SB 202, which became in part O.C.G.A. § 21-2-382(c)(1), borrowed heavily from the SEB 2020 drop box rule. Importantly, however, the General Assembly expressly *declined* to adopt the video surveillance requirement in O.C.G.A. § 21-2-382(c)(1). This purposeful legislative decision has been usurped by the SEB in New Rule 183-1-14-.02(19).

56.

New Rule 183-1-14-.02(19) legislates an additional requirement to the detailed absentee ballot voting procedure, potentially eliminates legal avenues for absentee voting, and it further says that votes cast in drop boxes that are not video monitored may *not* be counted at all. The rule says that “any drop box that is not under constant and direct surveillance shall be locked or removed and prohibited from use.” This would lead to: (1) statutorily authorized drop boxes being taken out of use as legal depositories of absentee votes; and (2) votes deposited in an unlocked drop box that is not video monitored not being counted.

57.

This contravenes the not only the statutory process regarding the availability of absentee ballot drop boxes and improperly expands the constitutional limitation of SEB’s authority, but it also potentially violates the voter’s constitutional rights to have their votes counted. The ability of any superintendent to remove authorized drop boxes and potentially reject votes placed in those not video monitored, additionally and improperly expands the authority of local superintendents to surveil citizens (and potentially live-stream them to the public). All of this violates the Election Code.

58.

Additionally, the General Assembly’s general delegation of rulemaking authority to the SEB is broad and undefined—and thus unconstitutional. It does not contain “sufficient” and “realistic” parameters for the SEB to permit superintendents or any election board member to introduce a requirement for monitoring absentee ballot drop boxes, removing or restricting absentee ballot drop boxes, or not counting votes placed in such drop box.

59.

Finally, the General Assembly has no authority to delegate its legislative role to the SEB at all, as any such legislative delegation violates Ga. Const. Art. I, Sec. II, Par. III. This is particularly true where the General Assembly has set forth in over 500 pages of the Georgia Code Annotated the rules by which votes of our citizens must be counted. The conveyance of a gap-filling role to cover items the General Assembly did not specifically legislate is constitutionally impermissible.

### **5. All SEB Rules Are Unconstitutional**

60.

Indeed, as repeated above, the SEB lacks not only the constitutional authority to promulgate the specific rules challenged above, but also lacks the constitutional authority to promulgate any rules by Ga. Const. Art. I, Sec. II, Par. III. The SEB’s sole constitutional role is to execute the specific statutes the General Assembly has promulgated.

### **COUNT I**

### **DECLARATION THAT SEB RULES 183-1-12.02(c.2), 183-1-12.12, AND 183-1-14-.02(18) and (19) ARE CONTRARY TO THE ELECTION CODE**

61.

Paragraphs 1- 60 are incorporated herein by reference.

62.

For the foregoing reasons, the Court should declare that SEB Rules 183-1-12.02(c.2), 183-1-12.12, and 183-1-14-.02(18) and (19) are void, as they are inconsistent with the Election Code and not authorized by the General Assembly. The Court should further declare that the SEB lacks authority to promulgate rules in contravention of the Election.

**COUNT II**

**DECLARATION THAT THE SEB UNCONSTITUTIONALLY PROMULGATED RULES 183-1-12.02(c.2), 183-1-12.12, AND 183-1-14-.02(18) and (19) WITHOUT SUFFICIENT OR REALISTIC GUIDELINES FROM THE GENERAL ASSEMBLY**

63.

Paragraphs 1- 62 are incorporated herein by reference

64.

For the foregoing reasons, the Court should declare that SEB Rules 183-1-12.02(c.2), 183-1-12.12, and 183-1-14-.02(18) and (19) are void. The Court should further declare that the delegation by the General Assembly to the SEB to promulgate such rules violates Ga. Const. Art. I, Sec. II, Par. III and is an unconstitutional delegation of legislative authority, violating the separation of powers doctrine, by the General Assembly to the SEB because the General Assembly conveyed to the SEB legislative authority without sufficient or realistic guidelines regarding the SEB's rulemaking.

**COUNT III**

**DECLARATION THAT THE SEB UNCONSTITUTIONALLY PROMULGATED RULES 183-1-12.02(c.2), 183-1-12.12, AND 183-1-14-.02(18) and (19) IN VIOLATION OF GA. CONST. ART. I, SEC. II, PAR. III**

65.

Paragraphs 1- 64 are incorporated herein by reference.

66.

For the foregoing reasons, the Court should declare that SEB Rules 183-1-12.02(c.2), 183-1-12.12, and 183-1-14-.02(18) and (19) are void. The Court should further declare that the delegation by the General Assembly to the SEB to promulgate such rules violates Ga. Const. Art. I, Sec. II, Par. III and is an unconstitutional delegation of legislative authority and that the General Assembly lacks authority to convey any legislative rulemaking to the SEB.

**COUNT IV**

**DECLARATION THAT THE SEB UNCONSTITUTIONALLY PROMULGATED ALL ITS RULES IN VIOLATION OF GA. CONST. ART. I, SEC. II, PAR. III**

67.

Paragraphs 1- 66 are incorporated herein by reference.

68.

For the foregoing reasons, the Court should declare that the SEB lacks constitutional authority to promulgate rules. The Court should further declare that the delegation by the General Assembly to the SEB to promulgate such rules violates Ga. Const. Art. I, Sec. II, Par. III and is an unconstitutional delegation of legislative authority and that the General Assembly lacks authority to convey any legislative rulemaking to the SEB.

**COUNT V**

**INJUNCTION AGAINST THE SEB AND THE STATE FROM ENFORCING 183-1-12.02(c.2), 183-1-12.12, AND 183-1-14-.02(18) and (19)**

69.

Paragraphs 1- 68 are incorporated herein by reference.

70.

If the Court issues the declarations requested in Counts I, II, III, or IV, then pursuant to Ga. Const. Art. I, Sec. II, Par. V(a), the Court should enjoin the State and the SEB (which the State of Georgia stands in the shoes of for purposes of this action) from enforcing SEB Rules 183-1-12.02(c.2), 183-1-12.12, and 183-1-14-.02(18) and (19).

71.

If the Court issues the declarations requested in Counts I, II, III, or IV, then pursuant to Ga. Const. Art. I, Sec. II, Par. V(a), the Court should issue an injunction requiring the State of Georgia and the SEB (which the State of Georgia stands in the shoes of for purposes of this action) from enforcing SEB Rules 183-1-12.02(c.2), 183-1-12.12, and 183-1-14-.02(18) and (19) to delete those rules from its rolls and to inform all superintendents or others to whom the rules purportedly apply that these rules are void and may not be used or considered to count, canvass, certify, or validate votes.

## **COUNT VI**

### **INJUNCTION AGAINST THE SEB AND THE STATE FROM ENFORCING THE SEB RULES**

72.

Paragraphs 1- 71 are incorporated herein by reference.

73.

If the Court issues the declaration requested in Count IV, then pursuant to Ga. Const. Art. I, Sec. II, Par. V(a), the Court should enjoin the State and the SEB (which the State of Georgia stands in the shoes of for purposes of this action) from enforcing any SEB Rules.

If the Court issues the declaration requested in Count IV, then pursuant to Ga. Const. Art. I, Sec. II, Par. V(a), the Court should issue an injunction prohibiting the State of Georgia and the SEB (which the State of Georgia stands in the shoes of for purposes of this action) from enacting any SEB Rules and to require the State of Georgia and the SEB (which the State of Georgia stands in the shoes of for purposes of this action) to delete all SEB Rules from its rolls and to inform all superintendents or others to whom the rules purportedly apply that these rules are void and may not be used or considered to count, canvass, certify, or validate votes.

**PRAYER FOR RELIEF**

1. That the Court enter the declarations requested herein.
2. That the Court enter the injunctions requested herein.
3. That the Court provide any other relief necessary and proper to effectuate the relief requested herein.

Respectfully submitted this 11<sup>th</sup> day of September 2024.

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