IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AMERICAN OVERSIGHT and JOHN DOE,

Plaintiffs,

v.

THE GEORGIA STATE ELECTION BOARD; JANICE JOHNSTON, in her individual capacity and official capacity as a Member of the Georgia State Election Board; RICK JEFFARES, in his individual capacity and official capacity as a Member of the Georgia State Election Board; JANELLE KING, in her individual capacity and official capacity as a Member of the Georgia State Election Board; JOHN FERVIER, in his official capacity as the Chairman of the Georgia State Election Board; SARA TINDALL GHAZAL, in her official capacity as a Member of the Georgia State Election Board;

Defendants, and

THE GEORGIA REPUBLICAN PARTY,

Defendant-Intervenor.

CIVIL ACTION FILE NO. 24CV009124

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs American Oversight and John Doe hereby file their response to the Motion to Dismiss filed by Defendant Georgia State Election Board ("SEB") and the Defendant Members of the Georgia State Election Board.[1]

[1] Plaintiffs' August 30, 2024 motion seeking leave from this Court to file an amended complaint to remove one claim and drop the two nominal defendants associated solely with it (Board members John Fervier and Sarah Tindall Ghazal) is pending. *See* Pl. Mot. for Leave to Drop John Fervier and Sarah Tindall Ghazal as Defs. in This Action ("Mot. Drop Defs."). If granted,

INTRODUCTION

The Open Meetings Act (the "Act") exists to ensure that official business by government agencies is conducted in public view, "to eliminate . . . closed meetings which engender in the people a distrust of its officials who are clothed with the power to act in their name." *McLarty v. Bd. of Regents of Univ. Sys. Of Ga.*, 231 Ga. 22, 23 (1973). Yet Defendants' Motion essentially argues that if a governmental body does not follow the Open Meetings Act when conducting official business, it did not hold a "meeting" and is therefore relieved of the requirements of the Open Meetings Act. Defendants' argument relies on circular logic, misreads the allegations and claims in Plaintiffs' Verified Complaint, and applies overly strict statutory interpretation principles to one limited section of the Open Meetings Act while ignoring wholesale other provisions of the Act, resulting in an incorrect interpretation of the law.

Here, members of the SEB purported to take official agency action when they convened on July 12. They posted a public notice of an SEB meeting; assembled in the room in the State Capitol Building where the SEB customarily meets; gaveled in what purported to be an SEB meeting; discussed official SEB business; and purported to vote on those agenda items. But Defendants now claim that this was *not* a "meeting" because Defendants did not comply with the Open Meetings Act's requirements concerning notice and quorum. In other words, Defendants rely on their very violations of the Act to try to shield themselves from the Act's enforcement provisions.

Specifically, Defendants posit that three out of five members of a state agency can meet and attempt to take official action that would otherwise be subject to the Open Meetings Act. But

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this would leave the State Election Board, as well as Janelle King, Rick Jeffares, and Janice Johnston as the sole government defendants.

if they commit certain violations of the Open Meetings Act itself—in this case, the failure to meet the in-person quorum requirement—this renders the Open Meetings Act inapplicable. If adopted, this argument would leave people like Plaintiffs without recourse against actions that the Act prohibits, defeating the policy objectives underlying the statute. The Act's enforcement provisions would become a dead letter: if a meeting convened in violation of the Act's requirements is not a "meeting" and therefore not subject to the Act, then the Georgia General Assembly's carefully crafted penalties for violating the Act would be rendered a nullity. This perverts the bedrock principles of statutory construction.

Because Plaintiffs have sufficiently pleaded violations of the Open Meetings Act, Defendants' Motion should be denied.

BACKGROUND

On July 12, 2024, at 4 p.m., Defendants Rick Jeffares and Janelle King, joined by Board Executive Director Michael Coan, appeared in Room 341 of the Georgia State Capitol Building and purported to convene a meeting of the SEB. *See* Verified Compl., ¶ 61. Defendant Janice Johnston appeared by video. *Id.* ¶ 62. Just one day prior to the meeting, board members posted a document purporting to be a notice outside the room at the State Capitol Building where the meeting would take place. *Id.* ¶ 2. At the July 12 meeting, two rules were considered and approved as proposed rules by Defendants Jeffares, Johnston, and King. *Id.* ¶ 66.

On July 15, 2024, Plaintiff American Oversight sent a letter via email to all five members of the SEB, detailing allegations of the members' failure to comply with Georgia law, including their failure to provide proper notice to the public in advance of the July 12 meeting and their failure to establish a "physical quorum" at the meeting. *See* Verified Compl., Ex. B (Letter from American Oversight to Members of the SEB). The letter further stated that "American Oversight

and our partners in Georgia reserve the right to pursue legal action if the Board does not publicly, and **no later than Wednesday, July 17**, clarify that the sham meeting violated Georgia law and that the rules it purported to adopt are legally null and void." *Id.* ¶ 72 (emphasis in original).

Having received no response to their correspondence to the members of the SEB, Plaintiffs filed a Verified Complaint in this matter on July 19, 2024. On July 24, 2024, Plaintiffs filed an Emergency Motion for Interlocutory Injunction and Temporary Restraining Order, requesting that the Board and its members be enjoined from implementing or taking further action with respect to the rules proposed to be adopted at the unlawful July 12, 2024 meeting.

After Plaintiffs filed the Emergency Motion, the Board had another meeting in which it superseded the actions it took at the unlawfully convened July 12 meeting. *See* Mot. Drop Defs., Exh. A (Am. Compl. for Damages) ¶ 73.[2] In light of the Board's superseding action, Plaintiffs withdrew their Emergency Motion and, on August 30, filed a motion for leave to amend their Complaint to remove the claim against the Board seeking to invalidate actions taken at the July 12 meeting, and to drop the two nominal Defendants who did not attend the July 12 meeting and who had been included solely because of their association with that claim. *See* Mot. Drop Defs.

ARGUMENT AND CITATION TO AUTHORITY

Defendants' Motion to Dismiss should be denied because the allegations in Plaintiffs' Verified Complaint sufficiently plead that a majority of the members of the SEB participated in

[2] *See also* John McCosh, *Georgia Election Board Walks Back Rules Approved at Meeting Flagged by State AG*, GA. RECORDER (July 30, 2024 5:05 PM), https://georgiarecorder.com/briefs/georgia-election-board-walks-back-rules-approved-at-meeting-flagged-by-state-ag; Nick Corasaniti, *Georgia Board Grants Local Officials New Power Over Certifying Elections*, N.Y. TIMES (Aug. 6, 2024), https://www.nytimes.com/2024/08/06/us/politics/georgia-elections-certification.html.

the meeting on July 12. Therefore, the meeting is subject to the Open Meetings Act, even if—indeed *because*—Defendants' violations of the Act rendered the meeting without legal effect.

I. Standard for Motion to Dismiss

In Georgia, "[a] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *Williams v. DeKalb Cnty*., 308 Ga. 265, 270 (2020) (quoting *Anderson v. Flake*, 267 Ga. 498, 501 (1997)). Because Plaintiffs' Verified Complaint sets forth allegations establishing legal violations entitling them to relief, Defendants cannot meet these standards and their Motion should be denied.

II. Plaintiffs have properly alleged claims under the Open Meetings Act.

A. The July 12 meeting is subject to the Open Meetings Act's requirements and enforcement penalties.

At its core, Defendants' argument is that, because the SEB held a meeting that violated the Open Meetings Act, that meeting was not actually a meeting and therefore was not subject to the Act. Not only does this absurd proposition violate the spirit of the Act, it rests on a misreading of the statute. Defendants specifically argue that the "plain text" of the Open Meetings Act requires the physical presence of the majority of voting members of a governing body before the Act's requirements are triggered. Defs.' Mot. at 7-9. In doing so, Defendants omit key provisions of the statute.

The Open Meetings Act defines a "meeting" in relevant part as "[t]he gathering of a quorum of the members . . . of an agency at which any official business, policy, or public matter

of the agency is formulated, presented, discussed, or voted upon." O.C.G.A. § 50-14-1(a)(3)(A)(i). Plaintiffs alleged in their Verified Complaint that three of the five members of the SEB—a quorum—attended the July 12 meeting, at which rules were considered and approved. *See* Verified Compl. ¶¶ 61-62, 66; O.C.G.A. § 21-2-30(d) ("Three voting members of the board shall constitute a quorum. . . ."). The July 12 gathering therefore meets the definition of a "meeting" under the Act.

To get around this clear legal result, Defendants wrongly try to import the Act's *separate* in-person quorum requirement into the definition of a "meeting." To be sure, Plaintiffs allege that one of the three members of the SEB appeared by video, *id.* ¶ 62, which is a violation of the Act's requirement that a "quorum is present in person," absent emergency conditions or express authorization by statute not applicable here. O.C.G.A. § 50-14-1(g)(3). While failure to establish an in-person quorum when it is required violates the Act, it does not mean that a meeting is no longer a "meeting" covered by the Act. Importantly, the in-person quorum requirement is not a part of the "meeting" definition, which simply requires a "gathering of a quorum" without regard to whether they gather virtually or in person. *Compare* O.C.G.A. § 50-14-1(a)(3)(A) (defining "meeting"), *with* § 50-14-1(g) (addressing virtual meetings in emergency conditions). Moreover, the in-person quorum requirement does not always apply, such as in emergencies. Yet virtual meetings held during emergencies are still "meetings" covered by the Act.

Certainly, if the legislature had intended the Open Meetings Act to *not apply at all* to situations in which a quorum is established only by the presence of one person by video, it would have addressed that clearly in the statute, such as by defining "quorum" to mean not the standard

understanding of the word—a majority—but the "physical presence of a majority."[3] Instead, while the Open Meetings Act does not define "quorum," it does, in the provision addressing attendance by teleconference, employ the phrase "and so long as ***a quorum is present in person***," indicating that a quorum can exist (and thus make a meeting subject to the Act) but still violate the Act if the required number of members are not physically present. *See* O.C.G.A. § 50-14-1(g)(3) (emphasis added). That is what Plaintiffs allege and what Defendants concede happened here.

In fact, elsewhere in the statute, the General Assembly made clear its intent for the Open Meetings Act to apply whenever a government body attempts to hold a meeting, even if they fail to do so properly. For example, in defining a "meeting," the statute carves out several scenarios where a quorum of a governing body might gather but the General Assembly did not want the Act to apply. This includes where a quorum gathers for property inspections or to attend training courses. O.C.G.A. § 50-14-1(a)(3)(B)(i)–(ii). The General Assembly made clear that such gatherings are exempt from the Open Meetings Act ***only*** where members do not take any official action or discuss official business. O.C.G.A. § 50-14-1(a)(3)(B)(i)–(v). If they do, then the gathering is a "meeting" subject to the Open Meetings Act. O.C.G.A. § 50-14-1(a)(3)(A). The General Assembly reiterated this intent by creating a catch-all provision noting that the Act's requirements apply whenever the "primary purpose of the gathering or gatherings is to evade or avoid the requirements for conducting a meeting while discussing or conducting official

[3] *Black's Law Dictionary* defines a quorum as "[t]he smallest number of people who must be present at a meeting so that one or more official decisions can be made." *Quorum*, *Black's Law Dictionary* (12th ed. 2024). Merriam-Webster's online dictionary similarly defines a quorum as "the minimum number of officers or members of a body that is required to be present at a given meeting (as to transact business)." *Quorum*, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/quorum (last visited Sept. 27, 2024).

business." O.C.G.A. § 50-14-1(a)(3)(B). In other words, the General Assembly went to great pains to foreclose the very line of argument that Defendants attempt here. It would be incredible indeed if the General Assembly intended for the Open Meetings Act not to apply to a gathering where an agency purports to take official action—as the State Election Board did on July 12, *see* Verified Compl. ¶ 66—because one member of the quorum appeared virtually. And yet that is precisely the result Defendants advance in their Motion.

The short answer to Defendants' Motion is that the July 12 gathering was a "meeting" and therefore the Open Meetings Act applied. As a result, Plaintiffs have stated a claim for relief.

B. Defendants' case law is irrelevant.

The cases cited by Defendants are inapplicable to the facts at hand. Defendants cite *Lue v. Eady*, Defs.' Mot. at 8, which concerned the trial court's entry of an interlocutory injunction prohibiting the mayor from meeting privately with three or more members of the city council to discuss city business. 297 Ga. 321, 325-26 (2015). The mayor argued the order was improper because the city council's charter defined a quorum as "four or more members" of city council, and the mayor only had the power to vote on the council to break a tie. *Id.* The Georgia Supreme Court reversed the injunction to the extent it required compliance with the Open Meetings Act for meetings with only three councilmembers because a quorum would not be present. *Id.* at 327.

Here, unlike in *Lue*, attendees at the July 12 SEB meeting *did* constitute a quorum for the SEB under Georgia law. *See* O.C.G.A. § 21-2-30 (providing that three voting members of the SEB constitute a quorum). Plaintiffs do not allege that a majority of members did not participate in the July 12 meeting; they allege that the quorum that met that day—two in person and one by video—did not meet the separate in-person requirements prescribed by the Open Meetings Act and therefore amounted to a violation of the Act.

The Defendants also cite *Phillips v. Hawthorne*, 269 Ga. 9 (1998). But *Phillips* is not only inapplicable, Defendants' summation of it is incorrect. *See* Mot. at 8-9. Defendants claim *Phillips* holds that "petitions to recall public officials for alleged violations of Open Meetings Act were legally insufficient where they failed to specify that a quorum was present." *Id.* The Court actually held that the allegations *were* legally sufficient, stating: "We reject the implication that a recall application is legally insufficient for using terms the definitions of which are established by statutes referenced in the application. Nor can we agree that every recall application must set forth every essential element of any crime alleged to have been committed in order to qualify as 'legally sufficient.'" *Phillips*, 269 Ga. at 14. Regardless, *Phillips* is inapplicable to this case, as the Court in *Phillips* examined the sufficiency of a recall petition, not a legal pleading. And in this case Plaintiffs *have* alleged that a quorum—three of the five members of the SEB—attended the July 12 meeting.

Unlike the cases Defendants have cited, Plaintiffs have sufficiently pleaded that a quorum of the SEB attended the July 12 meeting, putting the meeting squarely in the ambit of the Open Meetings Act.

C. The content of American Oversight's letter should not be considered admissions in judicio.

The rest of Defendants' argument that Plaintiffs have failed to state a claim for which relief may be granted relies almost entirely on an exhibit attached to Plaintiffs' Verified Complaint. *See* Defs.' Mot. at 5-8. Defendants argue that language in the exhibit (a letter sent by Plaintiff American Oversight to members of the SEB prior to filing the lawsuit) should be

considered "admissions in judicio" that would operate to prevent Plaintiffs from moving forward in this action.[4] *Id.*

Defendants' assertion that the statements in American Oversight's letter should be categorized as judicial admissions is misplaced. An admission in judicio that "binds the party" must "constitute an admission of fact or of the existence of a legal relationship." *Wahnschaff v. Erdman*, 232 Ga. App. 77, 79 (Ga. Ct. App. 1998). Further, "[a]n admission in judicio applies only to the admission of fact and does not apply where the admission is merely the opinion or conclusion of the pleader as to law or fact," and "allegations which are conclusory, or which assert mere opinions of the pleader are not admissions in judicio." *Id.* (citing *Howell Mill/Collier Assoc. v. Pennypacker's, Inc.*, 194 Ga. App. 169, 172 (1990)).

Importantly, Defendants fail to provide context to American Oversight's inclusion of the letter as an exhibit in its Verified Complaint. The letter was included and cited only to substantiate Plaintiffs' allegation that American Oversight sent a letter on July 15, 2024 to the members of the SEB outlining the members' alleged violations of Georgia law. *See* Verified Compl. ¶ 72 ("On July 15, 2024, Plaintiff American Oversight sent a letter via email to all five members of the State Election Board, putting them on notice that the July 12 Unlawful Meeting violated the Georgia Open Meetings Act and possibly other provisions of Georgia law. Ex. B."). The content of the letter was not meant to supplant the allegations included in Plaintiffs' Verified Complaint—which state a claim for violation of the Act for the reasons set out above.

Further, Defendants' arguments that American Oversight's statement in the letter that "no meeting" took place (a phrase that was clearly intended by American Oversight to assert that it

[4] Even if Defendants were right that the letter somehow prevents American Oversight from moving forward in this suit—which it does not—the letter could not bind Plaintiff John Doe, who did not sign or send it.

considered the July 12 meeting unlawful), should be deemed an admission in judicio cannot prevail because the statement is not one of fact. It was instead an opinion of American Oversight based on the members' failure to comply with the Open Meetings Act. See *Wahnschaff v. Erdman*, 232 Ga. App. at 79 ("An admission in judicio applies only to the admission of fact and does not apply where the admission is merely the opinion or conclusion of the pleader as to law or fact."). The letter also plainly takes the position that the Open Meetings Act applied to the July 12 meeting, and it is certainly not an acceptance of the premise of Defendants' Motion.

In addition to the American Oversight letter included as an exhibit to the Complaint, Defendants point to two paragraphs in the actual Complaint that they incorrectly summarize to suggest that Plaintiffs failed to allege violations of the Open Meetings Act. Specifically, Defendants state that "Plaintiffs have alleged that because only two members of the SEB were physically present at the July 12, 2024 gathering, that there was no quorum present." Defs.' Mot. at 7 (citing ¶¶ 79 and 84 of American Oversight's Verified Complaint). Rather, American Oversight alleged that Defendant Johnston's participation by video meant that Defendants violated the Open Meetings Act's requirement that an ***in-person*** quorum must be present to conduct a meeting. Verified Compl. ¶¶ 79, 84. This Court should ignore Defendants' mischaracterization of the allegations of the Complaint and refer to that pleading itself, which plainly alleges that the Act applied to the July 12 meeting and states a claim for a violation of the Act.

CONCLUSION

For the reasons described above, Plaintiffs respectfully request that the Court deny the Defendants' Motion to Dismiss.

[signature on following page]

Respectfully submitted, this 27th day of September, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing to be filed with the Clerk of Court using the eFileGA system, which will serve a true and correct copy of the same upon all counsel of record.

This 27th day of September, 2024.

/s/ Sarah Brewerton-Palmer
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