

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

VASU ABHIRAMAN, TERESA K.
CRAWFORD, LORETTA MINANDOLA,
JENNIFER MOSBACHER, ANITA TUCKER,
ESSENCE JOHNSON, LAUREN WAITS,
SUZANNE WAKEFIELD, MICHELLE AU,
JASMINE CLARK, DEMOCRATIC
NATIONAL COMMITTEE, and
DEMOCRATIC PARTY OF GEORGIA, INC.,

Petitioners,

v.

STATE ELECTION BOARD,

Respondent.

Civil Case No. 24CV010786

**MOTION OF AMICI CURIAE ELBERT SOLOMON, PORCH'SE MILLER, AVA
BUSSEY, BRIAN NGUYEN, RAYNARD LANIER, JR., AND THE GEORGIA STATE
CONFERENCE OF THE NAACP TO FILE AN AMICUS BRIEF IN SUPPORT OF
PETITIONERS' VERIFIED PETITION FOR DECLARATORY RELIEF**

Amici, Elbert Solomon, Porch'se Miller, Ava Busey, Brian Nguyen, Raynard LaNier, Jr., and the Georgia State Conference of the NAACP hereby move this Court for leave to file an amicus brief in support of Petitioners' Verified Petition for Declaratory Relief. As explained in the attached brief, amici are registered Georgia voters ("Amici Voters") and a non-profit, nonpartisan organization ("Georgia NAACP") of Georgia-voter members who intend to make their voices heard in local, statewide, and national contests this November, and do not want their votes nullified. Amici Voters reside and are registered to vote in five different counties where members of their county election boards have previously attempted to weaponize certification to block ballots from counting toward the official results. The Georgia NAACP also has members residing and registered to vote in all of Georgia's 159 counties. Amici have a strong

interest in ensuring their boards of elections will timely certify their county's election returns and the right of Georgia voters, like themselves and their members, to exercise their right to vote and to have their votes counted. Amici seek to assist this Court by offering their unique perspectives regarding the consequences for voters in Spalding County, DeKalb County, Cobb County, Gwinnett County, and Fulton County and across the state should the State Election Board rules at issue in this matter be read to render county-level certification discretionary in contravention of Georgia law. WHEREFORE, amici request that this Court accept and consider the ELBERT SOLOMON, PORCH'SE MILLER, AVA BUSSEY, BRIAN NGUYEN, RAYNARD LANIER, JR., AND THE GEORGIA STATE CONFERENCE OF THE NAACP TO FILE AN AMICUS BRIEF IN SUPPORT OF PETITIONERS' VERIFIED PETITION FOR DECLARATORY RELIEF, attached hereto.

Respectfully submitted, this 9th day of September, 2024.

/s/ Caitlin May

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**Motion for Pro Hac Vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2024, a true and correct copy of the foregoing **MOTION TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS' VERIFIED PETITION FOR DECLARATORY RELIEF** was electronically filed with the Court using the Court's eFileGA electronic filing system, which will automatically send an email notification of such filing to all attorneys of record, and was additionally served by emailing a copy to the currently known counsel of named parties and proposed intervenors as listed below:

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Exhibit A

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**BRIEF OF AMICI CURIAE IN SUPPORT OF
PETITIONERS' VERIFIED PETITION FOR DECLARATORY RELIEF**

INTRODUCTION

“One of the most important and sacred rights possessed by an American citizen is to vote for whom he pleased, and to have that vote counted.” *Griffin v. Trapp*, 205 Ga. 176, 181 (Ga. 1949). If a vote is not certified, it does not count. Failure to properly certify the results of an election is nothing less than voter disenfranchisement.

Two new rules adopted by the State Election Board (the “SEB”)¹ threaten to disenfranchise Georgia voters by transforming the certification of county election results from a ministerial

¹ Georgia State Election Board, *Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.02 Definitions* (July 3, 2024), <https://sos.ga.gov/sites/default/files/2024-07/Notice%20of%20Proposed%20Rulemaking%20-%20183-1-12-.02.pdf>, codified at Ga. Comp. R & Regs. 183-1-12.02 at (1)(c.2); Georgia State Election Board, *Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.12 Tabulating Results* (July 18, 2024), <https://sos.ga.gov/sites/default/files/2024-07/Notice%20of%20Proposed%20Rulemaking%20-%20183-1-12-.12%28a%295.pdf>, codified at Ga. Comp. R & Regs. 183-1-12-.12 at (f)-(g).

accounting function into a discretionary political act. One new rule (the “Heekin Rule”) would require county elections administrators to conduct an “inquiry” into the election before certifying the results—a directive that conflicts with the statutory mandate to certify the vote totals after completing very specific, straightforward, and circumscribed verification procedures. Ga. Comp. R & Regs. 183-1-12-.02(1)(c.2). The second new rule (the “Grubbs Rule”) would allow any individual county election board member to “examine all election related documentation” before certification, allow county boards to devise their own “method[s]” for counting votes whenever they suspect “fraud,” and condition certification on new requirements that appear nowhere in the election code. Ga. Comp. R & Regs. 183-1-12-.12(f)–(g).

At first glance, the rule changes may appear limited in scope, but there is a danger that a willing county election board—or even single member—can read them to enlarge the power of county election boards beyond the scope prescribed by law. By improperly suggesting that timely certification is optional and dependent on prerequisites with no basis in law, the new rules invite rogue local officials to try to obstruct or manipulate certification if they disagree with the choices made by voters. Without clarification or constraint from this Court, the rule changes could unleash a Pandora’s box of chaos and confusion as soon as polls close and potentially strip millions of Georgians of their fundamental right to vote.

Amici are Georgia voters and an organization dedicated to protecting its members’ fundamental right to vote. Amici write to emphasize that the SEB’s new certification scheme lays the groundwork for unprecedented election subversion that would harm Georgia voters. If the rule changes are allowed to take effect without constraint, unelected and unaccountable local elections administrators could claim the legal authority to reject or delay certification while they conduct their own freelance investigations into any rumored election glitch, anomaly, or hiccup,

jeopardizing Georgia's compliance with state and federal certification deadlines. Rogue officials could even attempt to exclude certain ballots from the certified count simply by claiming to discover fraud. Should local officials invoke the new rules as a basis to disrupt certification, voters would be forced to flood courts across the state with emergency lawsuits to protect their right to have their ballots counted. Any disruption to the certification process will fuel dangerous election denialism that would undermine our democratic system and jeopardize the peaceful transfer of power.

This Court should not allow the SEB to turn a routine administrative function that is clearly required by Georgia law into a new tool for voter disenfranchisement. The risk that Georgians' votes could be nullified by the very people tasked with honoring them is intolerable in a representative democracy. The Court should grant Plaintiffs' requested relief to ensure that voters—not partisan officials—determine election outcomes.

STATEMENT OF INTEREST

Amici Elbert Solomon, Porch'se Miller, Ava Busey, Brian Nguyen, and Raynard LaNier, Jr. are proud Georgia voters who intend to make their voices heard in local, statewide, and national contests this November, and do not want their votes nullified. They are from five counties; in all those counties, election board members have previously attempted to weaponize certification to block ballots from counting toward the official results. Amici do not want to see similar efforts succeed in the upcoming election. The Georgia State Conference of the NAACP is a non-profit, nonpartisan organization dedicated to protecting its members' civil rights, including their fundamental right to vote. Amici oppose the SEB's attempt to legitimize election subversion through the certification process.

Amicus curiae Elbert Solomon is a resident and registered voter in Spalding County, Georgia. He is a Black man and active in local politics and a consistent voter for decades. As a teenager in Mississippi during the civil rights movement, Mr. Solomon understood that the ability to cast a vote and to have that vote counted has not always been protected. Those experiences inform his civic engagement work today. Mr. Solomon attends Spalding County Board of Elections meetings regularly and was very concerned when a Board member recently voted against certifying election results. He is concerned that his vote would not be counted if his county did not certify election results. Mr. Solomon is alarmed by the prospect of disenfranchisement in the upcoming election. Should he actually be disenfranchised, decades after he fought to secure his voting rights, Mr. Solomon would lose confidence in the electoral system and civil rights progress in Georgia.

Amicus curiae Porch'se Miller is a resident and registered voter in DeKalb County, Georgia. She is a Black woman and active in local and statewide politics as well as a consistent voter. She is a military veteran and cast her first vote by absentee ballot at age 18 from her station in Germany. Based on this experience, she is particularly concerned with the recent demonization and unfounded suspicion of absentee ballots. She was disturbed to learn that two of her county Board of Elections members voted not to certify the results in previous elections. She is concerned with nullification of any votes, but especially with her votes for down-ballot races. She notes that she rarely votes a "straight ticket" on any ballot and worries that voices like hers will not be heard if the DeKalb County Board of Elections fails to certify results. If her county fails to certify the results, she will lose confidence in the electoral system.

Amicus curiae Ava Bussey is 18 years old and a registered Cobb County voter. She identifies as multiracial. Ms. Bussey is excited to exercise her right to vote and cast a ballot for

president for the first time. Because of her experiences growing up in Cobb County, Ms. Bussey has always been aware and educated about racial gerrymandering and the dilution and suppression of Black votes in particular. She is very protective of her right to vote and believes we should all be working toward removing impediments to voting rather than installing more. She believes that voting is the only way to guarantee that your opinion is counted in the political process. She was very concerned when one of her county Board of Elections members voted not to certify results in recent elections. She is concerned about the risk of non-certification in the November election, which could mean that her ballot in her very first election year would not be counted. She is also worried that non-certification could result in the disenfranchisement of other Cobb County voters in the upcoming election. If she were disenfranchised based on her Board of Elections' failure to certify results, Ms. Bussey would lose confidence in our political system. .

Amicus curiae Bryan Nguyen is 18 years old and a registered Gwinnett County voter. Mr. Nguyen identifies as Vietnamese-American. He turned 18 years old last November year and became eligible to vote. He is excited to participate in his first presidential election and has been looking forward to voting since he learned about the right to vote in elementary school. Mr. Nguyen is active in his community and works to organize his peers around LGBTQ+ issues and climate change. He understands his protected right to vote includes both his right to cast a ballot and to have that ballot counted. He was very concerned that two of his county Board of Elections members voted not to certify results in recent elections, is concerned that Gwinnett County could fail to certify results in this November election, and believes he could be disenfranchised should his county fail to certify results. Mr. Nguyen comes from a family of irregular voters, but he intends to remain engaged and become a consistent voter. He would be disheartened if his ballot in his first election year was not counted, and it would lower his confidence in our political system.

Amicus curiae Raynard LaNier, Jr. is a resident and registered voter in Fulton County, Georgia, and has exercised his right to vote since turning 18. As a child, he would accompany his mother—who was Ralph David Abernathy’s personal assistant—to demonstrations, including activities related to protecting the right to vote. Mr. LaNier continues his family’s legacy in the civil rights movement by organizing and participating in voter registration and get-out-the-vote efforts. He believes that his right to vote includes both the right to cast a ballot and to have that ballot counted. He was very concerned that one of his county Board of Elections members voted not to certify results in recent elections. He is concerned about the risk of Fulton County failing to certify results of the November election. He believes that he is at risk of disenfranchisement and would be disappointed and discouraged if his ballot, including his votes for down-ballot races, was not counted. It would lower his confidence in our political system.

Amicus curiae Georgia State Conference of the NAACP (“Georgia NAACP”) is a non-partisan, interracial, nonprofit membership organization that was founded in 1941. Its mission is to eliminate racial discrimination through democratic processes and ensure the equal political, educational, social, and economic rights of all persons, in particular African Americans. A core part of the Georgia NAACP’s mission is protecting the right to vote, and the organization dedicates substantial resources to voter registration, voter education, and get out the vote (“GOTV”) efforts, including Sunday early voting events such as “Souls to the Polls.” The Georgia NAACP has approximately 10,000 members across Georgia. The Georgia NAACP has an interest in preventing the disenfranchisement of its members and other eligible voters, including those it may have supported in exercising their right to vote. As such, the organization’s mission and voter engagement efforts would be undermined by any attempt by a county board of elections to disenfranchise voters by delaying or denying the certification of election results. Moreover, the

unconstrained implementation of the SEB rules risks forcing the Georgia NAACP to divert its limited resources away from its standard activities toward advocating for duly cast ballots to be properly counted by boards of elections across the state.

BACKGROUND

The State Election Board recently adopted two rules that appear to contradict state election certification law. If left unchecked, these rules, each passed by a 3–2 vote, could dramatically interfere with counties’ obligation to certify election returns. The changes provide the opportunity for partisan officials dissatisfied with the outcome of an election to launch baseless, drawn-out investigations that could derail the orderly process of vote-counting, sow chaos and distrust in the democratic process, and disenfranchise Georgia voters.

I. Under Longstanding Georgia Law, County Election Superintendents Have a Strictly Delineated Role and a Nondiscretionary Duty to Certify Results.

Georgia law imposes upon counties a mandatory duty to timely certify their local results. By statute, each county’s “elections superintendent” plans and oversees elections. O.C.G.A. § 21-2-70(9). In most counties, a county elections board acts as the superintendent; in some, a single probate judge fulfills that role.² Once the polls close on election day, the entity acting as superintendent begins a careful tabulation process. *See* O.C.G.A. § 21-2-493. If the superintendent observes a “discrepancy” or “error” with the returns from a particular precinct, it may (or, in some circumstances, must) order a recount or recanvass of the returns and make corrections in accordance with strict statutory requirements. O.C.G.A. § 21-2-495(a)-(b). After that, the election “returns *shall* be certified by the superintendent” by 5:00 P.M. on the Monday after the election, and then “*shall* be immediately transmitted to the Secretary of State.” O.C.G.A. §§ 21-2-493(k)

² *See* O.C.G.A. § 21-2-2(35)(A) (defining “Superintendent” as “the county board of elections [or] the county board of elections and registration . . . if a county has such”).

(emphasis added), 21-2-497 (emphasis added). These duties are nondiscretionary, as demonstrated by the appearance of the word “shall.”³ Indeed, the Georgia Supreme Court has long deemed certification duties as “ministerial.” *See, e.g., Thompson v. Talmadge*, 201 Ga. 867, 876 (Ga. 1947) (“[A]ny and all persons who are merely authorized to canvass” were not “exercising or authorized to exercise any discretion, but were simply performing the ministerial act of disclosing to the public the official election returns”); *Brockett v. Maxwell*, 73 Ga. App. 663, 663 (App. Ct. 1946); *Bacon v. Black*, 162 Ga. 222 (Ga. 1926).

The statute directs the superintendent to report perceived anomalies to law enforcement without altering its ministerial task of certification: “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) (emphasis added). Georgia also provides extensive procedures for candidates and electors alleging irregularity to contest the election in Superior Court—*after* certification. *See* O.C.G.A. § 21-2-520, *et seq.* Once certified by the county, election returns go to the Georgia Secretary of State, who, in elections affecting more than one county, “tabulate[s], compute[s], and canvass[es]” the votes. O.C.G.A. § 21-2-499(a). Afterward, the Secretary “*shall*” certify the results. *Id.* (emphasis added). For presidential elections, the Secretary additionally sends the returns to the Governor, who enumerates the votes again and then “*shall* certify the slates of presidential electors receiving the highest number of votes.” O.C.G.A. § 21-2-499(b) (emphasis added). Again, the presence of “shall” means that the Secretary’s and Governor’s certifications are ministerial and mandatory. And their duties, too, must be completed on a strict timetable. *Id.*

³ *See, e.g., Hall Cnty. Bd. of Tax Assessors v. Westrec Properties, Inc.*, 303 Ga. 69, 75 (Ga. 2018) (“The word ‘shall’ is generally construed as a word of command. The import of the language is mandatory.”).

Timing is especially important in presidential elections, lest the state miss deadlines set out under federal law. *See* 3 U.S.C. § 5.

Thus, county-level certification is an early and crucial step in ensuring that Georgia voters are heard at the local, state, and federal levels. Any anomalies found at any step of the tabulation and computation processes are not addressed by delaying or refusing certification, but instead by post-certification investigations and challenges. *See* O.C.G.A. § 21-2-493; O.C.G.A. § 21-2-520. Thus, certification is *not* the final step of the election process. A delay or denial of county certification actually *interferes with* Georgia’s existing legal mechanisms for rooting out fraud or error.

II. Two New Rules Disturb the Statutory Framework.

The SEB is charged with “promulgat[ing] rules and regulations so as to obtain uniformity . . . in the practices . . . of superintendents.” O.C.G.A. § 21-2-31(1). In so doing, the SEB must “formulate, adopt, and promulgate such rules and regulations, *consistent with law*, as will be conducive to the fair, legal, and orderly conduct of primaries and elections.” O.C.G.A. § 21-2-31(2) (emphasis added). The SEB recently considered and adopted two rules (collectively, the “Heekin-Grubbs Rules”) that attempt to alter the statutory scheme. These two rules, especially if left unrestrained, are not “consistent with law.”

A. The Heekin Rule

On March 26, 2024, a member of the Fulton County Board of Registration and Elections named Michael Heekin submitted a rulemaking petition to the SEB seeking to require a “reasonable inquiry” into the election before certifying the returns. Specifically, Heekin proposed to amend SEB Rule 183-1-12.02 to include a new definition of certification that does not appear in the Georgia Code:

“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.

The potential for the rule change to disrupt certification was obvious, because Mr. Heekin had only days earlier voted against certifying the results of the presidential preference primary in Fulton County, without offering any evidence that the results were not “a true and accurate accounting of all votes cast in that election.” *See infra* at pp. 17-18.

Indeed, after SEB advanced the petition to proposed rulemaking and invited the public to submit comments,⁴ the comments flooded in. At the August 6 meeting where the petition was considered, SEB board-member Dr. Janice Johnston stated that it “won the prize for the most emails” to the SEB from the public.⁵ She did not mention, however, that of the 263 written comments about the Heekin Rule that voters sent to the SEB, 259 opposed it, expressing concerns about delay, confusion, and disenfranchisement.⁶ A Jackson County poll worker wrote, “I fear that my vote and the votes of other Georgians may not count because of . . . this revision to Rule 183-1-12-.02 [which] threatens the long-held premise that we are a nation ruled by the people.”⁷ A Cherokee County voter commented that “‘reasonable inquiry’ is alarmingly vague and open to broad interpretation. . . . As an Air Force veteran who values integrity in all aspects of life, including our democratic processes, I am deeply concerned that this petition could introduce

⁴ See Georgia State Election Board, *Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.02, Definitions* (July 3, 2024), <https://sos.ga.gov/sites/default/files/2024-07/Notice%20of%20Proposed%20Rulemaking%20-%20183-1-12-.02.pdf>.

⁵ Georgia House of Representatives, *State Election Board Meeting, August 6, 2024*, 7h:14m:43s, YouTube (Aug. 6, 2024), <https://www.youtube.com/live/rBiqOdOiD9s?feature=shared&t=26083>.

⁶ See *Response to Heekin-Rule Open Records Act Request, Part 1* (hereinafter “Heekin-Rule Comments, Pt. 1”), <https://www.citizensforethics.org/wp-content/uploads/2024/09/2024-8-26-Production-1.pdf> (last visited Sept. 9, 2024); *Response to Heekin-Rule Open Records Act Request, Part 2* (hereinafter “Heekin-Rule Comments, Pt. 2”), <https://www.citizensforethics.org/wp-content/uploads/2024/09/2024-8-26-Production-2.pdf> (last visited Sept. 9, 2024).

⁷ Heekin-Rule Comments Pt. 1 at 142.

inconsistencies in our certification practices and erode public trust.”⁸ Just four members of the public—comprising less than 2% of all comments received—sent comments approving of the rule, but none provided any explanation for their support, instead merely including the rule in a laundry list of recent SEB measures the commenter approved of.⁹ Other written comments came from the Georgia Association of Voter Registration and Election Officials; seven individual members of county election boards; eleven Georgia legislators; and at least eleven voting-access advocacy groups—all of which opposed the rule.¹⁰

Nevertheless, the SEB voted to adopt the Heekin Rule by a 3-2 margin.¹¹ It became effective on September 4, 2024, twenty days after it was filed with the Secretary of State’s office. *See* O.C.G.A. § 50-13-6(a).

B. The Grubbs Rule

On June 17, 2024, Salleigh Grubbs, Chair of the Cobb County Republican Party and a member of the Executive Committee of the Georgia Republican Party, proposed amendments to Rule 183-1-12-.12 that would add novel preconditions on county election certification.¹² Perhaps most dramatically, the Grubbs Rule provided that “[b]oard members shall be permitted to examine all election related documentation created during the conduct of elections prior to certification of results.” Additionally, it proposed to amend Rule 183-1-12-.12.1(f)(2)–(4) to add brand-new numerical checks before certification that are inconsistent with the election code. In subsection

⁸ Heekin-Rule Comments Pt. 1 at 71.

⁹ Heekin-Rule Comments Pt. 1 at 59, 98, 111, 139.

¹⁰ *See* Heekin-Rule Comments, Pt. 1 at 1, 3, 7, 8, 10, 16, 20, 21, 23, 25, 26, 28, 32, 42, 57, 65, 69, 95, 117, 191, 342; Heekin-Rule Comments, Pt. 2 at 33, 66, 69, 73, 86.

¹¹ Georgia House of Representatives, *State Election Board Meeting, August 6, 2024*, 7h 8h:23m:50s, YouTube (Aug. 6, 2024), <https://www.youtube.com/live/rBiqOdOiD9s?feature=shared&t=30230>.

¹² *See* Salleigh Grubbs, *Petition for Rule Changes pursuant to GA Regs. 183-1-1-.01* (June 17, 2024), (https://sos.ga.gov/sites/default/files/forms/Petition%20-%20Grubbs_Redacted.pdf).

(f)(5), the Grubbs Rule added two sentences that distort the statutory command that, even if error or fraud is suspected, the “superintendent shall compute and certify the return justly” and inform the district attorney of the issues after certification, *see* O.C.G.A. § 21-2-493(i); instead, the Grubbs Rule allows the board to “determine a method to compute the votes justly,” inviting extra-legal discretion into the process.

On July 18, the SEB posted the Grubbs Rule and solicited public comments.¹³ During the public comment portion of the August 19 meeting where the Grubbs Rule was considered, voters and election workers expressed concerns that the proposed rule added needless layers of procedure that could be weaponized against the public interest. A poll worker explained, “giving 159 boards discretion to hold up certification with ambiguous wording allowing members to examine ‘all election related documentation’ could be used to delay election certification with potentially never-ending review.”¹⁴ A voter who stated she had “voted in all general and primary elections for the last thirty years” described provisions 183-1-12-.12.1(2)–(4) of the new rule and said she was “very concern[ed] because it requires county boards to investigate discrepancies . . . , no matter how minor.”¹⁵ She predicted this “would give county board members an additional avenue to delay certification of election results, potentially allowing them to throw the state’s vote count into chaos this fall.” *Id.* A self-described retired Navy Captain from DeKalb County also feared the amendments would “grant undue license to members to investigate all documents . . . following a

¹³ *See* Georgia Secretary of State, *State Election Board: Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.12, Tabulating Results* (July 18, 2024), <https://sos.ga.gov/sites/default/files/2024-07/Notice%20of%20Proposed%20Rulemaking%20-%20183-1-12-.12%28a%295.pdf>.

¹⁴ Georgia Secretary of State, *State Election Board Meeting, Public Comments, Meeting R4 Part I*, 1h:09m:30s–55s (Aug. 19, 2024), <https://gasos.wistia.com/medias/w6sji7ebx>.

¹⁵ *Id.* at 0h:23m:40s–0h:25m:55s.

subjective, extremist, partisan perspective.”¹⁶

Of the more than 1,000 written comments submitted by voters, an overwhelming majority also opposed the Grubbs Rule. A Fulton County voter and “retired naval officer who serve[d] with pride to help protect the freedoms we hold so dear” warned that “[a]llowing a single election board member to scrutinize every document . . . whether there is evidence of irregularity or not[,] is a needless delay and ultimately undermines the integrity of elections.”¹⁷ An Athens-Clarke voter who attends every meeting of her local Board of Elections and has served as an elections administrator wrote: “This rule change horrifies me. It will allow for obstruction of county election certification by willful, frivolous . . . members of county boards . . . to sabotage democratic elections.”¹⁸ Another voter predicted that, “taken together with Rule 183-1-12-.02, the logical result might be costly and time[-]sucking litigation over whether it is ‘reasonable’ to certify an election if every piece of paper requested cannot be produced and reviewed prior to the state mandated deadline.”¹⁹

Disregarding those concerns, the SEB voted to adopt the rule by a 3–2 margin. The Grubbs rule will go into effect on September 16, 2024.²⁰

ARGUMENT

This Court should once again affirm that certification is mandatory and cannot be subverted by county election superintendents. Any ruling to the contrary would put our very democracy in jeopardy. If the Court does not grant Plaintiffs relief now, the new rules threaten to disrupt county-

¹⁶*Id.* at 0h:57m:00s–0h:57m:20s.

¹⁷ See Response to Grubbs-Rule Open Records Act Request (hereinafter “Grubbs-Rule Comments”), 95, https://www.citizensforethics.org/wp-content/uploads/2024/09/Grubbs-Combined-SEB-Comments_Redacted.pdf (last visited Sept. 9, 2024).

¹⁸ Grubbs-Rule Comments at 1156.

¹⁹ Grubbs-Rule Comments at 676.

²⁰ See Ga. Comp. R. & Regs. r. 183-1-12-.12.

level certification across the state and potentially strip thousands of Georgians of the fundamental right to vote. Implementation of the new rules will interject chaos, confusion, and uncertainty in the election process. The Court should act now to protect voters from the SEB’s power grab before our democratic system is put to that test.

I. Mandatory Certification Is Part of a Comprehensive Statutory Scheme That Safeguards the Right to Vote.

“There is a sanctity to elections under our system of self-government, wherein the will of the people . . . is the supreme law.” *Miller v. Hodge*, No. S24A0490, 2024 WL 3801827, at *4 (Ga. Aug. 13, 2024) (cleaned up). The right to vote is enshrined in Georgia’s Constitution, Ga. Const. art. II, § 1, ¶ II, and it is axiomatic that the right to vote includes the right to have your vote counted.²¹ Certification ensures that the will of the people is formally recognized and then enacted. Disrupting certification threatens the right to vote because, if votes are not certified, they do not count.

Certification is not optional. It is a nondiscretionary, ministerial duty mandated by the Legislature, and it has been recognized as such for more than a century.²² The election code directs election superintendents 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(9). The certification process outlined in the Georgia Code does not grant election superintendents an iota of power to delay or obstruct that process. Indeed, certification is mandatory even if the superintendent believes that the returns themselves are somehow erroneous or fraudulent. *See* O.C.G.A. § 21-2-493(i).

²¹ *See, e.g., Griffin v. Trapp*, 205 Ga. 176, 181 (Ga. 1949); *Reynolds v. Sims*, 377 U.S. 533, 554 (Ga. 1964); *United States v. Classic*, 313 U.S. 299, 315 (1941).

²² *See, e.g., Tanner v. Deen*, 33 S.E. 832, 835 (Ga. 1899); *Bacon v. Black*, 162 Ga. 222, 226 (Ga. 1926).

That is because certification is just one step in a comprehensive statutory scheme that safeguards election integrity and a delay or denial of county certification would actually interfere with the legal mechanisms for rooting out fraud or error. Although election fraud is exceedingly rare,²³ and the Georgia Secretary of State’s office has called the 2020 presidential election “the most secure election in the state’s history,”²⁴ the Legislature has designed robust and redundant verification procedures to ensure the accuracy of the count both before and after certification. The election code imposes several specific, pre-certification duties on county superintendents, including logic and accuracy testing of voting equipment, risk-limiting audits for the returns, and recanvassing if discrepancies are observed. O.C.G.A. § 21-2-374(b); O.C.G.A. § 21-2-379.6(c); O.C.G.A. § 21-2-498(b); O.C.G.A. § 21-2-495(b). Post-certification, the election code allows candidates and voters to file election contests in the courts. O.C.G.A. § 21-2-521. This reflects the Legislature’s considered judgment that courts are best positioned to adjudicate claims of fraud or misfeasance, as judges routinely preside over truth-seeking inquiries subject to the rules of evidence, the norms of party presentation, and the checking function of public accountability.

II. The Rule Changes Threaten to Disrupt Certification and Harm Georgia Voters.

The Heekin-Grubbs Rules impose new conditions on certification and attempt to rewrite the Legislature’s instructions on how to handle claims of fraud or error. Together, the new rules threaten to allow rogue county board members to delay certification, manipulate the certified count,

²³ Reuters Fact Check, *Re-examining how and why voter fraud is exceedingly rare in the U.S. ahead of the 2022 midterms*, Reuters (June 2, 2022), <https://www.reuters.com/article/fact-check/re-examining-how-and-why-voter-fraud-is-exceedingly-rare-in-the-us-ahead-of-th-idUSL1N2XP2AI/>.

²⁴ Stanley Dunlap, *Georgia election board dismisses claims of ‘ballot harvesting’ in 2020 election*, Georgia Recorder (May 18, 2022), <https://georgiarecorder.com/2022/05/18/georgia-election-board-dismisses-claims-of-ballot-harvesting-in-2020-election/>.

and deny the results of the election, disempowering Georgia voters and defying the mandates under Georgia law.

A. The rule changes invite rogue local officials to attempt to delay certification.

Under Georgia law, election superintendents are required to certify county results by 5:00 PM on the Monday after election day. O.C.G.A. § 21-2-493(k). Three features of the Heekin-Grubbs Rules will give officials cover to defy that mandatory deadline.

First, the Heekin Rule's new definition of "certification" seemingly makes certification contingent upon a "reasonable inquiry" by county boards into the returns—a contingency not enumerated or contemplated anywhere in the Georgia Code. Ga. Comp. R & Regs. 183-1-12-.02(1)(c.2). The Heekin Rule does not define "reasonable" or "inquiry" or place any guardrails on such inquiry's timing, subject, or scope. It also does not say how many board members are needed to conduct an inquiry, what happens after the inquiry, how long such an inquiry can go on for, or what recourse voters have if a board member claims their "inquiry" discovered evidence of fraud. These ambiguities open the door for county board of election members to attempt to stop certification by pursuing a long-term inquiry that extends beyond the statutory deadlines.

Second, the Grubbs Rule bars election superintendents from counting any votes from a precinct unless and until it perfectly reconciles "the total number of ballots cast to the total number of unique voter ID numbers." Ga. Comp. R & Regs. 183-1-12-.12(f)(4). This requirement is similarly found nowhere in the statute, which authorizes the superintendent to suspend recording of the returns from a particular precinct only where "the total vote returned . . . *exceeds* the number of electors in such precinct[.]" O.C.G.A. § 21-2-493(b) (emphasis added). The statute does not authorize, let alone require, the superintendent to suspend certification of precinct totals while it

investigates *any* apparent discrepancy between the number of ballots and number of voters. The Grubbs Rule thus fashions an entirely new benchmark that will result in obstruction and delay.

Third, the Grubbs Rule invites individual “[b]oard members” to delay certification until they have personally inspected “all election related documentation created during the conduct of elections.” Ga. Comp. R & Regs. 183-1-12-.12(f)(6). This new examination prerogative presents another invitation for rogue election board members to tie up certification with their own unauthorized fishing expeditions. The rule change represents a massive expansion of authority for individual election board members, who comprise only *part* of an election “superintendent” and have no statutory investigatory power as individuals at all.²⁵ County election boards often comprise political appointees from the two major political parties in the county,²⁶ so a rule that aggrandizes the power of a single board member also upsets the balance of power and invites partisan gamesmanship. The rule’s sweeping language contains no limitations whatsoever on what documents these individual board members may demand, or why, or from whom. And it would require the production of those documents in the few days after election day, when election workers are already extraordinarily busy fulfilling their statutory duties, making timely tabulation and certification of the returns even harder.

Any local certification delays could have cascading effects across the state, and indeed the country. The Secretary of State must certify Georgia’s statewide results by 5:00 PM on the 17th

²⁵ See O.C.G.A. § 21-2-40(b) (allowing for the creation of local election boards of “not fewer than three members” to carry out the “powers and duties of the election superintendent”).

²⁶ See, e.g., Fulton County, *Board of Registration & Elections*, https://fultoncountyga.gov/-/media/Departments/Clerk-to-the-Commission/Boards_Authorities/2-22-2024-Updates/BOARD-OF-REGISTRATION-AND-ELECTIONS.pdf (last visited Sept. 9, 2024); Dekalb County Board of Registrations & Elections, *Board Details*, <https://dekalbcountyga.granicus.com/boards/w/968f9572ef2211df/boards/7129> (last visited Sept. 9, 2024).

day after election day, and the Governor must certify Georgia’s slate of presidential electors by 5:00 PM on the 18th day. O.C.G.A. § 21-2-499(b). The federal safe harbor date for Georgia to submit its slate of presidential electors in the upcoming election is December 11, 2024.²⁷ Failure of the counties to timely and faithfully certify their results could embroil the Secretary in unnecessary and time-consuming confrontations with local officials, risk compliance with important deadlines set out under state and federal law, and potentially nullify the will of the people—this year and in every subsequent election.

These are not hypothetical concerns. Since 2020, an alarming number of other Georgia officials have refused to perform their statutorily mandated certification duties and demanded burdensome document production as a condition of certification, without offering any actual reason to doubt the returns.²⁸ That includes elections officials in each and every county where the individual amici live and are registered to vote. This past March, the sponsor of the Heekin Rule opposed a motion to certify the results of the presidential preference primary in Fulton County—despite acknowledging that the statements of votes cast were “all in order”—because he considers “chain of custody” to be “the weakest link” in elections even “predating the American Revolution.”²⁹ He did not offer evidence that the chain of custody was actually broken in Fulton or offer any other reason that the results should not be certified.³⁰ To date, none of the Georgia officials who have recently opposed certification have had any legal authority to do so, but the

²⁷ See 3 U.S.C. § 5(a)(1); National Archives, *Electoral College Timeline of Events*, <https://www.archives.gov/electoral-college/key-dates> (last visited Sept. 9, 2024).

²⁸ Citizens for Responsibility and Ethics in Washington, *Election Certification Under Threat*, 34–42 (Aug. 2024), <https://perma.cc/UCD3-K2ZS>.

²⁹ Fulton Government Television, *Fulton County Board of Registration & Elections Meeting March 18, 2024*, 38:14–39:42, 44:54, YouTube (Mar. 18, 2024), <https://perma.cc/ZK2L-YDC3>.

³⁰ *Id.*

Heekin-Grubbs rules could open the door for them to launch their own independent investigations, request voluminous documentation at will, or delay certification in defiance of duly enacted statutes.

B. The rule changes invite county officials to try to manipulate the certified count.

The rule changes also lay the groundwork for rogue local officials to attempt to manipulate the certified count and selectively disenfranchise Georgia voters according to their own preferences.

The Grubbs Rule invites election boards to throw out votes they disagree with by invoking the shibboleth of election fraud. Under the election code, a superintendent that discovers “fraud or error” still “shall compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented to him or her,” and then refer the issue to law enforcement. O.C.G.A. § 21-2-493(i). In other words, the superintendent “shall” certify “regardless” of any purported fraud. The Grubbs Rule attempts to subvert this clear directive by providing that, if “error” or “fraud is discovered, the Board shall *determine a method* to compute the votes justly.” Ga. Comp. R & Regs. 183-1-12-.12(f)(5) (emphasis added). The rule provides no guardrails on, or limiting principles for, what sort of “method” county boards can adopt, giving them free rein to make it up as they go along. And by directing election boards to “determine” their own “method[s]” for “justly” computing the votes whenever they claim to discover fraud, the rule improperly suggests that they can simply bypass the courts and make their own decisions about which ballots should “justly” count. This is both at odds with the Georgia election code and profoundly undemocratic.

C. The rule changes provide cover for election officials to deny the election results.

Even if the results are timely and accurately certified, the rule changes create new reasons for local officials to deny the election results, fueling dangerous election denialism that could itself subvert the will of the people.

We have been here before. The smallest perceived discrepancies and glitches have sparked widespread misinformation campaigns and conspiracy theories that undermined the peaceful transfer of power. In 2020, the election board of Coffee County, Georgia, refused to certify the results of the presidential election after a recount on the basis of a 50-vote discrepancy.³¹ The board blamed voting machines for the difference, even though the elections director admitted she “was unsure whether she had scanned a batch of 50 ballots twice, which,” in the words of the Secretary of State, “would account for the 50-vote discrepancy.”³² One member of that elections board then illegally permitted presidential campaign affiliates to copy large troves of records and data to fuel an extra-judicial investigation into voting machines.³³ No evidence of interference with the machines was uncovered, but conspiracy theories related to those machines ballooned online and “reinforced the Stop the Steal movement, which ultimately led to violence.”³⁴ Former president Donald Trump cited Coffee County’s refusal to certify its election results in a draft executive order that he contemplated issuing after his 2020 election loss; the order would have

³¹ Office of Georgia Secretary of State Brad Raffensperger, *Secretary of State’s Office Opens Investigation into Coffee County’s Handling of Recount* (Dec. 9, 2020), <https://sos.ga.gov/news/secretary-states-office-opens-investigation-coffee-countys-handling-recount>.

³² *Id.*

³³ Anna Bower, *What the Heck Happened in Coffee County, Georgia?*, LAWFARE (Aug. 15, 2023), <https://perma.cc/T7TM-9VHB>; Kate Brumback, *Security footage shows Georgia county Republican chair, election official present during breach of voting equipment*, PBS NEWS (Sept. 6, 2022), <https://perma.cc/DG68-EQ77>.

³⁴ See Center for an Informed Public, Digital Forensic Research Lab, Graphika, & Stanford Internet Observatory, *The Long Fuse: Misinformation and the 2020 Election*, Election Integrity Partnership, 91–97 (May 8, 2024), <https://perma.cc/DV9L-NW27>.

ordered federal agents to seize voting machines and mobilize the National Guard.³⁵ In other words, one Georgia county's refusal to certify in defiance of state law nearly contributed to unprecedented proposed federal intervention into state electoral processes, even though no fraud was found. The new rules make similar or worse situations even more likely, threatening to unlawfully thwart the will of the people.

III. The Rule Changes Subject Georgians to Unequal Risks of Disenfranchisement

All of these potential disruptions to the certification process create intolerable risks of disenfranchisement for Georgia voters. They could also result in the selective disenfranchisement of voters according to the whims and political or other preferences of unelected county election board members.

If allowed to stand, the vagueness and ambiguity baked into the rule changes all but guarantee arbitrary and uneven enforcement. The new rules purport to give local officials unfettered discretion to conduct their own investigations and devise their own methods of computation in cases of purported fraud, "virtually guaranteeing a crazy quilt of" approaches to certification "from county to county." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019). Election officials in some counties will readily comply with their mandatory certification duties while others will attempt to delay, block, or manipulate certification according to their own political preferences. Some county board members will invoke the Grubbs Rule to challenge only certain types of ballots or returns from certain precincts as fraudulent.

³⁵ Betsy Woodruff Swan, *Read the never-issued Trump order that would have seized voting machines*, POLITICO (Jan. 21, 2022, updated Jan. 25, 2022), <https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572>.

If these rules are permitted to go into effect unchecked, voters will be subjected to disparate risks of disenfranchisement simply because of where they live, or even who they voted for. This kind of haphazard and arbitrary election administration is irreconcilable with the ministerial nature of the certification process. It is also unconstitutional. *Id.* (disapproving state law permitting local officials to reject absentee ballots on the basis of a standardless signature-matching requirement that subjected eligible voters to arbitrary disenfranchisement.) Whether voters will have an equal voice in Georgia cannot come down to the whims of individual county election board members.

IV. The Rule Changes Will Undermine Amici's Faith in Democracy.

If the rule changes are permitted to go into effect without relief from this Court, amici will be forced to cast a ballot without the certainty that it will be counted. The risk of disenfranchisement to amici is too great to ignore. All individual amici live in counties where at least some county board members have *already* voted not to certify in recent elections, without legal authority to do so and without offering any proof of election fraud. Amici would lose confidence in our democracy if their county boards successfully disrupted certification in future elections, including the November 2024 election. Some amici, like Ava Bussey and Bryan Nguyen, are new voters who would be profoundly disheartened if their first-ever vote in a presidential election contest was not counted. Other amici, like Elbert Solomon, remember the rampant voter suppression of the Jim Crow era and do not want to see their State go backwards. They recognize that voter suppression takes many forms, and they ask the Court not to allow the routine and nonpolitical process of election certification to become subject to gamesmanship and a tool of voter disenfranchisement.

Amici recognize that any attempt by election superintendents to delay or manipulate certification of county election results would be illegal. But it could happen anyway, forcing voters

who have already cast their ballots to rush into courts across the state to make sure their votes are counted. Amici have already been forced to take the extraordinary step of participating in this lawsuit to defend their fundamental right to vote. The prospect of bringing emergency lawsuits over certification in their counties is profoundly demoralizing and unfair. It will also subject voters to undue public attention and scrutiny during a hotly contested election cycle. Voters should not have their votes held ransom while they pursue burdensome and entirely unnecessary emergency litigation to force officials to do what the law already requires.

By granting Plaintiffs' requested relief, this Court will give amici and voters across the state the confidence in the democratic process that they deserve. The Court should reject the SEB's unlawful attempt to disrupt the Legislature's mandatory certification scheme and defend Georgians' fundamental right to vote and have their votes counted.

Respectfully submitted, this 9th day of September, 2024.

/s/ Caitlin May

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2024, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS' VERIFIED PETITION FOR DECLARATORY RELIEF** was electronically filed with the Court using the Court's eFileGA electronic filing system, which will automatically send an email notification of such filing to all attorneys of record, and was additionally served by emailing a copy to the currently known counsel of named parties and proposed intervenors as listed below:

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