Fulton County Superior Court
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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

VASU ABHIRAMAN, TERESA K. CRAWFORD, LORETTA MIRANDOLA, 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,

&

REPUBLICAN NATIONAL COMMITTEE and GEORGIA REPUBLICAN PARTY, INC.,

Intervenors.

Civil Case No. 24CV010786

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PETITIONERS' TRIAL BRIEF

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INTRODUCTION

With the November general election now only six weeks away, two rules recently adopted by the State Election Board ("SEB") threaten to upend the statutorily required process for certifying election results in Georgia. In adopting these rules, the SEB seeks to turn the straightforward but essential act of certification—*i.e.*, confirmation of the accurate tabulation of the votes cast—into a broad license for individual board members to delay certification or block it altogether in a hunt for purported election irregularities, with the result of displacing settled (and separate) court-supervised recount and contest processes provided by statute for resolving any such irregularities or similar issues. Specifically, one rule (known as the "Reasonable Inquiry Rule") requires election officials to conduct a "reasonable inquiry" prior to certification, while the other (known as the "Examination Rule") requires officials to allow individual county election board members "to examine all election related documentation created during the conduct of elections."

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According to their drafters, these rules rest on the assumption that certification of election results by a county board is discretionary and subject to free-ranging inquiry that may delay certification or render it wholly optional. But as the Secretary of State reaffirmed in guidance issued just last week, that is not the law in Georgia. Rather, in order that subsequent steps in Georgia's election-administration process can occur timely, election officials have a *non-discretionary* duty to certify results and—the new rules notwithstanding—"are required by law to certify returns by 5:00 P.M. on November 12, 2024." Ex. 1, Att. A at 1. SEB's answer in this litigation admits this as well, saying (p.6) that "[t]he Board admits that O.C.G.A. § 21-2-493 provides that consolidated returns shall be 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." That unambiguous statutory command,

moreover, is consistent with over a century of case law (in Georgia and elsewhere) holding that local (often partisan) election officials have no power to alter election results.

At least in theory, both new SEB rules could be read as facially consonant with certification being a non-discretionary duty, if construed to permit only such "reasonable inquiry" or "examinations" as would *not* delay certification beyond the statutory deadline (much less prevent certification from happening at all). But that is not what the drafters intended, and that is not what election officials—including several petitioners here—are experiencing as county election officials prepare for certification in November.

Because certification is mandatory under Georgia law, each rule violates the commands of Georgia statutes to the extent each one (again, as the rules' drafters stated) allows election officials to delay certification or not certify. Accordingly, there is a live controversy about the meaning of these SEB rules and their validity. And petitioners not only face ongoing injury in preparing for November's election under an uncertain legal regime, but they will also be further harmed if certification of November's election results are delayed or blocked in any county. This risk is not hypothetical: following recent elections, county officials across Georgia have *already* sought to block or delay certification in defiance of state laws; the new rules hand those officials new tools to do so again in November, which would create chaos and risk disenfranchising large numbers of Georgia's voters.

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To remedy the severe harms that the challenged rules threaten to cause in the upcoming election, this Court should follow decades of binding precedent and declare that SEB's rules must be construed consistent with Georgia statutes and case law requiring county officials to certify election results by the statutory deadline, or else the rules are invalid.

BACKGROUND

A. Georgia's Process For Tabulation, Canvassing, Certification, And Contest

1. Georgia law establishes a comprehensive system of determining the results of an election. *See* O.C.G.A. §§ 21-2-1 through 21-2-604. Certification of those results by the responsible county officials—collectively known as the county "superintendent"—is only one part of that multi-step process. *See id.* § 21-2-493. And county-level certification serves a very specific purpose within this process: to aggregate all the votes from all the precincts in a county, and to ensure the numerical accuracy of that vote count. *See id.* § 21-2-493.

That aggregation and ascertainment of accuracy is done in accordance with statutory requirements. *See* O.C.G.A. §§ 21-2-490 through 21-2-504. For example, the code ensures accuracy by mandating certain precinct-level cross-checks and instructing superintendents on how to resolve any numerical discrepancies detected by those cross-checks. *See, e.g.*, *id.* §§ 21-2-493(e)–(h). Before county-level certification, moreover, a superintendent may order a recount or recanvass if it "appear[s] that a discrepancy or error, although not apparent on the face of the returns, has been made." O.C.G.A. § 21-2-495(a). And during county-level canvassing, the superintendent will review various pieces of precinct-level information. These include the number of electors in each precinct, *see id.* § 21-2-493(b), the number of persons who voted in each precinct, *id.*, the number of ballots cast in each precinct, *id.*, the unsealed and sealed returns of votes from each precinct, *id.* §§ 21-2-493(g)–(h), and, for each precinct using voting machines, the records from the general returns showing the machine counters and the internal records showing the machine counters prior to the start of the election, *id.* § 21-2-493(f).

Once the accuracy of a count is achieved, the superintendent must certify: the relevant state statute commands that "[a]s the returns from each precinct are read, computed, and found to be correct or corrected," they "shall be recorded on the blanks prepared for the purpose until all

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the returns from the various precincts … have been duly recorded; then they shall be added together," and those "consolidated returns shall then be certified by the [county] superintendent … not later than 5:00 P.M. on the Monday following the date on which such election was held." O.C.G.A. § 21-2-493(k). After county superintendents certify their returns, the Secretary of State must "immediately" conduct his own tabulation, computation, and canvassing, *id.* § 21-2-499(a), and then certify the statewide votes to the Governor, *see id.* § 21-2-499(b).

2. Steps in the election process other than certification address the validity of individual ballots as well as the prevention, detection, and remediation of any election-related fraud. In particular, any allegations of fraud or election misconduct are handled by courts—not election officials—including in the statutorily provided contest process that is available following certification. O.C.G.A. § 21-2-522(1), (3), (4). If a contest changes an election's results, Georgia statutes allow for re-certification. *See id*. §§ 21-2-493(l), 21-2-499(a).

These post-election procedures involve challenges to certified results, and hence are keyed to county-level certification. For example, a candidate within the recount threshold must request a recount within two business days after certification. O.C.G.A. § 21-2-495(c). And where there is a basis to believe "misconduct, fraud, or irregularit[ies]" may have compromised election results, a contest must be filed within 5 days after certification. *Id.* §§ 21-2-522, 524.

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B. The Challenged Rules Are Adopted Based On Claims That Election Certification Is Discretionary

For many decades, the certification of election results was a straightforward administrative process that was faithfully followed by local officials without fanfare or controversy. But in recent years, efforts to delay or impede the certification of election results, here and elsewhere, have become increasingly common. In Georgia, "[a]t least 19 election board members across nine Georgia counties have objected to certifying elections during the past four

years." Pet. ¶¶ 60–62. And after the May 2024 primary results, a member of the Fulton County Registration and Elections Board refused to vote to certify. *Id.* ¶ 63. That member has also sued in this Court, seeking a declaration that her duties regarding certification are discretionary. *See Adams v. Fulton Cnty.*, No. 24-CV-011584 (Fulton Cnty. Sup. Ct. Sep. 12, 2024).

Claims that election certification by counties is a discretionary act were also central to SEB's recent adoption of the two rules challenged in this case.

1. The Reasonable Inquiry Rule

On March 26, 2024, Fulton County Board of Registration and Elections member Michael Heekin petitioned SEB to amend Rule 183-1-12-.02. Pet. ¶ 64. (The prior week, Heekin had voted against certifying the March 2024 Democratic presidential primary election results. *Id.*) Heekin's petition, which expressly fosters confusion about whether certification is mandatory, stated that "what it means to certify an election is not defined in either the Georgia Election Code or SEB Rules," and that "[t]his creates a challenge in the efficient administration of Georgia elections, especially when elections are not perfect, which they rarely are." *Id.*, Ex. C at 1. Heekin added that SEB regulations supposedly did not define what "certify" means and that "it would be helpful" to have such a definition. *Id.* ¶ 69. Heekin made no mention of the existing statutory framework for certification, and testified that he believed (contrary to Georgia law) that board of elections members had the discretion to "vote no on certification." *Id.* ¶ 70; *see also id.* ("We want to vote yes on certification…. [W]e should be able to see before we make the certification vote."). Heekin then stated that his proposed rule borrowed from the U.S. Election Assistance Commission's certification guidance, although he acknowledged that the guidance actually contains no reference to any "reasonable inquiry" requirement. *Id.* ¶ 71.

On May 8, 2024, SEB voted to advance the petition into proposed rulemaking, Pet. ¶ 75, and it then publicly posted the proposed Reasonable Inquiry Rule for notice and comment on

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July 3, *id.* ¶ 76. A range of individuals and organizations commented on the proposed rule during the notice-and-comment period—including petitioner the Democratic Party of Georgia ("DPG"), which explained in opposing the rule that the rule "violates Georgia's election statute and exceeds the [SEB's] authority." Pet. Ex. D at 2. DPG further explained that the rule "serves only as a pretext to sow seeds of doubt about the election certification process, all but guaranteeing chaos in Georgia elections in the coming weeks and months." *Id.* And it highlighted "the all-too-real risk of subjecting elections officials across the state to threats of violence" because of the uncertainty the proposed rule would introduce. *Id.*

On August 6, 2024, SEB adopted the rule on a 3-2 vote. Pet. ¶ 82. The rule modifies SEB Rule 183-1-12-.02 to add the following:

> (c.2) "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.

Id. ¶ 77.

After SEB adopted the Reasonable Inquiry Rule, Secretary of State Brad Raffensperger posted on social media that "Georgia's Election Integrity Act requires counties to certify the election results by November 12th and we fully anticipate that counties will follow the law." @GaSecofState, X (Aug. 7, 2024), https://x.com/GaSecofState/status/1821179635972850114. Pet. ¶ 84. The Secretary's office subsequently issued guidance to the same effect, explaining that the rules "should be reviewed and interpreted within the framework of Georgia law," and that the election code "controls." Ex. 1, Att. A at 1. As a result, "[a]ll county superintendents are required by law to certify returns by 5:00 P.M. on November 12, 2024." *Id.*

In its comments on the rule, DPG had requested that SEB, if it adopted the rule, "issue a concise statement of the principal reasons for and against its adoption and incorporate therein its

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reason for overruling the consideration urged against its adoption." Pet. Ex. D at 2; *see also* O.C.G.A. § 50-13-4(a)(2) (requiring such a statement). SEB has not done so, instead "den[ying] that DPG made a clear request for the Board to issue a concise statement and [stating] that to the extent that such a request was made, it was made in such a manner as to be likely to escape SEB staff members' notice." SEB Answer ¶ 83. Nor has SEB otherwise indicated whether or how it had "consider[ed] fully all written and oral submissions respecting the proposed rule," O.C.G.A. § 50-13-4(a)(2), in advance of adopting the rule.

2. The Examination Rule

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On June 17, 2024, Cobb County Republican Chairwoman Salleigh Grubbs submitted a petition for rulemaking. Pet. ¶ 87. The petition questioned whether certification is mandatory, stating that "some outside entities have asserted that the certification of election results in a county is nothing more than a ministerial task and that the members of the board have no discretion but to rubber stamp results—sight unseen." *Id.* It then contended that a new rule was needed to ensure counties instead "lawfully fulfill their duties" in certifying election results. *Id.*

Although the petition purported to ask SEB to "adopt a rule to affirm existing Georgia law," it went beyond existing statutory requirements. Pet. ¶ 88. For example, it proposed to impose duties on county "boards" and individual "board members," rather than on the "superintendent" as defined in the relevant statutes. *Id.* ¶ 90. It also added non-statutory steps to the canvassing process. *Id.* ¶ 89. And it stated that board "members shall be permitted to examine all election related documentation created during the conduct of elections prior to certification of results." *Id.* ¶ 91. The proposed rule did not, however, define the universe of documents that must be assembled and made available, nor did it provide guidance to election superintendents regarding when such information must be made available. *Id.* It also did not address how election superintendents should manage the burden of providing such

documentation to individual board members while also conducting the critical and time-sensitive work required by statute as part of the county certification process. *Id*.

On July 18, 2024, the Board noticed Grubbs's proposed rule for rulemaking and hearing on August 19, 2024. Pet. ¶ 92. As with the Reasonable Inquiry Rule, various individuals and organizations commented on the proposed Examination Rule during the notice-and-comment period—again including DPG, which urged the proposed rule be rejected. Pet. Ex. F at 2. DPG explained that the rule would "violate[] Georgia's election code" by seeking "to inject some element of discretion into the performance of statutory duties of election superintendents that, by the election code's express design, are mandatory and non-discretionary." *Id.*

On August 19, 2024, SEB adopted the Examination Rule on a 3-2 vote. Pet. ¶ 95.

DPG asked SEB, if it adopted the Examination Rule, to "issue a concise statement of the principal reasons for and against its adoption and incorporate therein its reason for overruling the consideration urged against its adoption." Pet. ¶ 96. Again, SEB has not done so. *Id.* And again, SEB's answer (¶ 96) denies that DPG made this request—which is based on a statutory requirement—in a sufficiently clear or noticeable manner. SEB has not otherwise indicated whether or how it had "consider[ed] fully all written and oral submissions respecting the proposed rule[s]," O.C.G.A. § 50-13-4(a)(2), in advance of adopting them. Pet. ¶ 96.

Each new rule is now in effect and reflected in the election code. https://rules.sos.ga.gov/gac/183-1-12; SEB Answer ¶¶ 86, 97.

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LEGAL STANDARDS

O.C.G.A. § 50-13-10(a) provides that "[t]he validity of any rule … may be determined in an action for declaratory judgment when it is alleged that the rule … or its threatened application interferes with or impairs the legal rights of the petitioner." "The test of the validity of an administrative rule is twofold: whether it is authorized by statute and whether it is reasonable."

Black v. Bland Farms, LLC, 332 Ga. App. 653, 662 (2015). Even when authorized, a rule is invalid if it "exceed[s] the scope of or [is] inconsistent with the authority of the statute upon which it is predicated." *Id.* at 663. In adopting a rule, an agency must also "issue a concise statement of the principal reasons for and against its adoption and incorporate therein its reason for overruling the consideration urged against its adoption," and "consider fully all written and oral submissions respecting the proposed rule." O.C.G.A. § 50-13-4(a)(2). When a rule is challenged, "the agency shall be made a party to the action and a copy of the petition shall be served on the Attorney General." *Id.* § 50-13-10(b).

ARGUMENT

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The Court should declare the rules invalid to the extent they confer county election officials with discretion over certification. None of the non-merits defenses raised in respondents' answers preclude relief. *Infra* Part I. Certification is a non-discretionary duty under clear Georgia statutes and a century of consistent case law. *Infra* Part II. And separately, the rules violate both the procedural requirements of Georgia's Administrative Procedure Act and limits on rulemaking imposed by SEB's authorizing statute. *Infra* Part III.

I. THE COURT CAN AND SHOULD ADDRESS WHETHER CERTIFICATION IS MANDATORY

A. The State Has Consented To Suit, And SEB Is The Proper Respondent

Petitioners challenge the Reasonable Inquiry Rule and Examination Rule under O.C.G.A. § 50-13-10 (*quoted supra* p.8). *See* Pet. ¶¶ 50–51, 121, 134. SEB's answer asserts (p.2) that sovereign immunity bars "[s]ome or all claims raised by Petitioners" and that this suit "may be brought exclusively against the state." Neither claim is correct.

"The State's sovereign immunity has been specifically waived by the General Assembly pursuant to OCGA § 50-13-10, which is part of the Administrative Procedure Act," or APA. *Black*, 332 Ga. App. at 659–60. "Therein, the State has specifically consented to be sued and has

explicitly waived its sovereign immunity as to declaratory judgment actions in which the rules of its agencies are challenged." *Id.* Hence, O.C.G.A. § 50-13-10 "authorizes a superior court to accept an action for a declaratory judgment on the validity of rules of a state agency, and for the state agency to be made a party with service of the petition on the attorney general." *Olvera v. Univ. Sys. of Ga.'s Bd. of Regents*, 331 Ga. App. 392, 394–95 (2015). Because this action is a declaratory judgment action regarding the validity of rules of a state agency brought under § 50-13-10, sovereign immunity creates no bar to relief.

In arguing otherwise, SEB's answer (p.2) cites Article I, Section II, Paragraph V of the Georgia Constitution, and claims that SEB is not the proper respondent. But again, this action is expressly brought pursuant to O.C.G.A. § 50-13-10, which waives sovereign immunity under a separate constitutional provision, Article I, Section II, Paragraph IX. *See* Pet. ¶¶ 50–51, 121. Petitioners do not, that is, "try to avail themselves of Paragraph V's waiver of sovereign immunity in any way." *State v. SASS Grp., LLC*, 315 Ga. 893, 897 (2023). To the extent SEB's sovereign-immunity defense depends on the assertion that petitioners are relying on any sovereign-immunity waiver other than O.C.G.A § 50-13-10, the Court should reject the defense on the ground that this action—a declaratory-judgment action challenging two agency rules—was brought solely pursuant to O.C.G.A. § 50-13-10, and that no other waiver is required for the court to have jurisdiction over the action.

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For the same reason, any restrictions accompanying "[a]ctions filed pursuant to" Paragraph V—including that such actions must be filed "exclusively against the state and in the name of the State"—do not apply. Ga. Const. of 1983, Art. I, Sec. II, Para. V (b) (2). That is particularly true when, as here, the relevant statutory waiver imposes procedural requirements that are irreconcilable with Paragraph V's exclusivity provisions. *See SASS*, 315 Ga. at 897.

O.C.G.A. § 50-13-10(b)'s requirement that "[t]he agency shall be made a party to the action" is just such a provision, because it precludes naming the State as the exclusive respondent. To argue otherwise would require holding the APA unconstitutional following the adoption of the separate waiver of sovereign immunity embodied by Paragraph V. Even SEB does not so argue.

B. There Is A Justiciable Controversy, And Each Petitioner Has Standing (Though Only One Needs It For The Case To Proceed)

For suits brought under O.C.G.A. § 50-13-10, "the requirement remains that there must be a justiciable controversy between the parties." *Dep't of Transp. v. Peach Hill Props., Inc.*, 280 Ga. 624, 625 (2006). But as the Court of Appeals has made clear, courts:

> must construe the declaratory judgment statute liberally. The statute is available in situations presenting an 'actual controversy' where interested parties are asserting adverse claims upon a state of facts wherein a legal judgment is sought that would control or direct future action. Moreover, … to challenge … an administrative action taken pursuant to a statute, the plaintiff must normally show that it has interests or rights which *are or will be affected* by the statute or the action.

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Black, 332 Ga. App. at 659–60 (citations and quotation marks omitted). Here, a justiciable controversy exists, and petitioners each have standing, because they are each "challenging the adoption of a rule [they are] automatically affected by." *Id.* at 660. Petitioners' "interests or rights" both already have been and will continue to be "affected" by the challenged rules. *Id.*[1]

1. Board Member Petitioners

The petitioners who now serve on election boards—Abhiraman, Crawford, Mirandola, Mosbacher, and Tucker (the "Board Member Petitioners")—each have standing because the relief sought here would "guide and protect [them] from uncertainty and insecurity with respect to" their legal obligations. *Cobb Cnty. v. Floam*, 319 Ga. 89, 97 (2024); *see* Pet. ¶¶ 17–27, 38.

[1] "'To hear the case, [the Court] must find that at least one plaintiff has standing to raise each claim.'" *Milani v. Irwin*, 354 Ga. App. 218, 223 n.8 (2020) (quoting *Ga. Latino All. for Hum. Rights v. Governor of Ga.*, 691 F.3d 1250, 1258 (11th Cir. 2012)). So long as that requirement is met, it does not matter if any other plaintiffs (or here petitioners) also have standing. *See id.*

First, by requiring county board members to conduct an undefined "reasonable inquiry" before certification, and by mandating that they be allowed to examine an undefined set of "all election related documentation" before certification, the challenges rules create substantial uncertainty about whether and how the Board Member Petitioners can satisfy the rules consistent with their certification obligations under Georgia law. *See* Pet. ¶¶ 10–13, 38, 44; *see also* Exs. 2–6 (affidavits of each Board Member Petitioner). Absent declaratory relief, that uncertainty will persist through the administration of the upcoming election.

Second, O.C.G.A. § 21-2-33.2 allows SEB to take over a county elections board if it decides that the county board violated three election laws or rules during the last two election cycles, or that there is clear and convincing evidence of "nonfeasance, malfeasance, or gross negligence" in two elections within two years. Thus, the Board Member Petitioners require immediate guidance on the interaction between their statutory certification obligations and the challenged rules, to ensure they do not violate a legal duty, thereby risking an exercise of SEB's takeover authority. Pet. ¶ 39; *accord* Ex. 5 ¶ 8. For this additional reason, the Board Member Petitioners have standing because "the relief sought" would have "some *immediate legal effect on the parties' conduct*," *Perdue v. Barron*, 367 Ga. App. 157, 163 (2023) (emphasis in original).

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Third, the Board Member Petitioners each have standing because the Examination Rule requires them to make available for review "all election related documentation" and certain voting data (not mentioned or defined anywhere in the election code), and to carry out additional procedures prior to certification. Pet. ¶ 40. The assembly of information potentially necessary for the Examination Rule alone is highly resource-intensive, requiring board members to (1) determine exactly what additional documentation and voting data the challenged rules require; (2) ensure that this new data can be compiled and made available to board members

almost immediately after the polls close on November 5; and (3) review precinct-level returns on a timeline that does not account for other post-election procedures (like the curing of provisional ballots). *See* Ex. 2 ¶ 10; Ex. 3 ¶ 7; Ex. 4 ¶¶ 7, 9; Ex. 5 ¶¶ 5, 7, 11; Ex. 6 ¶¶ 7–8. Absent the requested relief, the Board Member Petitioners will need to expend substantial time and resources on these tasks, to the detriment of essential board functions such as attention to early voting and election day polling locations. *See* Ex. 3 ¶ 9.

Finally, in light of the challenged rules, the Board Member Petitioners will need to spend time and resources to educate fellow board members (and other election workers) about the relationship between the new rules and the appropriate role of county certification and the statutory obligation to certify election results. Pet. ¶ 38. Once again, some Board Member Petitioners have already expended significant efforts to that end. *See, e.g.*, Ex. 2 ¶¶ 3–4. And once again, absent the requested relief, the Board Member Petitioners will continue shouldering that burden, particularly in determining how to interact and respond to fellow BRE members who have *already* refused to certify elections and are now emboldened by the adoption of the new rules. *See* Ex. 2 ¶¶ 6–7; Ex. 3 ¶ 6; Ex. 4 ¶ 6; Ex. 5 ¶ 6; Ex. 6 ¶ 5.

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2. The Candidate Petitioners

Petitioners Au and Clark—candidates for the Georgia House of Representatives—each have standing because they face a similar uncertainty. These "Candidate Petitioners" cannot know whether all votes cast for them in the upcoming election will be counted, because of the uncertainty that the challenged rules introduce into the certification process and the resulting risk that county boards will delay or refuse certification. Pet. ¶ 42. Also, absent clarity on the nature of election officials' certification obligations and the rules' legality, the Candidate Petitioners must spend time and money preparing for the "reasonable inquiry" and examination processes mandated by the challenged rules. *Id.* This, in turn, will require the Candidate Petitioners (and

organizational supporters, including DPG and DNC) to divert resources that they would otherwise devote to furthering their candidacies. Ex. 7 ¶¶ 9–11.

3. The Voter Petitioners

The Voter Petitioners—Johnson, Wakefield, and Waits—each have standing because they are voting citizens of Georgia. Pet. ¶¶ 28–30, 41. The uncertainty the challenged rules inject into the certification process creates a substantial risk that county boards of elections will not timely certify election results. *Id.* ¶ 41. Consequently, the Voter Petitioners cannot know whether their ballots in the upcoming election will be counted, or whether instead their fundamental right to vote will be denied. *See id.* That very real threat of such a denial confers standing on each Voter Petitioner. The Voter Petitioners also face uncertainty regarding whether all valid ballots cast for their preferred candidates will be counted.

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4. DNC and DPG

DNC and DPG each have standing under the associational and organizational standing doctrines (although it would suffice for either petitioner to have standing under only one theory).

a. Associational standing

DNC and DPG each have members who live and vote in Georgia, members who would "have standing to sue in their own right" here. *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 387 (2002). These members include DPG-appointed or -nominated officials like the Board Member Petitioners, members of DPG County Committees, and the Voter Petitioners. Pet. ¶ 43. DPG has associational standing to sue on its members' behalf because of the uncertainty the new rules introduce, including whether and how DPG members serving on county election boards can meet the rules' mandates consistent with their statutory certification obligations. *Id.* ¶ 44.

Moreover, "the interests" that DNC and DPG "seek[] to protect are germane to [their] purpose[s]," *Black Voters Matter*, 313 Ga. at 387. Specifically, "DNC and DPG each seek … to

ensure that votes cast for Democratic candidates in November are properly counted and that their respective members serving as … county-level election administrators know their … obligations with respect to certification." Pet. ¶ 43. And "neither the claim asserted nor the relief requested [here] requires the participation of individual members." *Black Voters Matter*, 313 Ga. at 387.

b. Organizational standing

DNC and DPG also each have organizational standing because each has been and will be injured directly by the challenged rules. Each is injured when votes for Democratic candidates are not properly certified, thereby reducing the chance of Democratic candidates being elected. Pet. ¶ 46. Likewise, "DNC and DPG are each injured when citizens are denied their fundamental right to vote, because part of each organization's mission is to ensure that citizens can exercise their political freedoms." *Id.* ¶ 47. Any delays in certification or refusals to certify based on either challenged rule will thus harm DNC and DPG by infringing that right. *Id.*

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Further, the confusion that the challenged rules have injected into the certification process has caused and will continue to cause a diversion of DNC's and DPG's resources. Pet. ¶ 48. For example, DPG has already had to expend resources to submit public comments regarding both rules. *See id.* ¶¶ 81 & 94; *id.* Exs. D & F. Moreover, DPG faces uncertainty regarding how to educate and advise its members about the effect of the rules—and in particular, about the obligations the rules impose on DPG-appointed election officials. Ex. 7 ¶¶ 4–8. That, in turn, requires DPG to divert its time and resources. *Id.* ¶¶ 9–11.

Along the same lines, DNC and DPG each "currently engage in a county-liaison program in which they seek to support county election superintendents in running free and fair elections," including by "educating county officials about the requirements of state election law and advocating for the interests of their constituents." Pet. ¶ 49. Because of the uncertainty the new challenged rules introduced, these liaison programs will have to spend more of their time and

resources educating county officials about their certification obligations, which will displace time and resources the programs would otherwise spend working on issues important to DNC's and DPG's constituents, such as ensuring voters are registered. *Id.* Indeed, DNC and DPG have already expended significant resources discussing certification with county election officials in light of the new rules. Ex. 7 ¶¶ 3–5.

Finally, both DNC and DPG will need to expend resources to monitor the "reasonable inquiries" and examinations the challenged rules require to ensure the election results are timely certified and that votes for Democratic candidates are properly counted. Pet. ¶ 48. But "[s]pending money on preparing for and engaging in a contested inquiry, which is not part of either DNC's or DPG's mission, means DNC and DPG each cannot use that money to further activity that *is* a part of their missions, *e.g.*, increasing Democratic voter turnout." *Id.*; Ex. 7 ¶¶ 9–11. And if a county chooses to engage in an inquiry or examination under the rules—and especially if election results are not timely certified in a particular county—DNC and DPG each will receive an influx of calls from voters in that county, which will in turn require both DNC and DPG to divert resources away from otherwise assisting voters in Georgia. *Id.*

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C. *Purcell* Does Not Bar Relief

Lastly, the Republican intervenors state in their answer (p.15) that "Petitioners' requested relief is barred by the *Purcell* principle." That is incorrect.

Under *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), and its progeny, "lower *federal* courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam) (emphasis added) (citing cases). By its terms, then, *Purcell* imposes no constraints on *state* courts—consistent with its grounding, at least partly, in considerations of federalism, *see, e.g.*, *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S.Ct. 28, 28 (2020) (Roberts, C.J.,

concurring) (a case about "the authority of state courts to apply their own constitutions to election regulations" raises "different issues than" a case where "a [federal] District Court intervened in the thick of election season to enjoin enforcement of a State's laws," which "involves federal intrusion on state lawmaking processes").

In any event, if *Purcell* did apply here, it would support petitioners. *Purcell* seeks to avoid the "voter confusion and consequent incentive to remain away from the polls," *Purcell*, 549 U.S. at 4–5, that can result when "longstanding election rules" are changed close to an election, *Democratic Nat'l Comm.*, 141 S.Ct. at 30 (Gorsuch, J., concurring). Here, it is the challenged SEB rules that would change "longstanding election rules," *id.*—which is why the Secretary of State and others have urged SEB to cease its last-minute rulemakings. The Secretary's office, for example, has stated that "[i]t is far too late in the election process for counties to implement new rules and procedures, and many poll workers have already completed their required training." Ex. 1, Att. B at 1. Similarly, it has cautioned SEB against the passage of any rules well-within the period where courts have agreed *Purcell* applies. *Id.*at 2. And the Georgia Association for Voter Registration and Election Officials requested a rulemaking pause immediately following the Examination Rule's passage. *Id.,* Att. C at 1.

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As explained in Part II, the tenet that timely county certification is a mandatory duty—*i.e.*, that county officials have no roving license to delay certification and thereby disrupt the legislature's carefully crafted scheme for certifying elections throughout Georgia—has been firmly established in this state (and others) for over a century, and is reflected today in the governing statutes. The relief petitioners seek—a determination that the challenged rules violate that principle and those statutes' clear text—would avoid rather than create the confusion and other deleterious effects that *Purcell* exists to prevent. Again, the Secretary agrees, urging SEB

to "pause any further rulemaking to ensure that the rules are 'clear and settled' and avoid 'unfair consequences' in the 2024 General Election." Ex. 1, Att. B at 2. *Purcell* thus creates no bar to the relief sought.

*   *   *

None of the threshold defenses advanced in the answers has merit. This Court can and should reach the critical question of Georgia election law raised by the challenged rules.

II. THE RULES ARE INVALID TO THE EXTENT THEY CONFER DISCRETION OVER CERTIFICATION

The Reasonable Inquiry and Examination Rules are predicated on the assertion that certification is a discretionary function. Pet. ¶¶ 64–75, 87–91; *supra* pp. 4–8. That premise is wrong. The text, structure, and history of Georgia statutes, as well as case law interpreting them, make clear that certification is a mandatory duty within Georgia's highly regulated election administration scheme—a scheme that grants election officials limited discretion over functions *other* than certification, *see infra* pp. 19–20, and provides judicial mechanisms to address fraud or non-mathematical errors, *see infra* pp. 24–27. To the extent the rules make certification discretionary, they are invalid.

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A. The Text Of The Election Code Makes Certification Mandatory

Georgia law uses mandatory language to task county boards of election and other superintendents with administering elections. *See* O.C.G.A. § 21-2-2(35)(A); 2019 Ga. Laws 4181. O.C.G.A. § 21-2-70(9) provides (with emphases added) that "[e]ach superintendent … *shall* perform all the duties imposed upon him or her," including "receiv[ing] from poll officers the returns of all primaries and elections, [] canvass[ing] and comput[ing] the same, and [] *certify[ing] the results thereof*." The Georgia Code section that specifically governs "certification" and the "[c]omputation of returns by superintendent" likewise uses mandatory

language in providing that "[t]he superintendent *shall*, after the close of the polls on the day of a primary or election … publicly commence the computation and canvassing of the returns," adding that "[t]he consolidated returns *shall then be certified* by the superintendent." O.C.G.A. § 21-2-493(a) & (k) (emphases added). Georgia law also imposes a clear deadline to complete certification: "Such returns *shall be 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) (emphases added).[2]

The use of "shall" in these statutes shows that certification by county election officials is mandatory. The term "shall" means "required to," and "[d]rafters [of statutes] typically intend and … courts typically uphold" the use of "shall" as "mandatory." *Black's Law Dictionary* (12th ed. 2024). Georgia courts have recognized this, explaining that "'[s]hall' is generally construed as a word of command." *Mead v. Sheffield*, 278 Ga. 268, 269 (2004); *Nunnally v. State*, 311 Ga. App. 558, 560 (2011) ("'Shall' is recognized generally as a command, and is mandatory."); *see also State v. Henderson*, 263 Ga. 508, 510 (1993) ("must" and "shall" are synonymous).

Nothing in the plain language of these statutes even hints at an intent to leave certification to a superintendent's discretion. By contrast, in the same code section, the legislature explicitly gave superintendents discretion in other circumstances before and apart from certification—using words like "may" and "discretion." For example, O.C.G.A. § 21-2-493(b) states that when a superintendent investigates an apparent numerical discrepancy caused by a vote total from a precinct that "exceeds the number of electors in such precinct or exceeds the total number of persons who voted in such precinct or the total number of ballots cast

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[2] Because November 11, 2024, is a legal holiday, election returns this year must be certified by election officials not later than 5:00 P.M. on November 12, 2024. *See* O.C.G.A. § 21-2-14.

therein," the superintendent "*may*" order "a recount or recanvass of the votes … and a report … to the district attorney." *Id.* (emphasis added). Similarly, if such a discrepancy occurs in a precinct "in which paper ballots have been used," then "the superintendent *may* require the production of the ballot box and the recount of the ballots." *Id.* § 21-2-493(c) (emphasis added).

Where the General Assembly wanted to give the superintendent limited discretion, therefore, it did so expressly, using unmistakably discretionary language. That it included no such language with respect to the superintendent's duty to certify must be treated as deliberate and conclusive. "Under the statutory interpretation doctrine of expressio unius est exclusio alterius, where the [legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the [legislature] acts intentionally and purposely in the disparate inclusion or exclusion." *Grange Indem. Ins. Co. v. Burns*, 337 Ga. App. 532, 537–38 (2016), *quoted in Truist Bank v. Stark*, 359 Ga. App. 116, 119 (2021) (cleaned up). "If the General Assembly had desired to" leave certification up to the discretion of the superintendent, "it could have done so as it did with the [matters] mentioned in" § 21-2-493(b)–(c). *Id.*[3]

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Importantly, the mandatory certification language governs even where actual "error or fraud is discovered." O.C.G.A. § 21-2-493(i). In that event, "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." *Id.* (emphases

[3] As noted, the Secretary of State agrees that the county-certification deadline in Georgia statutes is mandatory, issuing a guidance stating that "Paragraph (k) [of O.C.G.A. § 21-2-493] mandates that the deadline for county certification of an election is '5:00 P.M. on the Monday following the date on which such election was held.' … **All county superintendents are required by law to certify returns by 5:00 P.M. on November 12, 2024."** Ex. 1, Att. A at 1 (emphasis in original); *see also supra* n.2 (explaining the (Tuesday) November 12 deadline).

added). The statute's reference to computing and certifying the votes "justly" confers no discretion over whether to certify. It conveys that certification is to occur despite any possible "error or fraud," *id.*, in conformance with the clear and mandatory deadlines Georgia law provides, *see Black's Law Dictionary* (12th ed. 2004) (defining "just" as "[l]egally right"). But the duty to further investigate any possible criminality is statutorily placed where it should be, in the hands of law enforcement—with, as discussed below, other statutorily prescribed election-related proceedings (election contests) then available to evaluate the possible impact on an election of any "error or fraud," *id.*; *see infra* Part II.D. To instead conclude that "justly" confers discretion not to certify would be an extremely oblique way for the legislature to create a massive carve-out from the other provisions just discussed that mandate certification. The legislature, however, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001), *quoted in State v. Hudson*, 303 Ga. 348, 353 (2018).

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B. The Structure Of The Election Code Confirms Certification Is Mandatory

The non-discretionary nature of the certification duty in O.C.G.A. § 21-2-493(k) is even clearer "when read with the remainder of the statutory scheme" governing elections, as it must be, *Cobb Hosp., Inc. v. Emory-Adventist, Inc.*, 357 Ga. App. 617, 621 (2020).

If a county board or other superintendent refused to certify (or delayed in certifying) in order to complete a "reasonable inquiry" or conduct an undefined examination, the Secretary of State would still proceed with his mandatory reporting of results, meaning that that reporting could occur *without* counting ballots from the county—thereby denying the county's voters their fundamental right to vote. Georgia law provides that "[n]ot 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 … and shall no later than that same time lay the returns for presidential electors before the Governor." O.C.G.A. § 21-2-499(b). Georgia law also provides that "[t]he 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." *Id.* These deadlines can only be altered by a court order. *Id.* Federal law also sets a deadline for the certification of presidential electors. 3 U.S.C. § 5. The mandatory nature and timing of county certification thus plays a crucial role in avoiding the disenfranchisement of Georgia voters.

C. History And Precedent Confirm That Certification Is Mandatory

In providing for mandatory county certification, the General Assembly was not breaking new ground; Georgia law has long treated election certification as non-discretionary. Nor is Georgia an outlier in this regard. Around the country, the argument that election canvassers should exercise "discretion" when certifying election results has been rejected for over a century.

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To start, our Supreme Court held in *Tanner v. Deen* that certain county superintendents' refusal to certify an election was subject to mandamus, and it ordered the lower court to issue a writ of mandamus requiring them to certify. 108 Ga. 95, 101–02 (1899). Rejecting the superintendents' contention that the returns of a certain precinct were invalid, the court noted that "most, if not all, the points made against the validity of these returns involved questions of law only." *Id.* at 101. And the superintendents "were not selected for their knowledge of the law," and therefore had no authority to make legal determinations as to the validity of any election returns. *Id.* The same is true here; Georgia's statutes do not require superintendents to be "selected for their knowledge of the law"—whether the law of fraud or any other topic—because investigating and adjudicating legal issues is not the purpose of the certification process. Instead, the election code provides for expedited election contests in court, *see infra* Part II.D.

Likewise on point is *Bacon v. Black*, 162 Ga. 222 (1926). There, the then-governing certification statute required "consolidating" (*i.e.*, canvassing) county superintendents:

> to make and subscribe two certificates, stating the whole number of votes each person received in the county; one of them, together with one list of voters and one tally sheet from each place of holding the election, shall be sealed up, and without delay mailed to the Governor; and the other, with like accompaniments, shall be directed to the clerk of the superior court of the county.

Id. at 227. Based on this mandatory language—using the same "shall" terminology as in today's statutes—the court held that certification was a "purely ministerial" duty that left no discretion for any superintendents to investigate issues of irregularity or fraud:

> [S]uperintendents who consolidate the vote of a county in county elections *have no right to adjudicate upon the subject of irregularity or fraud* …. The duties of the managers or superintendents of election who are required by law to assemble at the courthouse and consolidate the vote of the county *are purely ministerial*.

Id. at 226 (emphases added).

And in *Thompson v. Talmadge*, 201 Ga. 867 (1947)—which resolved the legendary "Three Governors Controversy"—our Supreme Court explicitly characterized canvassing (a duty the 1945 Georgia Constitution imposed on the General Assembly) as the "mathematical process of adding the number of votes," and it cited *Bacon* (among other cases) for the rule that canvassing and certification were purely ministerial, non-discretionary duties, *id.* at 877 (citing *Bacon*; *People ex rel. Sherwood v. State Bd. of Canvassers*, 29 N.E. 345 (N.Y. 1891); and *Davis v. Warde*, 155 Ga. 748 (1923)). As the court put it:

> The General Assembly, as canvassers of the election returns in this case, were subject to the general, if not indeed the universal, rule of law applicable to election canvassers. That rule is that *they are given no discretionary power except to determine if the returns are in proper form and executed by the proper officials and to pronounce the mathematical result*, unless additional authority is expressed. They can neither receive nor consider any extraneous information or evidence, but must look only to the contents of the election returns.

Id. at 876–77 (emphasis added).

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Thompson's description of this non-discretion principle as nigh-universal (in Georgia and beyond) was not an exaggeration. "By 1897, the ministerial, mandatory nature of certifying returns was so well-established that one leading treatise declared 'the doctrine that canvassing boards and return judges are ministerial officers possessing no discretionary or judicial power, is settled in nearly … all the states.'" Miller & Wilder, *Certification and Non-Discretion: A Guide to Protecting the 2024 Election*, 35 Stanford Law & Policy Review 1, 31 (2024) (quoting McRary, *A Treatise on the American Law of Elections*, 153 § 229 (4th ed. 1897)). This consensus is easy to understand: "[T]he risk that the certifying officers would seek to manipulate the results or otherwise abuse their power outweighed any thought that they could play a helpful role in investigating elections." *Id.* at 30. Thus, courts nationwide have acknowledged that giving election officials the discretion to refuse certification would threaten to disenfranchise voters and "create[] opportunities for election fraud" on the part of those officials. *Id.* at 29.

In short, courts here and elsewhere have long recognized that giving election officials discretion in certifying election results would allow those officials to "assume[] a power dangerous to the citizen, and fatal to the elective franchise." *People ex rel. Fuller v. Hilliard*, 29 Ill. 413, 422-23 (1862). Indeed, "to permit [canvassers] to refuse to canvass because of mistake or fraud … would be subversive of our entire scheme of elections." *People ex rel. Blodgett v. Bd. of Town Canvassers of Coeymans*, 19 N.Y.S. 206, 207–08 (N.Y. Sup. Ct. Albany Cty. 1892). Courts have thus consistently denied such discretion. This Court should do the same.

D. Georgia's Integrated Scheme Of Election Administration Already Addresses Fraud Or Election Irregularities Through Mechanisms Outside Certification

The challenged rules' proponents have at times argued that certification must be discretionary because of the possibility of voter fraud or other election irregularities. That is incorrect.

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As discussed in the Introduction and the Background (part A.2), certification duties are but one part of the Georgia election code's comprehensive, integrated system of election administration—a system designed to ensure that eligible Georgians can make their voices heard in the democratic process and are not denied their fundamental right to vote. *See* O.C.G.A. §§ 21-2-1 through 21-2-604. By a variety of mechanisms, the code ensures that qualified voters cast proper votes and that such votes are counted and reported, all according to an integrated legislative scheme. *See id.* Once ballots are cast and polling locations close, the votes are counted, canvassed, and certified in accordance with these statutory mandates. *See id.*

County-level certification serves a specific purpose within this process: to aggregate all the votes from all the precincts in a county, and ensure the numerical accuracy of that vote count. *See* O.C.G.A. § 21-2-493. For example, the code ensures mathematical accuracy by mandating certain precinct-level cross-checks and instructing superintendents on how to resolve any numerical discrepancies detected by those cross-checks. *See, e.g.*, *id*. §§ 21-2-493(e)–(h).

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Before county-level certification, a superintendent may order a recount or recanvass in the circumstances specified by O.C.G.A. § 21-2-495. And during county-level canvassing, the superintendent will review various pieces of precinct-level information, including the number of electors in each precinct, *see id*. § 21-2-493(b), the number of persons who voted in each precinct, *id*., the number of ballots cast in each precinct, *id*., the unsealed and sealed returns of votes from each precinct, *id*. §§ 21-2-493(g) to (h), and, for each precinct using voting machines, the records from the general returns showing the machine counters and the internal records showing the machine counters prior to the start of the election. *See id*. § 21-2-493(f). The statute itself sets forth the information relevant to performing these computations.

Once mathematical accuracy is attained, the superintendent has no discretion to refuse certification. *See* O.C.G.A. § 21-2-493(k). Rather, "[a]s the returns from each precinct are read, computed, and found to be correct or corrected" in accordance with § 21-2-493, "they *shall* be recorded on the blanks prepared for the purpose until all the returns from the various precincts … *shall* have been duly recorded; then they *shall* be added together," and those "consolidated returns *shall* then be certified by the [county] superintendent … not later than 5:00 P.M. on the Monday following the date on which such election was held." *Id*. (emphases added). After the county superintendents certify their returns, moreover, the Secretary of State must "immediately" undertake his own tabulation, computation, and canvassing process, O.C.G.A. § 21-2-499(a), and must then certify the votes to the Governor. *See id.* § 21-2-499(b).

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Other steps in the election process, meanwhile, directly address the process of validating individual ballots and preventing, detecting, and remediating fraud. For example, the election code provides an expedited procedure for contesting elections in court post-certification. An elector may contest an election on several grounds, including "misconduct, fraud, or irregularity by any primary or election official or officials," "when illegal votes have been received or legal votes rejected at the polls," or "for any error in counting the votes or declaring the result of the primary or election." O.C.G.A. § 21-2-522(1), (3), (4). If an election contest changes the results, Georgia law authorizes the superintendent to recertify the election. *See id.* at § 21-2-493(l); *see also id.* § 21-2-499(a) (authorizing Secretary of State to recertify an election).

These processes make clear that county-level discretion over certification is not needed to address misconduct, fraud, or error; an expedited, orderly, and evidence-based judicial process exists to do so instead. Under the General Assembly's comprehensive framework, that is, election contests—not certification—are the designated mechanism for resolving disputes about

alleged irregularities in the election process. *See* Ex. 1 Att. A at 1 ("Compliance with the certification deadline is critical … to allow candidates or voters to contest election results in court."). This division reflects the relative ability of courts to address complex issues of law and fact, and recognizes that election officials are "not selected for their knowledge of the law," *Tanner*, 108 Ga. at 101; *see also supra* p. 22. If election officials have concerns about possible election irregularities, they are free to voice those concerns at the time of certification, so that they may be considered and adjudicated, by judges, in any subsequent election contest. But they may not point to those election irregularities (or anything else) as a basis for delaying certification or denying it entirely.

As explained, *see supra* pp. 20–21, Georgia statutes reflect the foregoing, requiring certification despite any possible (or even actual) "error or fraud," O.C.G.A. § 21-2-493(i), and leaving it to the judicial and law-enforcement officials to address any such error or fraud.

E. The Additional Duties Assigned To Superintendents Do Not Undermine The Mandatory Nature Of Certification

Those claiming that certification is discretionary sometimes invoke *other* duties assigned to county election officials under the election code, claiming that these duties reveal discretion in certification or distinguish longstanding precedent. But as explained, *see supra* pp. 19–20, the fact that the election code confers specific and limited discretion over *other* duties—using discretionary, "may," language—only confirms that the mandatory language used in the provisions governing certification ("shall") shows a lack of discretion over certification. To the extent respondents invoke the breadth of a superintendent's duties under the current election code, that is also beside the point. Even if superintendents have more duties now than under prior election statutes, that does nothing to alter either the mandatory nature of certification that

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courts have recognized for decades or the clear statutory language making certification mandatory in Georgia.

F. The Challenged Rules Introduce Discretion To Certify That Conflicts With The Georgia Statutes And Case Law Just Discussed

As discussed in the Background, the challenged rules were each adopted amidst—and based on—claims that county-level certification in Georgia is a discretionary rather than mandatory act. *See supra* pp. 4–8. Each rule's language further confirms that it rests on that faulty premise and in fact seeks to confer discretion on county superintendents to delay or deny the statutorily required certification.

Specifically, the Reasonable Inquiry Rule's adopts a definition of "[c]ertify" that *requires* officials to conduct a "reasonable inquiry" *before* certifying election results—but without defining in any way what constitutes a reasonable inquiry. Pet. ¶ 77. That omission invites election boards, as well as individual board members, to decide that they have discretion to decide that issue for themselves. Consequently, any official who decides that he or she (for whatever reason) has not yet completed a "reasonable inquiry" may improperly delay or refuse certification on that basis while claiming compliance with the rule.

Likewise, the Examination Rule *requires* that board members "be permitted to examine all election related documentation created during the conduct of elections *prior* to certification of results" *Id.* ¶ 91 (emphasis added). This similarly indicates that officials have discretion to simply delay or miss the statutory certification deadline if the requisite examination of "all" election-related documents has not been—in their subjective view—completed.

But as just explained, Georgia's statutes and decades of consistent precedent make clear that certification is mandatory and not discretionary. Because each of the challenged rules purports to confer such discretion, they are invalid.

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III. THE CHALLENGED RULES ARE EACH INVALID EVEN IF THEY DO NOT CONFER DISCRETION OVER CERTIFICATION

A. Each Rule Is Procedurally Invalid

Although the Court need go no further than the foregoing to grant the petition, the rules are independently invalid because they violate the APA's notice-and-comment requirements. The APA provides that, prior to the adoption of a rule:

> The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, *if requested to do so by an interested person* either prior to adoption or within 30 days thereafter, *shall issue a concise statement of the principal reasons for and against its adoption and incorporate therein its reason for overruling the consideration* urged against its adoption.

O.C.G.A. § 50-13-4(a)(2) (emphases added).

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Failure to comply with those requirements is fatal. As the Court of Appeals held in *Outdoor Advertising Association of Georgia, Inc. v. Department of Transportation*, "[i]nasmuch as we have concluded that [the agency] violated mandated precepts of the APA in its attempt to adopt amendments to [its] rules and regulations, we must … hold that the amendments are invalid." 186 Ga. App. 550, 554 (1988). Notably, the court in that case expressly noted that one of the agency's failures was the violation of O.C.G.A. § 50-13-4(a)(2) "because the board did not consider the written and oral comments concerning the proposed amendments[.]" *Id.*

The same is true here. Petitioners asked for their comments to be considered as to each challenged rule, *see* Pet. Ex. D at 2; Pet. Ex. F at 2. Nonetheless, SEB has not issued any statement as to why Petitioners' comments on either rule (let alone both) were disregarded. That failure requires invalidation of each Rule. Pet. ¶¶ 83, 96, 128–30, 137.

B. The Examination Rule Is Independently Invalid Because It Does Not Apply Uniformly

Georgia law requires SEB to "promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of *superintendents*." O.C.G.A. § 21-2-31(1) (emphasis added). The Examination Rule does not comply with this legislative mandate. It applies not to "superintendents" but only to a subset, namely "Board[s]" and "board members." Pet. Ex. B. The approximately 25 Georgia counties that do not have a county board serving as election superintendent thus appear to be exempt from the Examination Rule. *See* Video of SEB 8/19/2024 Meeting at 2:09:41–2:09:53, *available at* https://gasos.wistia.com/medias/w6sjyi7ebx (hereafter "SEB Video Meeting"). The rule therefore does not "obtain uniformity in the practices and proceedings of superintendents," O.C.G.A. § 21-2-31(1).

This was, in fact, a known defect in the Examination Rule at the time it was considered. During the public comment period, the rule's proponents acknowledged the defect, noting that the rule "would be more uniform if it referred to superintendents of elections rather than boards—that would be a worthwhile change," and that "[f]or the sake of uniformity, the statute and the rule should be synced up." SEB Video Meeting at 2:11:40–2:12:15. The problem was not corrected, however, leaving the rule in conflict with Georgia's statutory uniformity requirement. For that reason as well, the Examination Rule is invalid. *See HCA Health Servs. of Ga., Inc. v. Roach*, 265 Ga. 501, 502 (1995).

IV. CONCLUSION

The Court should confirm that the duty of county superintendents to certify election results by the statutory deadline is mandatory and that the rules, properly read as consistent with Georgia statutes, confer no discretion to withhold or delay certification. If the Court concludes that either rule must be read as purporting to confer discretion, that rule should be invalidated.

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Respectfully submitted this 23rd day of September, 2024.

/s/ Manoj S. "Sachin" Varghese
Manoj S. Varghese
Georgia Bar No. 734668
Ben W. Thorpe
Georgia Bar No. 874911
Jeffrey W. Chen
Georgia Bar No. 640207
E. Allen Page
Georgia Bar No. 640163
BONDURANT MIXSON &
ELMORE, LLP
1201 West Peachtree Street NW
Suite 3900
Atlanta, GA 30309
(404) 881-4100
varghese@bmelaw.com
bthorpe@bmelaw.com
chen@bmelaw.com
page@bmelaw.com

Attorneys for Essence Johnson, Lauren Waits, Suzanne Wakefield, Michelle Au, Jasmine Clark, and Democratic Party of Georgia, Inc.

/s/ Charles C. Bailey
Charles C. Bailey
Georgia Bar No. 626778
COOK & CONNELLY, LLC
750 Piedmont Ave. NE
Atlanta, GA 30308
(678) 539-0680
charlie.bailey@cookconnelly.com

Attorney for Vasu Abhiraman, Teresa K. Crawford, Loretta Mirandola, Jennifer Mosbacher, and Anita Tucker

/s/ Kurt G. Kastorf
Kurt G. Kastorf
Georgia Bar No. 315315
KASTORF LAW LLC
1387 Iverson Street NE
Suite #100
Atlanta, GA 30307
(404) 900-0330
kurt@kastorflaw.com

Seth P. Waxman*
Daniel S. Volchok*
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037
(202) 663-6000
seth.waxman@wilmerhale.com
daniel.volchok@wilmerhale.com

Felicia H. Ellsworth*
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
felicia.ellsworth@wilmerhale.com

Alex W. Miller*
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007
(212) 230-8800
alex.miller@wilmerhale.com

Anuj Dixit*
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue
Los Angeles, CA 90071
(213) 443-5300
anuj.dixit@wilmerhale.com

Attorneys for the Democratic National Committee

* *Pro hac vice*

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CERTIFICATE OF SERVICE

I certify that, on this 23rd day of September 2024, I electronically filed a true and correct copy of the foregoing using the Court's eFileGA electronic filing system, which will automatically send an email notification of such filing to all attorneys of record, and I also served via email the following attorneys of record as listed below:

Elizabeth T. Young
Senior Assistant Attorney General
Danna Yu
Assistant Attorney General
eyoung@law.ga.gov
dyu@law.ga.gov

Attorneys for Respondent The State Election Board

Thomas R. McCarthy
Gilbert C. Dickey
Conor D. Woodfin
CONSOVOY MCCARTHY PLLC
tom@consovoymccarthy.com
gilbert@consovoymccarthy.com
conor@consovoymccarthy.com

Alex B. Kaufman
CHALMERS, ADAMS, BACKER & KAUFMAN, LLC
AKaufman@chalmersadams.com

William Bradley Carver, Sr.
Baxter D. Drennon
HALL BOOTH SMITH, P.C.
BCarver@hallboothsmith.com
BDrennon@hallboothsmith.com

Attorneys for Intervenor / Respondents The Republican National Committee and The Georgia Republican Party

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/s/ *Manoj S. "Sachin" Varghese*