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,

REPUBLICATION NATIONAL COMMITTEE AND GEORGIA REPUBLICAN PARTY, INC.,

Respondent-Intervenors.

Civil Case No. # 24CV010786

TRIAL BRIEF FOR THE REPUBLICAN NATIONAL COMMITTEE AND GEORGIA REPUBLICAN PARTY

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INTRODUCTION

Georgia's courts are not empowered to render advisory opinions on abstract legal questions. This Court can render a decision only if the decision will have "immediate legal consequence." *City of Atlanta v. Atlanta Indep. Sch. Sys.*, 307 Ga. 877, 880 (2020). "Mere disagreement about the abstract meaning or validity" of a rule does not suffice. *Id.* at 879 (cleaned up).

But Petitioners ask this Court for a decision resolving the abstract meaning of two amendments passed by the State Election Board. These new rules instruct that election officials should conduct a reasonable investigation before certifying an election and provide that county board members should be permitted to review election related documents. Petitioners ask this Court to render an opinion addressing whether these rules are invalid to the extent that they conflict with the obligation to certify results by the statutory deadline. Pet'rs' Br. at 30. But they never identify any conduct or legal right of their own that will be impacted by an answer to that question. This Court should reject this invitation to render an advisory opinion.

Even if this Court does reach the merits, this Court should reject Petitioners' claims. Petitioners ask this Court to declare the challenged rules unlawful on their face for conflicting with statutory deadline for certification. Yet they admit that the rules "could be read as facially consonant with" the statutory deadline. Pet'rs' Br. at 2. That admission should be fatal to Petitioners facial attack since the law "requires [them] to establish that no set of circumstances exists under which the [regulation] would be valid" or "at least that the [regulation] lacks a plainly legitimate sweep." *Bello v. State*, 300 Ga. 682, 685-86 (2017) (internal quotation omitted).

For these reasons and those explained below, this Court should render judgment for Respondents.

FACTUAL BACKGROUND

The State Election Board is empowered by the Georgia General Assembly to "promulgate" such "rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct" of "elections." O.C.G.A. §21-2-31(2). It is also the Board's duty to "promulgate rules and regulations" to ensure "uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections." *Id.* §21-2-31(1). To fulfill these statutory duties, the Board approved two amendments to its administrative rules to ensure that the upcoming election would be conducted in a "fair, legal, and orderly" manner.

The first amendment defines the phrase "certify the results" of an "election." *See* Ga. Comp. R. & Regs. 183-1-12-.02(1)(c.2). Under Georgia law, each election superintendent has a duty "[t]o receive" the "returns" of all "elections, to canvass and compute the same, and to certify the results thereof." O.C.G.A. §21-2-70(9). But "certify the results" is not defined by state statute. To "explicitly define certification," the Board amended its rules to clarify that to "certify the results" 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." Revisions to Subject 183-1-12-.02. *Definitions*, (proposed Jul. 3, 2024). And by statute, if a superintendent discovers "any error or fraud," she "shall compute and certify the votes justly, regardless of any fraudulent or erroneous returns … and shall

report the facts to the appropriate district attorney for action." O.C.G.A. §21-2-493(i). The Board adopted this Reasonable Inquiry Rule on August 6, 2024.

The Board's second amendment affirms existing Georgia law requiring superintendents to examine election documents. By statute, whenever there is "a discrepancy and palpable error" related to "excess" votes, election superintendents "shall" be able to "examine all" the "election documents whatever." O.C.G.A. §21-2-493(b). The amendment likewise permits county board members to "examine all election related documentation created during the conduct of elections prior to certification of results." Revisions to Subject 183-1-12-.12. *Tabulating Results*, (proposed Jul. 18, 2024) (codified at Ga. Comp. R. & Regs. 183-1-12-.12(f)(6)). The purpose of this amendment is to ensure that "county superintendents and boards of elections" can "reconcile the number of ballots to the number of voters so that certification of election results accurately reflects the will of the voters in every county." *Id.* The Board adopted this Examination Rule on August 19, 2024.

Over a week before the Reasonable Inquiry Rule was set to go into effect, Petitioners filed this lawsuit. Petitioners argue that defining the phrase "certify the results" and allowing county superintendents to have access to election related documents before certification "threaten[s] to upend" Georgia's upcoming election. Pet'rs' Br. at 1. They allege that the amendments are "new tools" to "create chaos and risk disenfranchising large numbers of Georgia's voters." *Id.* at 2. At the same time, Petitioners acknowledge that "[i]n theory, both rules could be read as facially consonant with Georgia statutes." Pet. at ¶2. Nevertheless, Petitioners seek to declare the amendments facially invalid and permanently enjoin their enforcement to the extent the

provisions do not comport with Petitioners' views concerning the meaning of Georgia law. *Id.* at 38. Petitioners ask this Court to overthrow the certification process established by the State Election Board's amended rules just three weeks before voting begins in Georgia.

ARGUMENT

I. This case is non-justiciable as Petitioners have failed to establish the existence of an "actual controversy."

Petitioner's request for relief conflicts with the "settled principle" that Georgia courts can resolve only "justiciable controversies." *Fulton Cnty.*, 299 Ga. 676, 677 (2020). This principle bars courts from addressing the abstract legality of a statute or rule in "advisory opinions." *Id.* A decision fails to meet this standard when it lacks "immediate legal consequence." *Atlanta Indep. Sch. Sys.*, 307 Ga. at 880. "Mere disagreement about the abstract meaning or validity" of a rule is not enough. *Id.* at 879 (cleaned up).

Petitioners raise the kind of abstract and hypothetical dispute that fails to meet these requirements. They ask this Court to declare unlawful two amendments enacted by the State Election Board requiring election officials to make a "reasonable inquiry" into accuracy before certifying election results and permitting election board members to examine election-related documents. Pet'rs' Br. at 28; Pet. at ¶¶77, 91. They never identify the "immediate legal consequence" that would follow from this Court's decision. *Atlanta Indep. Sch. Sys.*, 307 Ga. at 880. After all, they admit that these rules could be "read as facially consonant with Georgia statutes." Pet. at ¶2. At the start of each count, Petitioners again acknowledge that the rule each count challenges "theoretically could be read not to conflict with Georgia statutes" that form the basis

of their claims. *Id.* at ¶¶123, 135. But they argue that the "drafters … intended" the rules to operate in a way that could lead to a delay in certification "beyond the statutory deadline." *Id.* at ¶2. They ask this Court to step in not to resolve immediate legal rights but to avoid the "confusion" and "disorder" that could result in that situation. *Id.*; Pet'rs' Br. at 15. Thus, the petition asks this Court to address the "abstract meaning or validity" of the Rules to avoid confusion in future hypothetical situations.

Petitioners cannot save their claims by pointing to the Declaratory Judgment Act. The requirement of a justiciable controversy "holds even in proceedings for declaratory judgments" and declarations under the Administrative Procedure Act. *Fulton Cnty.*, 299 Ga. at 677; O.C.G.A. §50-13-10(c) (declaratory judgments under the APA are governed by the same rules as other declaratory judgments). Thus, a declaratory judgment can issue only if it will "have some immediate legal effect on the parties' conduct, rather than simply burning off an abstract fog of uncertainty." *Atlanta Indep. Sch. Sys.*, 307 Ga. at 880. "[M]ight" is not good enough. *Id.* There must be "a bona fide dispute over the applicability of the ordinance" for an "actual controversy" to exist. *City of Atlanta v. Hotels.com, L.P.*, 285 Ga. 231, 235 (2009). "Entry of a declaratory judgment" based on a mere possibility or even probability of a "future contingency" would be "an erroneous advisory opinion" that "must be vacated." *Baker v. City of Marietta*, 271 Ga. 210, 215 (1999) (internal citation omitted). Without any showing that a conflict between the amendments and a statute will arise, Petitioners' claims are not justiciable.

Moreover, Petitioners have failed to prove that their "uncertainty" concerning the challenged rules "affects *their* future conduct." *Cobb Cnty v. Floam*, 319 Ga. 89, 101 (2024). No Petitioner is "asking for guidance with respect to actions *they* might take or

alleging that *they* risk taking some dangerous step that may or may not be authorized." *Id.* at 100 (emphasis added). "The law is well established that declaratory judgment is not available where a judgment cannot guide and protect *the petitioner* with regard to some future act…." *Drawdy v. Direct Gen. Ins.*, 277 Ga. 107, 109 (2003) (emphasis added). But no Petitioner alleges that *they* plan to rely on the challenged rules as the legal predicate to delay or deny certification. *See generally* Pet'rs' Br. at Ex. 2–7. Instead, Petitioners request a declaratory judgment to guide the actions of unnamed and unknown persons who are not parties to this lawsuit, whom Petitioners speculate will choose to ignore the statutory certification deadline for the upcoming election by citing the challenged rules. Petitioners have failed to present a justiciable claim since they are not attempting to clear up uncertainty about "their own future conduct" and are rather "merely attempting" to "direct the future actions" of other "County" superintendents and election officials. *Floam*, 319 Ga. at 100.

Petitioners' only effort to show either an immediate legal consequence or uncertainty concerning their own future conduct is to point to the Board Member Petitioners. They argue that these Petitioners face uncertainty about how to conduct a reasonable inquiry or what documents to permit a county board member to examine. *See* Pet'rs' Br. at 12-13. And they argue that they face immediate legal consequences because the State Election Board could take over if they commit repeated violations of the law. *Id.* at 12.

None of these arguments render the relief that Petitioners request meaningful. To begin, Petitioners don't claim confusion on whether they must certify election results by the statutory deadline, but they request a decision recognizing that the

Reasonable Inquiry Rule and Examination Rule do not permit them to "withhold or delay certification." Pet'rs' Br. at 30. That ruling would not answer the Board Member Petitioners' questions about how to conduct a reasonable investigation or what documents should be available for review. Petitioners cite no authority supporting their attempt to obtain a declaratory judgment on one question based on purported confusion about different legal questions. Petitioners have thus failed to present any justiciable legal controversy before this Court.

II. Petitioners' challenge fails on the merits.

A. Petitioners' facial challenge must fail given their admission that the challenged rules can be read to comply with statutory authority.

Petitioners "object" to the Reasonable Inquiry and Examination Rules "not in the context of an actual election, but in a facial challenge." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). They do not "show that" the Rules have "been applied to them in any way." *Greater Atlanta Homebuilders Ass'n v. Dekalb Cnty.*, 277 Ga. 295, 296 (2003). Nor do they "challenge [the rules'] application in a particular instance." *Reno v. Flores*, 507 U.S. 292, 300 (1993). Instead, they bring a challenge before the Rules could be construed "in the context of actual disputes arising from the electoral context." *Wash. State Grange*, 552 U.S. at 450. In fact, Petitioners sued before either of the amended rules were in effect. Pet. at ¶¶86, 95-97; *see also Wash. State Grange*, 552 U.S. at 450 (challenge was facial where rules were "not yet in existence" when suit was filed). But Petitioners ask this Court to declare "that the two rules are unlawful." Pet'rs' Emergency Mot. at 2; Pet'rs' Br. at 30.

Petitioner's facial challenge must meet a high standard. A facial challenge "is, of course, the most difficult challenge to mount successfully because it requires one to establish that no set of circumstances exists under which the [regulation] would be valid" or "at least that the [regulation] lacks a plainly legitimate sweep." *Bello*, 300 Ga. at 685-86 (internal quotation omitted). So, Petitioners cannot merely show that "it is possible" the challenged regulation "may be improperly imposed" in "some" cases. *I.N.S. v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991). Instead, they must show that "the regulation is facially invalid because it is without statutory authority." *Id.*

Petitioners admit that they cannot meet this standard. They explain that "[i]n theory, both rules could be read as facially consonant with Georgia statutes." Pet. at ¶2. The Reasonable Inquiry Rule "could be read not to conflict with Georgia statutes, by permitting only such 'reasonable inquiry' as would not delay certification beyond the statutory deadline." *Id.* ¶123. And the Examination Rule "could be read not to conflict with Georgia statutes, by permitting only such 'examinations' as would not delay certification beyond the statutory deadline." *Id.* ¶135. They ask this Court to weigh in not on any facial invalidity of the Rules, but to reject "what the drafters of those rules intended." *Id.* ¶2; Pet'rs' Br. at 1, 2. They cite no authority supporting a facial, pre-enforcement rejection of a rule based not on any facial invalidity, but on the drafter's intent.

Petitioners are correct to concede that the Rules are facially valid. The Rules impose substantive requirements on election officials—requiring them to certify the accuracy of results after a reasonable inquiry and permitting members of election boards

to examine documents. Petitioners argue that these substantive rules could conflict with a timing rule—the requirement to certify election results by the Monday following an election. O.C.G.A. §21-2-493(k); Pet'rs' Br. at 28; Pet. at ¶¶123, 135. But these rules do not conflict when an election official completes the required inquiry and examination by the time for certification. In fact, Petitioners give no reason why any substantive requirement could not be facially challenged for potential conflict with a timing requirement on their theory that the substantive requirements might not be met by the deadline. But a facial challenge cannot succeed based on "'hypothetical' or 'imaginary' cases" where an interpretation might be invalid. *Wash. State Grange*, 552 U.S. at 450.

For three reasons, Petitioners cannot avoid this defect by asking for relief only to the extent the Rules conflict with statutory authority. *See* Pet'rs' Br. at 18, 30; Pet. at ¶¶127, 136. First, this request for relief confirms that Petitioners are bringing a facial challenge. A claim "raise[s] a facial challenge" when petitioners "have not shown" that a rule "has been applied to them in any way." *Greater Atlanta*, 277 Ga. at 296. Here, Petitioners do not challenge any particular application to them as exceeding statutory authority, but instead speculate that the Rules might exceed statutory authority in some other circumstances.

Second, any argument that Petitioners are not raising a facial challenge reinforces that their claims are not justiciable. As explained, "[m]ere disagreement about the abstract meaning or validity" cannot support an exercise of this Court's jurisdiction. *Atlanta Indep. Sch. Sys.*, 307 Ga. 877, 879 (2020) (cleaned up). This Court needs more than a hypothetical disagreement based on a "future contingency." *Baker*, 271 Ga. at 215 (cleaned up). Thus, Petitioners confirm that their claim is nonjusticiable to the

extent they argue that they seek resolution only of a hypothetical future application of the Rules to someone else.

Third, Petitioners have failed to meet the administrative exhaustion procedures for an as-applied challenge. While exhaustion of administrative remedies may not be required when "challenges are facial," "as-applied challenges" must be dismissed for "failure to exhaust their available administrative remedies." *Ga. Dept. of Human Servs. v. Addison*, 304 Ga. 425, 432 (2018). Petitioners bring a claim for relief under the APA even though they "failed to follow the appropriate procedures for obtaining an interpretation of a regulation" from the State Election Board. *Georgia Oilmen's Ass'n v. Dep't of Revenue*, 261 Ga. App. 393, 399 (2003). "A party aggrieved by a state agency's decision must raise all issues before that agency and exhaust available administrative remedies before seeking any judicial review of the agency's decision." *Ga. Dept. of Community Health v. Georgia Soc. of Ambulatory Surgery Centers*, 290 Ga. 628, 629 (2012) (cleaned up). The APA "explicitly allows a party to request a declaratory ruling from an administrative agency concerning the application of agency rules." *Ga. Oilmen's Ass'n*, 261 Ga. App. at 399. It establishes a process "for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." O.C.G.A. §50–13–11. But instead of first seeking a declaratory ruling from the State Election Board, Petitioners rushed into this Court to demand a "permanent injunction" concerning two rules approved by the State Election Board before those rules even went into effect. Pet. at 38. Petitioners skipped a step, "circumventing the prescribed procedure for challenging [State Election Board] rules." *Georgia Oilmen's Ass'n*, 261 Ga. App. at 400.

B. The rules are authorized by statute and reasonable.

Even if this Court reaches the merits of Petitioners' challenges to the Rules, those challenges fail. Petitioners ask this Court to declare the Rules unlawful for exceeding statutory authority. Pet'rs' Br. at 28; Pet. at ¶¶122, 135. Petitioners must overcome "a presumption of validity" to succeed on these claims. *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 638 (2002). Indeed, "we defer to the [agency] on the issue of reasonableness unless there is evidence the regulation is arbitrary and capricious." *Ga. Oilmen's Ass'n*, 261 Ga. App. at 398-99. They can meet this standard only by showing that the Rules "plainly conflict" with the "language" of the "authorizing statute." *Id.* at 399. But Petitioners fail to point to any plain conflict between the Rules and the authorizing statutory provisions.

1. The Reasonable Inquiry Rule is consistent with the obligation to certify an election.

The Reasonable Inquiry Rule is consistent with the State Election Board's statutory authority. The State Election Board is statutorily authorized to "adopt" such "rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct" of "elections." O.C.G.A. §21-2-31. This rule-making authority "is not limited to those subjects expressly addressed in the Code." *Ga. Oilmen's Ass'n*, 261 Ga. App. at 395. It allows the State Election Board to enact regulations that "are not inconsistent with the Code or other laws." *Id.* The Reasonable Inquiry Rule exercises this general rule-making power by defining what it means to "certify the results." Ga. Comp. R. & Regs. 183-1-12-.02(1)(c.2). It clarifies that certifying an election 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.*

Petitioners try to conjure a conflict with the statutory obligation to certify election results by the Monday following an election. Under the Rule, election officials must "conduct a 'reasonable inquiry' *before* certifying election results." Pet'r Br. 28. Petitioners stop short of arguing that this Rule confers discretion not to certify. But they speculate that "individual board members" might "decide that they have discretion" to "delay or refuse certification." *Id.*

This speculation fails to show any conflict between the text of the Reasonable Inquiry Rule and the State Election Board's statutory authority. The "plain language of the regulation … determine[s] its meaning." *Upper Chattahoochee Riverkeeper, Inc. v. Forsyth Cnty.*, 318 Ga. App. 499, 502 (2012). As explained, an election official could both conduct a reasonable inquiry into the accuracy of a count and certify election results. The text of the amended rule, therefore, cannot be cast aside because of speculation about what some election officials "might" do. Pet. at ¶13.

Georgia's election laws confirm the consistency of the Reasonable Inquiry Rule with the obligation to certify election results. Multiple provisions of Georgia's election laws require superintendents to investigate election results. For example, O.C.G.A. §21-2-493(b) mandates that election superintendents conduct an "investigation" when there are "excess" votes. During this "investigation," election superintendents have "discretion" to "require the production" of ballot boxes containing "paper ballots" and "the recount of the ballots contained in such ballot box." O.C.G.A. §21-2-493(c). Similarly, O.C.G.A. §21-2-493(h) establishes that "[i]n precincts in which voting

machines have been used" that are "equipped with a mechanism for printing paper proof sheets," election superintendents are required to "examine all of the return sheets, proof sheets, and other papers in his or her possession relating to the same precinct" if there are any "discrepancies" that "are discovered" between the "general and duplicate return sheets" and the "proof sheets" of the voting machine. And Georgia's election laws even clarify that identifying error or fraud is within the authority of superintendents: "[i]f any error or fraud is discovered, the superintendent … shall report the facts to the appropriate district attorney for action." *Id.* §21-2-493(i). These provisions calling for reasonable investigative steps do not conflict with the certification requirement. After all, a supervisor could fulfill these substantive requirements while complying with the certification deadline. The same is true of the Reasonable Inquiry Rule.

Petitioners argue that these statutory responsibilities support them because the statute uses discretionary language. Pet'rs Br. 27. But that argument misses the point. Whether mandatory or discretionary, these responsibilities for supervisors to conduct investigations exist alongside the duty to certify election results. Petitioners provide no more reason to think that the Reasonable Inquiry Rule conflicts with the duty to certify election results.

Moreover, the concept of conducting a "reasonable inquiry" is not "novel" to Georgia law as Petitioners contend. Pet. at ¶13. Indeed, it is the type of inquiry Petitioners were required to carry out before filing this case in the first place. Under Georgia law, Petitioners must act in "[g]ood faith" by conducting a "reasonable inquiry" that their "position" is "well grounded in fact" and "warranted by existing law."

O.C.G.A. §§51-7-80, 51-7-82. Of course, the statutory requirement for Petitioners' counsel to conduct a "reasonable inquiry" in confirming the facts and claims upon which their petition rests does not mean that Petitioners can ignore court-imposed deadlines, act in bad faith, or otherwise violate the laws of Georgia. Rather, this requirement is "an objective good faith requirement" which "imposes a duty" to act in an "objectively reasonable" and "competent" manner "under the circumstances." *Kluge v. Renn*, 226 Ga. App. 898, 903 (1997).

Petitioners have also claimed that the "reasonable inquiry" requirement is "vague." Pet'rs' Emergency Mot. at 3. But this assertion does not advance Petitioners' argument that the Reasonable Inquiry Rule is not statutorily authorized. In any event, reasonableness standards are common in the law. Petitioners were required to satisfy one before filing this suit. O.C.G.A. §§51-7-80, 51-7-82. The Reasonable Inquiry Rule approved by the State Election Board simply requires this good faith effort of election superintendents before certification.

The Reasonable Inquiry Rule does not conflict with the plain language of Georgia law. To the contrary, this Rule simply reiterates that election superintendents are to, in a "reasonable" manner confirm that electoral results are accurate. *Cf.* Ga. Comp. R. & Regs. 183-1-12-.02(1)(c.2). Since the State Election Board's Reasonable Inquiry Rule is consistent with Georgia statutes, it is authorized by law.

2. The Examination Rule is consistent with the obligation to certify an election.

The Examination Rule is also consistent with the State Election Board's statutory authority to "adopt" such "rules and regulations, consistent with law, as will be

conducive to the fair, legal, and orderly conduct" of "elections." O.C.G.A. §21-2-31. The Examination Rule exercises this power by confirming that local election "[b]oard members shall be permitted to examine all election related documentation created during the conduct of elections prior to certification of results." Ga. Comp. R. & Regs. 183-1-12-.12(f)(6).

Petitioners again try to conjure a conflict with election statutes by arguing that this Rule could be read to delay certification. Pet'rs Br. 28. But they draw that conclusion from their own speculation about how some members of local boards might understand the Rule. It does not appear in the text of the Rule.

Petitioners point to the absence of a definition "of the documents that must be assembled and made available" or a deadline for assembling those documents and making them available. Pet'rs' Br. at 7; Pet. at ¶12. But the Examination Rule explains the covered documents—"all election related documentation created during the conduct of elections." Ga. Comp. R. & Regs. 183-1-12-.12(f)(6) (emphasis added). This instruction is consistent with the election code, which provides that whenever there is "a discrepancy and palpable error" related to "excess" votes, "[t]he superintendent shall" be able to "examine all" the "election documents whatever." O.C.G.A. §21-2-493(b). And the Rule does not require that any documents "be assembled," *contra* Pet'rs' Br. at 7; Pet. at ¶91, but only that members be "permitted" to examine documents that have already been "created," Ga. Comp. R. & Regs. 183-1-12-.12(f)(6). The Rule explicitly provides a timeline of "when such information must be made available," *contra* Pet'rs' Br. at 7; Pet. at ¶91, by stating that the information must be available "prior to certification of results," Ga. Comp. R. & Regs. 183-1-12-.12(f)(6).

More importantly, Petitioners never explain how any of their criticisms mean that the Examination Rule lacks statutory authority. To prevail, Petitioners must show that the Examination Rule "plainly conflicts with the language of its authorizing statute." *Ga. Oilmen's Ass'n*, 261 Ga. App. at 399. It is not enough that they find the Rule unclear or burdensome.

Unable to show a conflict with the duty to certify, Petitioners argue that the Examination Rule conflicts with the State Election Board's authority to create rules for the "uniformity" of election procedures because it gives members of multi-member boards the right to review documents. Pet'rs' Br. at 30. But Petitioners do not dispute that individuals who are acting as a "superintendent" already had access to election-related documents. O.C.G.A. §21-2-70(8) After all, Georgia law empowers a "superintendent," to examine election-related information to the extent it allows for the "superintendent" to "inspect systematically" the "conduct" of "elections in the several precincts of his or her county to the end" that "elections may be honestly, efficiently, and uniformly conducted." *Id.* Against this background, the Examination Rule promotes uniformity by ensuring that all individuals involved in fulfilling that statutory role have access to election materials whether they are an individual or part of a multi-member board.

Finally, Petitioners point to the requirement to compile "[a] list of all voters who voted in the election" and "examine[] for duplicates," arguing that this is "a non-statutory step." Pet'rs' Br. at 7; Pet. at ¶89. But the State Election Board can "adopt" such "rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct" of "elections." O.C.G.A. §21-2-31. Petitioners never explain how

this requirement exceeds that rulemaking authority. In any event, this provision tracks statutory requirements closely. Election superintendents must "compare the registration figure" with "the number of persons who voted in each precinct or the number of ballots cast." *Id.* §21-2-493(b). Consistent with this statutory duty, the challenged rule requires that "[a] list" of "the number of voters who voted" be made and that this "list" be "examined for duplicates." Ga. Comp. R. & Regs. 183-1-12-.12(f)(3). If "the number of voters" is not checked for duplicates, then "number *of persons* who voted" cannot be reported as any reported number that includes duplicates would be a different number than the true "number of voters" in the election. *Id.*; O.C.G.A. §21-2-493(b). Therefore, the Examination Rule has statutory authority in Georgia law.

3. The amended rules are valid under the Administrative Procedure Act.

Petitioners argue that both amendments are procedurally "invalid" because the Board failed to consider some written comments and issue a concise statement of the reasoning for approval of the amendments. Pet'rs' Br. at 29; Pet. at ¶¶128-29, 137. But this argument misstates the standard for procedural challenges to amendments. "[S]trict compliance" with the APA "is necessary only when a rule is being *adopted,* not when it is being amended." *Corner v. State*, 223 Ga. App. 353, 355 (1996). The APA specifies that no rule "adopted" will be valid without "exact compliance" with notice and comment procedures. O.G.C.A. §50-13-4(d). But it omits any language mandating strict compliance when a rule is amended. Instead, an amendment should be invalidated

only where "there was substantial non-compliance with the requirements and substantial harm as a result." *Corner*, 223 Ga. App. at 355.

The State Election Board substantially complied with the APA. *Id.*; *see also* O.C.G.A. §1–3–1(c) (a "substantial compliance" is "sufficient" unless "expressly so provided by law"). An agency substantially complies with the APA even if it issues a rule under the name of a wrong agency, *State v. Holton*, 173 Ga. App. 241, 245 (1984), or an amendment with no citation to statutory authority, *Corner*, 223 Ga. App. at 355. Further, where there is "a full administrative record upon which to base" judicial review and "the amendment itself contains a statement of reasons," the "concise statement" requirement "has been met substantially." *Ala. Renal Stone Inst., Inc. v. Ala. Statewide Health Coordinating Council*, 628 So. 2d 821, 825 (Ala. Civ. App. 1993) (interpreting similar Alabama APA provision).

The record here confirms that the State Election Board considered Petitioners' comments. There is video evidence that State Election Board members considered written and oral submissions before voting to approve the challenged amendments. Board members read from the public comments they received both for and against the challenged amendments before voting on those amendments. SEB Hr'g, at 7:20:31-7:25:39 (Aug. 6, 2024), https://www.youtube.com/live/rBiqOdOiD9s?feature=shared [hereinafter Reasonable Inquiry Rule Hearing]; SEB Hr'g, at 2:18:40-2:25:40 (Aug. 19, 2024), https://gasos.wistia.com/medias/w6sjyi7ebx [hereinafter Examination Rule Hearing]. Further, before voting on the Reasonable Inquiry Rule, the Chairman of the State Election Board stated, "We probably got more emails on this one topic than any of the others and I promise I read all of them up until ten o'clock last night." Reasonable

Inquiry Rule Hearing, at 7:20:31-38. The Chairman's statement shows the Board substantially complied with the APA. Petitioners have presented no evidence to support their claim that the Board did not fully consider their public comment or any other comment sent to the Board. At a minimum, Petitioners need some sort of "testimony" to confirm that "the board did not consider the written and oral submissions made with regard to the proposed rules" to show a violation of the APA. *Outdoor Advert. Ass'n of Ga., Inc. v. Dep't of Transp.*, 186 Ga. App. 550, 552-53 (1988). But they have none.

The record also confirms that the Board adequately explained the reasons for the amendments. "Not only do" the "responsive pleadings, and exhibits provide us with an adequate basis for judicial review, they also indicate that the [Board] actually considered all the arguments made at the rules hearings." *Somer v. Woodhouse*, 28 Wash. App. 262, 273 (1981) (interpreting similar Washington APA provision). Petitioners attached the petitions for both amendments they challenge as exhibits to their first filing in this case. Each of those petitions include concise statements of the reasons for adopting the amendment. *See* Pet. at Exhibit C; Pet. at Exhibit E. Further, there is a full administrative record that Petitioners acknowledge showing the Board's reasons for adopting the amendment and rejecting counterarguments. Pet'rs' Br. at 30; Pet. at ¶¶11, 69-71; *see generally* Reasonable Inquiry Rule Hearing at 7:19:00-8:24:20; Examination Rule Hearing at 8:00-2:51:02. And State Election Board Members made statements explaining their reasoning for approving or voting against the amendments before and at the time they were passed. *See generally* Reasonable Inquiry Rule Hearing, at 7:19:50-8:24:15; Examination Rule Hearing, at 2:17:25-2:51:02. Georgia's APA, like other similar state

statutes, "sets forth no particular requirements as to how an agency is to issue a concise statement." *Ala. Renal Stone Inst.*, 628 So. 2d, at 825.

These explanations of the reasons for the amendment make this case far different from the cases where Georgia courts have found that substantial compliance has not been met. The agency in *Outdoor Advertising*, for example, failed to even issue notice for comments until after an amendment had been adopted. 186 Ga. App. at 551-54. And the petitioners came forward with evidence to show that the amendments were not considered. *Id.* at 552-53. That level of deviation from the APA is "substantial non-compliance." *Corner*, 223 Ga. App. at 355. In contrast, given this record, "[i]t stretches reason to suggest" that the alleged "omission in this instance," which is at worst "imprecision due to inattention, constitutes an abuse of power." *Id.*

Even if Petitioners could muster this evidence or demonstrate that there was no "concise statement" issued by the State Election Board concerning the challenged amendments, Petitioners still must prove "substantial harm" from any alleged APA violations. *Corner*, 223 Ga. App. at 355. Agency amendments should be invalidated only "[i]n those instances" where "there was substantial non-compliance with the requirements and substantial harm as a result. The omission in this case does not rise to the same level." *Id.*

Unable to show either substantial non-compliance or substantial harm, Petitioners cite *dicta* suggesting that any deviation from the APA's notice-and-comment procedures requires invalidation of an amendment. Pet'rs' Br. at 29. But they omit that the Georgia Court of Appeals has since clarified that substantial noncompliance with substantial harm is required when an amendment is at issue. *Corner*, 223 Ga. App. at

355. And the Court of Appeals has explained that previous decisions—including Petitioners' only authority—rested not on a holding that any deviation from notice-and-comment procedures is fatal, but instead on "substantial non-compliance with the requirements and substantial harm as a result." *Id.* (discussing *Outdoor Advertising*).

III. Equitable principles mandate preserving the status quo.

Petitioners request that this Court "enter a permanent injunction against the enforcement of the rules" to the extent the rules are "inconsistent" with statutory authority. Pet. at 38. But injunctive relief requires Petitioners to show that they are "in great danger of suffering an imminent injury" for which they do "not have an adequate and complete remedy at law." *VoterGA v. State*, 368 Ga. App. 119, 122 (2023) (cleaned up). Petitioners don't allege these elements in their petition and nowhere show how they are suffering an injury that is "irreparable." *Lue v. Eady*, 297 Ga. 321, 329 (2015) (cleaned up).

In any event, relief is not appropriate because "there is not sufficient time left" before the "general election for the parties to present their arguments and the trial court to research and rule upon this difficult issue." *O'Kelley v. Cox*, 278 Ga. 572, 576 (2004) (Hunstein, J., concurring) (refusing to grant injunction in state ballot amendment close to election). Indeed, voters and the democratic process "suffer when time constraints compel" a trial court to issue "rushed rulings" that "can serve only to undermine the public's faith in the legitimacy and accuracy of the judicial process." *Id.* at 576-77.

The Supreme Court has recognized these costs through the *Purcell* principle. *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). *Purcell* instructs that 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). It recognizes that "[c]ourt orders affecting elections" can themselves "result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5. For these reasons, the Supreme Court has "repeatedly emphasized" that federal courts "should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 589 U.S. at 424 (per curiam) (collecting cases). Similar considerations apply to state courts as well. *Moore v. Lee*, 644 S.W.3d 59, 65-66 (Tenn. 2022); *In re Hotze*, 627 S.W.3d 642, 645-46 (Tex. 2020); *Fay v. Merrill*, 338 Conn. 1, 23-24 n.21 (Conn. 2021); *All. for Retired Ams. v. Sec'y of State*, 240 A.3d 45, 49-50 (Me. 2020); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020).

This Court should abide by "the wisdom of the *Purcell* principle." *Republican Nat'l Comm.*, 589 U.S. at 425. Enjoining the State Election Board's Reasonable Inquiry and Examination Rules in the final weeks before voting starts would inject judicially created confusion. In recognition of "the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures," this Court should refrain from issuing an injunction. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

Petitioners argue that this principle should not preclude relief because the State Election Board only recently adopted the Reasonable Inquiry and Examination Rules. Pet'rs' Br. 17. But *Purcell* and similar state principles are concerned with judicially imposed changes before an election. It is policymakers—not judges—who should make "policy choices on the ground before and during an election." *Democratic Nat'l Comm. v.*

Wis. State Legislature, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Thus, this principle advises against court interference with election rules close to an election.

CONCLUSION

For these reasons, the Court should enter judgment in favor of Respondents.

DATED this 25th day of September, 2024 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2024, a true and correct copy of the foregoing **TRIAL BRIEF** 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 as listed below:

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