IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

VASU ABHIRAMAN *et al.*, Petitioners, v. STATE ELECTION BOARD, Respondent, & REPUBLICAN NATIONAL COMMITTEE and GEORGIA REPUBLICAN PARTY, INC., Intervenors.	*	Civil Case No. 24CV010786

RESPONDENT STATE ELECTION BOARD'S PRE-TRIAL BRIEF

Christopher M. Carr 112505
Attorney General
Bryan K. Webb 743580
Deputy Attorney General
Elizabeth T. Young 707725
Sr. Asst. Attorney General
Danna Yu 846403
Assistant Attorney General

Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3425
eyoung@law.ga.gov
(404) 458-3682
dyu@law.ga.gov

Counsel for State Election Board

TABLE OF CONTENTS

Page

INTRODUCTION

Petitioners ask this Court to declare what is already enshrined in Georgia law: the fact that certification is a mandatory act that must occur at the county level by a certain date. *See* O.C.G.A. § 21-2-493(k). Despite acknowledging that both Ga. Comp. R. & Regs. 183-1-12-.02(c.2) (the "Reasonable Inquiry Rule") and Ga. Comp. R. & Regs. 183-1-12-.12(f)-(g) (the "Examination Rule") may be read in conjunction with the Georgia Election Code, *see, e.g.*, Petition, ¶¶ 123, 135, Petitioners argue that to the extent the Rules may be read to allow election officials to delay certification or not certify at all, they should be declared invalid.

However, this Court cannot reach the merits of this case because Petitioners have failed to properly avail themselves of O.C.G.A. § 50-13-10's waiver of sovereign immunity and thus failed to name the correct defendant in this declaratory judgment action to properly waive sovereign immunity. Further, even if there is a waiver of sovereign immunity here, Petitioners' arguments fail because the crux of their argument for invalidity is based not on the text of the Rules themselves, but the alleged intent of the individuals who initially presented the Rules to the Board and the prior actions of other individual members of county election boards. Petitioners' concerns about possible future interpretations of the Rules that may run contrary to Georgia law are future contingencies which do not provide the requisite actual or

justiciable controversy necessary to sustain declaratory relief regarding the validity of the Rules here. Further, on separate grounds, declaratory relief in this type of action is not warranted as to the Voter, Candidate, or DNC and DPG Petitioners specifically because they have neither made a sufficient showing that they have statutory standing, nor alleged that they are uncertain about the propriety of their own future conduct.

Finally, the Rules are not invalid. A close reading of O.C.G.A. § 50-13-4(a)(2) in the Georgia Administrative Procedure Act (the "APA") does not yield an interpretation that requires that the agency issue a concise statement of the principal reasons for and against its adoption *at the time* the rules are adopted. Further, neither Rule permits election superintendents to delay certification.

BACKGROUND

The State Election Board ("SEB" or "Board") will occasionally receive petitions for rulemaking from interested persons in accordance with O.C.G.A. § 50-13-9. *See also* Ga. Comp. R. & Regs. 183-1-1-.01. When the Board receives a rule petition in this manner, it generally considers the rule petition at its next regularly scheduled meeting to determine the action to be taken on the rule petition. *See* Ga. Comp. R. & Regs. 183-1-.01(4).

On April 12, 2024, the Board received a rule petition seeking that the Board amend Ga. Comp. R. & Regs. 183-1-12-.02 to include a new definition

that would define "certify the results of a primary, election, or runoff" to mean "to attest, after reasonable inquiry that 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." Petition, Ex. C at 3. The rule petition was presented to the Board at its May 8, 2024 meeting, at which time the Board voted to initiate rule-making procedures. SEB Ex. 1 ("Hardin Aff."), ¶ 7. On July 3, 2024, the Board posted notice of the rule in accordance with O.C.G.A. § 50-13-4. *See* Petition, Ex. A. The Board submitted the same notice to the Office of Legislative Counsel via email. Hardin Aff., ¶ 9. The notice included text of the proposed rule, and the time, date, and location at which the rule would be adopted, which was properly at least 30 days after the notice was published. Petition, Ex. A. The Board also solicited public comment as to the rule. *Id.* At its August 6, 2024, meeting, at which time the rule was to be considered for adoption, the Board further heard additional public comment as to the rule. Hardin Aff., ¶ 11. Following discussion, a quorum of the Board voted to formally adopt the Reasonable Inquiry Rule. *Id.*

Concurrently, the Board received another rule petition submitted in accordance with O.C.G.A. § 50-13-9, seeking that Ga. Comp. R. & Regs. 183-1-12-.12 be amended to include specific procedures for county election board members to follow prior to certification. *See* Petition, Ex. E. The rule sought

to require board members to meet at a specific time following the election to review precinct returns; require that a list of all voters with their unique voter ID numbers be compiled and sorted into categories as to the type of voting (in-person, advance voting, absentee, or provisional); and require that the board members compare the total number of ballots cast with the total number of unique voter ID numbers for each precinct. *See id.* at 6.

The rule further provided that if the comparison rendered a discrepancy where the number of ballots exceeded the number of voters, then the board members would be required to investigate with no votes to be counted until the results of the investigation were presented. *Id.*; *see also* O.C.G.A. § 21-2-493(b) ("If … it shall appear that the total vote returned for any candidate or candidates for the same office or nomination … exceeds the number of electors in such precinct or exceeds the total number of persons who voted in such precinct or the total ballots cast therein, such excess … shall be investigated by the superintendent; and no votes shall be recorded from such precinct until an investigation shall be had."). If fraud were discovered, the board members would then determine a method to compute the votes justly and report the facts to the district attorney in accordance with O.C.G.A. § 21-2-493(i). *See* Petition, Ex. E at 6.

The rule also permitted board members to examine "all election related documentation created during the conduct of elections prior to certification of

results," and it specifically included the provision that "[t]he consolidated returns shall then 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." *Id.* The language tracks the language in O.C.G.A. § 21-2-493(k) almost exactly.

The Board considered this rule at its July 9, 2024 meeting. Hardin Aff., ¶ 13. After discussion, the Board voted to initiate rule-making procedures. *Id.* On July 18, 2024, the Board publicly posted notice of its proposal of the rule, which appeared unchanged from the initial rule petition. Petition, Ex. B. On the same day, the Board submitted the same notice to the Office of Legislative Counsel via email. Hardin Aff., ¶ 15. Therein, as before, the Board solicited comments for the 30-day comment period. *See* Petition, Ex. B. On August 19, 2024, as set forth in the notice, the Board also received oral comments during the meeting regarding the rule. Hardin Aff., ¶ 17. After discussion, a quorum of the SEB voted to adopt the Examination Rule. *Id.*, ¶ 18.

ARGUMENT

I. The Petition should be dismissed because it is barred by sovereign immunity.

Because Petitioners failed to name the proper defendant as required by Article I, Section II, Paragraph V of the Georgia Constitution ("Paragraph

V"), the Petition for Declaratory Relief, which seeks a declaratory judgment, and is barred by sovereign immunity.

Petitioners have challenged the Rules under the APA's procedure for challenging the validity of administrative rules, *see* O.C.G.A. § 50-30-10(a), but also seek a declaratory judgment under O.C.G.A. § 9-4-2 and § 9-4-3. *See* Petition, ¶ 50 ("SEB is subject to the jurisdiction of this Court pursuant to … O.C.G.A. § 9-4-2, 9-4-3, and 50-13-10); *see also* Petition, ¶¶ 131-138 (describing Court's authority to enter declaratory judgments under O.C.G.A. § 9-4-2 and setting forth cause of action and claims for relief pursuant to O.C.G.A. § 9-4-2). Petitioners' attempt to initiate a declaratory judgment in the name of the SEB is barred by sovereign immunity and requires dismissal of the entire complaint.

"[T]he constitutional doctrine of sovereign immunity forbids our courts to entertain a lawsuit against the State without its consent." *Lathrop v. Deal*, 301 Ga. 408, 408 (2017). Accordingly, suits against the State may only be permitted when there is an explicit waiver of sovereign immunity in a constitutional or statutory provision. Ga. Const. art. I, § 2, Par. IX(e). Petitioners bear the burden of establishing such a waiver. *Georgia Dep't of Lab. v. RTT Assocs., Inc.*, 299 Ga. 78, 81 (2016) ("The burden of demonstrating a waiver of sovereign immunity rests upon the party asserting it.") (citations omitted). They have failed to do so.

First, while Paragraph V provides a limited waiver of sovereign immunity for challenges involving acts of state officers, such waiver applies "exclusively" to suits "against the state and in the name of the State of Georgia." Ga. Const. Art. I, § II, Para. V(b)(2). Actions "naming as a defendant any individual, officer, or entity other than as expressly authorized under this Paragraph shall be dismissed." *Id.* Here, though, Petitioners named the Board, not the "State of Georgia." That mandates dismissal. *See State v. Sass Group., LLC*, 315 Ga. 893, 894 (2023) ("[T]his exclusivity provision of Paragraph V means what it says: it requires dismissal of a lawsuit brought under that paragraph against the State if it names defendants other than the State or local governments specifically authorized by that provision.").

Petitioners have asserted a claim under the APA's provision for challenging administrative rules, *see* O.C.G.A. § 50-13-10, pursuant to which the State has explicitly waived its sovereign immunity, *see State Bd. of Ed. v. Drury*, 263 Ga. 429, 432 (1993), and which provides that the Board shall be made a party to the action. O.C.G.A. § 50-13-10(b). However, because Petitioners also raised a claim for declaratory judgment under O.C.G.A. § 9-4-2 and § 9-4-3, their Petition relies at least partially on Paragraph V's waiver

of sovereign immunity.[1] "When plaintiffs 'try to avail themselves of Paragraph V's waiver of sovereign immunity in any way — i.e., **even for one claim** — then it is an action filed pursuant to [Paragraph V].'" *Lovell v. Raffensperger,* 318 Ga. 48, 50 (2024) (*citing Sass Group,* 315 Ga. at 897(2)) (emphasis added). And, if an action is filed at least partially in reliance on Paragraph V, the action must be brought exclusively in the name of the State of Georgia. A lawsuit that does not comply must be dismissed "even if some claims within the lawsuit could otherwise have been brought on their own without relying on Paragraph V's waiver." *Lovell*, 318 Ga. at 50 (dismissing action naming Secretary of State, not State of Georgia, where action sought declaratory and injunctive relief). Therefore, because the Petition seeks a declaratory judgment that relies upon Paragraph V's waiver of sovereign immunity, and was brought against the Board and not the State of Georgia, the Petition must be dismissed in its entirety.

[1] Although O.C.G.A. § 50-13-10(c) provides that "[a]ctions for declaratory judgment provided for in this section shall be in accordance with Chapter 4 of Title 9, relating to declaratory judgments," Petitioners have done more than bring solely a O.C.G.A. § 50-13-10 claim that would then be adjudicated in accordance with the provisions of Title 9, Chapter 4. Instead, they have made claims pursuant to O.C.G.A. § 9-4-2 and 9-4-3 directly, asserting that this Court has jurisdiction pursuant to those statutory provisions and seeking relief under those statutory provisions. *See* Petition, ¶¶ 50, 131-138.

II. The Petition should be dismissed because declaratory judgment is not proper here.

The APA 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.**" O.C.G.A. § 50-13-10(a) (emphasis added). However, such actions for declaratory judgment involving the validity of an agency rule are still adjudicated in accordance with the requirements of the Declaratory Judgment Act. *See id.* § 50-13-10(c). "[O.C.G.A.] § 50-13-10 does not allow advisory opinions; it simply permits the State to be sued in an otherwise proper declaratory judgment action involving the validity of an agency rule." *Dep't of Transp. v. Peach Hill Props., Inc.*, 280 Ga. 624, 625-26 (2006). Consequently, the other principles of declaratory judgments apply here, including the requirement that there be a justiciable controversy. *Id.*

However, for the reasons set forth below, even if this Petition were properly before this Court, it should be dismissed for the lack of an actual or justiciable controversy, and because declaratory relief is specifically improper with regard to a number of the named Petitioners.

A. The Petition is based on a possible or potential future contingency, which cannot sustain a declaratory judgment action.

Under the Declaratory Judgment Act, superior courts may "declare rights and other legal relations of any interested party" seeking such declaration either in "cases of actual controversy," O.C.G.A. § 9-4-2(a), or "justiciable controversy," *Baker v. City of Marietta*, 271 Ga. 210, 214 (1999) (citing O.C.G.A. § 9-4-2(b)).

An "actual controversy" typically refers to the statutory standing to bring a suit. *See VoterGA v. State*, 368 Ga. App. 119, 121 (2023). Generally, "to challenge a statute or 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 action." *Black v. Bland Farms, LLC*, 332 Ga. App. 653, 659-60 (2015) (quoting *Atlanta Taxicab Co., etc. v. City of Atlanta*, 281 Ga. 342, 345 (2006)) (emphasis in original); *see also Bd. of Nat. Res. v. Monroe Cnty.*, 252 Ga. App. 555, 557 (2001) ("To establish a legal interest sufficient to maintain standing under the Declaratory Judgment Act, a party must show that his rights are in direct issue or jeopardy.").

A justiciable controversy, on the other hand, requires "circumstances showing a necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to his alleged rights

and which if taken without direction might reasonably jeopardize his interest." *U-Haul Co. of Az. v. Rutland*, 348 Ga. App. 738, 747 (2019).

Under either subsection, however, plaintiffs must allege more than a "hypothetical, abstract, academic or moot" controversy. *Strong v. JWM Holdings, LLC*, 341 Ga. App. 309, 315 (2017) (citing *Burton v. Composite State Bd. of Med. Examiners*, 245 Ga. App. 587, 588 (2000)); *U-Haul Co.*, 348 Ga. App. at 745 (plaintiff must show interest is not merely academic or hypothetical). Mere disagreement about the "abstract meaning" or validity of a statute or ordinance is insufficient to warrant declaratory judgment. *See City of Atlanta v. Atlanta Indep. Sch. Sys.*, 307 Ga. 877, 879-80 (2020). There must be "some *immediate legal effect* on the parties' conduct." *Perdue v. Barron*, 367 Ga. App. 157, 163 (2023) (emphasis in original) (citation omitted). "[A] declaratory judgment will not be rendered based on a possible or probable future contingency because such a ruling would be an erroneous advisory opinion." *Strong*, 341 Ga. App. at 315 (internal citation and punctuation omitted).

Petitioners argue that the Rules introduce uncertainty into the election process based on Petitioners' concern that the Rules *may* be interpreted inconsistently with Georgia law and their suggestion that election superintendents *may* utilize that interpretation of the Rules to delay or block certification of elections. *See* Petition, ¶ 13. In addition, the Board Member

Petitioners specifically allege they require "immediate guidance on the interaction between the Rules and their statutory certification duties" so they can avoid a "violation of O.C.G.A. § 21-2-70(9) and O.C.G.A. § 21-2-493(k)—and, in turn, a strike under O.C.G.A. § 21-2-33.2[.]" *Id.*, ¶ 39.

However, Petitioners acknowledge that the Reasonable Inquiry Rule and the Examination Rule may both be read "not to conflict with Georgia statutes." *Id.*, ¶¶ 123, 135. Thus, Petitioners argue that their interests will be affected, not by the Rules as they are written, but rather by a possible different interpretation of the Rules by other election officials or superintendents at the time of certification in November. *See id.*, ¶ 16 ("*[T]o the extent the rules confer discretion [to certify]*, they are [] invalid…") (emphasis added).

But whether and how other election superintendents may interpret the Rules at the time of certification in November are "hypothetical questions based on possible future events." *GeorgiaCarry.Org, Inc. v. Bordeaux*, 360 Ga. App. 807, 811 (2021); *see also Patterson v. State*, 242 Ga. App. 131, 132 (2000) (plaintiff not charged with violation of statute and no showing of intent by authorities to take action pursuant to statute). Petitioners have identified situations where, even prior to the promulgation of these Rules, individual board members have objected to certification or otherwise refused to certify. *See* Petition, ¶ 62; Petitioners' Brief, Ex. 2, ¶ 7; Ex. 3, ¶ 6; Ex. 4, ¶ 6; Ex. 5,

¶ 6. However, individual board members are not superintendents. *See* O.C.G.A. § 21-2-2(35)(A). Thus, at this juncture, whether election superintendents, which are the bodies that certify elections, *see* O.C.G.A. § 21-2-493, will (1) interpret the Rules as Petitioners fear and (2) rely on that interpretation to delay or block certification are still yet possible or probable future contingencies.

Petitioners urge the Court to issue declaratory relief now, rather than wait "until a county board or other superintendent relies on the [R]ules to delay certification[.]" Petition, ¶ 15. But the Rules do not permit election officials to delay certification. A declaration that the Rules should be construed in accordance with the Georgia code therefore would have "no immediate legal effect on the parties' conduct." *Perdue*, 367 Ga. App. at 163. Thus, Petitioners are, in effect, "ask[ing] this Court to rule in the abstract as to issues it anticipates will arise," *Chambers of Ga., Inc. v. Dep't of Nat. Res.*, 232 Ga. App. 632, 634 (1998), if election superintendents interpret the Rules to not comply with the mandatory certification deadline set forth in the statute. "[W]hat [Petitioners] seek[] is [the Court's] advisory opinion so it can test the strength of [Petitioners'] anticipated future [arguments]." *Id.*

Accordingly, because the controversy as alleged by Petitioners here is based on possible or probable future contingencies, declaratory judgment is

not warranted, and the Petition should be dismissed. *See Peach Hill Props.*, 280 Ga. at 626-67.

B. The Voter Petitioners, Candidate Petitioners, and DNC and DPG do not have statutory standing to bring a challenge, nor do they face any uncertainty as to their own actions.

Further, declaratory judgment is not warranted for the Voter Petitioners, the Candidate Petitioners, or either the DNC or DPG (collectively, the "Organizational Petitioners") specifically, as none of those classes of Petitioners have statutory standing to challenge the invalidity of the Rules, and the requested relief is not proper to any of those classes of Petitioners.

For prospective petitioners to have standing under O.C.G.A. § 50-13-10, they must make a sufficient showing that they have a legally protectible interest implicated by the Rules. *See Monroe Cnty.*, 252 Ga. App. at 558. Further, to warrant declaratory relief, such petitioners must also show that they face some sort of uncertainty as *to their own actions*. *See Cobb Cnty. v. Floam*, 319 Ga. 89, 100 (2024). However, none of the Voter, Candidate, or Organizational Petitioners have demonstrated either.

1. Statutory standing

For plaintiffs to have statutory standing to bring a declaratory judgment action challenging the validity of administrative rules, the plaintiffs must show that they have "interests or rights which are or will be affected by the

statute or action." *Bland Farms, LLC*, 332 Ga. App. at 659-60 (emphasis removed). However, the interest or right implicated by the regulation must be directly affected by the regulation, as opposed to a more attenuated interest that is "continent upon future events[.]" *Monroe Cnty.*, 252 Ga. App. at 558 (county did not identify how the rules would jeopardize its rights to carry out express and implied statutory duties and only identified a "generalized economic interest that is contingent upon future events" which was insufficient to warrant standing).

Here, Voter Petitioners allege that they are uncertain as to the application of the Rules, and "the resulting risk that county boards will not timely certify election results mean[s] that Voter Petitioners cannot know whether their ballots in the November 2024 general election will be counted, or whether instead their fundamental right to vote will be denied." Petition, ¶ 41. Similarly, the Candidate Petitioners allege that they face the "risk that county boards of elections will not timely certify" and thus, they "cannot know whether all votes cast for them in the November 2024 general election will be counted." *Id.*, ¶ 42.

However, these rights are distinguishable from the type of legal interest or right that would be sufficient to sustain statutory standing for either the Voter or the Candidate Petitioners under O.C.G.A. § 50-13-10(a). For example, in *Bland Farms, LLC*, the petitioner was an interested party

"claiming a right to ship onions pursuant to a statute—a right which it claims is impeded by a newly enacted regulation." 332 Ga. App. at 660. In holding that the petitioner in that case had statutory standing, the court reasoned that because the petitioner may be liable for civil and criminal penalties if it failed to comply with the promulgated regulation, which automatically applied to it, the petitioner had sufficiently shown that its rights would have been affected by the regulation, and it thus had standing. *Id.*

Here, unlike the petitioner in *Bland Farms, LLC*, neither the Voter nor the Candidate Petitioners would be subject to penalties for failing to adhere to the Rules because they are not involved in the certification process. *See* O.C.G.A. § 21-2-493. The Rules will not interfere with or impair either the Voter or Candidate Petitioners' ability to vote in the upcoming election. Rather, the Voter and Candidate Petitioners' alleged affected interest is implicated only by the possibility that the Rules may be interpreted in such a way that interferes with the certification deadline. Thus, the Voter and Candidate Petitioners have failed to demonstrate they have statutory standing.

The Organizational Petitioners fare no better here. At most, they allege that they have an interest in "ensur[ing] that votes cast for Democratic candidates in November are properly counted and that their respective members serving as election superintendents, as members of county Boards

of Registration and Elections, or otherwise as county-level administrators know their legal obligations with respect to certification[.]" Petition, ¶ 43. However, like the Voter and Candidate Petitioners, that interest is not so directly implicated by the Rules that the Organizational Petitioners' failure to follow the Rules would imperil that interest. *Cf. Bland Farms, LLC*, 332 Ga. App. at 660. Therefore, they too do not have statutory standing to challenge the Rules under O.C.G.A. § 50-13-10(a).

2. Declaratory relief

Declaratory relief is similarly not warranted for any of the Voter, Candidate, or Organizational Petitioners. "The proper scope of declaratory judgment is to adjudge those rights among parties upon which their future conduct depends." *Sexual Offender Registration Rev. Bd. v. Berzett*, 301 Ga. 391, 393 (2017) (internal citations and punctuation omitted). Thus, the Petitioners "must allege that *they* are at risk of taking some undirected future action incident to their rights and that such action might jeopardize their interests." *Floam*, 319 Ga. at 100 (emphasis in original). "Alleging some future conduct *of the petitioner* about which it is uncertain is an 'essential ingredient,' the absence of which will result in dismissal of the petition." *Empire Fire & Marine Ins. Co. v. Metro Courier Corp.*, 234 Ga. App. 670, 671 (1998)).

Neither the Voter nor the Candidate Petitioners have alleged that *their* conduct will be affected by a determination as to the validity of the Rules, which is necessary for declaratory relief. *See Floam*, 319 Ga. at 100. Voter Petitioners are not uncertain about whether they can vote. Neither are the Candidate Petitioners. At most, Candidate Petitioners allege that, absent relief, they "must prepare for the 'reasonable inquiry' process the rule mandates," and that will divert resources they would have otherwise "devote to furthering their candidacies." Petition, ¶ 42. But it is unclear how additional preparation for the "reasonable inquiry" process would affect Candidate Petitioners' conduct. Certification is conducted by election superintendents, not candidates, *see* O.C.G.A. § 21-2-493, and the Code also already provides that "examination of all the registration and primary or election documents whatever relating to such precinct" will occur in the presence of "each party, body, and interested candidate." *Id.* at § 21-2-493(b); *see also id.* at § 21-2-493(g).

Similarly, the Organizational Petitioners do not allege they are uncertain about any future conduct that relief here will alleviate. The Organizational Petitioners are not uncertain or insecure about the "propriety" of their own future conduct, *see Empire Fire & Marine Ins., Co.*, 234 Ga. App. at 671, which they have characterized as their diverting resources to educate and advise its members about the effect of the rules and

the obligations imposed upon their appointed election officials. Petition, ¶ 48; Petitioners' Brief, Ex. 7, ¶¶ 4-8. Indeed, they have asserted that "the confusion that the Rules introduce *has already caused*" the diversion of their resources. Petition, ¶ 48 (emphasis added). Organizational Petitioners merely wish they will not have to continue to do so in the future, but the *propriety* of that possible future conduct is not in jeopardy. Relief here will therefore provide no "immediate legal effect" for the Organizational Petitioners. *Cf. Perdue*, 357 Ga. App. at 163.

Thus, these Petitioners are "not 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." *Fleam*, 319 Ga. at 100. Accordingly, declaratory relief is not proper for these Petitioners.

III. The Rules are not procedurally invalid.

Petitioners argue that the Rules are independently invalid because they were not promulgated in accordance with the APA. Specifically, Petitioners allege that the Board neither issued a concise statement of the principal reasons for and against the adoption of either Rule and incorporated therein its reason for overruling the consideration urged against the Rules' adoption, nor considered fully all written and oral submissions respecting the proposed rule in advance of adopting the Rules. Petition, ¶¶ 129, 137. However, the

statute does not require that such concise statement be issued prior to adoption of the rule, as Petitioners argue. *See* Petitioners' Brief, at 29.

O.C.G.A. § 50-13-4(a)(2) provides in relevant part that "[t]he 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[.]"

The APA must be strictly construed. *Corner v. State*, 223 Ga. App. 353, 355 (1996). The "fundamental rules of statutory construction … require [the courts] to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage." *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 362 (2012). The obligation that an agency issue a concise statement of the principal reasons for and against the adoption of rules and its reason for overruling consideration urged against its adoption is triggered only upon a request by an interested party, which may be made within 30 days of the agency's adoption of the rule. O.C.G.A. § 50-13-4(a)(2). There is otherwise no indication as to when the agency must issue such statement.

The Petition was filed on August 26, 2024. The Rules were adopted on August 6 and 19. Construing O.C.G.A. § 50-13-4(a)(2) to require an agency to issue the concise statement before or at the time the rule was adopted would render the language of the statute that permits interested persons to request such a statement within 30 days following the adoption of such rule surplusage. Thus, an agency that does not issue the concise statement set forth in O.C.G.A. § 50-13-4(a)(2) upon or before the rule's adoption does not fail to comply with the APA.

Further, Petitioners' reliance on *Outdoor Advertising Association of Georgia Inc. v. Department of Transportation*, 186 Ga. App. 550, 554 (1988) is misplaced, given the specific fact-based inquiry conducted by the court in that case. In *Outdoor Advertising Association*, the agency board published notice regarding a revision of the rules and sought public comment at a hearing held on September 19. *Id.* at 552. The proposed rules were then amended and then presented again to the board at a meeting held October 16; the board at that time directed its staff to proceed with the adoption of the proposed amendments. *Id.* at 552. A final hearing was then held on November 25, at which oral and written submissions were also submitted. *Id.* at 552-53. However, the board failed to take action on the rules at the November meeting. *Id.* at 554. Under those specific facts, therefore, the court held that the amended rules had been effectively adopted at the October meeting, and

the board there could not have possibly considered all written or oral submissions prior to adopting the amended rules, such as the ones made at the November meeting. *Id.*

That conclusion reached by the court in that case cannot be imported wholesale and uncritically to this case here, where the facts differ substantially. Here, the Rules were adopted after the expiration of the 30-day notice and comment period; after the Board solicited written and oral submissions; and after the Board heard public comment regarding the rules at each of the meetings where the Rules here were adopted. Hardin Aff., ¶¶ 8, 11, 12, 14, 17, 18. Thus, unlike in *Outdoor Advertising Association*, the Board considered the written and oral submissions prior to adopting the Rules.

IV. The Rules can be read consistently with the Georgia code.

"The test of the validity of an administrative rule is twofold: whether it is authorized by statute and whether it is reasonable." *Dep't of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995) (citations omitted); *accord Albany Surgical, P.C. v. Dep't of Cmty Health*, 257 Ga. App. 636, 637 (2002); *Ga. Dep't of Rev. v. Ga. Chem. Council, Inc.*, 270 Ga. App. 615, 616 (2004); *Ga. Dep't of Cmty. Health v. Dillard*, 313 Ga. App. 782, 785 (2012); *Bland Farms*, LLC, 332 Ga. App. at 662. "All duly enacted regulations carry a presumption of validity." *Albany Surgical, P.C.*, 257 Ga. App. at 638.

O.C.G.A. § 21-2-31 gives rule-making authority to the Board to promulgate rules and regulations to obtain "uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections," O.C.G.A. § 21-2-31(1), and as will be conducive to the fair, legal, and orderly conduct of elections, as consistent with law, O.C.G.A. § 21-2-31(2).

However, even when a rule is authorized by the statute, "it must not exceed the scope of or be inconsistent with the authority of the statute upon which it is predicated." *Bland Farms*, 332 Ga. App. at 663. Such an analysis requires an evaluation of the statute. *See Georgia Dep't of Revenue v. Georgia Chemistry Council, Inc.*, 270 Ga. App. 615, 616 (2004).

A. Reasonable Inquiry Rule

There does not appear to be dispute as to the meaning of O.C.G.A. § 21-2-31. The relevant question for the Reasonable Inquiry Rule appears, then, to be whether the Rule is "consistent with law." *See* O.C.G.A. § 21-2-31(2). The agency rule, therefore, must neither "change a statute by interpretation, [n]or establish different standards within a statute that are not established by a legislative body." *N. Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 544 (1998); *accord Palmyra Park Hosp., Inc. v. Phoebe Sumter Med. Ctr.*, 310 Ga. App. 487, 491 (2011). The Reasonable Inquiry Rule does neither. The Reasonable

Inquiry Rule defines "certify the results of a primary, election, or runoff" to mean "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." Ga. Comp. R. & Regs. 183-1-12-.02(c.2). This definition reflects the statutory scheme that permits election superintendents to investigate or otherwise resolve discrepancies during the certification process. *See, e.g.*, O.C.G.A. § 21-2-493(b) (if total vote returned for candidates or question exceeds number of electors in such precinct or total number of ballots cast, "such excess … shall be investigated by the superintendent"); *see also* O.C.G.A. §§ 21-2-493(d), (f), (h). The Reasonable Inquiry Rule does not contain any provisions that permit election superintendents to delay statutory certification. Petitioners do not argue otherwise.

Accordingly, the Reasonable Inquiry Rule is both authorized and not inconsistent with the statute.

B. Examination Rule

The Examination Rule sets forth a series of processes for boards and board members to undertake during the certification process. Ga. Comp. R. & Regs. 183-1-12-.12(f)-(g). Like the Reasonable Inquiry Rule, the Examination Rule does not grant the board members the authority to delay certification. *See id.* 183-1-12-.12(g).

Petitioners argue that because the Examination Rule identifies only "boards" and "board members" as opposed to the broader category of "superintendent," the Examination Rule is inconsistent with the "legislative mandate" that the Board promulgate rules and regulations to obtain uniformity "in the practices and proceedings of superintendents." Petitioners' Brief, at 30 (citing O.C.G.A. § 21-2-31(1)).

However, O.C.G.A. § 21-2-31(1) does not prescribe a legal mandate, but rather merely describes one arena in which the Board can promulgate rules and regulations. *See* O.C.G.A. § 21-2-31(2) (Board to promulgate rules conducive to fair, legal, and orderly conduct); O.C.G.A. § 21-2-31(7) (Board to promulgate rules defining uniform and nondiscriminatory standards concerning what constitutes a vote). "When considering the meaning of a statute, we must afford the statutory text its plan and ordinary meaning." *Drs. Hosp. of Augusta, LLC v. Dep't of Cmty. Health*, 356 Ga. App. 428, 431 (2020) (citation omitted). However, "when interpreting legal text, [the court] do[es] not read words in isolation but rather in context." *City of Guyton v. Barrow*, 305 Ga. 799, 805 (2019) (citation and quotations omitted). "Thus, even if words are apparently plain in meaning, they must not be read in isolation and instead, must be read in the context of the regulation as a whole," including the legal context from which the rule developed. *Id.* (citing

Elliott v. State, 305 Ga. 179, 187 (2019)). These principles apply "to all positive legal rules, including agency regulations." *Id.*

Here, Examination Rule can be read not to exceed the scope or be otherwise inconsistent with O.C.G.A. § 21-2-493. The notice that contained the proposed Examination Rule specifically identified that the purpose of the rule was "to ensure that county superintendents and boards of elections follow the required procedures…." *See* Petition, Ex. B. That reflects the statutory scheme for certification, which also identifies that the process is conducted by superintendents. *See* O.C.G.A. § 21-2-493. As Petitioners note, boards of elections are one type of superintendent. Petitioners' Brief, at 30; *see* O.C.G.A. § 21-2-2(35)(A).

"[A]ll presumptions are in favor of the constitutionality of a statute or regulation." *Ga. Dep't of Cmty. Health v. Northside Hosp. Inc.*, 295 Ga. 446, 448 (2014) (citing *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 490 (2011)) (internal punctuation omitted). *See also Albany Surgical, P.C.*, 257 Ga. App. at 638 ("All duly enacted regulations carry a presumption of validity."). "When a statute … is capable of two constructions, constitutional under one construction and unconstitutional under the other, it is the duty of the court to adopt that construction which will sustain its constitutionality." *City of Newman v. Atlanta Laundries*, 174 Ga. 99, 99 (1932).

Thus, to the extent the Court finds that there is a reasonable constitutional construction of the Examination Rule, the Court should construe it accordingly.

CONCLUSION

The Court should dismiss the Petition or otherwise find the Rules valid.

This 25th day of September, 2024.

CHRISTOPHER M. CARR 112505
Attorney General

BRYAN K. WEBB 743580
Deputy Attorney General

/s/ *Elizabeth T. Young*
ELIZABETH T. YOUNG 707725
Senior Assistant Attorney General

/s/ *Danna Yu*
DANNA YU 846403
Assistant Attorney General

Counsel for the State Election Board

Please address all
communications to:
Elizabeth Young
Georgia Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334
Telephone: (404) 458-3425
eyoung@law.ga.gov

Danna Yu
Georgia Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334
Telephone: (404) 458-3682
dyu@law.ga.gov

EXHIBIT 1

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

VASU ABHIRAMAN *et al.*,	*	
	*	
Petitioners,	*	
	*	
v.	*	
	*	
STATE ELECTION BOARD,	*	
	*	Civil Case No. 24CV010786
Respondent,	*	
	*	
&	*	
	*	
REPUBLICAN NATIONAL COMMITTEE and GEORGIA REPUBLICAN PARTY, INC.,	*	
	*	
	*	
	*	
Intervenors.	*	

AFFIDAVIT OF ALEXANDRA HARDIN

STATE OF GEORGIA
COUNTY OF FULTON

Personally appeared before me, an officer duly authorized by law to administer oaths, Alexandra Hardin, who after first being duly sworn, states as follows:

1.

My name is Alexandra Hardin. I am over 18 years of age and am competent to give this Affidavit. I have personal knowledge of the facts stated herein and they are true and correct.

2.

I currently serve as the paralegal for the State Election Board (the "Board").

3.

As the paralegal for the Board, I attend all the Board's meetings; prepare and compile all the materials necessary for those meetings, including rule petitions; prepare and post notices as required and directed by the Board, including those for proposed rules; and liaison with other agencies as required by the Board, including for its rule-making processes.

4.

The State Election Board receives petitions for rule-making from individuals.

5.

The Board received a rule petition submitted by Mr. Michael Heekin that contained the initial version of the "Reasonable Inquiry Rule."

6.

The Board received a rule petition submitted by Ms. Salleigh Grubbs that contained the initial version of the "Examination Rule."

The Reasonable Inquiry Rule

7.

The Board heard Mr. Heekin's rule petition at its May 8, 2024, meeting, at which time the Board voted to initiate rule-making procedures on the Reasonable Inquiry Rule.

8.

On July 3, 2024, the Board posted a notice containing the proposed rule and other information as required by O.C.G.A. § 50-13-4 to begin the 30-day notice-and-comment period for the Reasonable Inquiry Rule.

9.

On the same day, the Board emailed the same notice of the Reasonable Inquiry Rule to the Office of Legislative Counsel.

10.

The notice provided that the Board would consider formal adoption of the Reasonable Inquiry Rule at its August 6, 2024, meeting.

11.

At the August 6, 2024, meeting, the Board heard additional oral public comment as to the Reasonable Inquiry Rule.

12.

Following discussion, a quorum of the Board voted to formally adopt the Reasonable Inquiry Rule.

The Examination Rule

13.

The Board heard Ms. Grubbs's rule petition at its July 9, 2024, meeting, at which time the Board voted to initiate rule-making procedures on the Examination Rule.

14.

On July 18, 2024, the Board posted a notice containing the proposed rule and other information as required by O.C.G.A. § 50-13-4 to begin the 30-day notice-and-comment period for the Examination Rule.

15.

On the same day, the Board emailed the same notice of the Examination Rule to the Office of Legislative Counsel.

16.

The notice provided that the Board would consider formal adoption of the Examination Rule at its August 19, 2024, meeting.

17.

At the August 19, 2024, meeting, the Board heard additional oral public comment as to the Examination Rule.

18.

Following discussion, a quorum of the Board voted to formally adopt the Examination Rule.

Concise Statement

19.

The Board receives a tremendous amount of email traffic and other correspondence both in general and in the form of public comments regarding proposed rules. It is simply not possible for me to be able to comb through the text of all correspondence received to determine whether some request for Board action is contained somewhere within a larger document. When I receive what appears to be a public comment related to a Board rule, I treat it accordingly and forward it to the Board members for review but do not have the ability to analyze each and every comment received to determine whether or not a request for a concise statement of the principal reasons for and against the adoption of the Rules might be contained within a document that appears to be an expression of public comment upon a proposed Rule.

20.

The Board is currently working to issue a concise statement of the principal reasons for and against the adoption of the Rules and its reasons for overruling consideration urged against the Rules' adoption.

[SIGNATURES APPEAR ON NEXT PAGE]

FURTHER AFFIANT SAITH NOT.

This 25th day of September, 2024.

ALEXANDRA HARDIN
Paralegal for the State Election Board

Sworn to and subscribed before
me this 25th day of September, 2024.

NOTARY PUBLIC
My commission expires:
8/28/2026

LARAINE J. DAVIS
NOTARY PUBLIC
DEKALB COUNTY, GEORGIA
MY COMMISSION EXPIRES
AUGUST 28, 2026

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **RESPONDENT STATE ELECTION BOARD'S PRE-TRIAL BRIEF** by statutory electronic service pursuant to O.C.G.A. § 5-3-10(b) and O.C.G.A. § 9-11-5(f) by emailing the same to the following and electronically serving the same to the extent provided by the Court's e-filing system:

Manoj S. Varghese
Ben W. Thorpe
Jeffrey W. Chen
E. Allen Page
varghese@bmelaw.com
bthorpe@bmelaw.com
chen@bmelaw.com
page@bmelaw.com
Counsel for Voter Petitioners, Candidate Petitioners, and Democratic Party of Georgia, Inc.

Charles C. Bailey
charlie.bailey@cookconnelly.com
Counsel for Board Member Petitioners

Kurt G. Kastorf
kurt@kastorflaw.com
Counsel for Democratic National Committee

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

Alex B. Kaufman
akaufman@chalmersadams.com

William Bradley Carver, Sr.
Baxter D. Drennon
bcarver@hallboothsmith.com
bdrennon@hallboothsmith.com

Counsel for Intervenor-Respondents Republican National Committee and the Georgia Republican Party

This 25th day of September, 2024.

/s/ *Danna Yu*