No. S25M0259

In the Supreme Court
State of Georgia

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Petitioners,

v.

ETERNAL VIGILANCE ACTION, INC., ET AL.,

Respondents.

RESPONSE IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR SUPERSEDEAS ON BEHALF OF RESPONDENTS ETERNAL VIGILANCE ACTION, INC., SCOT TURNER, AND JAMES HALL

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INTRODUCTION

The right to vote is one of the most treasured and important rights of any Georgian. *See Griffin v. Trapp*, 205 Ga. 176, 181 (1949); *see also* GA. CONST. ART. II, § I, ¶ II. This right embodies not only casting a vote, but having that vote "correctly counted and reported" in accordance with the law. *Gray v. Sanders* 372 U.S. 368 380 (1963); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962).

Pursuant to its constitutional mandate, the General Assembly, in over 500 annotated pages of the Georgia Code, has protected this fundamental right by promulgating extensive and clear provisions detailing all aspects of voting, vote counting, voter certification, vote challenges, and a myriad of other procedural and other election related provisions. *See* O.C.G.A. §§ 21-1-1, *et seq*. ("the Election Code").

Despite this, and only a month prior to the casting of the first Georgia ballots in the 2024 election, the State Election Board ("SEB") imposed a series of rules fundamentally altering the General Assembly's election scheme. The SEB's rulemaking is constitutionally impermissible and is contrary to existing statutory law. Thus, the trial court properly enjoined these illegal rules.[1]

[1] The challenged rules were passed by 3-2 majority of the SEB. They were passed against Georgia Attorney General's advice that the SEB's rules were unauthorized under Georgia law. *See* Plaintiffs' Amended Complaint at Ex. A. These rules have been criticized by Georgia's Secretary of State, former and current Democrat, Republican, and independent law makers and groups, and local election officials. *See, e.g.* Issac Sabetai and Mark Nisse, *How Georgia's new election rules could lead to disputes over the results*, Atlanta Journal Constitution, October 17, 2024; Amicus and Intervenor briefs filed below; *Cobb County Bd. of*

While the State has not sought to stay the trial court's injunction, Intervenors Republican National Committee and the Georgia Republican Party (collectively "RNC" or "Petitioners") seek such relief. This Court should deny that request.

As detailed below, the RNC is not likely to succeed on appeal because: (i) the SEB lacked authority under the Georgia Constitution to promulgate the challenged rules; (ii) the challenged rules contravene, and are unauthorized by, the Election Code; (iii) the SEB's rules violate the U.S. Constitution; (iv) Respondents seek to vindicate their individual, private voting rights in accordance with the law; and (v) Respondents have standing to pursue these claims. Not only is the RNC unlikely to prevail here, both Respondents and the public would be irreparably harmed if the injunction were not maintained during the 2024 election. And the RNC has articulated no countervailing harm suggesting otherwise.

The trial court's order ensures that the 2024 election will be held in accordance with the express procedures and terms set forth by the General Assembly in the Election Code. And these procedures will not— and cannot—be changed or altered by the SEB's last minute, unconstitutional power grab. All elections are important. The 2024 election is especially so. It should proceed according to the law as set forth by the General Assembly.

Elections and Registration v. State Election Board, 24CV012491 (Superior Court of Fulton County, Georgia); and *Abhiraman v. State Election Bd.*, 24CV010786 (Superior Court of Fulton County, Georgia).

STANDARD OF REVIEW

The issuance of a stay pending appeal, or supersedeas, constitutes an "extraordinary remedy."[2] *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1455 (11th Cir. 1986). Such relief is extraordinary because it constitutes "an intrusion into the ordinary processes of administration and judicial review[.]" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation omitted). A stay or supersedeas is therefore "not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). And "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433–44.

Petitioners bear the burden of showing: (i) they will prevail on the merits; (ii) they will suffer irreparable harm in the absence of a stay or injunction; (iii) a stay or injunction will not substantially harm the other parties with an interest in the proceedings; and (iv) the public interest favors a stay or injunction. *See id.* at 434*; see also Green Bull Georgia Partners, LLC v. Register*, 301 Ga. 472, 473 (2017). "The first two factors are the most critical." *Democratic Exec. Comm. of Fla. v. Lee*,

[2] O.C.G.A § 9-11-62(c) empowers Georgia courts to "suspend . . . an injunction during the pendency of the appeal." That language "is modeled after Federal Rule of Civil Procedure 62(d)[,]" which features nearly identical language. *Green Bull Ga. Partners, LLC v. Register*, 301 Ga. 472, 473 n.3 (2017). So Georgia courts often "look to the decisions of the federal courts construing and applying Rule 62(c) as an aid to [their] understanding of O.C.G.A. § 9-11-62(c)." *Id.*

915 F.3d 1312, 1317 (11th Cir. 2019). Petitioners fall far short of their burden on all these elements.

ARGUMENT

I. The RNC Is Not Likely To Prevail On the Merits

A. Petitioners are unlikely to succeed on the merits because they seek implementation and enforcement of rules that violate GA. CONST. Art. I, § II, ¶ III.

The Georgia Constitution broadly vests the General Assembly with authority to legislatively enact election rules and procedures. *See* GA. CONST. ART. II, §§ I-II.[3] The General Assembly exercised this authority by passing the detailed provisions of the Election Code.

Unlike the General Assembly, the SEB is an unelected, executive board created pursuant to O.C.G.A. § 21-2-30(a). The SEB's enabling legislation empowers it to promulgate rules and regulations (i) "so as 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," (ii) that are "consistent with the law," (iii) that promote the "fair, legal, and orderly" conduct of elections, and (iv) that "define uniform and non-discriminatory standards concerning what constitutes a vote and what will be counted as a vote[.]" O.C.G.A. § 21-2-31 (1), (2), and (7). None of these high-

[3] U.S. Const. Art. Art. I, § II, cl. I further provides that only state legislators may prescribe the time, place, and manner of federal elections..

minded principles are defined or constrained, and the SEB lacks any other guidance regarding the boundaries of its rulemaking authority.

The question here is whether the SEB, as an executive body, can legislate election criteria. It cannot. GA. CONST. ART. I, § II, ¶ III provides: "[t]he legislative, judicial, and executive powers *shall* ***forever*** *remain separate and distinct*; and no person discharging the duties of one shall at the same time exercise the functions of either of the others . . . ." This Court has found "the constitutional non-delegation doctrine is rooted in the principle of separation of powers and mandates that the General Assembly not divest itself of the legislative power granted to it by . . . our Constitution by delegating legislative powers to (for example) executive agencies." *Premier Health Care*, 310 Ga. 32, 49. Yet, the trial court properly found that is precisely what happened here.

i. Delegations without "sufficient" or "realistic" guidelines constitute an unconstitutional delegation.

This Court has permitted limited, non-legislative delegations by the General Assembly to the executive. Such delegations must contain "sufficient" and "realistic" guidelines constraining the executive's rulemaking. *See Premier Health Care Invs.* 310 Ga. at 49-50. Without "sufficient" or "realistic" guidelines, any rulemaking delegations run afoul of GA. CONST. ART. I, § II, ¶ III. *Id.*

While this Court has not provided explicit guidance on what constitutes "sufficient" or "realistic" rulemaking guidance, it has expressly found that "where

the General Assembly fails to establish guidelines for the delegatee's exercise of authority or where it delegates such broad discretion that an agency is permitted to decide what violates a law passed by the General Assembly," such an assignment violates the separation-of-powers and non-delegation clauses of our Constitution. *Id.* at 50.

In *Premier Health Care*, this Court struck down a Department of Community Health ("DCH") rule modifying the express statutory instances in which a healthcare provider needed to obtain a certificate of need. *See id.* at 35-51. In so doing, the Court found DCH's exercise of rulemaking authority, without sufficient statutory guidance, was "complete and unbridled," and thus constitutionally suspect. *See id.* at 51-53 (citing *N. Fulton Medical Center v. Stephenson*, 269 Ga. 540, 543 (1998) and *HCA Health Care Servs. of Ga., Inc. v. Roach*, 265 Ga. 501 (1995)).

The same is true here. Nothing in the SEB's enabling legislation provides any real guidance regarding the constraints of SEB's rulemaking authority. Rather, the delegations in O.C.G.A. § 21-2-30(a) are "complete and unbridled" and would allow the SEB to impose most any regulation it desired. This "delegation running riot" is not allowed. *See A.L.A. Schechter Poultry Cop. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). This is especially true when, as here, the delegation would permit an executive to enact regulations that contravene and are unsupported by the applicable statutory scheme.

Further, it is without question that a citizen's right to vote and have that vote counted is fundamentally important.[4] As such, any delegation of legislative power concerning voting rights must be exceedingly specific so that courts can be confident that the General Assembly actually meant to cede its authority on such a critical issue. *See State v. Hudson*, 303 Ga. 348, 353 (2018) (the General Assembly "does not, one might say, hide elephants in mouseholes") (quoting *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001)); *see also Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) ("[The importance of the issue of [voting and voting rights], which has been the subject of an earnest and profound debate across the country . . ., makes the oblique form of the claimed delegation all the more suspect.") (quotation omitted).

In almost every recent legislative session, the General Assembly has carefully considered and enacted extensive revisions to the Election Code. None of those revisions, however, implemented any of the changes promulgated by the SEB. Contrary to the RNC's suggestion, the General Assembly did not, and could not, coyly vest the SEB with the fundamental, election-altering, authority it claimed. The SEB's rules were thus properly enjoined.

[4] To the extent Georgians' rights will be altered, it should be the democratically elected legislature that does so. Delegating legislative authority to an unelected executive board, strips the citizens of that voice. "The principle that [the General Assembly] cannot delegate away its vested powers exists to protect our liberty." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 61 (2015) (Alito, J. concurring).

ii. The SEB's rulemaking is otherwise constitutionally suspect.

Respondents challenge not only whether the SEB's rulemaking here was sufficiently guided, but also whether this Court's prior opinions allowing guided executive rulemaking can withstand further constitutional scrutiny. *See Premier Health*, 310 Ga. at 49 n.18 (discussing whether *Dep't of Transp. v. City of Atlanta*, 260 Ga. 699, 703 (1990) is still good law). This is important to consider when determining whether or not the trial court's order should be stayed. The SEB's rules here are "constitutionally suspect" at best—because they are completely unguided and exceed the constraints of the Election Code. *See Id. at* 49–50. But it is also possible that the SEB's rulemaking authority is constitutionally prohibited altogether. In the face of such constitutional uncertainty, the SEB's rules were properly enjoined.

B. Petitioners are unlikely to succeed on the merits because the challenged rules are unsupported by, and contrary to, the Election Code.

Any rulemaking authority exercised by the SEB must be consistent with the existing Election Code. *Ga. Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975). Stated another way, the SEB's authority can only extend to "adopt rules and regulations to carry into effect a law already passed" or otherwise "administer and effectuate an existing enactment of the General Assembly." *Id*.

Georgia courts interpret statutes according to the text's "plain and ordinary meaning, viewed in the context in which it appears, and read in its most natural and reasonable way." *Quynn v. Hulsey*, 310 Ga. 473, 475 (2020). If the statutory text is "clear and unambiguous," then that is where the "search for statutory meaning ends." *Stockton v. Shadwick*, 362 Ga. App. 779, 783 (2022); *see also Funvestment Group, LLC v. Crittenden*, 317 Ga. 288, 294 (2023). The relevant portions of the Election Code at issue are clear and unambiguous. Thus, the RNC's claim that the SEB is entitled to interpret these clear and unambiguous provisions through regulation or otherwise is misplaced.

This Court has repeatedly admonished state executive entities, like the SEB, for exercising rulemaking authority that is unbounded by or contrary to statute. *See Camp v. Williams*, 314 Ga. 699, 709 (2022) (Bethel, J., concurring) (for government entity created by statute "the absence of statutory authority is the absence of legal authority to act); *Premier Health*, 310 Ga. 32, *passim* (DCH did not have authority to expand by rule statutory categories of certificates of need); *Gebrekidan v. City of Clarkston*, 298 Ga. 651, 654 (2016) (local government cannot enact ordinances that conflict with, impair, or detract from general law); *N. Fulton Med. Ctr.*, 269 Ga. at 544 (state agency may not take action not contemplated by statute); *HCA Health Services of Ga.*, 265 Ga. at 502 ("The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed

is apparently and strikingly great") (quoting *Dep't of Transp. v. Del-Cook Timber Co., Inc.*, 248 Ga. 734, 738 (1982)); *see also Tabletop Media, Ga. Lottery Corp. v. Tabletop Media, LLC*, 346 Ga. App. 498, 503 (2018) (GLC could not expand its authority beyond statutory limits).[5] The SEB's challenged rules violate this well-established rulemaking constraint.[6]

i. SEB Rule 183-1-12.02(c.2) contradicts O.C.G.A. § 21-2-493.

SEB Rule 183-1-12.02(c.2) ("the Reasonable Inquiry Rule"). purports to impose a new definition of the term "certify" that changes the statutory way superintendents certify election results. The Reasonable Inquiry Rule defines "certify" as follows: "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." (emphasis added).

The SEB did not define or constrain what "reasonable inquiry" might be employed to investigate and determine the validity of votes cast and certified. Importantly, Petitioners admit this rule would empower superintendents to reject a vote based solely on their "discretion" made after an undefined "reasonable inquiry."

[5] The Attorney General cited many of these principles and cases when it advised the SEB that its rulemaking here was improper. *See* Amended Complaint at Ex. A.

[6] In many of the challenged rules, the SEB seeks to add additional conditions or criteria that are not mandated in the Election Code. Our appellate courts have regularly employed the doctrine of "expression unius est elusio alterius" to constrain such overreach. *See, e.g.*, *AMG LLC v. Dep't of Transp.*, 372 Ga. App. 160, 165 (2024); *Land USA, LLC v. Ga. Power Co.*, 297 Ga. 237, 242 n.10 (2015).

See RNC Brief at 16-19. This is absurd. Votes are to be counted, not subjectively interpreted.

O.C.G.A. § 21-2-493 explicitly sets forth how a superintendent computes and certifies election returns.

- The superintendent is required to "[p]ublicly commence computation and canvassing of returns. . . [and] [u]pon completion of such computation and canvassing . . . tabulate[s] the figures for the entire county or municipality and sign, announce, and attest the same ***as required by this Code section***." O.C.G.A. § 21-2-493(a) (emphasis added).

- "[B]efore computing the votes cast in any precinct" determine whether the total number of votes cast for any candidate "exceeds the number of electors in the precinct or exceeds the total number of persons who voted in such precinct . . . ." O.C.G.A. § 21-2-493(b). If such a discrepancy occurs regarding this numerical comparison, the superintendent shall initiate an investigation "and no votes shall be recorded from the precinct until an investigation shall be had." *Id*. This provision details how the superintendent is to investigate such discrepancies and it provides for the possibility of a recount or recanvassing and reporting such discrepancies to the district attorney. *Id*.

- Where voting machines are used, the superintendent may require a recanvass of the votes only as provided in O.C.G.A. § 21-2-495. O.C.G.A. § 21-2-493(d). O.C.G.A. § 21-2-493(f) and (h) provide the method by which to canvass votes cast in voting machines and what to do if there are identified discrepancies set forth in the subjection.

- O.C.G.A. § 21-2-493(i) says " If any error or fraud is discovered, the superintendent shall compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented to him or her, and shall report the facts to the appropriate district attorney for action."

Nowhere does the General Assembly allow superintendents to withhold vote certification based on anything but these express statutory guidelines.

As noted, O.C.G.A. § 21-2-493(i) requires a superintendent to certify the vote count, even if fraud is suspected—though the district attorney must be notified of the suspicion. Any adjudication of suspected fraud is done not by the superintendent, but by a superior court post-certification. *See* O.C.G.A. § 21-2-522(1); *see also* O.C.G.A.§ 21-2-524(a). If the superior court finds fraud, it will issue an order requiring the superintendent to recertify the votes. *See* O.C.G.A. § 21-1-522(l).

Thus the superintendent mechanically ***counts*** the votes, certifies the count, reports the count, and reports any suspected fraud. *See*, *e.g.*, *Hendricks v. State*, 100 Ga. App. 722, 722 (1959). Superintendents may not adjudicate vote validity based on their discretion after a "reasonable inquiry." Review of suspected fraud is a job for the superior court. The RNC errs in claiming otherwise. *See* RNC Brief at 18-19.

ii. SEB Rule 183-1-12-.12 contradicts O.C.G.A. § 21-2-493 and 21-2-70(9).

SEB Rule 183-1-12-.12 provides county election boards must give individual superintendents "all election related documentation created during the conduct of elections prior to certification results." SEB Rule 183-1-12.12(.1)(6) is inconsistent with the Election Code which otherwise provides the time, manner, and method in which election-related documentation must be produced and maintained. O.C.G.A. § 21-2-493 specifically accounts for the materials superintendents may consider when canvassing and certifying votes. In conformity with O.C.G.A. § 21-2-493, O.C.G.A. § 21-2-70(9) provides superintendents can "receive from poll officers ***the***

returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to authorities as may be prescribed by law." (emphasis added).[7]

The Election Codes does not permit superintendents to consider any other materials in executing their function. SEB Rule 183-1-12.12(.1)(6)'s requirement that superintendents be provided with "all election related documentation created during the conduct of elections prior to certification results" is unbounded in scope and would introduce into the certification process materials superintendents are not statutorily authorized to consider in tabulating, canvassing, and certifying election results. For the superintendent to consider such extraneous information "prior to certification" is contrary to the statute.

iii. SEB Rule 183-1-14-.02(18) contradicts O.C.G.A. § 21-2-385.

O.C.G.A. § 21-2-385(a) provides "that mailing or delivery [of a voter's absentee ballot] may be made by the elector's mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector." *Id.* Additionally, O.C.G.A. § 21-2-385(a) allows any "caregiver" of a disabled elector to mail or deliver the

[7] The RNC cites O.C.G.A. § 24-2-70(8) as authority for this rule. But that provision does not deal at all with the provision of election related materials to superintendents.

absentee ballot of that elector. *Id*. These are the only statutory requirements for delivering another person's absentee vote.

Even so, SEB Rule 183-1-14-.02(18) imposes an additional requirement. Namely, the rule requires the "signature and photo ID of the person delivering the absentee ballot[.]" The production of a signature and photo ID by the absentee ballot courier is not statutorily required. Had the General Assembly intended to impose additional burdens or obstacles to the lawful submission of an absentee ballots, it could have done so. It chose not to do so, and the SEB cannot impose an additional ballot delivery restriction that the General Assembly did not.[8]

iv. SEB Rule 183-1-14-.02(19) contradicts O.C.G.A. § 21-2-382(c)(1).

SEB Rule 183-1-14-.02(19) provides that after "the close of polls . . . the poll officials shall initiate video surveillance and recording of a drop box at any early voting location. . . . Any drop box that is not under constant and direct surveillance shall be locked or removed and prohibited from use." Nothing in the Election Code requires video surveillance and recording of a drop box and nothing allows the removal of an authorized drop box location if video surveillance is not used. The

[8] Elsewhere in the Election Code, the General Assembly does require presentation of identification for certain electors. *See* O.C.G.A. § 21-2-417. The fact that the General Assembly has an identification requirement in one part of the Election Code but not another, evidences a purposeful legislative choice that the SEB cannot undermine. Moreover, issues surrounding the presentation of identification for voting have been the source of substantial litigation in Georgia. *See, e.g.*, *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. 270 (2011). It is unlikely that the General Assembly just "forgot" to put that requirement in O.C.G.A. § 21-2-385(a).

Election Code says only "[t]he drop box location shall have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement official, or licensed security guard." O.C.G.A. § 21-2-382(c)(1). This was a purposeful legislative choice.

During the 2020 COVID pandemic, the SEB created emergency rule 183-1-14-.06-.14(4) (2020) that administratively provided "[d]rop box locations must have adequate lighting and use a video recording device to monitor each drop box location. The video recording must either continuously record the drop box location or use motion detection that records one frame, or more, per minute until detection of the motion triggers continuous recording." *See also* SEB Rule 183-1-14-.06-.14(5) (2020) (discussing retention of drop box videos).

In 2021, the General Assembly, in SB 202, statutorily provided for the first time that drop boxes would be available for absentee ballots. *See* O.C.G.A. § 21-2-382(c)(1). The General Assembly borrowed heavily from the SEB's 2020 emergency drop box rule. But the General Assembly expressly ***declined*** to adopt the emergency rule's video surveillance requirement.[9] By reimposing this requirement, the SEB undermined the General Assembly's purposeful legislative decision. What is worse,

[9] Anecdotally, the video surveillance requirement was dropped from the model emergency rule because of the substantial cost imposed on localities in maintaining and storing such videos.

the SEB allows for the removal of authorized drop box locations if ***its*** unconstitutional rule is not followed.

v. SEB Rule 183-1-13-.05 contradicts O.C.G.A. § 21-2-408.

SEB Rule 183-1-13-.05 (the "Poll Watcher Rule") expands mandatory enumerated poll watcher locations beyond those places specifically identified in O.C.G.A. § 21-2-408(c).

The Poll Watcher Rule provides that designated poll watchers "shall" be entitled to observe certain "designated places" including "the check-in-area, the computer room, the duplication area, ***and such other areas that tabulation processes are taking place including but not limited to provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing of mail in ballots, memory card transferring, regional or satellite check in centers*** and any election reconciliation processes as the election superintendent may deem necessary to the assurance of a fair and honest procedures in the tabulating center." (emphasis added).

The General Assembly amended O.C.G.A. § 21-2-408(c) this year in H.B. 1207. While it mandated certain poll watching locations, it did not require poll watchers be given access to the areas emphasized in the rule above. To be sure, the General Assembly permits the superintendent to allow poll workers to observe "other areas as the superintendent deems necessary to the assurance of fair and

honest procedures in the tabulation centers." But the only ***mandatory*** designated poll watching areas are those specified by the General Assembly. The SEB has no authority to require additional mandatory designated areas by rule when the General Assembly chose not to do so.

vi. SEB Rule 183-1-21-.21 contradicts O.C.G.A. § 21-2-385(e).

SEB Rule 183-1-12-.21 (the "Daily Reporting Rule") adds additional requirements for reporting absentee ballot information by the county board of registrars beyond that contemplated in O.C.G.A. § 21-2-385(e). In particular, the Daily Reporting Rule requires "each registrar" to "establish a method of daily reporting to the public the total number of voters who have participated in the election or runoff" and to further categorize these votes "by method by which those voters participated (advance voting or absentee by mail)" and political and nonpartisan ballots cast. *See* Rule 183-1-12-.21(1). This information is required to be published daily on the registrar's and the county election superintendent's website, or if no website is available in a public place "accessible 24 hours a day to the public." *See* Rule 183-1-12-.21(3)-(6).

O.C.G.A. § 21-2-385(e) requires the daily reporting on business days of the (i) "number of persons to whom absentee ballots have been issued, the number of persons who have returned absentee ballots and the number of absentee ballots that have been rejected[,]" (ii) "the number of persons who have voted at advance voting

sites[,]" and (iii) "the number of persons who have voted provisional ballots, the number of provisional ballots that have been verified or cured and accepted for counting, and the number of provisional ballots that have been rejected." The Daily Reporting Rule is inconsistent with the specific requirements set forth by the General Assembly in the Election Code and is impermissible.

For instance, the Election Code requires only business day reporting, not weekend reporting. The Election Code does not require reporting by partisan and nonpartisan votes, while the Daily Reporting Rule does. The Election Code requires posting certain information in a "place of public prominence," while the rule requires information to be posted in a place "accessible 24 hours a day to the public."

vii. SEB Rule 183-1-12-.12(a)(5) contradicts O.C.G.A. §§ 21-2-420, and 21-2-483.

SEB Rule 183-1-12-.12(a)(5) (the "Hand-Count" Rule) requires poll managers and poll officers to engage in a cumbersome hand-counting process after the close of polls and prior to transmitting the ballots to the superintendents for certification. But hand counting is not statutorily authorized.[10]

[10] At the October 16, 2024 hearing, the SEB represented the Hand Count Rule only applies to ballots cast on Election Day. Hearing Trans. at 46:13-47:3. The Hand Count Rule does include such a limitation. Either way, even the SEB does not know what this rule actually does. If it only applies to Election Day ballots, then those ballots are treated differently than those not cast on election. If it does include all ballots, as the rule facially provides, then the problems and impact associated with the hand count infect almost all votes cast.

Rule 183-1-12-.12(a))(5) empowers and requires poll officials (out of whole cloth) to conduct a hand count of the ballots ***prior*** to delivering the ballots to the superintendents and prior to certification. The Hand Count Rule requires poll officers to "record the date and time that the ballot box was emptied and present to three sworn poll officers to independently count the total number of ballots removed from the scanner, sorting into stacks of 50 ballots, continuing until all the ballots have been counted separately by each of the three poll officers." In other words, the Hand Count Rule requires that ***all*** ballots be counted by hand by ***three*** separate poll officers. *Id.* This rule then requires a reconciliation of the hand counted ballots with "numbers recorded on the precinct poll pads, ballot marking devices . . . and scanner recap forms" and a placement and sealing of hand counted ballots and scanner counted ballots. *Id*.[11] All this prior to sending the ballots to the superintendent for certification. None of this is permitted by statute, and in fact it is expressly precluded.

O.C.G.A. § 21-2-483 provides the "[p]rocedures at the tabulation center." O.C.G.A. § 21-2483(a) says "[i]n primaries and elections in which optical scanners are used, the ***ballots shall be counted at the precinct or tabulating center*** under the direction of the superintendent. All persons who preform any duties at the tabulating center shall be deputized by the superintendent, and ***only persons so deputized shall***

[11] The decision about when to start the hand count is up to the poll manager or the assistant poll manager. Rule 183-1-12-.12(a))(5)(a).

touch any ballot, container, paper, or machine utilized in the conduct of the count or be permitted to be inside the area designated for officers deputized to conduct the count." (emphasis added). The RNC contends this statute is irrelevant because it deals only with counting ballots at the tabulation center by the superintendent and its deputies. *See* RNC Brief at 30-31. The RNC is wrong.

In O.C.G.A. § 21-2-483, the General Assembly carefully and explicitly said (i) where ballots are to be counted, and (ii) who can count them. Ballots are to be counted at the tabulation center and only the superintendent and sworn deputies may count them. Poll workers, pre-transmission of the ballots to the tabulation center, may not handle or count these ballots.

Rather, O.C.G.A. § 21-2-420(a) provides:

> After the time for the closing of the polls and the last elector voting, the poll officials in each precinct shall [1] complete the required accounting and related documentation for the precinct and [2] shall advise the election superintendent of the total number of ballots cast at such precinct and the total number of provisional ballots cast. The chief manager and at least one assistant manager shall [3] post a copy of the tabulated results for the precinct on the door of the precinct and then [4] immediately deliver all required documentation and election materials to the election superintendent. The election superintendent shall then ensure that such ballots are processed, counted, and tabulated as soon as possible and shall not cease such count and tabulation until all such ballots are counted and tabulated.

(bracketed material added). Notably absent from the poll worker's authorized duties is any right to handle or hand count ballots. The foregoing is ***all*** the Election Code allows the poll officials to do after the polls close.

The RNC suggests, without explanation, the Hand Count Rule "clarifies" O.C.G.A. § 21-2-420(a)'s requirement that poll workers "complete the ***required*** accounting and related documentation for the precinct." *See* RNC Brief at 31. This suggestion is at odds with the plain language of the statute. Poll workers are neither "required" nor "allowed" to hand count ballots. In addition to being unauthorized and unconstitutional, the SEB's Hand Count Rule would have delayed and hampered the tabulation of election results and interjected a substantial potential for misadventure into the election process.

C. In addition to seeking implementation of rules that violate GA. CONST. Art. I, § II, ¶ III, Petitioners are also unlikely to succeed on appeal because the SEB's rules are in tension with the U.S. Constitution.

The U.S. Constitution's Elections Clause provides, in relevant part, that (ii) "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, [(ii)] shall be prescribed in each State by the Legislature thereof[.]" U.S. Const. art. I § 4, cl. 1. "Times, Places, and Manner" "embrace authority to provide a complete code for congressional elections," including "in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[.]" *Smiley v. Holm*, 285 U.S. 355, 366 (1932). And the Constitution's "language specifies a particular organ of a state government [who can make such rules], and [courts] must take that language

seriously." *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay). Specifically, "[t]he Constitution provides that state legislatures—not . . . state governors, not other state officials—bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay). In short, "a state legislature's responsibility over congressional elections transcends any limitations sought to be imposed by the people of a State through other state actors; ***the state legislature is the exclusive state authority***." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. ——, 144 S. Ct. 1221, 1258 (2024) (Thomas, J., concurring in part) (quotations omitted) (emphasis added).

The legislature in Georgia is the General Assembly alone. *See* GA. CONST. Art. III, § I, ¶ I. And GA. CONST. Art. I, § II, ¶ III precludes delegation of that legislative role to executive entities like the SEB. So it necessarily follows that no executive branch agency in Georgia can do anything to alter the "Times, Places and Manner" of federal elections.

To be sure, "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." *Moore v. Harper*, 600 U.S. 1, 22 (2023). And "state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause." *Id*. at 32; *id*. at 34. But there is no

such carve-out for state executive agencies. Thus the SEB's rules, which affect 2024 federal elections are impermissible for this reason as well.[12]

D. Petitioners' contention that non-delegation principles are not at stake because the SEB rules involve only public and not private rights is wrong.

The U.S. Supreme Court decisions invoked by Petitioners "ha[ve] not definitively explained the distinction between public and private rights[.]" *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 334 (2018) (quotation omitted). The U.S. Supreme Court acknowledges it has "not been entirely consistent" when distinguishing between public and private rights. *Id*. (quotation omitted). At a high level, private rights are those "belonging to individuals, considered as individuals." 3 William Blackstone, Commentaries *2. Public rights, however, "belong to the People in common [and] can be modified by the elected representatives of the People prospectively or retroactively, as they see fit." *Deal v. Coleman*, 294 Ga. 170, 181 (2013).

This case involves an individual right that bares the hallmarks of a private right. "The ***right to vote is individual and personal in nature***[.]" *Gill v. Whitford*, 585 U.S. 48, 49 (2018) (quotation omitted). And as noted at the outset of this brief,

[12] Citing *Moore,* the RNC claims "the Supreme Court has held that 'although the Elections Clause expressly refers to the 'Legislature,' it does not preclude a State from vesting' authority over the manner of elections 'in a body other than the elected group of officials who ordinarily exercise lawmaking power.'" RNC Brief at 33. But what *Moore* actually says is that the Elections clause "does not preclude a State ***from vesting congressional redistricting authority*** in a body other than the elected group of officials who ordinarily exercise lawmaking power." *Moore*, 600 U.S. at 25. Thus *Moore* is inapposite. And *Moore* arose in the context of judicial review, not agency rulemaking. Id. at 22.

voting rights encompass the right to have one's vote "correctly counted and reported." *Gray,* 372 U.S. at 380 (1963); *see also Green Party of Haw. v. Nago*, 378 P.3d 944, 959 (2016). And, under Georgia law, "voting rights are *individually cognizable* for litigation purposes, *even if* they are shared among the general public." *Camp v. Williams*, 314 Ga. 699, 708 (2022). This makes sense because individuality is the hallmark of a private right. *See* 3 William Blackstone, Commentaries *2.

The right to vote, and by extension the right to have one's vote correctly counted and reported, also bears the hallmark of a private right because the General Assembly cannot modify it in any manner it chooses. As this Court long ago explained:

> Could the Legislature provide that persons who cannot read shall not vote? Very clearly not. And yet there is no express provision denying to the Legislature this power, nor is there any express guarantee of this right to those who cannot read. The exercise of such a power is forbidden to the Legislature, by the very fact that the framers of the Constitution, by entering upon the subject of the qualifications of voters, by declaring that certain persons shall vote, and certain others shall not vote, have expressed the sovereign will upon the whole subject, and though there is no express denial to the Legislature of the right to add new classes, or to fix new disqualifications, yet by necessary implication the right is denied.

White v. Clements, 39 Ga. 232, 265 (1869). In other words, while the General Assembly certainly has discretion to pass statutes regarding the time, place, and manners of elections, it lacks the ability to alter core private voting rights. By comparison, the General Assembly can do essentially whatever it wants with public

parks and waterways without restriction. That is because the right to enjoy public parks and waterways is purely public, while the right to vote is plainly at least quasi-private. And here, each of the challenged SEB rules affects how an individual can vote, how that vote is counted and certified, and how that vote is reported. The RNC incorrectly argues otherwise.

E. Petitioners are unlikely to succeed on their standing challenges

The trial court correctly found Scot Turner, James Hall, and Eternal Vigilance have standing to pursue their claims. The trial court's findings are supported by Respondents' verified complaints and the affidavits of Turner and Hall filed below. These factual findings will not be disturbed on appeal. *See Black Voters Matter Fund, Inc. v. Kemp.*, 313 Ga. 375, 381 (2022).

The RNC limits it standing challenge to Respondents' right to challenge (i) the Daily Reporting Rule, and (ii) the non-delegation clause issues. Both of these arguments lack merit. As to the non-delegation clause, the RNC argues voting is not a private right. That argument is dispatched in the section above.

As to whether their local boards of election are required to follow the law regarding the posting of votes, Respondents have standing to pursue that claim. Respondents Scot Turner and James Hall are voters, taxpayers, and community stakeholders who have an interest in their government following the law—in particular, their local superintendents and election officials following the Election

Code and they have a direct interest in how and whether their votes will be cast, counted and certified. Moreover, Hall is a member of the Chatham County Board of Elections, who individually has an interest in how to perform his duties, avoiding personal legal liability, and conforming his conduct to the law. They easily satisfy the standing requirements established by this Court. *See Cobb Cnty. v. Floam*, 319 Ga. 89, 91, 901 S.E.2d 512, 515 (2024); *Sons of Confederate Veterans v. Henry County Bd. of Comm'rs*, 315 Ga. 39, 61, 880 S.E.2d 168, 185 (2022).[13]

Similarly, Eternal Vigilance has organizational standing Eternal Vigilance is a multi-issue advocacy organization whose core function includes defending elections from attacks that erode public faith in electoral outcomes based on misinformation and disinformation, advising election officials regarding their duties, and providing support for the public and election officials regarding election process issues. Eternal Vigilance's president, Respondent Turner, has testified before Congress about the damage misinformation and disinformation does to public confidence in elections. *See Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 381–82, 870 S.E.2d 430, 437 (2022).

[13] Even in the stricter context of federal standing, "where a harm is concrete, though widely shared, the [U.S. Supreme] Court has found 'injury in fact.'" *FEC v. Akins*, 524 U.S. 11, 24 (1998). And that occurs when "large numbers of voters suffer interference with voting rights conferred by law." *Id*. "A plaintiff need not have the franchise wholly denied to suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005).

As to the Daily Reporting Rule only, the RNC challenges whether Respondents have an injury in fact. They do. Respondents have an interest in reviewing and having access to the materials O.C.G.A. § 21-2-385(e) mandates—and in the manner and times set forth in the statute rather than the rule. The statutory reporting requirements are for the benefit of voters and related organizations. They are ***not*** for the benefit of any local government body as the RNC suggestions. Accordingly, this argument fails as well.

II. Petitioners are unlikely to suffer any irreparable harm absent supersedeas.

Petitioners' motion nowhere say how ***they*** would suffer an irreparable harm absent supersedeas. Thus, little needs to be said on this issue. Petitioners will not suffer irreparable harm absent supersedeas because they have "no legitimate interest in" the State's enforcement of "unconstitutional [regulations]." *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1283 (11th Cir. 2024) (quotation omitted). Put differently, "no harm [arises] from the state's nonenforcement of invalid [regulations]." *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012). It again bears mentioning: (i) the State has not sought a stay of the trial court's order; and (ii) the Attorney General and other State officials, including the Secretary of State, concur that the SEB's Rules violate the law and would impede the 2024 election. While Petitioners may seek such impediments, they are not injured by them being removed.

III. Respondents, on the other hand, are highly likely to sustain irreparable harm as a result of supersedeas.

Respondents have established: (i) voters have an interest in making sure they can cast votes and that their votes are correctly counted and reported pursuant to the law; (ii) voters and voter groups have an interest in the election process being conducted in accordance with the law; (iii) the SEB's rules run counter to the Election Code; and (iv) the SEB's rules are unconstitutional and otherwise unauthorized. Thus, if the 2024 election were to proceed pursuant to these stricken, illegal rules, and if the Election Code is not strictly followed, their rights will be forever and irreparably harmed. Again, this is going to be a close election. And Respondents have a direct interest in making sure their votes and voices are counted and heard in accordance with the law.

IV. Allowing the superior court's order to remain in effect will serve the public interest.

"[T]he public interest favors the enforcement of the law in general." *Adams v. Bordeau Metals Southeast, LLC*, No. 4:23-cv-00299-WMR 2024 WL 2626543, at *9 (N.D. Ga. May 7, 2024) (quotation omitted); *see also Trump v. Vance*, 591 U.S. 786, 808 (2020) (recognizing "the public interest in fair and effective law enforcement"). As a corollary, "[t]he public has no interest in the enforcement of what [are] very likely . . . unconstitutional [regulations]." *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013). But "the real

question posed in this context is how [supersedeas relief] would impact ***the public interest in an orderly and fair election***, with the fullest voter participation possible and an ***accurate count of the ballots cast.***" *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018) (emphasis added).

Petitioners here ultimately seek to implement last-minute regulations "in roughly 2,600 precincts and 159 counties[, which] will seriously test the organizational capacity of the personnel handling the election, to the detriment of Georgia voters." *See id*. And "[t]here is nothing like bureaucratic confusion . . . to sour a citizen." *Id*. In other words, the public interest favors clear rules generally, and in the election context specifically.

But "[a]n election system lacks clear rules when, as here, different officials dispute who has authority to set or change those rules. This kind of dispute brews confusion because voters may not know which rules to follow. Even worse, with more than one system of rules in place, competing candidates might each declare victory under different sets of rules." *See Rep. Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from denial of certiorari). And, while "[c]hanging the rules in the middle of the game is bad enough[,] … rule changes by officials who may lack authority to do so is even worse. When those changes alter election results, they can severely damage the electoral system on which our self-governance so heavily depends." *Id*. at 735.

Keeping the superior court's order in effect serves the public interest because the order simply preserves the status quo as it existed under Georgia law before the SEB's chaotic, eleventh-and-a-half-hour regulations. By contrast, vacating the order will only sow greater confusion among voters and the local officials tasked with accurately tabulating their votes. It is time, for the sake of voter's rights and general confidence, to stop changing the rules of the game and to just follow the Election Code as written.

V. The trial court properly enjoined the SEB Rules.

Lastly, Petitioners contend that *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) provides support for their stay request. They are mistaken.

"When an election is close at hand, the rules of the road should be clear and settled." *Grace, Inc., et al. v. City of Miami*, No. 23-12472, 2023 WL 5286232 (11th Cir. Aug. 4, 2023) (*per curiam*) (quotation omitted). Contrary to that principle, however, it was the ***SEB*** that attempted to fundamentally, and unconstitutionally, alter the manner in which Georgia elections are governed in the heat of an important election. The SEB had full knowledge that the rules they passed would not become effective until well after early voting had already begun, making them basically impossible to implement without mass confusion and opportunities for error.

It is important to maintain voters' faith in the electoral process and it is even more important to ensure the voters' fundamental constitutional right to have their

votes counted. *See Purcell*, 549 U.S. at 4-5. Upending the status quo regarding the manner in which elections are conducted and votes are counted, as the SEB tried to do, puts these rights in jeopardy.

"[T]he importance of maintaining the status quo on the eve of an election" cannot be understated. *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014). "The *Purcell* principle—that federal courts should usually refrain from interfering with state election laws in the lead up to an election—"is "designed to "protect[ ] the status quo." *Carson v. Simon*, 978 F.3d 1051, 1056 (8th Cir. 2020). And "[t]he status quo is one in which the challenged requirement has not been in effect, given the rules used in [a state's] last election," except as validly changed by the state legislature. *Republican Nat'l Comm. v. Common Cause of Rhode Island*, 141 S. Ct. 206 (2020). As the Attorney General advocated, *Purcell* logically applies to actions of the SEB that would cause as much, if not more, damage than a federal court's injunction that also changed the status quo.

Here the status quo is supplied by the Election Code. The General Assembly's election process, made in duly promulgated legislation governing all the issues in which the SEB now sticks its thumb, provide the status quo certainty that the elections will be conducted. And these statutory mandates, not the SEB's eleventh-hour changes, should govern.

The SEB's argument to the contrary is that it can wait until the election is underway, impose unconstitutional and improper rules, fundamentally alter the manner in which elections are handled, and that because it did so at the last minute, its unconstitutional rules cannot be enjoined. This argument flies in the face of all the foregoing. *Purcell* does not counsel otherwise.

CONCLUSION

The Court should deny Petitioners' Emergency Motion for Supersedeas and allow the superior court's order to remain in effect pending appeal.

Rule 20(3) requires certification that Briefs are less than 7,000 words. Contemporaneous with this filing, Respondents are seeking, as Petitioners did, permission to file a Brief of less than 8,000 words.

[*Signature on Following Page*]

Respectfully submitted this 21st day of October, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that there is a prior agreement with counsel for Petitioners and intervenors to allow documents in a PDF format sent via email to suffice for service. To that end, on the 21st day of October, 2024, I served a copy of the foregoing Brief of Respondents upon the counsel of record via e-mail:

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No. S25M0259

In the Supreme Court State of Georgia

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Petitioners,

v.

ETERNAL VIGILANCE ACTION, INC., ET AL.,

Respondents.

RESPONDENTS' MOTION TO FILE IN EXCESS OF WORD COUNT

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Respondents filed this appeal on an emergency basis and the Court entered an expedited briefing scheduled. Per that schedule, Petitioners filed a brief on Saturday October 19, 2024. With its brief, Petitioners requested to file in excess of the word count provided in Rule 20(3). The Court granted Petitioners' Request on October 20, 2024, allowing Petitioners to file a brief containing 8,011 words.

Respondents similarly seek to file a response in excess of Rule 20(3)'s 7,000 word limit. Petitioners request that they be able to file a brief containing 7,991 words in those portions of the brief to which the word limit applies. *See* Rule 20(6).

Respectfully submitted this 21st day of October, 2024.

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CERTIFICATE OF SERVICE

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