Case No. S25M0259

In the Supreme Court of Georgia

REPUBLICAN NATIONAL COMMITTEE, et. al.,

Appellants,

v.

ETERNAL VIGILANCE ACTION INC., et al.,

Appellees.

On appeal from the Superior Court of Fulton County
Civil Action No. 24CV011558

AMICUS BRIEF OF COBB COUNTY REPUBLICAN PARTY INC. AND SELECT COUNTY BOARD OF ELECTIONS MEMBERS

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Introduction

This emergency appeal shouldn't be necessary. The State Elections Board is charged with promulgating regulations to govern Georgia's elections. In September, and consistent with past practice, it adopted rules governing this November's general election. It did so after months of public comment on the proposed rules, where it heard and considered input from relevant stakeholders. Plaintiffs, dissatisfied with the decisions made by the Board, challenged seven of these rules. A month after Plaintiffs' filed suit and *after early voting had already begun*, the superior court substituted its judgment for that of the Board: it struck down all seven rules and enjoined elections officials from relying on them. It did this despite receiving almost no evidence about the alleged harm arising out of the patently commonsense rules.

The superior court did not stop there; it also decided first-impression constitutional challenges to the Board's authority, which will only amplify the resulting confusion, calling into question other Board rules mid-election. To get there, the superior court focused on a novel and unworkable application of Georgia's anti-delegation doctrine and held that the statute that has governed Board rulemaking for over five decades is constitutionally infirm. Even if the superior court is correct—and to be clear, it is not—this Court should not allow such an extraordinary ruling and injunction changing the rules for Georgia elections to be issued during the middle of a presidential election.

Election litigation is relatively common, perhaps increasingly so. Federal and state courts, however, only rarely enjoin election rules or statutes when an election is on the horizon (let alone *already begun*). This, as explained below, is far from that rare case. The superior court's deeply flawed analysis of the merits warrants reversal. But even if the merits ruling was sound, this Court should still reverse or stay the superior court's injunction given the ongoing election.

I. Interest of Amici Curiae

The Cobb County Republican Party Inc. (CCRC) is a Georgia not-for-profit corporation that is dedicated to protecting its individual members' right to vote in fair, transparent, and accurate elections. CCRC is composed of qualified electors who reside in Cobb County and who have already voted in the November general election or intend to vote in the upcoming general election. Additionally, CCRC's members regularly participate in the rulemaking process before the Board. CCRC and its members have a strong interest in ensuring that Georgia's voting system is fair and accurate, and that the upcoming election is conducted in accordance with Georgia law. CCRC's interests are both personal, to ensure Republican political candidates are given equal and fair access to the voters, and organizational, to ensure that their party members' votes are accurately counted and not diluted by error or intention.

This amicus brief is narrowly focused on certain critical issues in this case, including the federal and state constitutional issues and the

equitable considerations counseling against the superior court enjoining elections rules during an ongoing general election.

David Hancock. A Member of the Gwinette County Board of Election and Georgia voter. **Debra J. Fisher.** A member of the Cobb County Board of Elections and Georgia voter. **Emily Holcomb.** A member of the McIntosh Board of Elections and Georgia member. **Julie Adams.** A Fulton County Board of Registration and Elections Board Member. These County Board of Elections members have an interest in how the Georgia Board of Elections rules are implemented and administered for the upcoming November 2024 general election. They are familiar with Georgia election administration and the impact of the Board of Elections Rules enjoined by the superior court in this litigation. As members of County Boards of Elections, they have a direct interest in having access to all documents requested for purposes of certifying election results.

II. Argument

A. The State Election Board issued common sense rules consistent with its statutory authority and past practices.

The Board has existed since 1964 when it supplanted the former State Elections Commission. Ga. Laws 1964, Ex. Sess., p. 26, § 1 (1964). Its duties are prescribed in O.C.G.A. § 21-2-31, and include duties:

> (1) To *promulgate rules and regulations* 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;
>
> (2) To *formulate, adopt, and promulgate such rules and regulations*, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections; and, upon the adoption of each rule and regulation, the board shall promptly file certified copies thereof with the Secretary of State and each superintendent;
>
> ...
>
> (7) To *promulgate rules and regulations* to define uniform and nondiscriminatory standards concerning what constitutes a vote and what will be counted as a vote for each category of voting system used in this state;
>
> ...
>
> (10) To take such other action, consistent with law, as the board may determine to be conducive to the fair, legal, and orderly conduct of primaries and elections.

O.C.G.A. § 21-2-31 (emphasis added). The Board has been empowered to make rules since its inception. 1964 Ga. Laws, Ex. Sess., p. 35 (1964)

(former Ga. Code Ann. § 34 202(b)). There is no temporal limitation on the Board's ability to issue new rules—only the requirement that such rules fit within one of the authorized rulemaking purposes in section 21-2-31. The Board has regularly adopted new rules and issued substantive amendments to existing rules in relatively close proximity to a general election on a range of topics, including rules affecting voter access to polling places. *See, e.g.*, Ga. Comp. R & Regs. R. 183-1-6-.04 (addressing access for disabled voters, first adopted August 21, 1986 and revised October 8, 1986); Ga. Comp. R & Regs. R. 183-1-12-.01 and .02 (addressing the conduct of elections generally, repealed and replaced with a substantively different rules September 19, 2002); Ga. Comp. R & Regs. R. 183-1-14-.06 (addressing spoiled absentee ballots, substantively amended Oct. 6, 2020); Ga. Comp. R & Regs. R. 183-1-15-.05 (addressing statewide risk limiting audit, adopted October 14, 2020).

This case involves a challenge to seven rules issued in the Board's most recent pre-election rulemaking. Each of these rules are squarely within the authority conferred on the Board by section 21-2-31 and its duties to ensure constitutionally sound uniformity among the counties.

First, Rule 183-1-12-.02(c.2) provides a regulatory definition for precisely what it means when county officials certify the results of an election. Ga. Comp. R & Regs. R. 183-1-12-.02. Georgia's Election Code doesn't define this term: it simply requires that certification must occur no later than 5:00 p.m. on the Tuesday following Election Day. O.C.G.A.

§ 21-2-493(k) and this rule does not change that. The rule is easily within the authority granted by subsection 21-2-31(1).

Second, Rule 183-1-12-.12(f)(6) guarantees superintendents of elections the ability to examine all documentation related to the election prior to certification. Ga. Comp. R & Regs. R. 183-1-12-.12. Nothing in this rule contradicts existing Georgia law and it is again easily within the authority granted the Board by subsection 21-2-31(1), as it addresses the practices of superintendents of elections. It is also likely covered by subsections 21-2-31(2) and (10).

Third, Rule 183-1-14-.02(18) requires all locations receiving absentee ballots other than the Post Office and official drop-boxes to require documentation that the person delivering the absentee ballot is either the elector himself or someone on the list of relations permitted by O.C.G.A. § 21-2-385(a). Ga. Comp. R & Regs. R. 183-1-14-.02. If the documentation is not provided, Rule 183-1-14-.02(18) provides that the voter shall have the opportunity to cure the ballot. This rule is consistent with statute, which limits the persons who may deliver a voter's absentee ballot, and easily falls under the authority granted the Board in subsections 21-2-31(1) and (2).

Fourth, Rule 183-1-14-.02(19) requires 24-hour video surveillance of official drop-boxes, a practice consistent with other states employing 24-hour drop-boxes for absentee or mail ballots. Ga. Comp. R & Regs. R. 183-1-14-.02; *see, e.g.*, 8 Colo. Code. Reg. 1505-1 Rule 20.4.2(b) (requiring

video surveillance of "secure ballot areas" which include ballot drop-boxes). Nothing in Georgia law forbids this commonsense practice and its adoption is unmistakably within the authority granted by subsections 21-2-31(1), (2), and (10).

Fifth, Rule 183-1-13-.05 requires jurisdictions using central count optical scanning ballot tabulators to allow the major political parties and independent candidates to appoint poll watchers to observe this process at key points such as the "check-in area," the "duplication area," and "such other areas that the tabulation process are taking place," including the "adjudication of ballots." Ga. Comp. R & Regs. R. 183-1-13-.05. This is a wholly commonsense rule and consistent with O.C.G.A. § 21-2-408(c), which provides for party and candidate-appointed poll watchers. It is, again clearly within the authority granted by subsections 21-2-31(1), (2), and (10).

Sixth, Rule 183-1-12-.21 requires elections officials to provide the public with a daily report of the number voters who have participated in the election and to do so in a manner accessible 24-hours a day. Ga. Comp. R & Regs. R. 183-1-12-.21. Officials are already required to provide daily reporting of this nature under O.C.G.A. § 21-2-385; this Rule merely requires that the reporting be accessible 24-hours a day. Given Georgia's history of close elections, this rule makes sense and is consistent with the Board's authority under subsections 21-2-31(1) and (10).

Seventh, and finally, Rule 183-1-12-.12(a)(5) requires polling place officials to hand-verify the number of ballots from each ballot box to be sealed and transported to county elections officials. Ga. Comp. R & Regs. R. 183-1-12-.12. The Rule does not require hand tabulation, only a hand count of the number of ballots present—which three officials must agree with. This commonsense rule is consistent with many other states that require the hand counting of ballots on election day. *See, e.g.*, Cal. Elec. Code § 14428; Iowa Code § 50.16.

In the event of a discrepancy from precinct records, the discrepancy must be reconciled. This is precisely the sort of belt-and-suspenders approach to ensuring an accurate result that precinct-based voting allows and is consistent with O.C.G.A. § 21-2-410(a), which requires, among other things, that precinct officials "advise the election superintendent of the total number of ballots cast at such precinct." This makes the precinct officials responsible for accurately reporting the number of ballots cast. Rule 183-1-12-.12(a)(5) provides a default method for ensuring the required accuracy and is within the Board's authority under subsections 21-2-31(1) and (2). Ga. Comp. R & Regs. R. 183-1-12-.12.

At bottom, it is the Board's responsibility to issue the sorts of rules challenged in this litigation, even on the eve of an election. The superior court's slapdash analysis after taking weeks to issue a ruling cannot and should not be permitted to usurp the considered opinion of the Board.

B. *Purcell* counsels against enjoining the Board's Rules during an ongoing election.

The superior court enjoined seven rules governing the administration of the 2024 general election after voting had already started. Injunctive relief of this type is clearly barred by multiple equitable doctrines during or close to the start of an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see also Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."); *DeVisser v. Secy. of State*, 981 N.W.2d 30 (Mich. 2022) (Welch, J., concurring) ("[The *Purcell* principle] is, in essence, the equitable doctrine of laches applied in a unique way to election matters.").

Commonsense motivates this principle. As the Ohio Supreme Court explained just days ago, *Purcell* "stands 'for the common-sense principle that judges—novices in election administration—should not meddle in elections at the last minute ... because when they do, they are likely to do more harm than good." *State ex rel. Ohio Democratic Party v. LaRose*, --- N.E.3d ----, 2024 WL 4488054, at ¶29 (Ohio Oct. 15, 2024) (quoting *State ex rel. DeMora v. LaRose*, 217 N.E.3d 715, 744 (Ohio 2022) (DeWine, J., concurring in part and dissenting in part)).

This is so because rules governing elections are not promulgated in a vacuum. "[R]unning a statewide election is a complicated endeavor"

involving many actors, each of whom have varying authority, interests, and reliance concerns. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). State lawmakers and their delegees "make a host of difficult decisions about how best to structure and conduct the election." *Id.* "[T]housands of state and local officials ... participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards." *Id.* And, at every step, officials "communicate to voters how, when, and where they may cast their ballots through in-person voting ..., absentee voting, or early voting," and how those votes will be counted. *Id.* For their part, judges should avoid awarding relief that changes this process, or the resulting election rules, at the last minute. "It is one thing for state legislatures [or their delegees] to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a ... court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent" or, indeed, underway. *Id.*

It's no surprise then that the *Purcell* principle and its state-law equivalents are particularly acute when an election is ongoing. Courts routinely reject challenges out of hand—sometimes without reaching the merits—when relief would require changing the rules during an ongoing election. *See, e.g.*, *New PA Project Educ. Fund v. Schmidt*, No. 112 MM

2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (slip op.) (per curium) ("This Court will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election."); *Ohio Democratic Party*, 2024 WL 4488054, at ¶30 ("[I[f we were to grant a writ, we would effectively be ordering a change to election procedures after the election has already started. Intrusions into elections that would lead to disparate enforcement of election procedures and confusion among voters should be avoided."). *Jones v. Sec'y of State*, 239 A.3d 628, 630–31 (Me. 2020) (citing *Purcell* and concluding "[v]oting has begun with voters using this method, and there is a strong public interest in not changing the rules").

The Court here should exercise similar restraint by reversing—or at least staying—the superior court's order enjoining the Georgia election officials from relying on and enforcing the subject rules in the ongoing 2024 general election. Quixotically, despite the parties' extensive briefing on this issue, the superior court didn't acknowledge *Purcell* or the gravity of its order changing the election rules—after voting was underway.

This is reason enough to doubt the bona fides of order. But even so, while "it would preferable if [lower] courts did not contravene the *Purcell* principle [in the first instance] by rewriting state election laws close to an election," appellate courts must step in and "[c]orrect[] an erroneous lower court injunction of a state election rule." *See Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring) (collecting cases).

Not only did the superior court change the rules during an ongoing election, but the court rushed a ruling on foundational federal and state constitutional issues, thus amplifying the resulting confusion. Relief is inappropriate when "there is not sufficient time left" before the "general election for the parties to present their arguments and the trial court to research and rule upon th[e] difficult issue[s]." *O'Kelley v. Cox*, 278 Ga. 572, 576 (2004) (Hunstein, J., concurring). Here, those difficult issues include first-impression questions under the state's nondelegation doctrine (Order at 8–9), and the federal Constitution's election clause (*id.* at 9 (citing U.S. Const. art. I, § 4, cl. 1)). Indeed, according to the superior court, all the Board's rules are now constitutionally infirm under multiple federal and state constitutional theories and statutory claims. (*See id.* at 8–9.) It's one thing to strike down a discrete rule in abbreviated proceedings before an election—which *Purcell* and its state-law doctrines counsel against. It's an entirely different move to address novel constitutional theories that will undermine the Georgia Legislature's chosen design to administer elections, all in the middle of an ongoing presidential election. In fact, it's never been done.

Nor does the fact that an order from this Court will be further into early voting than the superior court's injunction mean this Court should hesitate to vacate the injunction. As Justice Kavanaugh noted before the 2020 election: such an argument would defy commonsense and "turn

Purcell on its head." *Democratic Nat'l Comm.*, 141 S. Ct. at 31–32 (Kavanaugh, J. concurring).

> Correcting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule. That obviously is not the law.

Id. The superior court should not have entered its sweeping injunction so late in the game; this Court should not hesitate to vacate it.

While it appears this Court has not had the occasion to rely on *Purcell* with regard to injunctions when an election is imminent, the Georgia federal courts have frequently considered the principle when adjudicating challenges to Georgia election procedures. The litigation surrounding the Georgia ban on certain "line warming" activities from SB 202 is particularly instructive. Plaintiffs sought to enjoin the Georgia rules shortly after SB 202 was adopted and the federal district court relied on *Purcell* to decline to enter an injunction in August, for an upcoming election with voting starting in October. *See In re Georgia Senate Bill 202*, 622 F. Supp. 3d 1312, 1345 (N.D. Ga. 2022) ("[T]he Court finds that the Purcell doctrine precludes the issuance of an injunction at this time."). The court declined to issue an injunction despite finding that plaintiffs had a likelihood of prevailing based on the First Amendment, and plaintiffs had established irreparable harm. 622 F. Supp. 3d at 1340. After declining to issue a preliminary injunction the litigation continued

and the court subsequently enjoined the law, after the current election cycle, when the Purcell considerations were no longer applicable. *In re Georgia Senate Bill 202*, 688 F. Supp. 3d 1300, 1320 (N.D. Ga. 2023) ("At this time, the earliest elections in Georgia are over six months away. The Court finds that Purcell does not apply here"). The litigation over SB 202 is hardly alone in applying *Purcell* to Georgia election rules. *See VoteAmerica v. Raffensperger*, 609 F. Supp. 3d 1341, 1369 (N.D. Ga. 2022) (applying *Purcell*); *Coal. for Good Governance v. Kemp*, No. 1:21-CV-02070-JPB, 2021 WL 2826094, at *4 (N.D. Ga. July 7, 2021) (same); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1325 (N.D. Ga.), *aff'd*, 981 F.3d 1307 (11th Cir. 2020) (same).

This Court should apply *Purcell* and reverse, or stay, the superior court's injunction issued in the middle of an election. Moreover, at minimum, because *Purcell* is born of equitable, commonsense considerations, this Court should apply the same considerations, sitting equity when considering the potential entry of an injunction that must be in the public interest. *Cf. W. Sky Financial, LLC v. State ex rel. Olens*, 793 S.E.2d 357, 369 (Ga. 2016) (moving party must show "granting the interlocutory injunction will not disserve the public interest.").

C. The Federal Constitution does not undermine the Board's Rules.

The superior court, sua sponte, held that the Board's rules violate the U.S. Constitution's Elections Clause. (*See* Order at 9 ("the SEB's rules

affecting the time, place and manner of the [sic] as to the election of the U.S. Representatives in the coming election are unconstitutional and void.").) As Defendants point out, this relief was not sought by Plaintiffs and the superior court's brisk paragraph-length analysis—relying on dissenting opinions—leaves much to be desired. For the following reasons, this Court should not give any weight to the superior court's drive-by speculation about the Elections Clause.

The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

U.S. Const. art. I, § 4, cl. 1. Nothing in this provision limits the ability of the Georgia Legislature, or other states for that matter, to provide for a State Election Board with the delegated authority.

First, the U.S. Supreme Court has never held that the Elections Clause operates to limit state election rules. Quite the contrary. In the leading modern precedent, Arizona delegated the exclusive power of redistricting for federal elections to an independent commission, fully depriving the legislature of any ability to engage in redistricting. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 792 (2015).[1] This was adopted by initiative. The Arizona State

[1] That some Justices and learned commentators disagree with the holding of *Arizona State Legislature* is irrelevant for this expedited litigation.

Legislature challenged the commission, arguing that the Elections Clause required "the Legislature thereof" to control the manner of elections in the form of redistricting. *Id.* The U.S. Supreme Court firmly rejected this argument:

> [W]e hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission. To restate the key question in this case, the issue centrally debated by the parties: Absent congressional authorization, does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts? The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.

Id. at 813. The reasoning of the Supreme Court in *Arizona State Legislature* is particularly instructive here. The "dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation." *Id.* at 814-15. Just so here. By way of contrast, the superior court appears to believe the Elections Clause works to "restrict" the way the Georgia Legislature "enact[s] legislation" by delegating specific rulemaking authority to the Board. That is contrary to the purpose of the Elections Clause. Consistent with this purpose, the Elections Clause was "surely not adopted to dimmish a State's authority to determine its own lawmaking process," *id.* at 824, such as the creation and empowerment of a State Election Board in Georgia.

Bolstering this conclusion, the Supreme Court has frequently opined that States are free to structure their own form of governance in ways that include complete delegations or even through the exercise of popular sovereignty through initiative or referendum provisions. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

Whatever may be said of the prudence of Georgia's creation of a State Election Board, the limited delegation of authority is by every measure less extreme than the delegation in *Arizona State Legislature* to an independent commission with exclusive jurisdiction over redistricting, which was fully upheld as constitutional. As a matter of black letter constitutional law, the Georgia Legislature could have provided the State Election Board with even more authority and power than it did. If the Arizona Independent Redistricting Commission complies with the U.S. Constitution, so too must the Georgia State Election Board.

Second, the superior court's federal constitutional frolic relies on the novel and discredited independent state legislature doctrine. *See* Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 Fla. St. U. L. Rev. 661, 672 (2001) (arguing the independent state legislature doctrine "does not rest on firm foundations of text, precedent, or history"); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 Mich. St. L. Rev.

571 (2022) (discussing independent state legislature theory). This Court should not use this litigation to breathe life into the notion that only the legislature, not a rulemaking entity like the Board, or judicial relief, can provide for election rules to govern a state's administration of federal elections.

Third, while this Court should not and need not resolve an Elections Clause challenge to the Board's rules, as a matter of first principles, the trial court was mistaken. The Elections Clause is best understood as falling within the exclusive provenance of Congress, not Courts, to enforce federal constitutional limits on state administration of elections. *See* U.S. CONST. art. I, § 5. ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members …"). There is a rich history and tradition supporting the conclusion that Congress, not the courts, stand as the body that can adjudicate disputes about a State's role over elections consistent with Section 4 of Article I, since that is the body that hears disputes in the very next section of Article I. *See generally* Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 Fla. St. U. L. Rev. 717, 735-36 (2016); *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (discussing the scope of Congress's power to adjudicate upon its own members' qualifications). Again, this Court need not determine which adjudicatory body has authority to enforce Section 4, and uncertainty over that point counsels against the novel application of the Elections Clause invited by the trial court.

Conclusion

For the foregoing reasons, this Court should reverse, or, at a minimum, stay the injunction issued by the superior court.

Rule 20 Certification

This submission does not exceed the word-count limit imposed by Rule 20.

DATED this 21st day of October 2024.

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Certificate of Service

I hereby certify that I caused to be served a true and accurate copy of the foregoing document to all parties and counsel of record via United States mail. In view of the expedited nature of this appeal, I have also sent same by electronic mail to below-listed counsel:

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