Case No. S25M0259

In the
Supreme Court of Georgia

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Applicants,

v.

ETERNAL VIGILANCE ACTION, INC., *et al.*,

Appellees.

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

OPPOSITION TO THE EMERGENCY MOTION FOR SUPERSEDEAS OF THE GEORGIA STATE CONFERENCE OF THE NAACP AND GEORGIA COALITION FOR THE PEOPLE'S AGENDA

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RESPONSE TO EMERGENCY MOTION FOR SUPERSEDEAS AND BRIEF IN OPPOSITION

The Georgia State Conference of the NAACP ("Georgia NAACP") and Georgia Coalition for the People's Agenda, Inc. ("GCPA") (together, "Intervenor-Plaintiff Appellees") respectfully submit this response and brief in opposition to Intervenor-Defendants the Republican National Committee and Georgia Republican Party Inc.'s ("Applicants") Emergency Motion for Supersedeas ("Emergency Motion" or "Application") to stay the injunction entered below (the "Injunction") pending disposition of this appeal.

The Application should be denied. Applicants—and Applicants only, not the State—ask this Court to act immediately to reinstate last-minute rule changes that upend Georgia's election laws and insert uncertainty and confusion into this already underway voting cycle. They do so without identifying any harm to themselves absent a stay and without acknowledging the substantial harms that the rule changes would cause to election workers and voters.

Applicants are also unlikely to succeed on the merits of their appeal. Two Superior Court judges have either restrained or enjoined the State Election Board's ("SEB") Amendment to Rule 183-1-12-.12(a)(5) (the "Hand Counting Rule"), which Plaintiff-Intervenor Appellees challenged, because the SEB lacked the authority to pass it. The Superior Court judges were right

to do so. The Hand Counting Rule has no basis in law, directly conflicts with multiple provisions of the Election Code, would cause chaos and confusion for election workers who would have to carry out the hand count without the benefit of uniform training or guidance from the State, and threatens to disenfranchise voters across the State. The State of Georgia has neither appealed the Superior Court's order, nor asked this Court for an emergency stay. This Court should not allow Applicants to jam through eleventh-and-a-half hour rules in the middle of an election to upend Georgia's electoral process.

JURISDICTIONAL STATEMENT

Applicants filed a notice of appeal and Emergency Motion in the Supreme Court of Georgia, erroneously seeking the Court's jurisdiction over a case involving challenges to the constitutionality of administrative rules and regulations. *See* Oct. 18, 2024 Order. Despite Applicants' error, this Court granted a writ of certiorari on the basis that the appeal presents issues of gravity and public importance. *Id*.

STATEMENT OF FACTS

Plaintiff-Intervenor Appellees do not contest the facts recounted in Applicants' brief. *See* RNC Mot. at 3. However, Applicants omit that, although the SEB rules at issue were promulgated approximately a month before early voting began, the rules have never been implemented. The

Reasonable Inquiry and Examination Rules were set to go into effect on September 4 and 16, respectively, but they never actually governed before the Injunction issued because no election had occurred. The remaining five rules at issue here, including the Hand Counting Rule, were not set to go into effect until October 22[1]—in the middle of early and absentee voting, and just two weeks before Election Day—and they never took effect because of the Injunction. Were this Court to grant Applicants' Emergency Motion and stay the Injunction, the challenged rules would go into effect for the very first time.

PROCEDURAL HISTORY

Plaintiff-Intervenor Appellees do not contest Applicants' procedural history. *See* RNC Mot. at 3. However, Plaintiff-Intervenor Appellees add that they filed a Complaint in Intervention challenging the Hand Counting Rule on October 1, 2024, and were granted leave by the Superior Court to intervene by right.

ARGUMENT

This Court should deny the Application for a stay pending appeal because none of the factors weighed by the Court favor Applicants. This Court "must weigh all of the pertinent equities, including the likelihood that

[1] *See* Administrative History, Chapter 183, Ga. Rules & Regs., https://rules.sos.ga.gov/GAC/183.

the appellant will prevail on the merits of his appeal, the extent to which the applicant will suffer irreparable harm in the absence of a stay or injunction, the extent to which a stay or injunction would harm the other parties with an interest in the proceedings, and the public interest." *Green Bull Ga. Partners, LLC v. Reg.*, 301 Ga. 472, 473 (2017). The Superior Court was right to enjoin the rules, and Applicants are unlikely to succeed on the merits of their appeal. And the other factors—irreparable harm to the Applicant, potential harm to others, and the public interest—also weigh strongly in favor of maintaining the Injunction.

I. Applicants Will Not Be Irreparably Harmed if the Existing Election Rules Are Maintained Pending Appeal.

A. Applicants Demonstrate No Harm to Themselves of Any Kind.

Applicants cannot demonstrate that they will suffer any harm, let alone irreparable harm, while the Injunction remains in place. Applicants do not even *attempt* to identify any harm to themselves absent a stay. *Cf. Stewart v. Johnson*, 358 Ga. App. 813, 817 (2021) (interlocutory injunction properly denied where, *inter alia*, applicants "offer[ed] no explanation" of how they would "suffer irreparable harm"). Applicants instead gesture at theoretical harms that the *State* may suffer if the rules do not take effect, RNC Mot. at 5-6, but the test is whether "the *applicant* will suffer irreparable harm in the absence of a stay." *Green Bull*, 301 Ga. at 473 (emphasis added). The State is

not the "applicant." The State did not appeal the Injunction, let alone move for a stay. Applicants cite no authority suggesting that they can rely on purported irreparable harm to a different party in order to obtain relief that that party did not seek.

Indeed, Applicants themselves have never demonstrated that they will be affected by the outcome of this case—which means they cannot obtain relief from this Court at all. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663 (2019) ("As the Court has repeatedly recognized, to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing."); *Morgan v. Miller*, 191 Ga. App. 803, 803 (1989) (dismissing party appeal from a declaratory judgment that did not affect the party's liability). Applicants make no attempt to argue that the judgment harms them or their members. Nor could they. As a practical matter, the judgment did not change anything about Georgia election law: At the time Plaintiffs filed this suit, the challenged rules were not in effect; they did not go into effect during the pendency of the litigation; and because of the judgment, they are *still* not in effect. Applicants have no right to effectuate the rules and cannot demonstrate any legally protected interest in doing so now with voting already underway.

The only supposed interests in the outcome of this case that Applicants have ever articulated are those cited in their unopposed motion to intervene.

See RNC Unopposed Expedited Mot. to Intervene ("RNC MTI Br."). None of those alleged interests support a finding that Applicants are aggrieved by the judgment. First, Applicants' vague concerns on behalf of themselves and their members about "the integrity of the election," RNC MTI Br. at 4, are the prototypical "generalized grievance." *See Perdue v. Barron*, 367 Ga. App. 157, 161-62 (2023), *cert. denied* (Oct. 11, 2023); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020). Second, while the RNC advanced a vague diversion-of-resources theory, it did not substantiate it with any specific allegations or supporting evidence, and there is no way the judgment could force RNC to change its "guidance concerning everything from poll-watching to absentee voting," RNC MTI Br. at 5, when the judgment simply maintained the status quo. Finally, Applicants have not articulated, let alone demonstrated with evidence, how keeping the judgment in place would harm Republican electoral candidates specifically, *see id*. As "[o]nly a party who is aggrieved by a judgment has the right to appeal that judgment," *In re B.R.W.*, 242 Ga. App. 232, 239 (2000), Applicants' utter lack of showing of harm from the judgment underscores the inappropriateness of their Application.

B. The State of Georgia Will Not Be Irreparably Harmed if the Existing Election Rules Are Maintained Pending Appeal.

Furthermore, Applicants fail to demonstrate that the State would suffer any irreparable harm absent a stay. "[T]here is no substantial harm to

[state] defendants in continuing to comply with rules they are currently following." *Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566, 568 (6th Cir. 2020). Applicants cite inapposite case law for the general proposition that the state is harmed when it cannot enforce the law, but the cited cases instead demonstrate why the Injunction should remain in place. *See* RNC Mot. at 5. The Injunction did not disturb a "decades-old" and "long-standing" Georgia election rule. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1280-83 (11th Cir. 2020). It preserved the rules as they existed before the SEB attempted to change them. *Cf. New Ga. Project*, 976 F.3d at 1284 ("[P]reserv[ing] the status quo [] promotes confidence in our electoral system."). Failure to grant a stay will not prevent the legislature "from applying its duly enacted legislation." *Org. for Black Struggle v. Ashcroft,* 978 F.3d 603, 609 (8th Cir. 2020). To the contrary, the Injunction *protects* duly enacted legislation from ultra vires interference. And nothing in the record suggests that the State has expended any resources to effectuate the rules. *Cf. A. Philip Randolph Inst. of Ohio v. LaRose*, 831 F. App'x 188, 190, 192 (6th Cir. 2020).[2]

[2] Applicants missed the key takeaway from that case: "The public interest would be best served by consistent rules regarding how to vote during the pendency of this lawsuit." *Id.* at 192. Here, advance voting is already underway without the challenged rules in place, so leaving the Injunction in place is what ensures consistency and uniformity during the pendency of the appeal.

Applicants' failure to identify irreparable harm to themselves or even to the State underscores the fact that no irreparable harm exists. The new rules challenged in this appeal have never taken effect. The Injunction maintains the laws that historically have governed Georgia's elections and preserves the set of rules and practices that all poll workers, election workers, and superintendents have been trained to execute. The Hand Counting Rule, the one which Intervenor-Plaintiffs specifically challenged, had not gone into effect prior to the Injunction, so there has been no period when the Hand Counting Rule was the governing procedure. In this case, the Injunction maintains the status quo—and it is a status quo carefully enacted by the Georgia Legislature's detailed Election Code.

Furthermore, early and absentee voting already has *begun*. If this Court were to stay the Injunction in the middle of early and absentee voting, the resulting pivot required by the poll workers, election workers, and the superintendent risks a level of confusion that would throw the mechanics of running the election into disarray and potentially disenfranchise voters across the State.

II. Intervenor-Plaintiff Appellees Will Be Irreparably Harmed if the Court Stays the Judgment.

Whereas Applicants have not identified a single harm that they will suffer absent a stay, Plaintiff-Intervenor Appellees will be irreparably

harmed if the Hand Counting Rule goes into effect. *See Green Bull*, 301 Ga. at 473 (courts must consider "the extent to which a stay or injunction would harm the other parties with an interest in the proceedings").

The Hand Counting Rule will irreparably harm Plaintiff-Intervenor Appellees' voting members because hand counting is unreliable, disrupts chain of custody procedures, introduces the potential for spoliation of ballots, jeopardizes ballot secrecy, and could result in counting delays that threaten the timely certification of election returns.[3] In his letter to the SEB, the State's chief election officer emphasized the "new procedures would disrupt existing chain of custody protocols under the law and needlessly introduce the risk of error, lost ballots,"[4] and, in his public statements about the Rule, he warned that "having poll workers handle ballots at polling locations after they have been voted introduces a new and significant risk to chain of custody procedures."[5] The threats of irreparable harm to Plaintiff-Intervenor Appellees and their members are real and imminent.

[3] *See* Compl. in Intervention ¶¶ 11, 17 (Oct. 1, 2024) ("Compl."); Ex. E to Plaintiff-Intervenors' Trial Br. (Declaration of Gerald Griggs ¶ 16 (Oct. 1, 2024) ("Griggs Decl.")); Ex. F to Plaintiff-Intervenors' Trial Br. (Declaration of Helen Butler ¶¶ 12-14 (Oct. 1, 2024) ("Butler Decl.")).

[4] Ex. I to Plaintiff-Intervenors' Trial Br. at 2 (SOS Letter to Mr. John Fervier, Chairman, Georgia State Election Board (Sep. 16, 2024)).

[5] Ex. B to Plaintiff-Intervenors' Trial Br. at 2 (Press Release, Ga. Sec'y of State, Raffensperger Defends Georgia's Election Integrity Act from Last Minute Changes Delaying Election Results (Aug. 15, 2024), *available at* https://sos.ga.gov/news/raffensperger-defends-georgias-election-integrity-act-last-minute-changes-delaying-election).

III. Leaving the Injunction in Place Serves the Public Interest.

The public interest weighs strongly in favor of keeping the Injunction in place pending appeal. The challenged rules would force disruptive changes to election procedures in the midst of the election; the Injunction preserves the status quo. Election officials have acknowledged that the Hand Counting Rule would harm voters and that they are not prepared to implement it smoothly across Georgia's 159 counties on such short notice. As noted above, the Secretary of State warned the SEB that the Rule "would disrupt existing chain of custody protocols under the law and needlessly introduce the risk of error, lost ballots, or fraud."[6] He also warned that "[i]t is far too late in the election process for counties to implement new rules and procedures, and many poll workers have already completed their required training."[7] After the SEB passed the Rule anyway, the Secretary confirmed that it would go into effect without the benefit of any training or uniform guidance from his office, advising that the "SOS Elections Division does not intend to provide additional training on SEB Rules" because, among other reasons, "poll worker training in many counties has already started and there is limited

[6] Ex. I to Plaintiff-Intervenors' Trial Br. at 2 (SOS Letter to Mr. John Fervier, Chairman, Georgia State Election Board (Sep. 16, 2024).
[7] *Id.* at 1.

time remaining for additional training . . . ."[8] The Georgia Association of Voter Registration and Election Officials (GAVREO), which comprises over 500 county election workers and officials across the State, similarly warned that its members were "gravely concerned that dramatic changes at this stage will disrupt the preparation and training processes already in motion for poll workers, absentee voting, advance voting, and Election Day preparation."[9] They also recognized that the changes "could ultimately lead to errors or delays in voting[.]"[10] Thus, staying the Injunction would revive a rule that election workers are not prepared to administer, that injects chaos and confusion into the election process, and that threatens to disenfranchise Georgia voters.

Indeed, another judge of the Fulton County Superior Court has recognized that the Hand Counting Rule represented an "11-and-one-half hour" rule change that would disrupt election administration at the expense of voters:

> The 11th-and-one-half hour implementation of the Hand Count Rule will make this coming election inefficient and non-uniform by the introduction of an entirely new process -- the precinct-level hand count -- that involves thousands of poll workers handling,

[8] Ex. H to Plaintiff-Intervenors' Trial Br. (SOS Guidance on Recent SEB Rule Amendments to 183-1-12.12(a)(5) (Oct. 1, 2024)).
[9] Ex. C to Plaintiff-Intervenors' Trial Br. (Release, Georgia Association of Voter Registration and Election Officials, GAVREO Calls on State Elections Board to Pause Future Rule Changes Ahead of Presidential Election (Aug. 21, 2024)).
[10] Id.

> sorting, and counting actual ballots in a manner unknown and untested in the era of ballot scanning devices. No training has been administered (let alone developed), no protocols for handling write-in ballots (which are handled separately from regular ballots).

Cobb Cnty. Bd. of Elections v. State Election Bd., No. 24CV012491, slip op. at 6 (Fulton Cnty. Sup. Ct. Oct. 15, 2024). The public interest is not served by injecting this degree of unnecessary chaos into election administration.

Applicants thus have it backwards when they argue that the Injunction "alter[s] the election rules on the eve of an election" in violation of the so-called *Purcell* principle. RNC Mot. at 6-7 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). As an initial matter, *Purcell* is an equitable principle rooted in "federalism concerns" and does not apply to state courts considering the legality of laws or rules passed by other state departments. *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 15 (Iowa 2020) (Appel, J., specially concurring). So this Court need not address this federal equitable principle at all. Moreover, the practical concerns that animated *Purcell* weigh in favor of leaving the Injunction in place because it was the *SEB*—not the Superior Court—that upended the status quo on the eve of an election.

In *Purcell*, the U.S. Supreme Court halted a federal court order issued just weeks before the election that would have required state election officials to change their existing procedures, explaining that upending the status quo could "result in voter confusion and consequent incentive to remain away

from the polls." 549 U.S. at 4-5. In this case, it is the rules that would have changed election procedures weeks out from the election, causing confusion and disorder. Indeed, the State Attorney General's Office advised the SEB that, "as a general matter, the passage of any rules concerning the conduct of elections are disfavored when implemented as close to an election as the rules on the September 20 agenda."[11] But the SEB passed the rules anyway, without regard to the practical effects of attempting to implement the rules across the State in a matter of weeks. As Applicants acknowledge, voting has *already begun* and the challenged rules are not in place. RNC Mot. at 4-5. If this Court were to stay the Injunction in the middle of voting, the Court would radically alter the status quo. *Purcell* counsels against a stay.

Applicants' other cited authorities do not support their view of the equities or support their skewed reading of *Purcell*. They point to *OPAWL-Bldg. AAPI Feminist Leadership v. Yost*, No. 24-2768, 2024 WL 4441458, at *3 n.1 (6th Cir. Oct. 8, 2024), where the court commented in dicta that *Purcell* does not apply to a state legislature's power to set rules. But this Court is not considering the state legislature's power to set rules; it is considering whether the equities favor staying an injunction of an administrative rule not yet in effect that was promulgated by an agency *in*

[11] Ex. D to Plaintiff-Intervenors' Trial Br. at 2 (Mem. re Request for Comments on Proposed Rules in Advance of September 20, 2024 State Election Board Meeting from Ga. Dep't of Law to the SEB (Sept. 19, 2024)) (citing *Purcell*, 549 U.S. at 4-5).

conflict with the statutory scheme enacted by the legislature. The concurring opinion in *O'Kelley v. Cox*, 278 Ga. 572, 576 (2004), concerned a constitutional challenge to a ballot amendment passed by the General Assembly in 2004, and is similarly unhelpful for Applicants. *Id.* at 572. There, the plaintiff waited until after advance voting had already begun to challenge the amendment. *Id.* at 576 (Hunstein, J., concurring). *O'Kelley* is inapposite, as the challenged rules are themselves an "election eve" change and Plaintiffs and Plaintiff-Intervenors acted expeditiously to prevent them from taking effect.

IV. Applicants Are Unlikely to Succeed on the Merits of this Appeal.

The Court should also leave the Injunction in place pending appeal because Applicants are unlikely to succeed on the merits. Applicants claim to represent the State's interest in enforcing election laws, but the State declined to appeal, and Applicants cannot appeal unless they can demonstrate that the judgment directly harms them. *See Bethune Hill*, 587 U.S. at 663; *see also Morgan*, 191 Ga. App. at 803. Moreover, as the lower court found, the rules promulgated by the SEB conflict with the Election Code and are thus outside the Board's authority. Applicants take issue with the Superior Court's broad statements about the SEB's constitutional authority, but none of those statements was necessary to the holding. Even

though the lower court issued its ruling on numerous grounds, the Court need not consider the broad grounds regarding the non-delegation doctrine or the federal Elections Clause. *See Harper v. Burgess*, 225 Ga. 420, 421 (1969) ("It is an established rule of this court that it will never decide a constitutional question if the decision of the case presented can be made upon other grounds."). That the challenged rules conflict with statute is sufficient in itself to affirm. *See Gwinnett Cnty. v. Gwinnett I Ltd. P'ship*, 265 Ga. 645, 646 (1995) ("[A] judgment right for any reason should be affirmed.").

A. The Lower Court Had Jurisdiction to Issue Its Judgment.

Applicants only contest Plaintiffs' standing to challenge one rule and do not challenge Plaintiff-Intervenors' standing at all. *See* RNC Mot. at 26. This Court is likely to hold on appeal that the Superior Court had jurisdiction over the action and the authority to issue relief.

First, this Court is likely to hold that at least one plaintiff had standing to challenge the Hand Counting Rule. "There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy[.]" *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 381, 385 (2022) (citation and quotation marks omitted). Georgia NAACP and GCPA demonstrated actual injury to themselves as organizations because the Hand Counting Rule threatened to "impair the

organization[s'] ability to provide [their] services or to perform [their] activities and, as a consequence of that injury, require a diversion of [the organizations'] resources to combat that impairment." *Id.* at 386.[12] The Hand Counting Rule in fact "threaten[ed] to undo much of the hard work" that Georgia NAACP and GCPA had done to "register[] voters and mobilize[e] them to the polls in the first place by increasing the risk that their ballots are thrown out."[13] And the Rule would have directly impeded their core business activities of "registering, educating, and activating voters to show up at the polls" and "helping voters [cure] provisional ballots,"[14] by forcing them to redirect their limited "staff and volunteer time away from planned activities and campaigns to troubleshoot any issues that arise from the application and administration of the Hand Counting Rule on Election Day."[15] That is precisely the type of evidence of harm that was missing in *Black Voters Matter Fund*, 313 Ga. at 387, but has been recognized as sufficient to confer organizational standing. *See, e.g.*, *Fair Fight Action, Inc. v. Raffensperger*,

[12] The U.S. Supreme Court agreed with this Court's reasoning in *Black Voters Matter Fund* when it reaffirmed that an organization suffers a cognizable injury when a defendant's actions have "directly affected and interfered with [the plaintiff organization's] core business activities," *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024), but explained that "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action," *id.* at 394. It left undisturbed *Havens*'s holding that an organization can establish standing where it must divert resources from its core activities because of a challenged policy.
[13] Compl. ¶¶ 13, 20; Griggs Decl. ¶ 16; Butler Decl. ¶¶ 9-19.
[14] Compl. ¶¶ 11, 12, 18, 19; Griggs Decl. ¶¶ 20-21; Butler Decl. ¶¶ 17-19.
[15] Compl. ¶¶ 12, 18, 19; Griggs Decl. ¶¶ 20-21; Butler Decl. ¶¶ 17-19.

634 F. Supp. 3d 1128, 1180 (N.D. Ga. 2022) (organizations demonstrated actual impairment of their core programming to address the effects of the challenged statutes on their members).

Georgia NAACP and GCPA also demonstrated associational standing. "[V]oting is a personal right" and infringement upon that right is a cognizable injury in Georgia. *Black Voters Matter Fund*, 313 Ga. at 388 (finding that members of an association challenging the creation of new judicial districts "would have standing to sue in their own right" had the association shown that it had members eligible to vote in the relevant judicial district). As noted *supra* in Section II, their members are Georgia voters who faced an immediate, heightened risk of disenfranchisement because of the rule. And protecting the right to vote is central to both organizations' missions.[16] Thus, Plaintiff-Intervenor Appellees satisfied the germaneness requirement for standing. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1315-17 (11th Cir. 2021) (holding that a lawsuit challenging state voter identification law was germane to the purposes of the Alabama NAACP).

This Court is also likely to hold that Georgia NAACP and GCPA demonstrated statutory standing under the Declaratory Judgment Act,

[16] *See* Compl. ¶¶ 9-10, 14-16; Griggs Decl. ¶¶ 3-5; Butler Decl. ¶¶ 3-8.

O.C.G.A. § 9-4-2(a). To obtain declaratory relief, a plaintiff must "allege[] threatened future injury that a declaration would prevent them from suffering," *Cobb Cnty. v. Floam*, 319 Ga. 89, 99 (2024), and "that they are at risk of taking some undirected future action incident to their rights and that such action might jeopardize their interests," *id.* at 100 (emphasis omitted).

Georgia NAACP and GCPA alleged—and proved with evidence—that their voting members faced uncertainty about how they could act to avoid disenfranchisement if the rule remained in place. Unlike in *Floam*, where the election had already occurred and the plaintiffs therefore had "no decision to make about where to vote," 319 Ga. at 100, Plaintiff-Intervenor Appellees' voting members *did* have crucial decisions to make about how to protect their right to vote if the Hand Counting Rule were allowed to take effect.[17] Their voting members had to decide whether to vote on Election Day, when the Hand Counting Rule would have applied, or to instead endeavor to vote during in-person advance voting or apply to vote by mail.[18] And Plaintiff-Intervenor Appellees had to advise their members on those same questions.[19] Therefore, Plaintiff-Intervenor Appellees demonstrated that they were

[17] The same was true of Plaintiff James Hall. *See* Hall Decl. ¶¶ 3, 14. Plaintiff Hall also had standing because he is a member of an election board that is directly regulated by the challenged rules. *See* Plaintiffs' Trial Br. at 21; Hall Decl. ¶ 16.

[18] *See* Ex. J to Plaintiff-Intervenors' Trial Br. (Declaration of Helen Butler ¶¶ 3-4 (Oct. 11, 2024) ("10/11 Butler Decl.")).

[19] *See id.*

"insecure about some future action they plan to take" and have a clear "need to declare rights upon which their future conduct depends." *Floam*, 319 Ga. at 101.

B. The SEB Lacks Authority to Promulgate the Hand Counting Rule.

This Court is likely to affirm the lower court's judgment as to the Hand Counting Rule. As a state agency, the SEB only has the authority to issue rules to the extent the rules are authorized by statute. *HCA Health Servs. of Ga., Inc. v. Roach*, 265 Ga. 501, 502 (1995). The SEB has been authorized to promulgate certain rules, but a statutory grant of rulemaking authority is not an unlimited grant of authority. *See Ga. Real Est. Comm'n v. Accelerated Courses in Real Est., Inc.*, 234 Ga. 30, 32-33 (1975) (administrative rules must be both authorized by statute and reasonable). As such, the Election Code is the touchstone for whether any given rule is beyond the authority of the SEB. It can only "adopt rules and regulations to carry into effect a law already passed" or otherwise "administer and effectuate an existing enactment of the General Assembly." *HCA Health Servs. of Ga.*, 265 Ga. at 502 (citation omitted). Where, as here, a rule "attempts to add" requirements or procedures inconsistent with statute, it is invalid. *Dep't of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995). It is not enough merely to invoke the SEB's authorizing statute to bless every rule promulgated by that body, as

Applicants appear to do. *See* RNC Mot. at 9. Rather, even if a state agency has been granted certain authority to promulgate rules, where those rules conflict with other governing statutory provisions, they must fail. Any "agency rule" that is "unauthorized by statute" is not consistent with law and thus "[can]not stand." *Ga. Real Est. Comm'n*, 234 Ga. at 32.

The SEB is authorized to promulgate only those "rules and regulations, *consistent with law*, as will be conducive to the fair, *legal*, and *orderly* conduct of primaries and elections," O.C.G.A. § 21-2-31(2) (emphases added), and 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) (emphasis added). Applicants invoke this statute throughout their motion, but fail to contend with the fact that the Hand Counting Rule is flatly inconsistent with other portions of the Election Code, such that the Rule is likewise inconsistent with the SEB's authorizing act, which allows only those rules that are "consistent with law."

None of the statutes cited by the SEB provide a basis for the Hand Counting Rule; on the contrary, the cited statutes are either inapposite or directly contradict the Hand Counting Rule. As such, the Hand Counting Rule does not "carry into effect a law already passed" or otherwise "merely

administer and effectuate an existing enactment of the General Assembly." *HCA Health Servs. of Ga.*, 265 Ga. at 502.

1. *The statutes cited by the SEB as the basis of its authority do not support the promulgation of the Hand Counting Rule.*

Applicants ignore that the three statutory provisions called out by the Superior Court as not providing a basis for the Hand Counting Rule are the same three statutory provisions invoked by the SEB *itself* as the basis for the Rule. *Compare* RNC Mot. at 30 *with* State Election Board, Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.12 Tabulating Results at 3 (Aug. 21, 2024), https://sos.ga.gov/sites/default/files/2024-08/seb-notice_of_proposed_rulemaking_183_1_12_.12a5_hand_count.pdf. The SEB cited O.G.C.A. § 21-2-483(a), O.C.G.A. § 21-2-436, and O.C.G.A. § 21-2-420(a) as the bases for its authority for adopting the Rule, but those statutes provide no such authority. Applicants now agree that Sections 21-2-436 and 21-2-483(a) are inapposite as they govern procedures at locations other than the precincts where the Hand Counting Rule would apply. RNC Mot. at 30-31.

The third of these cited provisions likewise does not provide a basis for the Hand Counting Rule. Section 21-2-420(a) provides a general directive for poll officers in each precinct to "complete the required accounting and related documentation for the precinct" and to "advise the election superintendent of the total number of ballots cast at such precinct and the total number of

provisional ballots cast." O.C.G.A. § 21-2-420(a). It also calls for the public posting of those totals. O.C.G.A. § 21-2-420(b). Contrary to Applicants' argument, RNC Mot. at 31, the "required accounting" referenced in this section is that which is specified in the subsequent statutory provisions, depending on the type of voting system used in the precinct in question. *See, e.g.*, O.G.C.A. §§ 21-2-436, 21-2-454, 21-2-485. Section 21-2-420(a) must be read in concert with these provisions that detail the required accounting, particularly as this Court has consistently recognized that when construing statutes, they must be read as a whole. *See La Fontaine v. Signature Rsch., Inc.*, 305 Ga. 107, 108 (2019); *McLeod v. Burroughs*, 9 Ga. 213, 218 (1851). None of the accounting provisions provide a basis to allow for hand counting, and indeed, the Hand Counting Rule conflicts with the required statutory procedures. *See infra* Section IV.B.2.

2. The Hand Counting Rule conflicts with numerous provisions of the Georgia Election Code.

The current system of election administration clearly sets forth statutory duties to be carried out by poll officers upon the closing of the polls. *See* O.G.C.A. §§ 21-2-454, 21-2-485. The Hand Counting Rule conflicts with these statutes, which mandate the specific steps that poll officers must take immediately upon the closing of the polls on Election Day.

In precincts using voting machines, "[a]s soon as the polls are closed and the last elector has voted," poll officers must "immediately" lock and seal the machine. O.G.C.A. § 21-2-454(a). Poll officers must then canvass the returns by "read[ing] from the counters or from one of the proof sheets" the "result as shown by the counter numbers." O.G.C.A. § 21-2-455(a). The Hand Counting Rule conflicts with these statutory provisions. The statute—contrary to the Hand Counting Rule—requires that the machines be "immediately" locked and the number of votes cast to be determined from the counter on the machine. O.G.C.A. § 21-2-454(a). Further, the statute—unlike the Hand Counting Rule—clearly specifies how the number of votes cast is to be determined. O.G.C.A. § 21-2-454(b). The Hand Counting Rule clearly conflicts with the directive of Section 21-2-454 that the machines be locked "immediately," O.G.C.A. § 21-2-454(a), because it calls for a prolonged process in which multiple poll workers repeatedly handle and count the ballots and reconcile their counts, and it allows poll workers to delay starting that atextual exercise until the next day, Amendment to Rule 183-1-12-.12(a)(5)(a).

In precincts using optical scanning voting equipment, "[a]s soon as the polls are closed and the last elector has voted," poll officers are required to, if tabulation occurs at a central count location, "[s]eal the ballot box and deliver the ballot box to the tabulating center," and once delivered, examine the

ballots and separate the write-in votes, O.G.C.A. § 21-2-485(1). The procedures for counting at the tabulation center occur "under the direction of the superintendent." O.G.C.A. § 21-2-483(a). If tabulation occurs at the precinct, "[a]s soon as the polls are closed and the last elector has voted," poll officers are to "[f]eed ballots from the auxiliary compartment of the ballot box, if any, through the tabulator" and after all ballots are put through the tabulator, "cause the tabulator to print out a tape with the total votes cast in each election." O.G.C.A. § 21-2-485(2).

The use of "immediately" and "[a]s soon as" in Sections 21-2-454 and 21-2-485 underscores that the Hand Counting Rule is without basis in statute, as it introduces a lengthy process that need not even begin until the day after polls close, Amendment to Rule 183-1-12-.12(a)(5)(a). In assessing the meaning of statutes, Georgia courts begin their analysis with "familiar and binding canons of construction," including "avoid[ing] a construction that makes some language mere surplussage." *Traba v. Levett*, 369 Ga. App. 423, 426 (2023) (citation omitted); *see also Lucas v. Beckman Coulter, Inc.*, 303 Ga. 261, 263 (2018). To find that the Hand Counting Rule does not conflict with the statutes governing the procedures at the close of polls would require impermissibly disregarding the language "immediately" and "[a]s soon as" in Sections 21-2-454 and 21-2-485.

The Hand Counting Rule also conflicts with a number of other provisions of the Election Code, such that it is plain that the Rule is not effectuating the Election Code, *see HCA Health Servs. of Ga.*, 265 Ga. at 502, and does not advance "orderly conduct of primaries and elections," O.G.C.A. § 21-2-31(2).

The Hand Counting Rule provides that following hand counting by three poll officers, the poll officers are to "each sign a control document containing the polling place, ballot scanner serial number, election name, printed name with signature and date and time of the ballot hand count." Amendment to Rule 183-1-12-.12(a)(5). No such form otherwise exists for the conduct of Georgia elections, and the Code empowers the Secretary of State to provide to the superintendents "all blank forms . . . and such other supplies as the Secretary of State shall deem necessary and advisable." O.C.G.A. § 21-2-50(a)(5). This does not include the "control document." To the extent the Hand Counting Rule relies on someone other than the Secretary to create the "control document," it directly conflicts with statute. And as the Secretary has already made clear in his statement regarding the challenged rules, he does not consider the Hand Counting Rule (and thus its related materials) to be "necessary and advisable," O.C.G.A. § 21-2-50(a)(5).

The Hand Counting Rule also requires that "if the numbers recorded on the precinct poll pads, ballot marking devices [BMDs] and scanner recap

forms do not reconcile with the hand count ballot totals, the poll manager shall immediately determine the reason for the inconsistency; correct the inconsistency, if possible . . . .” Amendment to Rule 183-1-12-.12(a)(5). But assigning this task of determining the reason for such a count inconsistency to the relevant poll manager reassigns the statutory responsibilities of the superintendent to any one of many poll managers, something an agency rule may not do. *See Anderson*, 218 Ga. App. at 529 (regulation invalid where it reassigned decisions that were left to the Department’s discretion by statute to another official). Section 21-2-493(b) authorizes county superintendents to “compare the registration figure with the certificates returned by the poll officers showing the number of persons who voted in each precinct or the number of ballots cast” and if there is a discrepancy, to “investigate[]” the issue. O.G.C.A. § 21-2-493(b). The Hand Counting Rule makes it so that instead of any such discrepancies being investigated by the superintendent, poll managers now have the first, and potentially only, opportunity to address such numerical inconsistencies.

By its own terms, the Hand Counting Rule allows for the process described in the Rule “to start the next day and finish during the week designated for county certification.” Amendment to Rule 183-1-12-.12(a)(5). But the Georgia Election Code requires that “[a]s soon as possible but not later than 11:59 P.M. following the close of the polls on the day of” the

Election, the superintendent must publicly post and report to the Secretary of State the "number of ballots cast at the polls on the day of the . . . election," among other things. O.C.G.A. § 21-2-421(a)(1). The Hand Counting Rule makes it impossible for the superintendent to comply with this statutory duty.

A review of the Election Code makes clear that the Hand Counting Rule is not authorized by statute and as such it cannot stand. *See Ga. Real Est. Comm'n*, 234 Ga. at 32. Because the Hand Counting Rule conflicts with multiple provisions of the Election Code, Applicants are unlikely to succeed on the merits of their appeal.

CONCLUSION

Because all of the relevant factors counsel against the issuance of a stay pending appeal, this Court should deny Applicants' motion.

RULE 20 CERTIFICATION

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

Respectfully submitted this 21st day of October, 2024,

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