Cases No. S25A0362, S25A0490

In the
Supreme Court of Georgia

STATE OF GEORGIA, REPUBLICAN NATIONAL COMMITTEE, AND GEORGIA REPUBLICAN PARTY

CONSOLIDATED APPELLANTS,

v.

ETERNAL VIGILANCE ACTION, INC. ET AL

Appellees.

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

Amicus Brief in support of Appellants State of Georgia, Republican National Committee, and Georgia Republican Party by Voters Organized for Trusted Election Results in Georgia, the Libertarian Party of Georgia, the Georgia Green Party and the Constitution Party of Georgia

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INTEREST OF THE *AMICI CURIAE*

VOTERGA is a non-profit, non-partisan, tax-exempt organization under IRC 501(c)(3) created by a coalition of citizens working to restore election integrity in Georgia. The organization advocates for independently verifiable, auditable, recount-capable and transparent elections. Its members have successfully lobbied the Georgia Legislature to make ballot images a matter of public record. Its members have also been a part of several litigations regarding the rights of voters in challenging election activities. The Libertarian, Green and Constitution Parties of Georgia are political bodies that seek to ensure that elections conducted in Georgia are conducted freely, fairly, accurately, securely and in accordance with state and federal laws. These bodies, collectively, support the Appellants' appeal.

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BACKGROUND

Since its inception in 1964, the State Election Board (SEB) has been expressly delegated exclusive authority to promulgate rules and regulations, consistent with law, for the purposes of uniformity of election procedures across Georgia counties and to make ensure such processes are conducive to the fair, legal, and orderly conduct of primaries and elections.

During the course of its activities in 2024, the SEB was presented with roughly 21 rule proposals by citizens who submitted the proposals in accordance with SEB procedures. In addition, two rules were submitted by sitting members of the SEB. Ten of the rules were approved and adopted as new regulations. Plaintiffs made seven challenges including six rules, one of which was challenged in two parts.

Each of the approved rules was posted for a 20-day period at different times before the rule was heard in open discussion. A separate vote was then taken to determine if each rule should advance to rule making. Upon completion of rulemaking, each rule was posted for 30-day review period before another open discussion and a final vote taken to determine if it should be adopted.

JURISDICTIONAL STATEMENT

The Superior Court entered a final judgment granting a permanent injunction on October 16, 2024. Appellants timely noticed an appeal to this Court. Appellants asserted that the trial court's Order is directly appealable to this Court under Georgia Constitution Article VI, Section VI, Paragraphs II(1) and III(2) and O.C.G.A. § 5-6-34(a)(1) on the basis that the appeal presents issues of gravity and public importance.

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Procedural History

Plaintiffs Eternal Vigilance Inc., Scot Turner, and James Hall filed a suit in Superior Court seeking declaratory and injunctive relief that four election administration regulations promulgated by the State Elections Board were unlawful. They later amended their complaint to add similar claims against three additional regulations. Appellants Republican National Party and Georgia Republican Party were granted intervention as of right in the trial court to defend the regulations. The trial court, after full briefing and a hearing, agreed and entered an order on October

16, 2024 declaring the regulations unlawful and enjoining their enforcement. Both Appellants timely noticed an appeal to this Court which consolidated the cases.

ARGUMENT

In evaluating an administrative rule our courts ask first whether it is authorized by statute, and if so, then evaluate if it is reasonable. *Georgia Real Est. Comm'n v. Accelerated Courses in Real Est., Inc.*, 234 Ga. 30, 35, 214 S.E.2d 495, 498 (1975) "The promulgation of rules authorized by statute is not an unconstitutional usurpation of legislative power." *Id*. At 499 While agency regulations may not make new law, the legislature "may outline the duty" and leave "making reasonable regulations" to the designated agency. See, e.g., *S. Ry. Co. v. Melton*, 133 Ga. 277, 65 S.E. 665, 668 (1909) All duly enacted regulations carry a presumption of validity. *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 638, 572 S.E.2d 638, 641 (2002) Georgia courts give great deference to executive agencies' policy decisions, because executive agencies provide a "high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches" that enables such agencies to "make rules and enforce them in fashioning solutions to very complex problems." *Bentley v. Chastain,* 242 Ga. 348, 350–351(1), 249 S.E.2d 38 (1978). "Such is the practical application of the separation of powers doctrine between the executive and judicial branches inherent in the Georgia Constitution." *Id.* at 352, 249 S.E.2d 38. "Such judicial deference ends only when the executive branch agency's action is contrary to the plain language of the statute empowering such agency to act

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by the General Assembly." Sawnee Elec. Membership Corp. v. Ga. Public Svc. Comm., 273 Ga. 702, 705–706, 544 S.E.2d 158 (2001)

Here, the trial court adopted an excessively narrow view of the authority delegated by the legislature to the State Election Board, and in so doing erred in finding each regulation was unauthorized by statute.

The SEB regulation authority in regards to rule making and related actions in questions is defined by O.C.G.A. § 21-2-31 in pertinent part. The SEB is delegated broad statutory authority as follows:

(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; . . .

(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

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Correct citations of Georgia Election law show that the court erred in declaring newly implemented regulations as illegal, unconstitutional and void as follows:

I. THE COURT ERRED IN FAILING TO RECOGNIZE THAT SEB RULE 183-1-12-.02(c.2) CONCERNING CERTIFICATION COMPLIES WITH O.C.G.A. § 21-2-70 (8)

Under Georgia law the term "superintendent" refers to a county election board that is typically comprised of three or five members from the county or it can refer to the county probate judge for counties that do not have an election board. The superintendent duties in pertinent part are: "To instruct poll officers and others in their duties, calling them together in meetings whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several precincts of his or her county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted;" O.C.G.A. § 21-2-70 (8).

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The court accurately cited on Page 5 of its order how SEB Rule 183-1-12-.02(c.2) provides that "to certify election returns, a superintendent must 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".

However, the court erred in failing to identify the correct corresponding statute for the rule when it found "The reasonable inquiry provision of this rule is not part of O.C.G.A. § 21-2-493 certification process and it adds an additional and undefined

step into the certification process. As such, it is inconsistent with and unsupported by O.C.G.A. § 21-2-493."

The correct corresponding statute is not O.C.G.A. § 21-2-493. The correct corresponding is O.C.G.A. § 21-2-70(8)` that requires superintendents and their members "to inspect systematically and thoroughly the conduct of primaries and elections." This provision is well beyond the requirement of a "reasonable inquiry" and therefore the rule does not add any additional step to the process, nor is it undefined since the systematic and thorough inspection has already been defined by Georgia law. SEB Rule 183-1-12-.02(c.2) is "consistent with law" as explicitly defined by O.C.G.A. § 21-2-70 (8).

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II. THE COURT ERRED IN FAILING TO RECOGNIZE THAT SEB RULE 183-1-12-.12 CONCERNING CERTIFICATION DOCUMENTS COMPLIES WITH O.C.G.A. § 21-2-493(b)

Georgia certification law states in pertinent part that "The superintendent, before computing the votes cast in any precinct, shall 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. If, upon consideration by the superintendent of the returns and certificates before him or her from any precinct, it shall appear that the total vote returned for any candidate or candidates for the same office or nomination or on any question exceeds the number of electors in such precinct or exceeds the total number of persons who voted in such precinct or the total number of ballots cast therein, such excess shall be deemed a discrepancy and

palpable error and shall be investigated by the superintendent; and no votes shall be recorded from such precinct until an investigation shall be had. Such excess shall authorize the summoning of the poll officers to appear immediately with any primary or election papers in their possession. **The superintendent shall then examine all the registration and primary or election documents whatever relating to such precinct in the presence of representatives of each party, body, and interested candidate.** Such examination may, if the superintendent deems it necessary, include a recount or recanvass of the votes of that precinct and a report of the facts of the case to the district attorney where such action appears to be warranted." O.C.G.A. § 21-2-493(b)

The court accurately stated on Page 5 of its order that "SEB regulation 183-1-12.12 allows county boards to make available to any individual member of a county board of election all election related documentation created during the conduct of elections prior to certification results."

However, the court erred when it concluded that: "This provision is directly inconsistent with the Election Code, which provides the time, manner, and method in which election-related documents must be produced and maintained. See O.C.G.A. 21-2-493."

O.C.G.A. § 21-2-493(b) clearly states that: "The superintendent shall then examine all the registration and primary or election documents." The rule's provision "to make available to any individual member of a county board of election all election

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related documentation created during the conduct of elections prior to certification results." is "consistent with law" as the SEB enabling statute requires.

The court erred even more grievously when it then concluded: "The SEB rule creates a statutorily unbounded scope under which superintendents can consider unauthorized materials when tabulating, canvassing, and certifying election results.":

O.C.G.A. § 21-2-493(b) makes it clear that there are no unauthorized materials that are unavailable to superintendents when they are certifying elections. Thus, this provision cannot be "inconsistent with the statutory framework" as the court declared on Page 5 of its order. SEB regulation 183-1-12.12 is not only "consistent with law" but also "conducive to the fair, legal, and orderly conduct of primaries and elections" as the law requires.

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III. THE COURT ERRED IN FAILING TO RECOGNIZE THAT SEB RULE 183-1-14-.02(18) CONCERNING ABSENTEE BALLOT DELIVERY COMPLIES WITH O.C.G.A. § 21-2-385

Georgia election law concerning those dropping off envelopes for absentee ballots states in pertinent part "Such envelope shall then be securely sealed and the elector shall then personally mail or personally deliver same to the board of registrars or absentee ballot clerk, provided that mailing or delivery 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. The absentee ballot of a disabled elector may be mailed or delivered by the caregiver of such disabled elector, regardless of whether such caregiver resides in such disabled elector's household. The absentee ballot of an elector who is in custody in a jail or other detention facility may be mailed or delivered by any employee of such jail or facility having custody of such elector." O. C, G.A, 21-2-385.

The court accurately stated on Page 5 of its order that: "SEB Rule 183-1-14-.02(18) requires that a person delivering an absentee ballot provide a signature and photo ID at the time the absentee ballot is delivered. O.C.G.A. § 21-2-385(a) provides that absentee ballots may be mailed, or hand delivered by a voter'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. Additionally, this provision allows a caregiver of any disabled elector to mail or deliver that elector's ballot. Neither statute requires presentment of a signature or photo ID by the authorized person delivering the ballot."

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However, the court then erred in claiming that: "The SEB thus has no authority to require such presentment as a condition of accepting and counting an otherwise properly delivered ballot. Thus, SEB Rule 183-1-14-.02(18) is unsupported by and contrary to O.C.G.A. § 21-2-385(a) and is unenforceable and void."

The reference Election Code outlines the specific family members that can turn in a ballot for a voter. It also provides for caregivers to turn in ballots for disabled voters. SEB Rule 183-1-14-.02(18) assists in enforcing the law by helping to ensure

that individuals turning in ballots for those voters are identified as in compliance with O.C.G.A. § 21-2-385(a). Therefore, the regulation is "consistent with law" and it is "conducive to the fair, legal, and orderly conduct of primaries and elections" as the law requires.

IV. THE COURT ERRED IN FAILING TO RECOGNIZE THAT SEB RULE 183-1-14-.02(19) CONCERNING DROP BOX VIDEO SURVEILLANCE COMPLIES WITH O.C.G.A. § 21-2-382(c)(1)

Georgia law in regards to monitoring of drop boxes for ballots states in pertinent part that: "The 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)

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The court held that "SEB Rule 183-1-14-.02(19) demands video surveillance and recording of authorized drop boxes after the polls closed. The rule further provides for the removal and closure of any drop boxes not so monitored. O.C.G.A. § 21-2-382(c)(1) provides for certain monitoring of drop box locations, however it does not require video monitoring and it does not allow for the removal or closure of authorized drop boxes that are not video monitored."

However, the court erred on Page 6 of its order when it stated: "The SEB cannot by rule require something the General Assembly both did not legislate and specifically considered and declined to enact. Thus, SEB Rule 183-1-14-.02(19) is unsupported by and contrary to O.C.G.A. § 21-2-382(c)(1) and is unenforceable and void.

O.C.G.A. § 21-2-382(c)(1) requires drop boxes to "…be under constant surveillance…". The video surveillance requirement of SEB Rule 183-1-14-.02(19) allows election officials to fulfill the surveillance requirement of O.C.G.A. § 21-2-382(c)(1) more cost effectively than by employing a designee, law enforcement official, or licensed security guard. Therefore, SEB Rule 183-1-14-.02(19) is "consistent with law" as the enabling statute requires.

V. THE COURT ERRED IN FAILING TO RECOGNIZE THAT SEB RULE 183-1-13-.05 CONCERNING CREDENTIALED POLL WATCHER ACCESS COMPLIES WITH O.C.G.A. § 21-2-408(d)

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Georgia newest election transparency statute for credentialed poll watching, passed as part of HB1207 in the 2024 General Assembly legislative session states explicitly states in pertinent part that "Notwithstanding any other provisions of this chapter, poll watchers shall be granted access to polling places, advance voting locations, tabulation centers, and locations where absentee ballots are being verified, processed, adjudicated, and scanned and may be permitted behind the enclosed space for the purpose of observing the conduct of the election and the counting and recording of votes. **Poll watchers shall be entitled to observe any activity conducted at the location at which they are serving as poll watchers.** Except as otherwise provided for in this chapter, poll watchers shall be entitled to sit or stand as close as is practicable to the observed activity so as to be able to see and hear the poll worker or election official being observed." O.C.G.A. § 21-2-408(d).

The court grievously erred in declaring that SEB "Rule 183-1-13-.05 expands the mandatory designated poll watching areas, despite the Election Code specifically delineating mandatory poll watching areas in O.C.G.A. 21-2-408." and in claiming "But the SEB expanded these mandatory locations…" and "This is contrary to and exceeds the limited mandatory poll watching areas promulgated by the General Assembly in O.C.G.A. § 21-2-408." Some of the Amici were instrumental in helping to pass the new poll watcher transparency law and are intimately familiar with legislative intent of this statute.

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SEB Rule 183-1-13-.05 did not expand the poll watching areas because O.C.G.A. § 21-2-408(d) states "Poll watchers shall be entitled to observe any activity at the location at which they are serving as poll watchers." The Election Code does not specifically delineate only mandatory poll watching areas because the law states "Poll watchers shall be entitled to observe any activity…". There are no limited mandatory poll watching areas again, because the law states "Poll watchers shall be entitled to observe any activity…".

For these reasons. SEB Rule 183-1-13-|.05 is not "inconsistent with the statutory framework" as the court claimed on Page 6 and 7 of its order. The rule is "consistent with law" and the intent of the legislature during the 2024 General Assembly session when it passed. In addition, the extra transparency it provides is further "conducive to the fair, legal, and orderly conduct of primaries and elections" as the law requires.

VI. THE COURT ERRED IN FAILING TO RECOGNIZE THAT SEB RULE 183-1-21-.21 CONERNING ABSENTEE VOTE REPORTS CLARIFIES O.C.G.A. § 21-2-385 AND APPELLEES DO NOT HAVE STANDING TO CHALLEGE THE RULE

SEB Rule 183-1-21-.21 and its corresponding statute O.C.G.A. § 21-2-385 in pertinent part impose reporting requirements as to the Board of Registrars. None of the Appellees in the case are members of a Board of Registrars. Plaintiff Hall is a member of the Chatham County Board of Elections but joined the complaint in his individual capacity. None of the Plaintiffs have standing to challenge whether the new rule imposes new duties on the Board of Elections not authorized by statute.

But even if a Plaintiff had standing, to challenge this new absentee vote reporting rule, the rule does not conflict with Georgia law as the court declared on page 7 of its order. SEB Rule 183-1-21-.21 closely mirrors its corresponding statute O.C.G.A. § 21-2-385 almost word for word. See Exhibit 16. The new regulation simply clarifies that the statutorily required absentee ballot reporting for primaries should include separate totals for each political party. Likewise, it clarifies that if a county has no web site it can chose to post the reports in any public place where it is visible each day. These clarifications are "consistent with law" as required by the SEB enabling statute and cannot reasonably be considered to be "inconsistent with the statutory framework" as the court declared.

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VII. THE COURT ERRED IN FAILING TO RECOGNIZE THAT SEB RULE 183-1-12-.12(a)(5) CONCERNING TOTAL BALLOT RECONCILIATION COMPLIES WITH O.C.G.A. § 21-2-420(a)

Georgia law in regards to procedures for counting and tabulation of ballots cast states in pertinent part that: "After the time for the closing of the polls and the last elector voting, the poll officials in each precinct shall complete the required accounting and related documentation for the precinct and shall 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).

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In order for the poll officials to accurately advise the election officials of the total number of ballots cast at a given precinct the board implemented SEB Rule 183-1-12-.12(a)(5) to reconcile the electronic scanner count of total ballots cast with the physical number of ballots when the ballots are removed from the scanner. See Exhibit 17. This rule helps fulfill O.C.G.A. § 21-2-420(a) and is "consistent with law" as the SEB enabling statute requires.

Once the reconciliation is complete, the code section goes on to state: "The chief manager and at least one assistant manager shall post a copy of the tabulated results for the precinct on the door of the precinct and then immediately deliver all required documentation and election materials to the election superintendent."

The court erred in citing statutes such as O.C.G.A. § 21-240 which is a non-existent statute and O.C.G.A. § 21-2-436 which does not apply to the type of voting system Georgia uses. None of the statutes cited by the court preclude a hand count

reconciliation of total ballots cast to ensure the accuracy of the machine counts. Therefore, the rule does not conflict with any of these statutes as the court claimed on Page 7 of its order. The additional step of reconciliation provided by SEB Rule 183-1-12-.12(a)(5) helps ensure accuracy of machine counts is not only "consistent with law" but also "conducive to the fair, legal, and orderly conduct of primaries and elections" as the law requires.

CONCLUSION

Each State Election Board Rule passed by the board is consistent with the intent of the legislature and corresponds to a specific statute cited in this brief. The rules passed do not conflict with other statutes and were reviewed by legislative counsel as is standard procedure before passage. The Lower Court's order to reject these rules as "illegal" was issued without the typical legal analysis that should accompany such an order that impacts the voting rights or all Georgia electors. It attempts to usurp the authority for these rules from the executive branch of the Georgia State government and place it within the judicial branch. The order, on its face, is therefore, unconstitutional and should be declared as such.

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CERTIFICATION

I certify that this submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted this 17th day of January, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the within and foregoing AMICUS CURAIE BRIEF upon all Appellees below by depositing in United States Postal Service, with sufficient postage thereon for delivery, on January 17, 2025, as follows:

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