SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ETERNAL VIGILANCE ACTION, et al	)	
	)	
Plaintiffs,	)	
	)	**Civil Action File No.24CV011558**
v.	)	
	)	
STATE OF GEORGIA, et al	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' TRIAL BRIEF

I. INTRODUCTION

Early voting for the November 2024 election starts on October 15, 2024. About a month prior to this constitutionally critical event, the State Elections Board ("SEB") promulgated a series of rules that attempt to make massive changes to how Georgia election officials will administer the currently ongoing election. The SEB unconstitutionally promulgated these rules in contravention of the express language of Georgia's Election Code, Ga. Const. Art. I, Sec. II, Par. III, and U.S. Const. art. I, § IV, cl. I. Because the SEB has no authority to promulgate the challenged rules, or any others, and because these rules contravene the General Assembly's express statutory election framework, the Court should issue a declaration finding that the SEB's rules are void and unenforceable. After issuing such a declaration, the Court should enjoin the SEB's rules.

II. BACKGROUND

A. The General Assembly Alone May Promulgate Or Change Election Laws

U.S. Const. art. I, § IV, cl. I provides that (1) "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, [(2)] ***shall be prescribed in each State by the***

Legislature thereof[.]" (emphasis). Ga. Const. Art. II, Sec. II, Par. I provides "[t]he General Assembly shall provide by law for a method of appeal from the decision to allow or refuse to allow any person to register or vote and ***shall provide by law for a procedure whereby returns of all elections by the people shall be made to the Secretary of State.***" And Ga. Const. Art. I, Sec. II, Par. III provides: "[t]he legislative, judicial, and executive powers *shall* ***forever*** *remain separate and distinct*; and no person discharging the duties of one shall at the same time exercise the functions of either of the others …." Thus it is the General Assembly's constitutional duty to legislate election-related processes and those may not be delegated. The General Assembly has taken its constitutional role seriously and detailed the manner in which elections work in this State in the Election Code—which is constitutionally the ***final*** word on how elections run and the SEB's pronouncements to the contrary are invalid.

B. <u>The Election Code Limits The Manner of Vote Counting and Vote Certification</u>

The right to vote for an elected official is one of the most treasured and important rights of any Georgian. *See, e.g., Griffin v. Trapp*, 205 Ga. 176, 181 (1949). It follows that the prompt and unbiased counting and certification of votes is essential to the protection of voting rights. The General Assembly detailed in the Election Code provisions ensuring the prompt and unbiased tabulation and certification of votes. *See* O.C.G.A. § 21-2-1 *et seq.* The process of vote counting and certification by superintendents is a ministerial and mechanical function. Georgians' votes are counted, not interpreted. The Election Code ensures subjectivity is eliminated from the election counting and certification process.

Procedures for the computation, canvassing, and certification of votes by the superintendent are set forth in O.C.G.A. § 21-2-493(a)-(b). The superintendent calculates the votes. O.C.G.A. § 21-2-493(a). If the votes returned are more than the total number of those

who voted or ballots cast in the precinct, then until resolution of the discrepancy after investigation "no votes shall be recorded . . . ." O.C.G.A. § 21-2-493(b); *see also* O.C.G.A. § 21-2-493(c), (e), (g); O.C.G.A. § 21-2-493(d), (f), (h). If any error or fraud is discovered, "the superintendent shall compute and certify the votes justly, ***regardless*** of any fraudulent or erroneous returns presented to him or her, and shall report the facts to the appropriate district attorney for action." O.C.G.A. § 21-2-493(i) (emphasis added).

Once the votes have been computed and canvassed "the superintendent shall tabulate the figures for the entire county or municipality and sign, and attest the same," O.C.G.A. § 21-2-493(a), duly record and certify them "not later than 5:00 P.M. on the Monday" after the election, and immediately transmit the returns to the Secretary of State. O.C.G.A. § 21-2-493(k). Once consolidated returns are tabulated and certified by the superintendent they are posted and also submitted to the Secretary of State per the procedures in O.C.G.A. §§ 21-2-496 and 21-2-497; *see also* § 21-2-499 (Secretary of State's post-certification obligations).

Again, if during the superintendent's vote canvassing and review "any error or fraud is discovered, the superintendent ***shall*** compute and certify the votes justly, ***regardless*** of any fraudulent or erroneous returns presented to him or her; and shall report the facts to the appropriate district attorney for action." O.C.G.A. § 21-2-493(i) (emphasis added). The Election Code elsewhere provides for investigations and challenges to any questionable election results post-certification. *See, e.g.* O.C.G.A. § 21-2-522(1); O.C.G.A. § 21-2-524(a). And a court may require recertification after such a challenge. O.C.G.A. § 21-2-493(l). But this does not alter the initial certification requirement pre-challenge.

The limitations of the superintendent's role in calculating, canvassing, and certifying election results are thus clearly set forth in the Election Code, as are the proper methods of

reporting and challenging election certifications. Superintendents are required to tabulate the votes, canvass them, and flag issues. But the Election Code limits the scope of these reviews and requires timely certification of the vote computations. Certification is mandatory pursuant to the language of the Election Code and is a ministerial function that the superintendent must complete per the Election Code.

C. The SEB's Function and Authority Are Limited

The SEB is a Board of the State of Georgia created pursuant to O.C.G.A. § 21-2-30(a) and is part of the executive branch of State government. All SEB members are unelected. The SEB consists of a Chairperson chosen by the General Assembly, electors chosen by the Georgia Senate and the Georgia House of Representatives, and a member of each political party. O.C.G.A. § 21-2-30(a). Pursuant to O.C.G.A. § 21-2-31, the General Assembly empowered the SEB promulgate rules and regulations that "obtained uniformity" in the practices of election officials, are "consistent with the law," and that "define uniform and non-discriminatory standards." No other legislative guidance is provided. And the laws promulgated by the SEB are inconsistent with the law, promote disunity and discrimination, and are otherwise unconstitutional.

D. The Challenged Rules and the Election Code Provisions Prohibiting Them

1. SEB Rule 183-1-12-02(c.2) Contradicts O.C.G.A. § 21-2-493

The SEB enacted new Rule 183-1-12-.02(c.2) ("the Reasonable Inquiry Rule"). The Reasonable Inquiry Rule imposes a new definition of the term "certify" that changes the statutory way superintendents certify election results. The rule says: "Certify the results of a primary, election, or runoff,' or words to that effect, means to attest, ***after reasonable inquiry*** that the tabulation and canvassing of the election are complete and accurate and that the results

are a true and accurate accounting of all votes cast in that election." (emphasis added). What "reasonable inquiry" might be employed to investigate and determine the validity of votes cast and counted is unknown, but the rule allows delays or refusals to certify until the "reasonable inquiry" is satisfied. This is not allowed.

The General Assembly explicitly set forth how a superintendent computes and certifies election returns in O.C.G.A. § 21-2-49. This includes, *inter alia*,: (1) determining if the total number of votes cast exceeds the number of electors and investigate such discrepancies; (2) where paper ballots are used, requiring the production of ballot boxes, potentially recounting ballots, and potentially excluding polls of a precinct if the number of ballots in a box exceed the number of electors; (3) certifying returns even if fraud or error is found. *See* O.C.G.A. § 21-2-493(a)-(l). Nowhere in O.C.G.A. § 21-2-493, or in any other provision of the Election Code, does the General Assembly permit superintendents to premise or delay certification based on a "reasonably inquiry into the tabulation and canvassing" of the election results. O.C.G.A. § 21-2-493 provides the sole processes the General Assembly has allowed regarding vote canvassing and certification and the sole set of criteria upon which returns may be certified. And a "reasonable inquiry" by superintendents is not among them.

2. <u>SEB Rule 183-1-12-.12 Contradicts O.C.G.A. § 21-2-493 and 21-2-70(9)</u>

The SEB enacted new Rule 183-1-12-.12. This Rule provides that county boards shall 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."

New SEB Rule 183-1-12-.12(.1)(6) is inconsistent with the Election Code which otherwise provides the time, manner, and method in which election-related documentation must be produced and maintained. O.C.G.A. § 21-2-493 specifically accounts for the materials

superintendents may consider when canvassing and certifying votes. In conformity with O.C.G.A. § 21-2-493, O.C.G.A. § 21-2-70(9) provides superintendents can "receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to authorities as may be prescribed by law."

SEB Rule 183-1-12-.12(.1)(6)'s requirement that superintendents be provided with "all election related documentation created during the conduct of elections prior to certification results" is unbounded in scope and would introduce into the certification process materials superintendents are not statutorily authorized to consider in tabulating, canvassing, and certifying election results. For the superintendent to consider such extraneous information "prior to certification" is both absurd and contrary to the specific statutory materials that superintendents are allowed to consider.

3. **SEB Rule 183-1-14-.02(18) Contradicts O.C.G.A. § 21-2-385**

The SEB enacted new Rule 183-1-14-.02(18) requires the "signature and photo ID of the person delivering the absentee ballot . . ." This requirement is not found in the Election Code provision governing the requirements surrounding transmittal of absentee ballots by authorized persons. Rather, O.C.G.A. § 21-2-385(a) says that the absentee voter shall either personally mail or personally deliver their absentee ballot, but "that mailing or delivery may [also] be made by the elector's mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector." *Id.* Additionally, O.C.G.A. § 21-2-385(a) allows any "caregiver" of disabled elector to mail or deliver the absentee ballot of that elector. *Id*. The production of a signature and photo ID by the absentee ballot courier is not statutorily required. The SEB has no authority to expand O.C.G.A. § 21-2-385(a)'s

criteria or to place any additional burdens or obstacles to the lawful submission of an absentee ballots, or reject delivered absentee ballots that confirm with the law, but not the rule.

4. <u>SEB Rule 183-1-14-.02(19) Contradicts O.C.G.A. § 21-2-382(c)(1)</u>

The SEB enacted new Rule 183-1-14-.02(19) requires constant video surveillance of ballot drop boxes after the close of polls each day, and it permits the removal of drop boxes not so monitored. Nothing in the Election Code permits the video surveillance and recording of a drop box. The Election Code says only "[t]he drop box location shall have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement official, or licensed security guard." O.C.G.A. § 21-2-382(c)(1).

It should be noted the SEB, in creating its emergency rules during the 2020 COVID pandemic, provided in Emergency Rule 183-1-14-.06-.14(4) (2020) that "[d]rop box locations must have adequate lighting and use a video recording device to monitor each drop box location. The video recording must either continuously record the drop box location or use motion detection that records one frame, or more, per minute until detection of the motion triggers continuous recording." *See also* SEB Rule 183-1-14-.06-.14(5) (2020). In 2021, the General Assembly, in SB 202, statutorily provided that drop boxes would be available for absentee ballots. As to drop boxes, SB 202, which became in part O.C.G.A. § 21-2-382(c)(1), borrowed heavily from the SEB 2020 drop box rule. Importantly, however, the General Assembly expressly ***declined*** to adopt the video surveillance requirement in O.C.G.A. § 21-2-382(c)(1). This purposeful legislative decision has been usurped by the SEB in New Rule 183-1-14-.02(19). This is not permitted.

5. Rule 183-1-13-.05 Contradicts O.C.G.A. § 21-2-408

The SEB enacted new Rule 183-1-13-.05 (the "Poll Watcher Rule") providing that designated poll watchers "***shall***" be entitled to observe certain "designated places" including "the check-in-area, the computer room, the duplication area, ***and such other areas that tabulation processes are taking place including but not limited to provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing of mail in ballots, memory card transferring, regional or satellite check in centers . . .*** ." (emphasis added).

O.C.G.A. § 21-2-408(c), which the General Assembly just amended earlier this year in House Bill 1207, only mandates that designated poll watcher places "include the check-in area, the computer room, the duplication area, and such other areas as the superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center." The statute does not mandate poll watcher access to those places in the rule's language emphasized above. The SEB has no authority to impose such mandates that are in contravention of the statute.

6. Rule 183-1-21.21 Contradicts O.C.G.A. § 21-2-385(e)

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

day to the public." *See* Rule 183-1-12-.21(3)-(6). In contrast, O.C.G.A. § 21-2-385(e): (1) only requires business day reporting, not weekend reporting; (2) does not require reporting by partisan and nonpartisan votes; and (3) requires only posting certain information in a "place of public prominence," while the rule requires information to be posted in a place "accessible 24 hours a day to the public." Again, the rule is invalid as it is inconsistent with the statute.

7. Rule 183-1-12-.12(a)(5) Contradicts O.C.G.A. §§ 21-2-420, 21-2-436, and 21-2-483

The SEB enacted Rule 183-1-12-.12(a)(5) (the "Hand-Count" Rule). This Rule requires poll managers and poll officers to engage in a cumbersome process of ballot hand-counting after the close of polls on Election Day (or shortly after Election Day in some limited circumstances) and prior to transmitting the ballots to the superintendents for certification.

O.C.G.A. § 21-2-436 sets forth the "duties of poll officers after the close of polls." Prior to opening ballot boxes, poll officers are required to: (1) announce the number of ballots issued to electors; and (2) announce the number of spoiled, returned, and cancelled ballots. Once this is done, poll officers are to "compare the number of electors voting . . . with the number of names shown as voting by the electors list, voters certificates, and numbered list of voters." *Id*. If there is a difference in these numbers they are to be reconciled (if possible) or noted on the general returns. *Id.* The poll officers shall then place "the electors' list, the voter's certificates, the numbered list of voters, and the stubs, of all ballots used, together with all unused ballots, all spoiled and cancelled ballots, and all voter's certificates . . . in separate packages, containers, or envelopes and [and seal them] before the ballot box is opened." No hand counting is permitted.

O.C.G.A. § 21-2-483 provides for the "[p]rocedures at the tabulation center." O.C.G.A. § 21-2483(a) says "[i]n primaries and elections in which optical scanners are used, the ballots shall be counted at the precinct or tabulating center under the direction of the superintendent." And

this section specifically provides the method of tabulating ballots delivered. No election official hand counting is permitted.

O.C.G.A. § 21-2-420(a) provides:

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

(bracketed material added). Again, notably absent is any requirement to hand count ballots.

The foregoing is ***all*** the Election Code allows the poll officials to after the polls close. Even so, Rule 183-1-12-.12(a)(5) empowers and requires poll officials to conduct a hand count of the ballots *prior* to delivering the ballots to superintendents and prior to certification. The Hand Count Rule requires that ***all*** ballots be counted by hand by ***three*** separate poll officers. *Id.* This rule then requires a reconciliation of the hand counted ballots with "numbers recorded on the precinct poll pads, ballot marking devices . . . and scanner recap forms" and a placement and sealing of hand counted ballots and scanner counted ballots. *Id*.

In addition to being clearly not authorized by the Election Code—which limits the role of poll officials—the mischief and confusion that can and will arise out of these processes cannot be understated. This cumbersome, potentially error filled process, will undoubtedly delay presentation of the ballots to the superintendents and will delay reporting or results in a manner specifically at odds with the Election Code. Additionally, confusion and distrust that will arise in the electoral process through this unauthorized and unnecessary step. Again, the Hand Count

Rule is not permitted by the Election Code, and is, in fact, antithetical to statutes that govern what poll officials must do in polling places following the close of polls. The SEB's creation of the additional hand count process is impermissible.

III. ARGUMENT AND CITATION OF AUTHORITIES

In the Election Code, the General Assembly carefully and clearly set forth the election rules to be followed by voters, registrars, poll officials, superintendents, the Secretary of State, the Governor, and the voters. The SEB's misadventure into rulemaking here upsets the General Assembly's careful and clear election processes by interjecting additional and conflicting requirements that General Assembly either never contemplated or rejected. This will create chaos, confusion and delay, as voters and election officials will not know whether to comply with the Election Code as written or the deviations created by the challenged rules.

"An election system lacks clear rules when, as here, different officials dispute who has authority to set or change those rules. This kind of dispute brews confusion because voters may not know which rules to follow. Even worse, with more than one system of rules in place, competing candidates might each declare victory under different sets of rules." *Rep. Party of Penn. v. Degraffenreid*, 592 U.S. ——, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from denial of certiorari). And, while "[c]hanging the rules in the middle of the game is bad enough[,] … rule changes by officials who may lack authority to do so is even worse. When those changes alter election results, they can severely damage the electoral system on which our self-governance so heavily depends." *Id*. at 735. The SEB's rules pose such a risk here.

A. The SEB's Rules Cannot Contradict the Election Code

The General Assembly has authorized the SEB to promulgate certain rules and regulations necessary to promote fair, legal, and orderly elections. *See* O.C.G.A. § 21-2-31(2).

The SEB may also promulgate rules and regulations to the extent necessary to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials. *See* O.C.G.A. § 21-2-31(1). But this authority is limited. All rules and regulations enacted by the SEB must be consistent with the existing Election Code and the Georgia Constitution. *Ga. Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975). Stated another way, the SEB's authority can only extend to "adopt rules and regulations to carry into effect a law already passed" or otherwise "administer and effectuate an existing enactment of the General Assembly." *Id*.

Here, and as noted above, the General Assembly explicitly and clearly set forth the statutory requirements regarding vote certification (*see* O.C.G.A. § 21-2-493), documentation provided to superintendents for vote certification and counting (*see* O.C.G.A. § 21-2-70(9)), how absentee ballots can be received (*see* O.C.G.A. § 21-2-385), authorized drop box surveillance (*see* O.C.G.A. § 21-2-382(c)(1)), authorized poll watcher locations (*see* O.C.G.A. § 21-2-408(c)), required absentee ballot reporting (*see* O.C.G.A. § 21-2-385(e)), and the authorized duties of poll officers (*see* O.C.G.A. §§ 21-2-420(a), 21-2-436, and 21-2-483). As detailed above, SEB Rules 183-1-12.02(c.2), 183-1-12.12(.1)(6), 183-1-14-.02(18), 183-1-14-.02(19), 183-1-13-.05, 183-1-12-.21, and 183-1-12-.12(a)(5), respectively contravene these Election Code provisions. *See* Section II(D)(1)-(7) *supra.*

The SEB has no authority to upend, deviate from, or add to, this carefully legislated scheme. Georgia Appellate Courts have repeatedly admonished state executive entities, like SEB, that they cannot constitutionally impose additional requirements through their rulemaking that are not provided by the General Assembly in statute. *See Premier Health Care Invs. LLC v. UHS of Anchor, LP*, 310 Ga. 32, 49 (2020), *passim*; *North Fulton Med. Ctr. v. Stephenson*, 269

Ga. 540, 544 (1998); *Tabletop Media, Georgia Lottery Corp. v. Tabletop Media, LLC*, 346 Ga. App. 498, 503 (2018). This is blackletter law. Yet the SEB violates it at every turn by adding barriers to the election process that were neither conceived nor approved by the General Assembly.

The SEB simply cannot create rules that expand, change, or contravene, the Election Code—and our appellate courts have repeatedly said so. To allow the SEB, an unelected administrative body, to contravene the General Assembly's careful and detailed election scheme would both allow the SEB to legislate in a manner our Constitution prohibits, but it further imposes a significant risk that the November 2024 election will descend into chaos and uncertainty—something that adherence to the Election Code avoids.

The SEB ***knows*** it has no authority to pass the challenged rules. In fact, prior to passing many of the challenged rules here, the Georgia Attorney General ***explicitly told*** the SEB it lacked authority to pass some of the challenged rules here. *See* September 19, 2024 Memorandum from Young to Fervier, as Ex. A to Pl's Amend. Compl. The Attorney General told the SEB it could not promulgate rules contrary to statutory authority or where no statutory expression exists at all.

The SEB chose to ignore its constitutional, statutory, and judicially imposed limitations. The SEB has been sued, and opposed in amicus filings, by Republicans, Democrats, independent groups, and most tellingly, county election superintendents to stop SEB's unlawful rulemaking here. These disparate groups do not seek political advantage. Rather, they seek only the lawful and orderly election that the Election Code, the Georgia Constitution, and the U.S. Constitution require. The SEB's rogue behavior, which contravenes the Constitution and the Election Code, cannot and should not usurp the rights of our citizens to an election process the General Assembly mandated.

B. The SEB's Rule Making Violates Ga. Const. Art. I, Sec. II, Par. III

1. The Constitution Precludes Legislative Delegation to Executive Bodies

Ga. Const. Art. I, Sec. II, Para. III explicitly provides that "[t]he legislative, judicial, and executive powers *shall* ***forever*** *remain separate and distinct*; and no person discharging the duties of one shall at the same time exercise the functions of either of the others …." (emphasis added). This separation of powers provision expressly precludes the delegation of legislative function of government to an executive body like the SEB.

Under this constitutional provision, the General Assembly has no authority to delegate its legislative role to the SEB, as any such legislative delegation violates Ga. Const. Art. I, Sec. II, Par. III. This is particularly true where the General Assembly has set forth in over 500 pages of the Georgia Code Annotated the rules by which votes of our citizens must be counted, and where the General Assembly is charged with enacting election rules by the U.S. Constitution and the Ga. Constitution.. "The constitutional non-delegation doctrine is rooted in the principle of separation of powers and mandates that the General Assembly not divest itself of the legislative power granted to it by Art. 3, Sec. 1, Para. 1 of our Constitution by delegating legislative powers to (for example) executive agencies." *Premier Health Care*, 310 Ga. at 49.

2. Delegations Without "Sufficient" or "Realistic" Guidelines Constitute an Unconstitutional Delegation

The General Assembly did empower the SEB with some rulemaking authority. *See* O.C.G.A. § 21-2-30(a). But that rulemaking authority is untethered to the SEB's contested rules here. At most, the General Assembly provided the SEB authority to promulgate rules to ensure some uniformity in practices of election officials that was consistent is the law. *See id*. Here, the SEB rules are ***inconsistent*** with the Election Code and promote a ***lack of uniformity***.

The Georgia Supreme Court has recognized limited non-legislative delegations by the General Assembly to the executive. Such delegations must contain "sufficient" and "realistic" guidelines constraining the executive's rulemaking. *See Premier Health Care*, 310 Ga. at 49-50. Without such "sufficient" or "realistic" guidelines, such a delegation is impermissible. *Id.* The Georgia Supreme Court has not yet provided explicit guidance on what constitutes "sufficient" or "realistic" guidance from the General Assembly or the precise boundaries of permissible rulemaking delegations. *Id.* at 51. However, the Georgia Supreme Court has stated that "where the General Assembly fails to establish guidelines for the delegatee's exercise of authority or where it delegates such broad discretion that an agency is permitted to decide what violates a law passed by the General Assembly," then such an assignment violates the separation-of-powers and non-delegation doctrines. *Id.* at 50.

In *Premier Health Care*, the Georgia Supreme Court struck down a Department of Community Health ("DCH") administrative addition to the General Assembly's statutory list of what health care businesses needed to apply for a certificate of need to function. *See id.* at 35-51. The Court held that a DCH rule that added to, or altered, the statutory scheme was impermissible and constitutionally suspect pursuant to Ga. Const. Art. I, Sec. II, Par. III's non-delegation provisions. *See id*. at 51-32 (citing *North Fulton Medical Ctr. v. Stephenson*, 269 Ga. 540, 543 (1998) and *HCA Health Care Servs. of Ga., Inc. v. Roach*, 265 Ga. 501 (1995)). The Court held that where there is not an express delegation constrained by sufficient and reasonable guidelines that results in the "complete and unbridled" authority of the executive agency, such a delegation is impermissible. *Id*. at 52-53. Here, SEB's rulemaking is "complete and unbridled." And again, the SEB rules are contrary to the express statutory language in the Election Code itself.

There is no express delegation by the General Assembly to the SEB that would allow the SEB to enact the challenged rules. There is certainly no "sufficient" or "realistic" constrains in the Election Code regarding these Rules. And thus the challenged SEB rules violate Georgia's Constitution's separation of powers and nondelegation provision.

Moreover, nothing is more sensitive and constitutionally important than voting rights.[1] As such, any delegation of legislative power concerning voting rights must be exceedingly specific so that courts can be confident that the General Assembly actually meant to cede its authority on such a critical issue. The General Assembly has made numerous changes to the Election Code since the last Presidential election in 2020. Yet, it saw no need to implement any change(s) resembling the SEB's recent misadventure.. In the face of overwhelming legislative silence, the SEB cannot credibly claim any delegated authority to upend the Election Code as it has.

Even if the General Assembly *could* broadly delegate unbounded authority to the SEB, the requisite specificity is utterly lacking. The General Assembly "does not, one might say, hide elephants in mouseholes." *State v. Hudson*, 303 Ga. 348, 353 (2018) (quoting *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001)). And "[t]he importance of the issue of [voting and voting rights], which has been the subject of an earnest and profound debate across the country …, makes the oblique form of the claimed delegation all the more suspect." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quotation omitted). Indeed, the General Assembly "could not have intended to delegate a decision of such … political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Rather, this Court should presume that the General Assembly "intends to make major policy decisions itself,

[1] To the extent that Georgians' rights are going to be altered or limited, it should be the democratically elected legislature that does so. "The principle that Congress cannot delegate away its vested powers exists to protect our liberty." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 61 (2015) (Alito, J. concurring).

not leave those decisions to agencies." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*). Here the SEB's unbridled rulemaking must be constrained, and the challenged Rules must be vacated.

3. No Rulemaking Delegation to the SEB is Permissible

The Georgia Supreme Court has indicated that its prior decisions permitting ***any*** rulemaking delegation by the General Assembly to executive agencies, including *Dep't of Transp. v. City of Atlanta*, 260 Ga. 699, 703 (1990) ("*DOT*") (which permitted some delegation where there is proper guidance from the General Assembly), may have been wrongly decided. *See Premier Health Care*, 310 Ga. at 49, n.18.; *see also Cazier v. Georgia Power Co.*, 315 Ga. 587, 593 n.5 (2023) (Peterson, J. concurring) (noting questionable holding of *DOT*). Based on Ga. Const. Art. I, Sec. II, Par. III's plain language, any delegation of rulemaking by the General Assembly to the SEB regarding elections in this state is unconstitutional. Thus, the SEB should be prohibited from enacting any rules. Plaintiffs raise this issue to preserve it.

C. In addition to violating Ga. Const. Art. I, Sec. II, Par. III, the SEB's Rulemaking is in tension with the U.S. Constitution.

The U.S. Constitution's Elections Clause provides, in relevant part, that (1) "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, [(2)] ***shall be prescribed in each State by the Legislature thereof***[.]" U.S. Const. art. I § 4, cl. 1. Starting with the first clause, "Times, Places, and Manner" are "comprehensive words" which "embrace authority to provide a complete code for congressional elections," including "in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[.]" *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

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

All this boils down to two principles and one conclusion. First, the Federal Constitution exclusively empowers state legislatures to prescribe the "Times, Places and Manner" of federal elections. U.S. CONST. ART. I § 4, cl. 1. Second, Georgia's Constitution forbids executive interference with legislative duties. Ga. Const. Art. I, Sec. II, Par. III. So it necessarily follows that no executive branch agency in Georgia can do anything to alter the "Times, Places and Manner" of federal elections. And the SEB cannot do so either.

To be sure, "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." *Moore v. Harper*, 600 U.S. 1, 22 (2023). And "state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause." *Id*. at 32. But there is no such carve-out for state executive agencies to enhance or detract legislative determinations concerning the "Times, Places and Manner" of federal elections.

D. <u>The SEB Cannot Enact New Rules On the Eve of an Election</u>

"When an election is close at hand, the rules of the road should be clear and settled." *Grace, Inc., et al. v. City of Miami*, No. 23-12472, 2023 WL 5286232 (11th Cir. Aug. 4, 2023) (*per curiam*) (quotation omitted). Contrary to that principle, however, the SEB fundamentally changed the manner in which Georgia elections are governed in the heat of an important election. It is important to maintain voters' faith in the electoral process and it is even more important to ensure the voters' fundamental constitutional right to have their votes counted. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Upending the status quo regarding the manner in which elections are conducted and votes are counted, as the SEB has done, puts these rights in jeopardy. *See id*. at 2-8. In its September 19, 2024 Memorandum to the SEB, the Georgia Attorney General warned the SEB that its "passage of any rules concerning the conduct of elections are disfavored when implemented as close to an election as the rules on the [SEB's] September 20 agenda." *See* Am. Compl. at Ex. A (citing *Purcell*).

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

As the Attorney General advocated, *Purcell* logically applies to actions of the SEB that would cause as much, if not more, damage than a federal court's injunction that also changed the status quo. The SEB Rules as promulgated (and contrary to the Election Code) may lead

absentee and other voters to not vote. Leaving these rules in place will cause inconsistency and a lack of uniformity in the manner in which, applying their discretion, various superintendents interpret non-statutory information, do away with drop-boxes, turn away statutorily authorized couriers of absentee ballots, hand-count ballots, or even certify otherwise authorized votes. All at the last minute, and all creating substantial confusion and concern.

Plaintiffs ask this Court to provide declaratory and injunctive relief here, to protect—not change—the status quo. . In other words, Plaintiffs seek declaratory and injunctive relief that "***restores the status quo ante*** to the disruption created by the [SEB] that is affecting this election cycle for the first time." *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 369 (9th Cir. 2016) (emphasis added). So any relief granted by this Court would "simply restore[ ] the status quo from the last statewide election[,]" except as validly changed by the General Assembly. *See Common Cause Indiana v. Lawson*, No. 1:20-cv-01825-RLY-TAB, 2020 WL 8167493, at *5 (S.D. Ind. Oct. 9, 2020). And whatever can be said of *Purcell* its progeny in federal courts, there is no prohibition against "enjoining [a] State's effort to change the rules shortly before the election" because doing so "preserve[s] the electoral status quo." *Middleton v. Andino*, 990 F.3d 768, 770 n.* (4th Cir. 2020) (King, J., concurring in the denial of a stay pending appeal).

The General Assembly's pronouncements, in duly promulgated legislation governing all the issues in which the SEB now sticks its thumb, provide the status quo certainty that the elections will be conducted. And these statutory mandates, not the SEB's eleventh-hour changes, should govern.[2]

[2] The State indicated it intends to invoke *Purcell* in opposition to Plaintiffs' demands. In *Purcell*, the plaintiffs sought to enjoin a voting related provision that was passed by ***two years*** prior to the election, and approved pursuant to the Voting Rights act***, a year prior*** to the election. *See Purcell*, 549 U.S. at 2-4. A federal appellate court enjoined the provision a month prior to the election. *Id*. at 3-4. The U.S. Supreme Court said the injunction should not have issued because there was not

E. Declaratory Judgment

The SEB issued rules that, if left in place, will affect the upcoming 2024 Georgia election. The SEB rules make uncertain regarding how voters (including Turner and Hall) can cast their ballots, what ballot drop off boxes are legitimate for use, whether votes will be constitutionally and legally counted and certified as to state, local, congressional, and Presidential election, and indeed whether voting at all in an election whose rules are constitutionally suspect is worthwhile at all. Additionally, Hall, ***as an individual***, is uncertain as to how to conduct himself in his role as a member of the Chatham Board of Elections. Hall could face opprobrium, scorn, notoriety, investigations, and legal actions, based on how or whether he follows the SEB rules at issues.

Eternal Vigilance, which educates, advocates, and testifies to voting communities, election and other government officials, and others regarding election and good governance issues, including those related to the upcoming 2024 Georgia election, is uncertain as to the rights and obligations regarding the 2024 election. Eternal Vigilance and Scot Turner do not know how to proceed in advising such persons and entities and may risk instructing people to violate the law if the SEB rules have any force.

The Georgia Declaratory Judgment Act ("DJA") allows parties "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." O.C.G.A. § 9-4-1. The DJA is "to be liberally construed and administered." *Id.* Declaratory relief is available when (1) there is an actual controversy between the parties, *see, e.g.,* O.C.G.A. § 9-4-2(a); *Leitch v. Flemming*, 291 Ga. 669, 670 (2012), and (2) there is need to "to guide and protect

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enough time to consider the challenge and the years long status quo should not be upended. *Id*. at 4-6. Here, the SEB is acting like the court in *Purcell*—changing the rules at the last minute and then saying those changes should not be enjoined.

the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to [the plaintiff's] alleged rights and which if taken without direction might reasonably jeopardize [the plaintiff's] interest." *Agan v. State*, 272 Ga. 540, 542-43 (2000). Here, there is a clear dispute between the parties that affects Plaintiffs' future rights.

Moreover, the requested relief is not hypothetical, abstract, or academic. Plaintiffs are uncertain about the status of their voting, voting rights, and their future conduct. *See Aliotta v. Gilreath*, 226 Ga. 263, 264, 174 S.E.2d 403, 405 (1970) ("The parties appear to be in hopeless conflict as to the meaning of the charter provisions of the Town of Thunderbolt, and as to the actions which they may legally take under the charter, and the case was a proper one for declaratory judgment."). Unless the SEB agrees that the challenged rules are void, there is a genuine dispute here that declaratory relief is designed to answer. And if declaratory relief is awarded, an injunction against the rules for the reasons set forth in this brief should follow.

F. <u>Plaintiffs Have Standing To Bring This Suit</u>

Though Plaintiffs do not know the grounds upon which the State and Intervenor-Defendants intend to challenge Plaintiffs' standing to bring this litigation, Plaintiffs nevertheless address standing because Defendants have indicated they will raise it as an issue. As shown below, Plaintiffs have standing to bring this action, as individuals (Scot Turner and James Hall) and as an association (Eternal Vigilance Action, Inc.).

To challenge the legality of the Rules established by the SEB, Plaintiffs Scot Turner and James Hall "need[] only to establish standing as community stakeholders interested in their local government following the law." *Cobb Cnty. v. Floam*, 319 Ga. 89, 91, 901 S.E.2d 512, 515 (2024). As the Georgia Supreme Court recently clarified in *Cobb County*, "it has long been the law that '[w]here a public duty is at stake, a plaintiff's membership in the community provides

the necessary standing to bring a cause of action to ensure a local government follows the law.'" *Id.* (quoting *Sons of Confederate Veterans v. Henry County Bd. of Comm'rs*, 315 Ga. 39, 61, 880 S.E.2d 168, 185 (2022)). This is because, as a matter of law, "community stakeholders—citizens, residents, voters, and taxpayers—are injured when their local governments do not follow the law." *Sons of Confederate Veterans*, 315 Ga. at 61, 880 S.E.2d at 185. Turner and Hall easily satisfy these conditions for standing. As is alleged in the Verified Complaint, both Turner and Hall are Georgia citizens, registered voters, and taxpayers. *See* Complaint at ¶¶ 3-4. As such, both are "community stakeholders" who have been "injured" for purposes of establishing standing by the SEB's failure to "follow the law" as alleged in the Complaint, and that injury can be remedied by a declaration by this Court.

Plaintiff Eternal Vigilance Action, Inc. likewise has standing to challenge the SEB's Rules. As stated in the Complaint, Eternal Vigilance Action—a Georgia Domestic Nonprofit Corporation 501(c)(4) corporation organized under 26 U.S.C. § 501(c)(4)—is a multi-issue advocacy organization with a significant focus on election policy. *See* Complaint at ¶ 2. Its board of directors are a group of activists, scholars, and former elected officials. *Id.* A core function and activity of Eternal Vigilance Action is to defend the institution of elections from attacks that erode public faith in electoral outcomes and are often based on misinformation and disinformation. *Id.* In pursuit of its mission, Eternal Vigilance Action educates communities, coordinates efforts and resources, and lobbies elected officials. *Id.* Indeed, recently Scot Turner, Eternal Vigilance Action's President, testified before Congress about the damage misinformation and disinformation does to public confidence in elections, and all of those expenses were born by the Eternal Vigilance Action.

Given its purposes, mission, and activities, Eternal Vigilance Action has "organizational standing" to challenge the enforceability of the SEB Rules at issue. "[O]rganizational standing permits an organization to sue in its own right if it meets the same standing test applicable to individuals," meaning that Eternal Vigilance Action must show "(1) an injury in fact, (2) a causal connection between the injury and the alleged wrong, and (3) the likelihood that the injury will be redressed with a favorable decision." *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 381–82, 870 S.E.2d 430, 437 (2022). The only dispute here would be on the issue of injury, but "an organization suffers an injury in fact for purposes of standing when the defendant's actions impair the organization's ability to provide its services or to perform its activities and, as a consequence of that injury, require a diversion of an organization's resources to combat that impairment." *Black Voters Matter Fund*, 313 Ga. at 386, 870 S.E.2d at 440.

As alleged in the Complaint, the resulting damage and uncertainty – and the loss of public confidence in election institutions – stemming from the illicit creation and exercise of the SEB Rules will directly impact and impair Eternal Vigilance Action's efforts and mission to ensure clarity and public confidence in those institutions. Furthermore, attempting to minimize and correct this damage, uncertainty and loss of public confidence in the election institutions has already caused and will continue to cause a diversion of Eternal Vigilance Action's time and resources in order to analyze and create remedies to attempt to combat and correct the negative public impact stemming from the unlawful creation and exercise of the SEB Rules at issue through education of the public and local and state officials. Accordingly, under the standards set forth by the Georgia Supreme Court, Eternal Vigilance Action can maintain this challenge to the SEB Rules as an "injured" party with organizational standing.

IV. CONCLUSION

This is not, and should not, be a close case. The SEB's Rules contradict and take liberty with the Election Code in a manner it has no authority to do. The SEB has a limited, not broad and indiscriminate, role to play it the election process. The SEB is an executor, not a legislator. Its assumption of legislative authority here to rewrite and amend the Election Code is prohibited by our Constitution and our courts. The SEB's actions have been broadly and publicly condemned--as they should be. And this Court should declare the SEB's actions to be illegal and void, and then enjoin the SEB (or any others) from carrying forth the SEB's usurpation of the General Assembly's authority and from imposing the disunity it seeks regarding the upcoming election.

Respectfully submitted this 11th day of October 2024.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served the foregoing **PLAINTIFFS' TRIAL BRIEF** upon all parties in this case via this Court's Odyssey electronic filing system which will automatically serve all counsel of record with electronic service of the same. In addition, we have also served the following individuals via secure electronic mail:

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This 11th day of October 2024.

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