IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ETERNAL VIGILANCE ACTION, INC., SCOT TURNER, and JAMES HALL,

Plaintiffs,

v.

STATE OF GEORGIA,

Defendant,

REPUBLICAN NATIONAL COMMITTEE and GEORGIA REPUBLICAN PARTY, INC.,

Intervenors.

Civil Case No. 24CV011558

TRIAL BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND GEORGIA REPUBLICAN PARTY

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INTRODUCTION

The State Election Board is tasked with creating rules for election officials across the State. Those rules ensure that election officials are operating on the same page and complying with the law. The Plaintiffs bring a wide-ranging challenge to seven rules adopted by the Board that ensure efficiency, security, and integrity of Georgia elections.

The Plaintiffs' claims fail at the outset because the Plaintiffs lack standing. Plaintiffs are private citizens and organizations, but most of the rules they challenge don't govern private citizens at all—they just tell county election officials how to do their jobs. The Plaintiffs' claims also aren't ripe. They claim no uncertainty about their conduct or what they need to do to comply with any of the rules. Nor could they, because the rules don't apply to them. Moreover, the Complaint fails to specify the statutory provisions that Plaintiffs believe are unconstitutional. The General Assembly gave the Election Board specific rulemaking duties. But the Plaintiffs allege only that the "delegation" of authority to the State Election Board is unconstitutional, without specifiying *which* delegations they believe are unconstitutional. Their failure to specify which provisions they challenge deprives this Court of jurisdiction over their constitutional claims.

The Plaintiffs' claims also fail on the merits. Their primary argument is that the Board lacks rulemaking authority. But "from the beginning of the government, the Congress has conferred upon executive officers the power to make regulations—'not for the government of their departments, but for administering the laws which did govern.'" *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 428 (1935) (quoting *United States v. Grimaud*, 220 U.S. 506, 517 (1911)). Since the Founding, the most basic form of rulemaking was one executive officer telling other lower-level officers how to do their jobs. That's not

an exercise of legislative power—it's just the executive doing its job. The Plaintiffs' nondelegation arguments fail for that basic reason.

In addition, the Election Board does not govern private citizens. The legislature did not give the Board rulemaking authority to take away people's property, or to put people in prison, or to limit their contracts, or to otherwise regulate their behavior. And the rules that the Plaintiffs challenge almost exclusively regulate how county registrars election boards, and superintendents do their jobs. To the extent they apply *at all* to private citizens, they regulate privileges (such as absentee voting), not private rights. And the nondelegation principle applies when the rule applied regulates citizens' private rights. The Plaintiffs' nondelegation claims thus fail as a matter of first principles.

Their nondelegation claims also fails under Georgia precedents. The Georgia Supreme Court has consistently upheld agencies' rulemaking authority. And the Election Board's rulemaking duties are some of the most specific rules that the General Assembly has legislated. The Board is also constrained by a detailed election code, and each rule they pass must be consistent with that statutory scheme. The Plaintiffs argue that the detailed election scheme implicitly *deprives* the Board of rulemaking power. But that transforms the nondelegation doctrine into a doctrine of implied preemption. The Supreme Court has never adopted that novel theory. In fact, it's said the opposite: the greater the statutory detail, the more likely the delegation is constitutional.

Finally, the Court should deny relief on the equities, even if it thinks that the Plaintiffs have standing and valid claims. The General Assembly has tasked the State Election Board, not courts, with policy decisions about elections. When an election is close at hand, courts should not step in and change the rules. Federal courts are familiar

with this doctrine, known as the *Purcell* principle. The logic of *Purcell* applies just as forcefully here: courts should not alter the election rules on the eve of an election.

For these reasons, the Court should enter judgment in favor of the Defendants.

BACKGROUND

The Georgia General Assembly tasked the State Election Board with the duty to "promulgate" such "rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct" of "elections." O.C.G.A. §21-2-31(2). It is also the Board's duty to "promulgate rules and regulations" to ensure "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." *Id.* §21-2-31(1). To fulfill these statutory duties, the Board approved seven rules to ensure that the upcoming election would be conducted in a "fair, legal, and orderly" manner.

The Reasonable Inquiry Rule defines the phrase "certify the results" of an "election." *See* Ga. Comp. R. & Regs. 183-1-12-.02(1)(c.2). Under Georgia law, each election superintendent has a duty "[t]o receive" the "returns" of all "elections, to canvass and compute the same, and to certify the results thereof." O.C.G.A. §21-2-70(9). But "certify the results" is not defined by state statute. To "explicitly define certification," the Board amended its rules to clarify that to "certify the results" 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." Revisions to Subject 183-1-12-.02. *Definitions*, (proposed July 3, 2024). And by statute, if a superintendent discovers "any error or fraud," she "shall compute and

certify the votes justly, regardless of any fraudulent or erroneous returns … and shall report the facts to the appropriate district attorney for action." O.C.G.A. §21-2-493(i).

The Board's Examination Rule affirms existing Georgia law requiring superintendents to examine election documents. By statute, whenever there is "a discrepancy and palpable error" related to "excess" votes, election superintendents "shall" be able to "examine all" the "election documents whatever." O.C.G.A. §21-2-493(b). The rule likewise permits county board members to "examine all election related documentation created during the conduct of elections prior to certification of results." Revisions to Subject 183-1-12-.12. *Tabulating Results*, (proposed July 18, 2024) (codified at Ga. Comp. R. & Regs. 183-1-12-.12(f)(6)). The purpose of this rule is to ensure that "county superintendents and boards of elections" can "reconcile the number of ballots to the number of voters so that certification of election results accurately reflects the will of the voters in every county." *Id.*

The Board's Drop-Box ID Rule provides a mechanism to ensure that Georgia's drop-box laws are followed. State law generally requires absentee voters "personally mail or personally deliver" their absentee ballot "to the board of registrars or absentee ballot clerk," which includes drop-box delivery. O.C.G.A. §21-2-385(a). There's an exception to the personal-delivery rule, "provided that mailing or delivery may be made by the elector's mother, father, grandparent" and similar household or family members. *Id.* But the law provides no mechanism to ensure that the person performing a drop-box delivery is actually the voter or a family member permitted by the statute. The Board's rule provides that mechanism by requiring "an absentee ballot form with written documentation, including absentee ballot elector's name, signature and photo ID of the

person delivering the absentee ballot, and approved relation to the elector's name on the absentee ballot" for drop-box deliveries. Ga. Comp. R. & Regs. 183-1-14-.02(18). The purpose is "to ensure accountability and security for absentee ballots." Revisions to Subject 183-1-14-.02. *Advance Voting* (proposed July 3, 2024).

Similarly, the Drop-Box Surveillance Rule provides another method to ensure compliance with state law. The drop-box statute requires that all "drop box location[s] 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). The Board's rule "requires video surveillance of drop boxes at early voting locations after polling hours each day. If a drop box is not under constant surveillance, it must be locked or removed." Ga. Comp. R. & Regs. 183-1-14-.02(19). The Plaintiffs state that the rule "says that votes cast in drop boxes that are not video monitored may not be counted at all." Compl. ¶56. That's false. The rule says nothing about what to do with ballots that are deposited in drop boxes that are not under video surveillance. "The purpose of the rule is to ensure accountability and security for absentee ballots, and to maintain the security of drop boxes through mandatory video surveillance." Revisions to Subject 183-1-14-.02. *Advance Voting* (proposed Jul. 3, 2024). Together, "[t]he video surveillance and the absentee ballot forms are specifically aimed to deter and document any attempts to tamper with the drop boxes, ensure ballots are deposited properly, provide evidence of any security incidents, and promote trust in the election process by demonstrating the protection of ballots." *Id.*

The Board's Poll Watcher Rule clarifies that poll watchers must be allowed to observe all parts of the tabulation process. State law provides political parties the right

to "appoint two poll watchers in each primary or election … to serve in the locations designated by the superintendent within the tabulating center." O.C.G.A. §21-2-408(c). Those "designated locations shall 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." *Id.* The rule clarifies that those "other areas" must include "other areas that tabulation processes are taking place," including the "provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing of mail in ballots, memory card transferring, regional or satellite check-in centers and any election reconciliation processes as the election superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center." Ga. Comp. R. & Regs. 183-1-13-.05. "The purpose of the rule is to clarify the existing election code and to ensure poll watchers may fairly observe all processes of the tabulation center." Revisions to Subject 183-1-13-.05, *Poll Watchers for Tabulating Center* (proposed Aug. 21, 2024).

The Board's Daily Reporting Rule adds additional specificity to the reporting duties of county election officials. State law requires that "[o]n each day of an absentee voting period," county election officials "shall report … to the Secretary of State and post on the county or municipal website … the number of persons to whom absentee ballots have been issued, the number of persons who have returned absentee ballots, and the number of absentee ballots that have been rejected." O.C.G.A. §21-2-385(e). The statute requires similar rules for "advance voting." *Id.* The new rule requires election officials to break down those numbers to report "the total number of voters who have participated, (2) the method by which those voters participated (advance voting

or absentee by mail), (3) the number of political party or nonpartisan ballots cast, and (4) the date on which the information was provided." Ga. Comp. R. & Regs. 183-1-12-.21. "The purpose of the rule is to ensure ongoing transparency in elections," and "it serves to continuously keep the public informed on the voting process and election information." Promulgation of Subject 183-1-12-.21, *County Participation and Totals Reporting* (proposed Aug. 21, 2024).

Finally, the Hand-Count Rule creates a system for organizing, counting, packaging, and reporting the ballots voted on election day. State law provides that after polls close, "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). The new rule clarifies what happens in the "required accounting." *Id.* It requires the "three sworn precinct poll officers to independently count the total number of ballots removed from the scanner, sorting into stacks of 50 ballots, continuing until all of the ballots have been counted separately by each of the three poll officers." Ga. Comp. R. & Regs. 183-1-12-.12(a)(5). The three poll officers then cross-check their counts, resolve any discrepancies, and "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." *Id.* "The purpose of the rule is to ensure the secure, transparent, and accurate counting of ballots by requiring a systematic process where ballots are independently hand-counted by three sworn poll officers." Revisions to Subject 183-1-12-.12 Tabulating Results (proposed Aug. 21, 2024).

The Election Board adopted these rules after noticing proposed rulemaking and accepting public comments.

ARGUMENT

I. Plaintiffs' claims are not justiciable.

Plaintiffs' claims are not justiciable because (1) Plaintiffs lack standing, (2) Plaintiffs' case presents no actual controversy that is ripe for review, and (3) Plaintiffs' allegations are too vague and imprecise. Courts "lack[] subject matter jurisdiction to address the merits of a constitutional challenge to a statute brought by a party who does not have standing to bring that challenge." *Black Voters Matter Fund v. Kemp*, 313 Ga. 375, 380 (2022). Further, this court is not empowered to render advisory opinions on hypothetical legal questions. Rather, it can render only a decision that will have "immediate legal consequence." *City of Atlanta v. Atlanta Indep. Sch. Sys.*, 307 Ga. 877, 880 (2020). And any complaint alleging the unconstitutionality of a law must specify the "particular part" of "the statute which the party would challenge" with "fair precision." *Wallin v. State*, 248 Ga. 29, 30 (1981) (cleaned up). As explained below, Plaintiffs' suit fails to satisfy all three of these jurisdictional prerequisites and therefore must be dismissed.

A. Plaintiffs lack standing as they have not alleged any individualized injury caused by the statutes and rules they challenge.

Plaintiffs assert that the Georgia Assembly's statutory grant of "rulemaking authority to the SEB is broad and undefined—and thus unconstitutional." Compl. ¶51. Plaintiffs further assert that *all rules* passed by the State Election Board are unconstitutional. Compl. ¶60. Since Plaintiffs challenge the constitutionality of dozens of pages of Georgia statutory provisions and administrative rules, they must demonstrate

constitutional standing. To establish "the irreducible constitutional minimum of standing," Plaintiffs must "allege facts sufficient to show (1) an injury in fact; (2) a causal connection between the injury and the causal conduct; and (3) the likelihood that the injury will be redressed with a favorable decision." *Stillwell v. Topa Ins. Co.*, 363 Ga. App. 126, 130 (2022) (cleaned up). Plaintiffs must show an injury that is "both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Black Voters Matter Fund, Inc.*, 313 Ga. at 382 (cleaned up). Organizational Plaintiff must also meet the "same standing test applicable to individuals." *Id.*

Plaintiffs have not proven any individualized injury caused by the statutes or rules they challenge. Plaintiffs are Georgia citizens, taxpayers, and voters, and a non-profit advocacy organization. Compl. ¶¶2-4. No Plaintiff is directly harmed by the Georgia Assembly's delegation of authority to the State Election Board. *Frances Wood Wilson Found., Inc. v. Bell*, 223 Ga. 588, 589 (1967) (Plaintiff suffers "no harm by the mere presence of the statute upon the books" and consequently "has no standing to attack its validity."). No Plaintiff alleges that they are a member of the State Election Board or any other county election board in Georgia. No plaintiff is an "election superintendent," O.C.G.A. §21-4-3, who must adhere to the State Election Board's rules. O.C.G.A. §21-2-31.

Plaintiffs are not individually bound to follow any of the rules they challenge. They do not have to count ballots by hand. *Cf.* Ga. Comp. R. & Regs. 183-1-12-.12(a)(5) ("the poll manager" and "poll officers" shall hand count). Plaintiffs do not have to conduct a reasonable inquiry before certifying the election results. *Cf. id.* 183-1-12-.18(12)(c) ("the election superintendent" shall "certify"). Plaintiffs are not being empowered with

administrative authority to review election related documentation before certifying the election results. *Cf. id.* 183-1-12-.12(f)(6) ("[b]oard members" may "examine all election related documentation"). Plaintiffs play no role in counting ballots or certifying the election results whatsoever. Plaintiffs are merely bystanders throughout this entire process. *Cf. Doe v. Broady*, 369 Ga. App. 493, 497 (2023) (finding unregulated plaintiff had no standing). Plaintiffs "cannot show anything more than a hypothetical concern" regarding the statutes and rules they challenge. *Parker v. Leeuwenburg*, 300 Ga. 789, 793 (2017). Therefore, "they lack standing" to challenge those statutes and rules. *Id.*

In addition, Plaintiffs' non-delegation claims amount to nothing more than a "generalized grievance shared in substantially equal measure by all or a large class of citizens." *Id.* at 792-93 (cleaned up). Such generalized grievances do not confer constitutional standing upon Georgia citizens. *Id.* Otherwise, any Georgia citizen could file a suit tomorrow challenging the constitutionality of the administrative authority that the Georgia General Assembly has delegated to any state agency—from the Department of Revenue to the Department of Transportation to the Governor's office. Under Plaintiffs' standing theory, any Georgia citizen could pick their least favorite rule promulgated by a state agency and sue. Because Plaintiffs cannot establish the basic "prerequisite to attacking the constitutionality of a statute" by showing that the statute is "hurtful" to them, their case must be dismissed. *Perdue v. Lake*, 282 Ga. 348, 348 (2007) (cleaned up).

Plaintiffs assert that they have standing because they are Georgia citizens, voters, and taxpayers. Compl. ¶¶3-4. However, these allegations are only relevant if Plaintiffs were pursuing a theory of standing as "community stakeholders" to challenge the

actions of a county or local government. *Cobb Cnty. v. Floam*, 319 Ga. 89, 91 (2024). Allegations of citizenship, taxpayer status, or voting eligibility are patently insufficient to support standing to challenge the constitutionality of a *state* statute and administrative rules promulgated by a *state* agency. *Id.* Rather, "in order to challenge the constitutionality of *state* statutes, the Georgia Constitution requires a more particularized injury similar to the federal Article III injury-in-fact requirement." *Id.*, at 92. The particularized injury requirement for constitutional challenges to *state* statutes "has long been rooted in principles of separation of powers." *Id.* Under this more stringent standing analysis, Plaintiffs must show "an actual, individualized injury" and not that they are just members of a Georgia community. *Sons of Confederate Veterans*, 315 Ga. at 39. Plaintiffs nowhere allege in their Complaint that they are directly injured by the challenged statutes and rules, premising their entire theory of standing on their status as Georgia citizens, taxpayers, and voters. This is fatal to their claims of standing to challenge the constitutionality of various state statutes and rules.

Likewise, the organizational Plaintiff, Eternal Vigilance Action Inc., has not properly alleged a direct injury-in-fact because it asserts merely that it has standing because it is concerned that the challenged statutes and rules will create "uncertainty" and result in "loss of public confidence in our election institutions." Compl. ¶2. Alleging mere concern "about the legitimacy of future elections" or mere concern "with the policies, procedures, practices, and customs" governing an election is not enough to rise to the level of an injury-in-fact. *Perdue v. Barron*, 367 Ga. App. 157, 161 (2023). "[C]oncern alone does not standing confer." *Id.* Eternal Vigilance thus lacks standing.

B. Plaintiffs' statutory claims present no ripe actual controversy.

Even if Plaintiffs had constitutional standing, "they cannot obtain a declaratory judgment because they do not face the requisite uncertainty about future decisions *they may face*." *Cobb Cnty.*, 319 Ga. at 96 (emphasis added). Plaintiffs have failed to prove that *their* "uncertainty" concerning the challenged rules will affect "*their* future conduct." *Id.* at 101. No Plaintiff has alleged that they will be engaging in future conduct that is in any way regulated by the challenged statutes or rules. Plaintiffs are Georgia voters and a Georgia non-profit organization. Compl. ¶¶2-4. They "have no decision to make" whatsoever concerning tabulating votes, hand counting votes, certifying votes, or any of the other types of conduct that the statutes and rules they challenge concern. *Cobb Cnty.*, 319 Ga. at 100. Consequently, all Plaintiffs are "walking in full daylight" concerning their respective legal duties and have "no need either of artificial light or judicial advice" that would be provided through declaratory relief. *Id.* at 101 (cleaned up).

Plaintiffs argue that the recent amendments to administrative rules promulgated by the State Election Board may "potentially" violate their "constitutional rights to have their votes counted." Compl. ¶57. But this allegation presents a "hypothetical" controversy that is not "ripe for judicial review." *Cheeks v. Miller*, 262 Ga. 687, 688 (1993). Indeed, to the extent that Plaintiffs allege that a hand count of their ballots will deprive them of their right to vote, they present a purely abstract controversy and ask this court to do what it is not authorized to do: "render an advisory opinion" on a legal question that has "not arisen but which [Plaintiffs] fear may arise at a future date." *Id.*

Plaintiffs present no actual controversy because they nowhere allege that their right to vote has been denied or will imminently be denied due to the statutes or rules

they challenge. "[N]othing" in the challenged statutes or rules "infringes on Plaintiffs' right to political participation." *Cobb Cnty.*, 319 Ga. at 100. Whatever decision this Court makes concerning the challenged statutes and rules, Plaintiffs will still be able to go to the polls and vote or choose to not vote. Plaintiffs "may be uncertain" about what county election superintendents will do in response to the new rules promulgated by the State Election Board, but Plaintiffs "do not show any future action *they* risk taking based on this uncertainty." *Id.* (emphasis added). Consequently, their claim for declaratory relief must be dismissed as Plaintiffs have failed to present any actual controversy between the acts they challenge and "*their* future conduct." *Id.* at 101.

C. Plaintiffs' allegations are "too vague and indefinite to draw into question the constitutionality" of any duly enacted law.

Plaintiffs' Complaint fails to specify the statutory provision or provisions Plaintiffs believe to be unconstitutional. "In order to raise a question as to the constitutionality of a 'law'," the "statute or the particular part or parts of the statute which the party would challenge must be stated or pointed out with fair precision." *Wallin*, 248 Ga. at 29 (cleaned up). But nowhere in Plaintiffs' Complaint do they mention the exact statutory provision that they are asking this Court to declare unconstitutional. Rather, Plaintiffs merely vaguely reference "the delegation" of authority by the General Assembly to the State Election Board throughout various counts of their Complaint. Compl. ¶¶63-68, 75-92. It's unclear whether the Plaintiffs are asking this Court to strike down all grants of rulemaking authority that the General Assembly has given to the State Election Board or just some of them. They allege only that the "delegation" of authority to

the State Election Board is unconstitutional. Compl. ¶¶64, 66, 68, 78, 79, 84, 85, 90, 91. But they do not specify which delegation.

Plaintiffs' lack of specificity concerning the statutory section they are asking this Court to strike down as unconstitutional makes their Complaint too vague and indefinite to support a ruling rendering any statute passed by the General Assembly unconstitutional. Both Defendants and this Court must guess at what Plaintiffs want this court to do. For example, O.C.G.A. §21-2-31(1) delegates to the State Election Board the authority 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." Plaintiffs *might* be asking this Court to nullify that statutory provision. Or they might be referring to O.C.G.A. §21-2-31(7), which delegates to the Board the authority to "promulgate rules and regulations" concerning "what constitutes a vote and what will be counted as a vote for each category of voting system used in this state." Or perhaps the Plaintiffs challenge O.C.G.A. §21-2-31(10), which delegates to the Board the authority to take "action[s]" that are "conducive to the fair, legal, and orderly conduct of primaries and elections." *Id.*

Or perhaps the Plaintiffs want all three provisions nullified. The fact that Plaintiffs failed to plead with specificity "the particular part or parts of the statute" they are challenging makes Plaintiffs' Complaint "too vague and indefinite to draw into question the validity of the act or any part thereof." *Dade Cnty. v. State*, 201 Ga. 241, 241 (1946). Since Plaintiffs' Complaint does not specify the statute or statutes they want declared

unconstitutional, Plaintiffs Complaint fails to raise "a constitutional question of which this court has jurisdiction." *Ledford v. J. M. Muse Corp.*, 224 Ga. 617, (1968).

II. The Election Board's rulemaking duty is consistent with the Georgia Constitution.

"The courts of this country, including the Supreme Court of the United States, have long recognized the right of an administrative agency of government to make rules and regulations to carry into effect a law already enacted." *Glustrom v. State*, 206 Ga. 734, 736 (1950). The Plaintiffs request a declaration that the Election Board "lacks constitutional authority to promulgate rules," and an injunction against the Board and the State from enforcing the Board's rules. Compl. ¶¶66, 73-74. Although the Plaintiffs frame this claim against the Election Board, their claim is really a facial attack on the statute that grants the Board rulemaking power. In other words, to declare that the Board cannot promulgate *any rules*, this Court would have to declare that the Legislature acted unconstitutionally when it granted the Board those powers in the first place. *See* O.C.G.A. §21-2-31(1), (2).

Agency rulemaking is commonplace. The General Assembly gave the Board of Natural Resources power to "promulgate rules and regulations necessary to develop and cultivate the shellfish industry in Georgia." O.C.G.A. §27-4-189(a). It gave the Commission on Equal Opportunity power to adopt "such rules and regulations as may be necessary to carry out" the Georgia Fair Housing Law. *Id.* §8-3-206(d)(5). It gave the Agricultural Commodity Commission power "to make all necessary rules and regulations" for carrying out its duties. *Id.* §2-8-105. The list goes on. *See, e.g.*, *id.* §14-8-56.1(Secretary of State, to register corporations); *id.* §36-32-26(1) (Georgia Municipal

Courts Training Council); *id.* §7-8-6 (Department of Banking and Finance); *id.* §26-5-43 (Department of Community Health); *id.* §37-9-13 (Board of Behavioral Health and Developmental Disabilities). In fact, Georgia's Administrative Procedure Act defines a state "agency" as an entity "authorized by law expressly to make rules and regulations or to determine contested cases." *Id.* §50-13-2(1).

While most of these agencies rely on a broad grant of rulemaking power "necessary for the implementation of [an] article" of the Georgia Code, *e.g.* O.C.G.A. §26-5-43, the Election Board has three distinct rulemaking duties. It must "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." O.C.G.A. §21-2-31(1). It must also "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." *Id.* §21-2-31(7). And finally, the Board must "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." *Id.* §21-2-31(2). This last rulemaking power comes with an extra requirement: "upon the adoption of each rule and regulation, the board shall promptly file certified copies thereof with the Secretary of State and each superintendent." *Id.*

The Plaintiffs don't distinguish these distinct rulemaking authorities, nor do they discuss the restrictions placed on them. Instead, the Plaintiffs lump all three duties together as "broad rulemaking authority," which they allege "[do] not provide any guidance or parameters regarding how the SEB must promulgate its rules." Compl. ¶12.

They're wrong for at least two reasons: the Board doesn't regulate private conduct, and the General Assembly cabined the Board's rulemaking with sufficient guidelines. Each reason is sufficient to deny the Plaintiffs' nondelegation claims.

A. The Election Board doesn't regulate private conduct.

"[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring in the judgment). That is, "the legislative power amounts to the enactment of 'generally applicable rules' that govern behavior." Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 Geo. Mason L. Rev. 1, 2 (2018) (citing *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1245 (Thomas, J., concurring in the judgment)). The first step in any nondelegation case is to "distinguish between regulations governing the conduct of government officials and regulations directing the actions of nongovernment parties in the private sector." Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc' Rev. 238, 248 (2022). And so "long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details'" of executive implementation. *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 45 (1825)).

Georgia Supreme Court decisions accord with these first principles. That's why the General Assembly cannot delegate to an agency the power to promulgate new misdemeanors through rulemaking. *See Howell v. State*, 238 Ga. 95, 95 (1976). A statute that "'authorizes an executive board to decide what shall and what shall not be an

infringement of the law,'" *Sundberg v. State*, 234 Ga. 482, 483 (1975) (citation omitted), grants the executive the power to proscribe "private conduct," *Ass'n of Am. Railroads*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). Thus, when the General Assembly punishes the possession of drugs but says that a drug is "anything the State Board of Pharmacy says it is," it impermissibly "delegate[s] to the State Board of Pharmacy the authority to determine what acts (the possession of such substances) would constitute a crime." *Sundberg*, 234 Ga. at 484; *see also Long v. State*, 202 Ga. 235, 237 (1947) ("[T]he act attempted to authorize the county commissioners to make a law, by defining the act, the violation of which would be a misdemeanor, and was a plain attempt to [delegate] the legislative authority of the General Assembly to the county commissioners."). In contrast, the General Assembly can "adopt as part of a statute, a regulation presently in force and to make the violation thereof a crime." *Howell*, 238 Ga. at 95 (citing *Johnston v. State*, 227 Ga. 387, 392 (1971)). The latter circumstance does not present a delegation problem because even though another branch has *described* the private conduct, the General Assembly is the one *proscribing* it.

The State Election Board's rulemaking powers do not pose a delegation problem because the Board does not set "generally applicable rules of private conduct." *Ass'n of Am. Railroads*, 575 U.S. at 77 (Thomas, J., concurring). The Board doesn't create crimes. *Cf. Sundberg*, 234 Ga. at 484. It doesn't tax private citizens, which "has always been an exclusively legislative function." *Consumers' Rsch. v. FCC*, 109 F.4th 743, 767 (5th Cir. 2024). It doesn't take private property. *Cf. Dep't of Transp. v. City of Atlanta*, 260 Ga. 699, 703 (1990). It doesn't restrict private contracts. *Cf. Premier Health Care Invs., LLC v. UHS*

of Anchor, L.P., 310 Ga. 32, 49-54 (2020). And it doesn't restrain trade. *Cf. Ga. Franchise Pracs. Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800, 801 (1979).

Instead, the Election Board sets rules governing "public conduct." Larkin, *supra* at 249. In that regard, the Board's powers are more like Founding-era delegations that "authorized the executive to create rules that were only 'binding' on executive officials, not members of the public." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 789 n.17 (6th Cir. 2023) (Nalbandian, J., dissenting) (citing Philip Hamburger, *Is Administrative Law Unlawful?* 89 (2014)). In fact, the Board's first rulemaking power is explicitly limited to rules that ensure "uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials." O.C.G.A. §21-2-31(1). Most of the rules that Plaintiffs challenge fall in this category: they instruct public officials on how to certify an election, maintain documents, monitor drop boxes, report to other public officials, etc. They bind public officials and are not "generally applicable rules of conduct governing future actions by private persons." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting).

Other Election Board rulemaking regulates privileges of citizens, not private rights. The distinction "between 'public rights' and 'private rights'" most often appears when courts consider an agency's adjudicatory power. *Oil States Energy Servs. v. Greene's Energy Grp.*, 584 U.S. 325, 334 (2018). But the distinction also appears in cases that concern an agency's rulemaking power. The private use of public lands, for example, is a "privilege" that the government can bestow on citizens. *United States v. Grimaud*, 220 U.S. 506, 521 (1911). So when an agency conditions the use of public land on "comply[ing] 'with the rules and regulations,'" it regulates not the private conduct of citizens,

but the exercise of a public privilege. *Id.* Even when the statute "makes it an offense to violate those regulations," the agency is not creating new crimes but conditioning "the implied license under which the United States had suffered its public domain to be used." *Id.* In that circumstance, "the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." *Id.*

The distinction between public and private rights illuminates some of the Election Board's other rulemaking powers. Poll-watching, for example, is a privilege the General Assembly has provided to "each political party and political body" in an election. O.C.G.A. §21-2-408(b)(1). Poll-watching is a public right—a privilege—because it "involves a matter 'arising between the government and others,'" not between private parties. *Oil States Energy Servs.*, 584 U.S. at 335. Absentee and mail voting, too, are public "privileges" afforded to voters, not "fundamental right[s]." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). So when a State conditions absentee voting, "[i]t is thus not the right to vote that is at stake … but a claimed right to receive absentee ballots." *Id.* Many of the Board's rules that are "conducive to the fair, legal, and orderly conduct of primaries and elections" regulate election privileges, to the extent they affect private parties at all. O.C.G.A. §21-2-31(2). The poll-watcher rule and the drop-box identification rule are good examples. *See* Compl. ¶47; 1st Am. Compl. ¶76. Both rules regulate "congressionally created public rights," *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 456 (1977), and thus do not wield legislative power. Put simply, the Plaintiffs' claims don't account for the "distinction between 'rights' and 'privileges,'" even though that distinction is "relevant to the nondelegation doctrine."

Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164, 180 (2019).

In sum, the Election Board doesn't wield legislative power because it doesn't regulate private conduct. The Plaintiffs' case complains of "broad" rulemaking discretion. Compl. ¶51. But they overlook that even "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'" *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting) (citation omitted). Most of the Board's rulemaking is internal to the executive branch—the Board adopts rules concerning how public officials do their jobs, not how private citizens live their lives. Some of the Board's rules incidentally affect private citizens, but only for the exercise of a public privilege, not a private right. In both instances, the Board isn't enacting "generally applicable rules of private conduct." *Ass'n of Am. Railroads*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). So there's no delegation of legislative power.

B. The General Assembly cabined the Board's rulemaking with sufficient guidelines.

Even if the General Assembly had delegated some legislative-type powers to the Election Board, the Georgia Supreme Court has "approved numerous delegations of legislative authority, provided the General Assembly has provided sufficient guidelines for the delegatee." *Dep't of Transp.*, 260 Ga. at 703. When the General Assembly has provided sufficient guidelines, "the delegatee is not performing a legislative function, that is, it is not making a purely legislative decision, but is acting in an administrative capacity by direction of the legislature." *Pitts v. State*, 293 Ga. 511, 517 (2013). For

example, directing an agency to "determine whether the taking of public property is in the public interest" provides "sufficient guidelines" for the agency's decisionmaking. *Dep't of Transp.*, 260 Ga. at 703. Directing the Board of Education to consider "sickness and other emergencies which may arise in any school community" when "promulgating its general policies and regulations" is likewise "realistic guidance." *Pitts*, 293 Ga. at 517.

In contrast, laws that "fail[] to set up guidelines" for agency discretion raise delegation problems. *Massey-Ferguson*, 244 Ga. at 802. In *Sundberg*, for example, the Georgia Supreme Court considered a statute that criminalized possession of any drug that the "State Board shall determine to be habit-forming … or any drug which the State Board shall determine to contain any quantity of a substance having a potential for abuse." *Sundberg*, 234 Ga. at 484. The statute effectively ceded the definition of crimes to the board "without any real guidelines," which the court found violated the nondelegation doctrine. *Id.* Similarly, in *Massey-Ferguson*, the Georgia Supreme Court considered whether the Franchise Practices Act unlawfully delegated legislative power to the Franchise Practices Commission to determine licensing and monopoly conduct in the motor vehicle industry. *Massey-Ferguson*, 244 Ga. at 800-01. The Court held that the statute violated the nondelegation doctrine because it "grant[ed] to the Commission the power to define instances in which the Act will apply," but it "fail[ed] to set up guidelines for making these determinations." *Id.* at 802.

Here, the Georgia election code does not "fail[] to set up guidelines" for the Election Board's rulemaking. *Id.* To start, the General Assembly did not give the Election Board blanket authority to adopt "such rules and regulations as may be necessary to carry out" the election code, although it has used that language for other agencies'

rulemaking authority. *E.g.*, O.C.G.A. §8-3-206(d)(5) (Commission on Equal Opportunity). Instead, the General Assembly demarcated three areas of rulemaking: (1) rules that "obtain uniformity in the practices and proceedings" of election officials and ensure "the legality and purity in all primaries and elections," (2) rules that are "conducive to the fair, legal, and orderly conduct of primaries and elections," and (3) rules that "define uniform and nondiscriminatory standards concerning what constitutes a vote and what will be counted as a vote." *Id.* §21-2-31. The Board's rulemaking power covers only these three limited subjects. Its rules must be directed to particular ends. And the rules must be "consistent with law." *Id.* The complaint does not identify these guidelines, let alone allege or explain why they are not "sufficient or realistic." Compl. ¶64. But these guidelines show that unlike other agencies, the Election Board "is not granted unlimited authority to promulgate rules." *Scoggins v. Whitfield Fin. Co.*, 242 Ga. 416, 417 (1978).

Instead of alleging specific deficiencies in the guidelines, the Plaintiffs try out a new nondelegation theory. They argue that "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," the "conveyance of a gap-filling role to cover items the General Assembly did not specifically legislate is constitutionally impermissible." Compl. ¶38. But within those 500 pages is the "duty of the State Election Board" to "promulgate rules and regulations" for a variety of election-specific functions. O.C.G.A. §21-2-31. The Court cannot simply ignore that the same election code "amply establishes the power of the authority to make rules and regulations." *Rich v. State*, 237 Ga. 291, 298 (1976).

Moreover, the detailed election code undercuts the Plaintiffs' claim that the Election Board lacks "'sufficient' and 'realistic' parameters" for its rulemaking. Compl. ¶43. The Board has "over 500 pages" of parameters. Compl. ¶38. And its "rules and regulations" must be "consistent with [that] law." O.C.G.A. §21-2-31(2). Georgia courts "look[] to the number and type of conditions the General Assembly has imposed on a delegatee to guide its exercise of authority." *Premier Health Care Invs.*, 310 Ga. at 50. And by the Plaintiffs' own admission, the General Assembly has enacted innumerable conditions that that cabin the Election Board's rulemaking. The Plaintiffs cite no precedent supporting their novel theory that when the General Assembly "painstakingly details" a statutory scheme, Compl. ¶42, it implicitly removes all rulemaking authority from an agency. For good reason—the Plaintiffs invert the nondelegation doctrine by suggesting that an agency governed by fewer statutes and bound by fewer guidelines presents *less* of a nondelegation problem. *See Premier Health Care Invs.*, 310 Ga. at 50.[1]

III. Equitable principles bar Plaintiffs' requests for immediate relief.

Plaintiffs demand that this Court enter a permanent injunction against the enforcement of the rules. But injunctive relief requires Petitioners to show that they are "in great danger of suffering an imminent injury" for which they do "not have an adequate and complete remedy at law." *VoterGA v. State*, 368 Ga. App. 119, 122 (2023) (cleaned up). Petitioners don't allege these elements in their petition and nowhere show

[1] The Republican Intervenors also contend that the Election Board's rules are consistent with the Election Code, as the State argues, but focus on justiciability and nondelegation consistent with their commitment to minimize duplicative briefing.

how they are suffering an injury that is "irreparable." *Lue v. Eady*, 297 Ga. 321, 329 (2015) (cleaned up).

In any event, relief is not appropriate because "there is not sufficient time left" before the "general election for the parties to present their arguments and the trial court to research and rule upon this difficult issue." *O'Kelley v. Cox*, 278 Ga. 572, 576 (2004) (Hunstein, J., concurring) (refusing to grant injunction in state ballot amendment close to election). Indeed, voters and the democratic process "suffer when time constraints compel" a trial court to issue "rushed rulings" that "can serve only to undermine the public's faith in the legitimacy and accuracy of the judicial process." *Id.* at 576-77.

The Supreme Court has recognized these costs through the *Purcell* principle. *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). *Purcell* instructs that federal courts "should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam). It recognizes that "[c]ourt orders affecting elections" can themselves "result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5. For these reasons, the Supreme Court has "repeatedly emphasized" that federal courts "should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 589 U.S. at 424 (per curiam) (collecting cases). Similar considerations apply to state courts as well. *Moore v. Lee*, 644 S.W.3d 59, 65-66 (Tenn. 2022); *In re Hotze*, 627 S.W.3d 642, 645-46 (Tex. 2020); *Fay v. Merrill*, 338 Conn. 1, 23-24 n.21 (Conn. 2021); *All. for Retired Ams. v. Sec'y of State*, 240 A.3d 45,

49-50 (Me. 2020); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020).

This Court should abide by "the wisdom of the *Purcell* principle." *Republican Nat'l Comm.*, 589 U.S. at 425. Enjoining the State Election Board's rules in the final weeks before voting starts would inject judicially created confusion. In recognition of "the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures," this Court should refrain from issuing an injunction. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

Plaintiffs will likely argue that this principle should not preclude relief because the State Election Board only recently adopted the challenged rules. But *Purcell* and similar state principles are concerned with judicially imposed changes before an election. It is policymakers—not judges—who should make "policy choices on the ground before and during an election." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). In other words, the rules set by the policymakers are the "legal status quo on the eve of an election." *OPAWL - Bldg. AAPI Feminist Leadership v. Yost*, __ F.4th __, No. 24-3768, 2024 WL 4441458, at *3 n.1 (6th Cir. Oct. 8, 2024) ("*Purcell* constrains the equitable powers of the federal courts, not the sovereign powers of state legislatures."). Equities thus advise against court interference with election rules close to an election.

CONCLUSION

For these reasons, the Court should enter judgment in favor of Defendants.

DATED this 11th day of October, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2024, a true and correct copy of the foregoing **TRIAL BRIEF** was electronically filed with the Court using the Court's eFileGA electronic filing system, which will automatically send an email notification of such filing to all attorneys of record.

/s/ William Bradley Carver, Sr.