IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JULIE ADAMS, in her official capacity as a member of the Fulton County Board of Elections and Registration, a/k/a Fulton County Board of Registration and Elections,

Plaintiff,

v.

FULTON COUNTY, GEORGIA

Defendant,

&

DEMOCRATIC NATIONAL COMMITTEE & DEMOCRATIC PARTY OF GEORGIA,

Defendant-Intervenors.

Civil Case No. 24CV011584

DEMOCRATIC NATIONAL COMMITTEE'S AND DEMOCRATIC PARTY OF GEORGIA'S JOINT MOTION TO DISMISS

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INTRODUCTION

Plaintiff Julie Adams, a member of the Fulton County Board of Registration and Elections ("BRE"), seeks declaratory relief based on the notion that the BRE and its members each have discretion over *whether* to certify election results. Plaintiff's theory attempts to turn the straightforward act of certification—*i.e.*, confirmation of the accurate tabulation of the votes cast—into a broad license for individual board members to hunt for purported election irregularities of any kind, potentially delaying certification and displacing longstanding (and court-supervised) processes for addressing fraud. But Georgia law dictates otherwise. By statute, the duty to certify election results is mandatory.

Plaintiff's contrary arguments misstate the role of county certification in the broader statutory scheme. Settled Georgia law establishes that election contests—not certification—are the designated mechanism for resolving disputes about alleged irregularities in the election process. If election officials have concerns about possible election irregularities, they are free to voice them at the time of certification. But those concerns provide no basis for *delaying* certification beyond the statutory deadline, much less denying it entirely. As a long line of cases in Georgia and elsewhere make clear, accepting Plaintiff's discretionary view of certification would invite chaos and could result in the widespread discarding of properly-cast votes by qualified electors.

Because Plaintiff is not entitled to the relief she seeks, even under the facts as alleged, Defendant-Intervenors—the Democratic National Committee and the Democratic Party of Georgia [hereafter "DNC-DPG"]—move the Court to dismiss for failure to state a claim. In dismissing Plaintiff's claims, this Court should make clear that individual BRE members have no discretion to refuse to certify election results or to delay certification past the statutory deadline.

BACKGROUND

I. Georgia's Comprehensive Statutory Election Scheme

As Plaintiff's Complaint recognizes, "[t]he Georgia Legislature carefully crafted the process by which elections would be conducted in the State of Georgia and by each county of the state" Compl. at 1. County certification of election results is but one part of the detailed and sophisticated elections regime established by the Georgia Legislature. Within this reticulated scheme, county-level certification serves a specific and limited purpose: to aggregate all the votes from all the precincts in a county and ensure the numerical accuracy of that vote count. *See* O.C.G.A. § 21-2-493. The statute includes the information necessary to accomplish this purpose. *See id.* And before county-level certification, election officials may order a recount or recanvass as specified by O.C.G.A. § 21-2-495.

Once mathematical accuracy is attained, however, the county superintendent (*i.e.*, the designated tabulator of election results, typically the county board of elections) has no discretion to refuse certification. *See* O.C.G.A. § 21-2-493(k). Rather, "[a]s the returns from each precinct are read, computed, and found to be correct or corrected," "they *shall* be recorded on the blanks prepared for the purpose until all the returns from the various precincts . . . shall have been duly recorded; then they *shall* be added together," and those "consolidated returns *shall* then be certified by the [county] superintendent . . . *not later than 5:00 P.M. on the Monday following the date on which such election was held*." *Id.* (emphases added).

This mandatory county-level certification is just an early step in the certification process. After county superintendents certify, the Secretary of State must "immediately" undertake his own tabulation and canvassing process, O.C.G.A. § 21-2-499(a), and then certify the votes to the Governor. *See id.* § 21-2-499(b). A delay or failure to certify at the county level would run

headlong into these secretarial obligations. That would potentially interfere with binding federal deadlines (3 U.S.C. § 5(a)(1)) and could result in the Secretary certifying without counting ballots from the affected county—meaning that county's voters would be disenfranchised.

Other steps in the election process, meanwhile, validate individual ballots and address possible fraud. For example, an election can be contested *in court* based on any of several grounds, including "misconduct, fraud, or irregularity by any primary or election official or officials," "when illegal votes have been received or legal votes rejected," and "for any error in counting the votes or declaring [an election] result of the primary or election." O.C.G.A. § 21-2-522(1), (3), (4). If an election contest changes the results, Georgia law authorizes the superintendent or the Secretary to recertify the election. *See id.* §§ 21-2-493(l), 21-2-499(a).

II. Plaintiff's Claim

Plaintiff's amended complaint seeks a declaratory judgment predicated on the same core legal arguments as she advanced in *Adams I*.[1] Specifically, Plaintiff seeks "declaratory relief . . . that the duties of the [Fulton] BRE members are discretionary, not ministerial, in nature." Compl. at 31. And she seeks a declaratory judgment that "BRE members are required to have full access to Election Materials and Processes presently under the control of the [Fulton County Elections Supervisor]." *Id.* This claim, too, turns on Plaintiff's assertion of discretion. *Id.* at 29–30. Indeed, in *Adams I*, Plaintiff expressly conceded in opposing the motions to dismiss her original complaint that "the issue in this case is whether or not the votes cast by [BRE] members to certify an election are discretionary or mandatory." *Adams I* Response to Motion to Dismiss, dated August 22, 2024, at 3.

[1] In Civil Case No. 24CV006566 (*Adams I*), this Court dismissed Plaintiff's claims without prejudice.

Because the discretion underlying Plaintiff's claims does not exist under Georgia law, DNC-DPG now move to dismiss the amended complaint for failure to state a claim.

LEGAL STANDARD

The Court should grant a motion to dismiss for failure to state a claim pursuant to O.C.G.A. § 9-11-12(b)(6) if:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

Norman v. Xytex Corp., 310 Ga. 127, 130–31 (2020). "When considering a motion to dismiss for failure to state a claim, a trial court may consider the complaint, the answer, and any exhibits attached to and incorporated into the complaint and answer." *Mark A. Schneider Revocable Trust v. Hardy*, 362 Ga. App. 149, 150 (2021). Moreover, "the trial court is required to take the factual allegations in the complaint as true. But in the absence of any specifically pled facts to support what amount[s] to a legal conclusion couched as fact, the trial court [is] not required to accept this conclusion as true." *Mabra v. SF, Inc.*, 316 Ga. App. 62, 65 (2012).

ARGUMENT

I. Plaintiff's Claim Must Be Dismissed For Failure To State A Claim Because County Certification Is Mandatory

Plaintiff's claim rests on the assumption that she and every other BRE member have only a *discretionary* duty to certify election results. That is wrong. By statute, each BRE member's duty to certify is mandatory. That is clear from the text, structure, and history of the relevant provisions—as well as a long line of Georgia cases and persuasive authority from other states.

A. Text

The text of the relevant Georgia statutes is plain. As Plaintiff alleges (Compl. ¶ 27), the

BRE acts as the superintendent of elections for Fulton County, *see* O.C.G.A. § 21-2-2(35)(A); 2019 Ga. Laws 4181. As superintendent, the BRE's many responsibilities include canvassing votes from each county precinct and then certifying the returns. *See generally* O.C.G.A. § 21-2-493 (titled "Computation of returns by superintendent; certification").

More specifically, O.C.G.A. § 21-2-70(9) provides (with emphasis added) that "[e]ach superintendent . . . *shall* perform all the duties imposed upon him or her," including "receiv[ing] from poll officers the returns of all primaries and elections, [] canvass[ing] and comput[ing] the same, and [] certify[ing] the results thereof." Likewise, the code section that governs both the "[c]omputation of returns by the superintendent" and "certification" uses mandatory language in providing that "[t]he superintendent *shall*, after the close of the polls on the day of a primary or election . . . publicly commence the computation and canvassing of the returns." *Id.* § 21-2-493(a) (emphasis added). It then dictates that "[t]he consolidated returns *shall then be certified* by the superintendent." *Id.* § 21-2-493(k) (emphasis added). This mandatory language, moreover, governs even where (unlike here) actual "error or fraud is discovered." *Id.* § 21-2-493(i). But even in that case, "the superintendent *shall compute and certify* the votes justly, regardless of any fraudulent or erroneous returns presented to him or her." *Id.* (emphasis added). Finally, the statute imposes a clear deadline for this particular duty to be completed: "Such returns *shall be certified* by the superintendent *not later than* 5:00 P.M. on the Monday following the date on which such election was held[,] and such returns *shall be immediately transmitted* to the Secretary of State." *Id.* § 21-2-493(k) (emphasis added).

The General Assembly's use of "shall" in these statutes establishes that certification by county election boards is mandatory. The term "shall" means "required to," and "[d]rafters [of statutes] typically intend and . . . courts typically uphold" the use of "shall" as "mandatory."

Black's Law Dictionary (12th ed. 2024). Georgia courts have acknowledged this, explaining that "'[s]hall' is recognized generally as a command, and is mandatory." *Nunnally v. State*, 311 Ga. App. 558, 560 (2011). Put another way, "must" and "shall" are synonymous. *State v. Henderson*, 263 Ga. 508, 510 (1993). Hence, like "must," "'[s]hall' is generally construed as a word of command." *Mead v. Sheffield*, 278 Ga. 268, 269 (2004).

Nothing in the plain language of the statutes just discussed even hints at an intent to depart from the general meaning of "shall" so as to leave certification to a superintendent's discretion. By contrast, in the very same code section, the General Assembly explicitly gave superintendents discretion in other circumstances—using words like "may" and "discretion." For example, O.C.G.A. § 21-2-493(b) states that when a superintendent investigates an apparent numerical discrepancy caused by a vote total from a precinct that "exceeds the number of electors in such precinct or exceeds the total number of persons who voted in such precinct or the total number of ballots cast therein," the superintendent "*may*" order "a recount or recanvass of the votes . . . and a report . . . to the district attorney." *Id.* (emphasis added). Similarly, if such a discrepancy occurs in a precinct "in which paper ballots have been used," then "the superintendent *may* require the production of the ballot box and the recount of the ballots [therein] . . . in the discretion of the superintendent." *Id.* § 21-2-493(c) (emphasis added).

Where the General Assembly wanted to give the superintendent discretion, therefore, it did so expressly, using unmistakably discretionary language. That the General Assembly included no such language with respect to the superintendent's duty to certify must be treated as deliberate and conclusive. "Under the statutory interpretation doctrine of expressio unius est exclusio alterius, where the [legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the [legislature] acts

intentionally and purposely in the disparate inclusion or exclusion." *Grange Indem. Ins. Co. v. Burns*, 337 Ga. App. 532, 537–38 (2016), *quoted in Truist Bank v. Stark*, 359 Ga. App. 116, 119 (2021) (cleaned up). "If the General Assembly had desired to" leave certification up to the discretion of the superintendent, "it could have done so as it did with the [matters] mentioned in" § 21-2-493(b)–(c). *Id.*

B. Structure

The non-discretionary nature of the certification duty in O.C.G.A. § 21-2-493(k) is even clearer "when read with the remainder of the statutory scheme" governing elections, *Cobb Hosp. v. Emory-Adventist, Inc.*, 357 Ga. App. 617, 621 (2020). Courts construe statutory provisions "in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015). Put another way, courts interpreting a statutory provision "may look to . . . the structure and history of the whole statute, and the other law . . . that forms the legal background of the statutory provision in question." *Plummer v. Plummer*, 305 Ga. 23, 27 (2019). Here, the "overall statutory scheme" confirms that a superintendent's duty to certify election results is mandatory and not a matter of discretion. *King*, 576 U.S. at 486.

As detailed above, the election code prescribes *every step* of the election administration system, from voter registration to casting and counting votes, to county certification, and then to risk-limiting audits, election contests, and state-level certification. Within this intricate, multi-step process, county certification serves the very specific purpose of aggregating the votes from every county precinct and ensuring the numerical accuracy of that vote count. And as explained, once this statutorily defined computation and canvassing process is complete, the superintendent *must* timely certify the election results.

The duty to certify is mandatory because otherwise there could be widespread and

unjustified denial of Georgians' fundamental right to vote. If a county board or other superintendent indefinitely refused to certify that county's results, the Secretary of State would likely still comply with his (equally mandatory) duty to report election results, *see* O.C.G.A. § 21-2-499(b)—meaning that that reporting could occur *without* counting ballots from the county, thereby disenfranchising all of that county's voters. The mandatory nature and timing of county certification therefore plays a crucial role in avoiding disenfranchisement.

Again, this makes sense considering the broader statutory context. The primary (narrow) purpose of county certification is to ensure that the aggregate tabulation is numerically accurate. *See id.* § 21-2-493. Other steps in the election process—which occur both before and after county certification—address the possibility of fraud. These steps include voter registration, voter verification at the polls, "risk-limiting audits," and the election-contest process. *See id.* §§ 21-2-210–236, -417, -498, -522.

Election contests are particularly important in this regard. "Georgia law . . . allows elections to be contested . . . as a check on the integrity of the election process[.]" *Martin v. Fulton Cnty. Bd. of Registration & Elections*, 307 Ga. 193, 194 (2019). And the grounds for a contest expressly include (1) "misconduct, fraud, or irregularity by any primary or election official or officials"; (2) "when illegal votes have been received or legal votes rejected at the polls," and (3) "any error in counting the votes or declaring the result of the primary or election." O.C.G.A. § 21-2-522(1), (3), (4). If an election contest changes the results, moreover, Georgia law authorizes the superintendent (and the Secretary of State) to recertify the election. *See id.* §§ 21-2-493(l), -499(a).

In short, county certification is mandatory and serves a particular purpose, while other parts of the election code provide avenues tailored to address fraud and similar concerns.

C. History

In providing for mandatory county certification, the General Assembly was not breaking new ground; Georgia law has long treated election certification as non-discretionary. Nor is Georgia an outlier in this regard. Around the country, the argument that election canvassers should exercise "discretion" when certifying elections results has been recognized for more than a century to be a thinly disguised attempt to subvert elections.

To start, our Supreme Court held in *Tanner v. Deen* that certain county superintendents' refusal to certify an election was subject to mandamus, and it ordered the lower court to issue a writ of mandamus requiring the superintendents to certify. 108 Ga. 95, 101–02 (1899). Rejecting the superintendents' contention that the returns of a certain precinct were invalid, the court noted that "most, if not all, the points made against the validity of these returns involved questions of law only." *Id.* at 101. And the superintendents, the court explained, "were not selected for their knowledge of the law," and therefore had no authority to make legal determinations as to the validity of any election returns. *Id.* The same is true here; Georgia's statutes do not require county election boards or other superintendents to be "selected for their knowledge of the law"—whether the law of fraud or any other topic—because investigating and adjudicating legal issues is not the purpose of the certification process. Instead, the election code provides for expedited election contests in court.

Bacon v. Black, 162 Ga. 222 (1926), is likewise on point. There, the then-governing certification statute required "consolidating" (*i.e.*, canvassing) county superintendents

> to make and subscribe two certificates, stating the whole number of votes each person received in the county; one of them, together with one list of voters and one tally sheet from each place of holding the election, shall be sealed up, and without delay mailed to the Governor; and the other, with like accompaniments, shall be directed to the clerk of the superior court of the county, and by him deposited in his office.

Id. at 227. Based on this mandatory language—the same term, "shall," appears in the current statute—the court held that certification was a "purely ministerial" duty that left no discretion for any superintendents to investigate issues of irregularity or fraud:

> [S]uperintendents who consolidate the vote of a county in county elections *have no right to adjudicate upon the subject of irregularity or fraud* . . . . The duties of the managers or superintendents of election who are required by law to assemble at the courthouse and consolidate the vote of the county *are purely ministerial*.

Id. at 226 (emphases added).

And in *Thompson v. Talmadge*—which resolved the legendary "Three Governors Controversy"—our Supreme Court explicitly characterized canvassing (a duty the 1945 Georgia Constitution imposed on the General Assembly) as the "mathematical process of adding the number of votes," and it cited *Bacon* (among other cases) for the rule that canvassing and certification were purely ministerial, non-discretionary duties. 201 Ga. 867, 877 (1947) (citing *Bacon*; *People ex rel. Sherwood v. State Bd. of Canvassers*, 29 N.E. 345 (N.Y. 1891); and *Davis v. Warde*, 155 Ga. 748 (1923)). As the court put it:

> [I]n publishing the returns and declaring the results the members of the General Assembly were performing a strict and precise duty identical in character with that which rests upon any and all persons who are merely authorized to canvass. *They were not, while performing that duty, exercising or authorized to exercise any discretion, but were simply performing the ministerial act of disclosing to the public the official election returns that had been prepared by the election managers*. By using the simple mathematical process of adding the number of votes appearing thereon for the persons named and seeing whether any person named therein had a majority, they could know whether any person was elected, and, if so, it was their duty to declare that such person had been duly elected Governor. This canvassing of the returns and declaration of the result were constitutional directives to the General Assembly, and its failure to observe them ought not to defeat the right of the person elected or the franchise of the voters who elected him.
>
> . . .
>
> The General Assembly, as canvassers of the election returns in this case, were subject to the general, if not indeed the universal, rule of law applicable to election canvassers. That rule is that *they are given no discretionary power except to determine if the returns are in proper form and executed by the proper officials and*

> *to pronounce the mathematical result*, unless additional authority is expressed. They can neither receive nor consider any extraneous information or evidence, but must look only to the contents of the election returns.

Id. at 876–77 (emphases added).

Thompson's description of this non-discretion principle as nigh-universal was not an exaggeration. "By 1897, the ministerial, mandatory nature of certifying returns was so well-established that one leading treatise declared 'the doctrine that canvassing boards and return judges are ministerial officers possessing no discretionary or judicial power, is settled in nearly . . . all the states.'" Lauren Miller & Will Wilder, *Certification and Non-Discretion: A Guide to Protecting the 2024 Election*, 35 Stanford Law & Policy Review 1, 31 (2024) (quoting George W. McRary, *A Treatise on the American Law of Elections*, 153 § 229 (4th ed. 1897)).

For instance, in *Leary v. Jones*, the Colorado Supreme Court addressed whether election officials were required to certify results even though they had allegedly tallied 1,163 ballots from a precinct in which only 365 people had voted. 51 Colo. 185, 188 (1911). Despite this alleged inconsistency, the court held that the election officials had a mandatory "duty to complete the remainder of their work by certifying to the result (which was purely a ministerial duty)." *Id.* at 192. In particular, the court added, election officials "had no right to refuse because of their claim (if true) that there were irregularities, frauds, and illegal votes in the ballot box," because "[t]hat was not a question at this stage of the procedure for them to determine." *Id.* Rather, "[t]hat question should have been left for the courts." *Id*.

Leary is just one example reflecting the consensus that had already formed across the country by the early 1900s. There are many others. *See, e.g.*, *Lewis v. Marshall Cty. Comm'rs*, 16 Kan. 102, 108 (1876) ("[The canvassing board's] duty is almost wholly ministerial. It is to take the returns as made to them from the different voting precincts, add them up, and declare the result. Questions of illegal voting, and fraudulent practices, are to be passed upon by another

tribunal."); *Kisler v. Cameron*, 39 Ind. 488, 490–91 (1872) ("The duty imposed is ministerial. It is not within [canvassing officials'] province to consider or determine any questions relative to the validity of the election held or of the votes received by the persons voted for." (quotation marks omitted)); *People ex rel. Fuller v. Hilliard*, 29 Ill. 413, 422 (1862) ("These officers are clothed with no discretionary power . . . They are not allowed to reject any returns, or to decide upon their validity, if, on the face, they are made in compliance with the law, and in the form prescribed by the statute."); *Stearns v. State*, 100 P. 909, 911 (Okla. 1909) ("The duty of the city council to canvass the returns as made to them by the election boards of the different precincts in the city is purely ministerial . . . To determine whether the votes of [a] precinct had been falsely and fraudulently counted and returned, as charged, would have required . . . a judicial proceeding which the canvassing board has no power to undertake." (collecting authorities)); *State v. Steers*, 44 Mo. 223, 227–28 (1869) ("Here is no discretion given—no power to pass upon and adjudge whether votes are legal or illegal—but the simple ministerial duty to cast up and award the certificate to the person having the highest number of votes.").

This consensus is easy to understand: "[T]he risk that the certifying officers would seek to manipulate the results or otherwise abuse their power outweighed any thought that they could play a helpful role in investigating elections." Miller & Wilder, *supra*, at 30. Thus, courts across the country have expressly acknowledged that giving election officials the discretion to refuse certification would both threaten to disenfranchise voters and "*create[] opportunities for election fraud*" on the part of those officials. *Id.* at 29 (emphasis added). As the Missouri Supreme Court explained in *State v. Steers*:

> To allow a ministerial officer arbitrarily to reject returns at his mere caprice or pleasure is to infringe or destroy the rights of parties . . . The exercise of such a power is subversive of the rights of the citizen, and dangerous and fatal to the elective franchise.

44 Mo. at 228. Likewise, in *Lehman v. Pettingell*, the Colorado Supreme Court cautioned that imbuing election boards with the discretion to refuse certification "would enable canvassing boards, through design or incompetency[,] to temporarily, at least, defeat the will of the people." 39 Colo. 258, 264 (1907). And in *Stearns v. State*, the Oklahoma Supreme Court issued a similar warning:

> In close elections [canvassing] boards swayed by local prejudice or interest could easily find some excuse or have supplied to them some excuse to refuse to canvass the returns, and the means of the people to have the vote canvassed and the result of the election declared would be destroyed. If alleged frauds in conducting and holding an election and making returns thereof to the extent of improperly counting 89 votes furnishes to a canvassing board an excuse to refuse to canvass the returns, it may refuse to do so when an allegation of one fraudulent vote is made, and in general elections each county canvassing board of the state might thus be turned into a contesting court, and the entire election machinery would become blocked and useless for the purpose for which it was created.

100 P. at 911.

Simply put, courts have long recognized that giving election officials discretion in certifying election results would allow those officials to "assume[] a power dangerous to the citizen, and fatal to the elective franchise." *Hilliard*, 29 Ill. at 422–23. Indeed, "to permit [canvassers] to refuse to canvass because of mistake or fraud . . . would be subversive of our entire scheme of elections." *People ex rel. Blodgett v. Bd. of Town Canvassers of Coeymans*, 19 N.Y.S. 206, 207–08 (N.Y. Sup. Ct., Albany Cty. 1892). As such, courts have emphatically refused to place such power in the hands of canvassing and certifying officials. This Court should do likewise.

II. Plaintiff's Other Arguments Are Unavailing[2]

A. Any reliance on official-immunity case law is misplaced.

In seeking a declaration that her duties as a BRE member—including the duty to certify election results—are discretionary, Plaintiff's original and amended complaints in *Adams I* relied heavily on cases that distinguish between "discretionary" and "ministerial" duties for purposes of official immunity. *See Adams I* Compl. ¶¶ 126–30. That reliance is misplaced because the issue here is not whether Plaintiff is officially immune from personal liability for damages (or otherwise). The question is whether Plaintiff—and all other BRE members—have a mandatory duty to certify county election results, one they could be compelled to perform via a writ of mandamus. The answer, as the Georgia Supreme Court held in *Tanner*, is yes.

The official-immunity argument also fails because even under an official-immunity analysis, Plaintiff's certification duty qualifies as "ministerial." For example, O.C.G.A. § 21-2-493(k) does not "call[] for the exercise of personal deliberation [or] judgment" by the superintendent, as would be required for the duty to be discretionary under an official-immunity analysis. *Harry v. Glynn Cty.*, 269 Ga. 503, 505 (1998). Instead, it provides a "simple, absolute, and definite" directive. *Common Cause/Ga. v. City of Atlanta*, 279 Ga. 480, 482 (2005). Indeed, the provision imposes an "if-this-then-that" command, which is a quintessential ministerial duty, *see Meagher v. Quick*, 264 Ga. App. 639, 644 (2004). Specifically, § 21-2-493(k) states (with emphases added) that "[a]s the returns from each precinct are read, computed, and found to be correct or corrected as aforesaid, they *shall* be recorded," they "*shall* be added together" and "announced," and "[t]he consolidated returns *shall then be certified* by the superintendent."

[2] Plaintiff has not yet filed any supporting briefs in *Adams II*. However, given the short timeframe for resolution of this and related case *Abhiraman et al. v. State Election Board*, 24CV010786, DNC-DPG here preemptively respond to arguments and authorities previously raised by Plaintiff in *Adams I*.

Hence, if the returns from each precinct are numerically accurate or have been corrected in accordance with the statute, then the superintendent must aggregate them and certify the results.

Finally, as our Court of Appeals has held, for purposes of an official-immunity analysis, a ministerial duty does not become discretionary merely because the official retains some authority to decide *procedural* aspects of the duty. Rather, "[t]he execution of a specific task is characterized as ministerial even though the manner in which it is accomplished is left to the employee's discretion." *Lincoln Cty. v. Edmond*, 231 Ga. App. 871, 874 (1998). Hence, an official's discretion in how to remove a tree did not change the ministerial nature of the duty to remove it. *Id.* And a duty to barricade a bridge is ministerial even if the official has some discretion "in determining how large the barriers should be and where they should be placed." *Joyce v. Van Arsdale*, 196 Ga. App. 95, 97 (1990).

Those holdings put this issue beyond doubt. But more fundamentally, the certification statute *does not* leave "the manner in which [certification] is accomplished . . . to [the superintendent's] discretion," *Lincoln Cty.*, 231 Ga. App. at 874. On the contrary, the statute sets a specific deadline for certification, and it stipulates that superintendents must effect certification "in the manner required by this chapter." O.C.G.A. § 21-2-493(k). In turn, provisions of "this chapter," *i.e.*, §§ 21-2-496 and 21-2-497, set forth the precise manner in which a superintendent must certify returns, down to the number of copies required and the exact destination of each copy. Accordingly, the duty to certify is nothing like the duties addressed in *Williams v. Pauley* and *Murphy v. Bajjani*—on which Plaintiff relies—where the statutes at issue imposed duties *without* any "specific instructions or procedures" on how to execute them. *Williams v. Pauley*, 331 Ga. App. 129, 134 (2015). In *Williams*, for example, the statute imposed a duty on law enforcement to "'impound livestock found to be running at large or straying,'" but offered no

further directions or guidance. *Id.* (quoting O.C.G.A. § 4-3-4(a)). And *Murphy* involved a "statutory mandate that a school safety plan be created," but the statute offered only general guidance regarding the plan's parameters, including that it "ha[ve] three goals" and be "prepared with input from a variety of persons." *Murphy v. Bajjani*, 282 Ga. 197, 199–200 (2007).

B. Any evolution in the structure and duties of election superintendents over time should not confuse the legal issue presented here.

The BRE is the election superintendent for Fulton County. Compl. ¶ 27. "Superintendent" is a statutorily defined term. *See id.* ¶ 20. It means: "Either the judge of the probate court of a county or the county board of elections, the county board of elections and registration, the joint city-county board of elections, or the joint city-county board of elections and registration, if a county has such[.]" O.C.G.A. § 21-2-2(35)(A). The BRE has long held the superintendent role in Fulton County, having been established in 1989 by the Georgia General Assembly through local legislation under Ga. L. 2019, p.4181. Compl. ¶ 9. As Plaintiff alleges, the authorizing legislation for the BRE states that it "'**shall have the powers and duties of the election superintendent of Fulton County relating to the conduct of elections** and the powers and duties of the board of registrars relating to the registration of voters and absentee balloting procedures.'" *Id.* ¶ 18 (emphasis in original). And thus "the BRE has the exclusive power to certify the results of Fulton County elections." *Id.* ¶ 34.

In the prior iteration of this case, and specifically in her amended complaint in *Adams I*, Plaintiff went further, alleging that the Fulton County superintendent's "statutory duties have been conferred on the individual members of the BRE—including but not limited to" Plaintiff. *Adams I* Amended Compl. (filed Aug. 22, 2024) ¶ 9. She then alleged that, "[j]ust as clearly as the Legislature has tasked the BRE—as Fulton County's election superintendent—with the task of managing elections, it has necessarily imposed *discretionary* duties on the BRE and its

members." *Id.* ¶ 12 (emphasis in original). The Court should not accept these arguments. As discussed in *Section I*, above, the duty of superintendents to certify election results is mandatory under Georgia law.

To the extent Plaintiff relies on the fact that superintendents under the current election code are multi-member boards, rather than individual persons, that changes nothing. Plaintiff does not offer any explanation—let alone legal support—for why the election code's allocation of superintendent duties to multi-member boards necessarily (or even logically) means that the specific duty to certify must be discretionary.

Once again, moreover, relevant case law rejects Plaintiff's argument. In *Tanner*, for example, the task of consolidating votes and certification was charged not to an individual person, but rather to a collection of county "superintendents" from "different political parties." 108 Ga. at 96. Nonetheless, when a "majority" of those superintendents (all belonging to one party) decided to certify the results without counting any votes from the McDonald precinct, our Supreme Court held that the superintendents had no discretion to do so, declared that "their certificate . . . amounted to nothing," and ordered the issuance of a writ of mandamus requiring all the superintendents to reassemble and certify the results, this time "including the returns from the McDonald precinct." *Id.* at 100–02.

Likewise, in *Thompson*, the duty to canvass and certify the results of the gubernatorial election belonged to *the General Assembly*, a quintessential multi-member body. 201 Ga. at 875–76. But even there, the Supreme Court repeatedly emphasized that individual members of the legislature "were *not*, while performing that duty, exercising or authorized to exercise any discretion"; instead, they "were simply performing the ministerial act of disclosing to the public

the official election returns" by "using the simple mathematical process of adding the number of votes." *Id.* at 876–77.

To be sure, there are other statutory duties that call for superintendents to exercise some measure of discretion. And it is in those situations that the multi-member structure of election superintendents comes into play. Specifically, when discretion is conferred by statute, superintendents exercise that discretion via majority vote of the multi-member board. But certification is not one of those situations; because the duty to certify is expressly mandatory, neither the board nor any of its individual members has discretion to delay or refuse certification.

Likewise, to the extent Plaintiff invokes the breadth of a superintendent's duties under the current election code, that is also beside the point. Even if superintendents have more duties now as compared to under prior election statutes, that does not alter the longstanding, mandatory nature of certification. Put another way, this Court need not consider whether superintendents might possess discretion in the exercise of some *other* statutory duty—old or new—because the declaratory relief Plaintiff seeks is specific to "votes on certification." Compl. at 29. That specific duty remains mandatory based on the text and structure of the current election code, as well as historical precedent.

O.C.G.A. § 21-2-493 itself demonstrates that the expansion of superintendent duties has no necessary bearing on the nature of certification. That statute imposes "new" duties on superintendents that were not present in prior election statutes, including the duty to perform certain comparisons and cross-checks to ensure the numerical accuracy of the vote count. *See, e.g.*, O.C.G.A. § 21-2-493(b)–(h). In some specified circumstances, the statute even affords superintendents a measure of discretion in performing those duties. *See, e.g.*, *id.* § 21-2-493(b) ("Such examination may, if the superintendent deems it necessary, include a recount or recanvass

of the votes of that precinct . . ."). But when it comes to certification, the same statute makes clear that the superintendent's duty is absolute. Once numerical accuracy is attained to the satisfaction of the statute and its required cross-checks, certification is mandatory; the returns from each precinct "*shall* be recorded" and "added together," and "[t]he consolidated returns *shall then be certified* by the superintendent." O.C.G.A. § 21-2-493(k) (emphases added).

* * *

Plaintiff's claims depend on the assumption that her duty to certify election results is discretionary. But because that duty is in fact mandatory under Georgia law, Plaintiff "could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought," *Norman*, 310 Ga. at 131. Her amended complaint should thus be dismissed with prejudice.

CONCLUSION

For the above reasons, the Court should grant the DNC-DPG motion to dismiss the amended complaint with prejudice.

[Signatures appear on the following page.]

Respectfully submitted this 25th day of September, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2024, a true and correct copy of the foregoing DEMOCRATIC NATIONAL COMMITTEE'S AND DEMOCRATIC PARTY OF GEORGIA'S JOINT MOTION TO DISMISS was electronically filed with the Clerk of Court using the Court's eFileGA electronic filing system, which will automatically send an email notification of such filing to all attorneys of record, and was additionally served by emailing a copy to the currently known counsel of named parties and intervenors as listed below:

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