

**IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

<p>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,</p> <p><i>Plaintiff,</i></p> <p>v.</p> <p>FULTON COUNTY, GEORGIA,</p> <p><i>Defendant,</i></p> <p>DEMOCRATIC NATIONAL COMMITTEE &amp; DEMOCRATIC PARTY OF GEORGIA,</p> <p><i>Defendant-Intervenors.</i></p>	<p>Civil Action File No. 24CV011584</p>
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**PLAINTIFF'S TRIAL BRIEF AND RESPONSE  
TO DEFENDANT-INTERVENORS' JOINT MOTION TO DISMISS**

**TABLE OF CONTENTS**

INTRODUCTION ..... 3

LEGAL STANDARD ..... 4

LEGAL AND FACTUAL BACKGROUND ..... 5

    A. Historic Background ..... 5

    B. Current Statutory Structure ..... 8

    C. Factual Background ..... 10

ARGUMENT ..... 11

    I. STATUTORY CERTIFICATION DEADLINES ARE CONSISTENT WITH  
DISCRETIONARY DUTIES ..... 11

        A. The difference between mandatory and discretionary authority ..... 11

        B. Review of the Election Materials and Procedures is a necessary step in the certification  
process ..... 14

CONCLUSION ..... 16

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## INTRODUCTION

This case involves the interplay between the mandatory and discretionary duties of members of the Fulton County Board of Registration and Elections (“BRE”). Many provisions of Title 21 of the Georgia Code (“Election Code”) were enacted at a time when election superintendents were single individuals and not multi-member bipartisan boards. While offering the virtue of additional oversight, the move to boards complicated the ease by which election results were certified. Where individual superintendents could make unilateral decisions regarding fraudulent ballots and counting returns “justly,” boards such as the BRE are statutorily required to make these decisions through majority votes. This structure, however, does not alter the fact that election superintendents—whether multi-member bipartisan boards or individual judges—must exercise discretion when determining whether election returns are accurate and without mistake, error, or fraud and can be certified as true and correct.

Furthermore, the move to the boards does not alter the mandatory nature of the certification deadline. Intervening Defendants Democratic Party of Georgia and the Democratic National Committee argue that BRE members are to ‘certify’ merely that the election took place, *not* that the results are accurate. Such a view is contrary to the reason for establishing multi-member bipartisan boards in the first place, which is to create an oversight function over the election process as well as the clear language of the attested certification certificate and multiple provisions of Title 21. If boards offer greater challenges in meeting election deadlines, the remedy is not to order BRE members to blindly rubber stamp and vote “yes” to certify inaccurate or suspect results (even if they know or have reason to believe that the certification of results would not be true); rather, the BRE must advance the process of examining election materials and ensuring adequate time for votes on certification. Whatever logistical burdens the BRE may have due to its

requirement to act through majority vote, the fact remains that election superintendents—whether individuals or multi-member boards—are required to use their discretion in investigating fraud, mistakes, or irregularities in Fulton County elections.

### **LEGAL STANDARD**

The Declaratory Judgment Act provides that

In cases of actual controversy, the respective superior courts of this state . . . shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

O.C.G.A. § 9-4-2(a). “Although the Act is to be ‘liberally construed and administered[,]’ the text of the Act also plainly states that its purpose ‘is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]’” *Cobb Cnty. v. Floam*, 319 Ga. 89, 96 (2024) (alterations original) (quoting O.C.G.A. § 9-4-1).

To survive a motion to dismiss under O.G.C.A. § 9-11-12(b)(6), plaintiffs must allege provable facts that would entitle them to relief. *See Anderson v. Daniel*, 314 Ga.App. 394, 395 (2012); *Benedict v. State Farm Bank, FSB*, 309 Ga.App. 133, 134(a) (2011) (a complaint defeats a motion to dismiss if “evidence may be introduced which will sustain a grant of relief to the plaintiff”). The core purpose of a complaint is to put “the opposing party on reasonable notice of the issues that must be defended against.” *TechBios, Inc. v. Champagne*, 301 Ga.App. 592, 593 (2009). The defendant bears the initial burden of proof for motions under O.G.C.A. § 9-11-12(b)(6). *McCloud v. Loundes Cnty. Bd. of Comms.*, 369 Ga.App. 756, 759 (2023). A successful movant must show that:

(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.

*Ausin v. Clark*, 294 Ga. 773, 774-75 (2014). Pleadings are to be construed most favorably to the filing party, with doubts resolved in their favor. *Quetgles v. City of Columbus*, 264 Ga. 708, 708 (1994).

### **LEGAL AND FACTUAL BACKGROUND**

The issue in this case is whether the actions BRE members take during the certification process are discretionary. The Defendants' clear understanding of the complaint demonstrates that they are on notice of the "issues that must be defended against." However, because the Motion to Dismiss ("Motion") fails to properly credit the impact of Georgia's 50 year shift from individual probate judges acting as superintendents to multi-member boards, it fails to recognize the fundamental issues presented to this case: (1) how multi-member boards are to execute statutory duties originally designed for individual superintendents; and (2) the common sense question, why the General Assembly chose to create and empower BREs and provide additional, broader duties and responsibilities through subsequent legislation? Before turning to the specific facts in this case, it is therefore necessary to discuss the evolution of the superintendent under the Election Code.

#### **A. Historic Background**

Prior to 1978, the Election Code defined the superintendent as an individual probate judge, then referred to as an "ordinary." *See* Laws 1970, p. 347, § 1; Laws 1978, p. 1004, § 1. Expanded in 1978 to include boards, the Election Code nevertheless failed to harmonize the text to accommodate multi-member boards. As a result, the Election Code is replete with statutory anomalies where boards are required to execute "individual" tasks. These irregularities are so

pervasive that they even appear in some of the statutes referenced in the Defendants' Motion to Dismiss:

- O.C.G.A. § 21-2-70(9) cited at Mot. at 5 reads as follows (emphasis added):

Each superintendent within **his or her** county or municipality shall exercise all the powers granted to **him or her** by this chapter and shall perform all the duties imposed upon **him or her** by this chapter, which shall include the following:

(9) To receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to such authorities as may be prescribed by law;

- O.C.G.A. § 21-2-493(a) cited at Mot. at 5 reads, in pertinent part, as follows (emphasis added):

(a) The superintendent shall, after the close of the polls on the day of a primary or election, at **his or her** office or at some other convenient public place at the county seat or in the municipality, of which due notice shall have been given as provided by [Code Section 21-2-492](#), publicly commence the computation and canvassing of the returns and continue until all absentee ballots received by the close of the polls ...

- O.C.G.A. § 21-2-493(c) cited at Mot. at 6 reads, in pertinent part, as follows (emphasis added):

... If the ballot box is found to contain more ballots than there are electors registered in such precinct or more ballots than the number of voters who voted in such precinct at such primary or election, the superintendent may, in **his or her** discretion, exclude the poll of that precinct, either as to all offices, candidates, questions, or parties and bodies or as to any particular offices, candidates, questions, or parties and bodies, as to which such excess exists.

The legacy of the era when superintendents were individual probate judges is on prominent display where the Election Code addresses fraud. The Motion on page 5 references O.C.G.A. 21-2-493(i) which states (emphasis added):

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.

This provision was added to the Election Code in 1969, when the superintendent was the individual probate judge. *See* Laws 1969, p. 292, § 1. As with the other sections detailed above, it references the superintendent as “him or her” but, more importantly, it tasks “him or her” with computing and certifying votes “justly.” Webster’s Third New International Dictionary defines “justly” as an action taken “in a just manner.” Individuals, of course, can exercise their judgment and discretion in deciding how to act “in a just manner” without taking a vote. By contrast, the BRE can only decide which ballots to compute and certify “justly” through its own vote. *See* O.C.G.A. 1-3-1(d)(5) (“A joint authority given to any number of persons or officers may be executed by a majority of them, unless it is otherwise declared.”). However, whether vested with unilateral authority or required to act through majority vote, the counting of votes “justly” can only be undertaken the exercise of an individual’s own judgment and discretion.

In addition to the changes over the last 50 years to the *structure* of the superintendent, there have been additional changes over the last 100 years to the *duties* of the superintendent. These changes directly affect the significance of the Defendants’ reliance on *Tanner v. Deen*, 108 Ga. 95 (1899), *Bacon v. Black*, 162 Ga. 222 (1926), and *Thompson v. Talmadge*, 201 Ga. 867 (1947). For example, in the Georgia Election Code of 1910, the superintendent’s full scope of duties was outlined in a single section including (1) voter list maintenance; (2) vote counting; (3) certifying the total number of votes cast; (4) delivery of tally sheets; and (5) the prevention of illegal votes. O.C.G.A. § 2-3-82 (1910).<sup>1</sup> The 1910 code prohibited superintendents from examining the election returns. *Id.* (“The ballots shall not be examined by the superintendents[.]”). While the 1933 Election Code replaced superintendents with “Election Managers” these new positions

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<sup>1</sup> available at: [https://archive.org/details/codeofstateofgeov1\\_prep/page/30/mode/2up](https://archive.org/details/codeofstateofgeov1_prep/page/30/mode/2up)

nevertheless held the limited authority of superintendents under the 1910 code. *See, generally*, O.C.G.A. § 34-1 *et. seq* (1933).<sup>2</sup>

The Defendants argue that superintendents are nothing more than mere canvassers, as they were under the old statutory regime which prohibited their review of ballots for irregularities and fraud. *See, e.g., Bacon v. Black*, 162 Ga. at 226. But unlike the superintendents and Election Managers of the early 1900s, today’s superintendents wield far greater statutory authority and discretion. The *Thompson* case illustrates that the superintendent’s role is to be determined by statutory authority, not mere nomenclature:

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.**

201 Ga. at 877 (emphasis added). As outlined below, the General Assembly has expressly granted superintendents the “additional authority” referenced in *Thompson*. BRE members like Plaintiff have a statutory mandate to review and sequester fraud and error, to investigate deceit, and to produce true and perfect returns. In contrast, Defendants’ argument remains confined to a version of the Election Code that no longer exists.

## **B. Current Statutory Structure**

As noted above, the current Election Code was modified in 1978 to allow the General Assembly to create multi-member boards to serve as a county superintendent. Compl. ¶ 16; O.C.G.A. § 21-2-40(b); Laws 1978, p. 1004, §§ 1, 2. In 1989, the General Assembly created the Fulton BRE and vested it with “the powers and duties of the election superintendent of Fulton County relating to the conduct of elections[.]” Ga. L. 1989, p.4577; Compl. ¶¶ 9, 16.

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<sup>2</sup> (available at: <https://archive.org/details/codeofgeorgiaof100prep/page/990/mode/2up>).



The Election Code grants superintendents a robust set of powers and duties to ensure that election returns are free of fraud and error, including but not limited to an obligation to:

- systematically and thoroughly inspect the conduct of elections; O.C.G.A. § 21-2-70(8);
- calculate and tabulate election returns; O.C.G.A. § 21-2-493(a);
- compare voter registration figures with various certificates returned by poll officers; O.C.G.A. § 21-2-493(b);
- set aside and sequester discrepancies where the number of votes cast in a precinct appear to exceed the number of electors therein; *id.*;
- investigate such discrepancies which, when initiated, pauses the recording of votes from said precinct; *id.*;
- initiate recount or recanvassing where such discrepancies exist; *id.*, O.C.G.A. § 21-2-495 (even where such discrepancies are not apparent upon the face of the election returns);
- summon poll officers and all election papers in those officers' possession for resolving discrepancies; O.C.G.A. §§ 21-2-493(b), (g);
- examine election return sheets, tally papers, proof sheets, and other papers in resolving discrepancies; O.C.G.A. §§ 21-2-493 (b), (g), (h);
- receive and verify sealed envelope containing zero tapes, result tapes, and memory cards from each polling place. O.C.G.A. § 21-2-379.11(g);
- examine voting machines and verify that they are properly zeroed before use on a voting day; O.C.G.A. §§ 21-2-379.6, 21-2-327;

- determine the sufficiency of recall applications and petitions; O.C.G.A. § 21-2-408(c);
- “announce and attest” to the results of their computation and canvassing of election returns, O.C.G.A. § 21-2-493(a);
- “compute and certify the votes **justly**[,]” O.C.G.A. § 21-2-493(i) (emphasis added); and
- swear to “prevent any fraud, deceit, or abuse” in carrying out the operation of elections and to “make a **true and perfect return of such primaries and elections** [and] impartially, and faithfully perform [their] duties in accordance with Georgia laws **to the best of** [their] **judgment** and ability.” O.C.G.A. § 21-2-70(15) (emphasis added); Compl. ¶¶ 5, 19.

The common theme running through all these portions of the Election Code is the broad duty of BRE members to ensure elections are free from “fraud, deceit, or abuse.” These duties *necessarily* require each BRE member to use their best judgment and exercise sound discretion.

### C. Factual Background

Plaintiff was appointed to the BRE on January 17, 2024, Compl. ¶ 4, and swore her oath of office on February 8, 2024. Compl. ¶ 5. Five days before the March 12 presidential preference primary, Plaintiff, submitted a request to Nadine Williams, the Elections Director of the Fulton County BRE (“Election Director”), asking for a copy of the following items: (1) Qualified Voter List; (2) Voter Check-In List for Advanced Voted and Election Day, collated by location; (3) Poll Open and Poll Close Tapes for Advanced Voted open and close statuses, and Election Day; (4) Ballot Recap Sheets; (5) Voted Ballot Removal Forms; (6) Drop Box Ballot Recap Sheets; (7) Provisional Ballot Recap Sheets; and (8) the Cast Vote record. Compl. ¶ 45. The Election Director

and BRE rejected Plaintiff's request. Compl. ¶¶ 41-44. Plaintiff was informed that the majority of the documents she sought would not be created until after the primary, that review was not required for her vote on certification, and that the Director's office "diligently conducted and completed" reconciliation before certification. Compl. ¶ 46. The Election Director and BRE also claimed that Plaintiff was not entitled to these materials pursuant to the Bylaws through which the BRE had "delegate[d] the powers and duties of the superintendent and the board of registrars" to "the [Election] Director[.]" Compl. ¶¶ 38-41. With no ability to examine the veracity and authenticity of the election returns presented by the Election Director, Plaintiff could not vouch for their accuracy and voted against certification. Compl. ¶ 49. On March 29, 2024, Proposed Intervenor Democratic Party of Georgia delivered a letter to the BRE declaring that certification was a ministerial task and alleging that failure to vote "yes" to certification was criminally liable offense. Compl. ¶ 50.

## **ARGUMENT**

### **I. STATUTORY CERTIFICATION DEADLINES ARE CONSISTENT WITH DISCRETIONARY DUTIES.**

The Election Code has charged boards with certifying results within a fixed period of time after an election. This action does not seek to alter that requirement, but rather clarify that BRE members have discretionary duties during that process.

#### **A. The difference between mandatory and discretionary authority.**

A discretionary act "calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." *Murphy v. Bajjani*, 282 Ga. 197, 199 (2007); *McDowell v. Smith*, 285 Ga. 592, 593 (2009). In contrast, a ministerial act, "is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution

of a specific duty.” *Id.* (adopting the same test used by the Court of Appeals). When determining if an act is discretionary or ministerial, Georgia courts look to “the character of the specific acts complained of, not the general nature of the job.” *Williams v. Pauley*, 768 S.E.2d 546, 549 (Ga. App. 2015) (citing *Davis v. Effingham County Board of Commissioners*, 760 S.E.2d 9 (Ga. 2014)). Finally, a statutorily mandated duty is not automatically converted to a ministerial task. *See Williams*, 768 S.E.2d at 549; *Todd v. Brooks*, 665 S.E.2d 11 (Ga. 2008).

*Brooks* provides a simple illustration of the difference between ministerial and discretionary duties. 292 Ga. App. 329. In *Brooks*, a claim for damages was brought against a deputy sheriff who, while attempting to control a loose bull, shot and killed it after it charged him. *Id.* Under O.C.G.A. § 4-3-4(a), sheriff’s deputies had the “duty ... to impound livestock found to be running at large.” *Id.* at 331. Despite this affirmative duty the court held that its execution called on the deputy “to exercise considerable deliberation and judgment” which thereby “rendered his actions discretionary.” *Id.* As the court observed, an “official’s actions in fulfilling a statutory mandate may be discretionary when those actions involved the exercise of personal deliberation and judgment.” *Id.*

This same analysis was applied in *Williams v. Pauley*. 768 S.E.2d 546. Summoned to capture a loose horse, a police officer left the animal to find a “a rope or something.” *Id.* at 547, 549. With the horse still loose, a driver struck the animal and died in the resulting accident. *Id.* at 549. The court found the officer’s decision to find some means of subduing the animal was a discretionary act. *Id.* Noting that the statute “contains no specific instructions or procedures for impounding livestock” the court held that—despite the statutory mandate—the method of “taking control of the horse and impounding it clearly required ... [the officer’s] deliberation and judgment.” *Id.*

These cases show that a statute can command action while also giving actors room to determine the manner of execution. As relevant in this case, it is undisputed that the Election Code mandates certification of the election by 5:00 pm on the Monday following the date of an election, primary, or special election. O.C.G.A. § 21-2-493. That command does not, however, require the BRE to certify every set of proffered election returns without review, analysis, and action. In fact, the plain language of the Election Code supports the opposite contention, *i.e.*, that the BRE must review and ensure the accuracy of election returns. And if the requirement under O.C.G.A. 1-3-1(d)(5) that boards act through majority vote complicates the ability of the BRE to meet the certification deadline the issue resolved by accelerating the BRE's review and certification process. The Election Code has created multi-member boards, charged their members with ensuring accurate elections, and tasked these boards with hitting certification deadlines. While this structure creates tension these goals are reconcilable, and it is not through forcing members to blindly vote "yes" on certifying the nearest collection of ballots.

As Defendant notes, the goal of certification is to "ensure the numerical accuracy of th[e] vote count." Mot. at 5. Certification can only proceed "[o]nce mathematical accuracy is attained[.]" *Id.* It is not possible to ensure numerical accuracy without first determining what ballots are valid to count and reviewing them for irregularities. Moreover, while the Election Code does contain statutory commands, it leaves the method of execution to the discretion of the election official. A review of the statutory duties imposed on BRE members makes clear that there neither are, nor can be, "specific instructions or procedures" for executing these core duties:

- the systematic inspection of the conduct of elections (O.C.G.A. § 21-2-70(8));
- the examination of discrepancies in precinct vote tallies (O.C.G.A. § 21-2-70(8));

- summoning witnesses and documents necessary to resolve discrepancies (O.C.G.A. §§ 21-2-493 (b), (g));
- determining the sufficiency of recall applications and petitions (O.C.G.A. § 21-2-408(c)); and
- the computation and certification of votes “justly” (O.C.G.A. § 21-2-493(i)).

None of these duties can qualify as so clear, definite and certain that BRE members are simply executing a relatively simple duty. However, if the Defendants are correct, then BRE members can have only one option on a certification vote: “yes.” Such a result would render multi-member boards a nullity, and the obligation to ensure elections free from “fraud, deceit, or abuse” moot. In short, then what was the point of the General Assembly creating the BRE and then legislating further duties, powers, and responsibilities to the BRE? To require a blind rubber stamp “yes” vote creates a result that is contrary to the entire structure of the Election Code, Plaintiff respectfully requests this Court to deny the Motion to Dismiss.

**B. Review of the Election Materials and Procedures is a necessary step in the certification process.**

Detecting discrepancies and other potential fraud is a necessary step in the certification process. As shown above, BRE members are tasked with numerous duties relating to the certification process, such as examining and resolving discrepancies in vote tallies. The same provision that implements the mandatory certification deadline also contemplates discretion. Specifically, it recognizes that through the exercise of a superintendent’s discretion not all returns will be counted:

As the returns from each precinct are read, computed, **and found to be correct or corrected** as aforesaid, they shall be recorded on the blanks prepared for the purpose **until all the returns from the various precincts which are entitled to be counted shall have been duly recorded**; then they shall be added together, announced,

and attested by the assistants who made and computed the entries respectively and shall be signed by the superintendent.

O.C.G.A. § 21-2-493(k) (emphasis added). In order to complete such a task, BRE members must have access to the relevant data. As evidenced in the Verified Complaint, the procedures in effect in Fulton County do not allow BRE members to timely fulfill their statutory oaths to ensure the integrity of elections. Questions regarding the “just” counting of votes in the face of suspected fraud are easily addressed by one person superintendents. With a board, this process is far more time consuming, but no less important. Furthermore, the determination of a fraud free election is first, last, and always a matter of discretion.

While true that the Election Code provides avenues to “validate individual ballots and address possible fraud,” Mot. at 6, such avenues do not conflict with BRE members’ discretion to review the Election Materials prior to certification. Courts are authorized to hear challenges regarding “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 the result of the primary or election.” O.C.G.A. § 21-2-522(1), (3), (4). However, determination of such fraud or illegal votes can be found on the initial review by BRE.

The detection of fraud or other error does not bar certification, but it does provide an evidentiary basis for these election contests. O.C.G.A. § 21-2-493(i). In fact, the Election Code contemplates a role for the superintendent in identifying and preserving this evidence by mandating that “[i]f any error or fraud is discovered, the superintendent . . . shall report the facts to the appropriate district attorney for action.” *Id.* Without review of the election materials, BRE members cannot discover any fraudulent or erroneous returns; and they certainly cannot report what they do not discover. Because election results are presumed valid in an election contest, *McIntosh County Bd. Of Elections v. Deverger*, 282 Ga. 566 (2007); *McCranie v. Mullis*, 267 Ga.

416 (1996), it is essential that any questionable ballots or other irregularities be flagged by superintendents during the certification process. Finally, as noted above, if there is a conflict between providing election data to BRE members and meeting the certification deadline, the solution lies not in imposing a blind mandatory yes vote on unscrutinized ballots but in a change to the demonstrably inadequate procedures of the BRE.

### **CONCLUSION**

The Court should confirm that that Plaintiff's duties are discretionary not ministerial and that the Director may not prevent BRE members from gaining access to the information required to fulfill their statutory duties as determined by the BRE.

Respectfully submitted this 27th day of September, 2024,

/s/ Alex B. Kaufman

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