Nos. S25A0362, S25A0490

In the Supreme Court State of Georgia

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Appellants,

v.

ETERNAL VIGILANCE ACTION, INC., ET AL.,

Appellees.

BRIEF OF APPELLEES ETERNAL VIGILANCE ACTION, INC., SCOT TURNER, AND JAMES HALL

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INTRODUCTION

The General Assembly promulgated extensive, detailed, and specific laws governing the manner in which votes are cast, counted, reviewed, and certified in this State. *See* O.C.G.A. §§ 21-2-1, *et seq*. (the "Election Code"). On the eve of the 2024 general election, the State Elections Board ("SEB") promulgated a series of rules that (i) contradicted and altered the express provisions of the Election Code and (ii) exceeded the SEB's statutory and constitutional rulemaking authority.

This Court has long held that a State executive body, like the SEB, has no power to (i) enact rules that amend, in any way, legislative pronouncements or (ii) act in a manner inconsistent with, or unauthorized by, legislation. Inherent in these cases is this Court's consistent recognition that Ga. Const. Art. I, Sec. II, Para. III (the separation of powers provision), precludes *both* (i) the executive from legislating and (i) the legislature from delegating legislative authority to the executive. Pursuant to current case law, an impermissible delegation of legislative authority occurs when (i) the legislature empowers the executive to make rules without "specific" and "realistic" guidelines

regarding how to do so or (ii) the executive promulgates rules without such guidance. While this Court has not detailed the precise parameters of such "specific" and "realistic" guidelines, it has, in application, determined that the leeway is narrow. And it has determined that the legislature simply empowering the executive to create rules alone is not enough to satisfy those requirements.

Moreover, this Court has called into question whether the strict prohibitions in Ga. Const. Art. I, Sec. II, Para. III can be excepted at all. These limitations on executive authority are even more important when the rulemaking directly impacts "major questions" or rights, including the fundamental right to vote and have that vote counted and certified in accordance with the law. In sum, the challenged SEB rules and actions evidence impermissible legislation that usurps the authority of the General Assembly. The unelected SEB cannot do so.

Prior to the 2024 general election, Appellees Eternal Vigilance Action, Inc., Scot Turner, and James Hall challenged the enforceability of the SEB rules on the above grounds. After receiving briefing and conducting an evidentiary hearing, the trial court determined Appellees had standing, the challenged SEB Rules conflicted with and altered the

Election Code, and the SEB exceeded its statutory and constitutional authority in promulgating the rules.[1] The trial court was correct, and this Court should affirm. Appellants' arguments to the contrary are unmoored from the plain language of the Election Code, the existing body of case law limiting executive rulemaking, the plain language of Ga. Const. Art. I, Sec. II, Para. III, and existing case law regarding standing. As such, it should be rejected.

STANDARD OF REVIEW

This Court reviews the legal conclusions of a trial court *de novo*. *Lawrence v. Lawrence*, 286 Ga. 309, 310 (2009). Factual findings are upheld "as long as they are not clearly erroneous, which means there is some evidence in the record to support them." *Id.* In the standing context, "[a] trial court's determination . . . will not be disturbed unless its factual determinations are clearly erroneous; however, the trial court's

[1] Appellants oddly contest whether this Court can decide whether Ga. Const. Art. I, Sec. II, Para. III prohibits the type of rulemaking SEB engaged in completely. Plaintiff explicitly raised and argued this issue below. *See, e.g.,* Complaint at ¶¶ 9-18, 38-39, 43-44, 57-59, 60 (V1-23–42). The trial court ruled that the SEB's rulemaking violated Ga. Const. Art. I, Sec. II, Para. III under current case law. V1-13–14. But Appellees conceded, and the trial court recognized, the trial court lacked ability to "overrule" this Court's prior in *Department of Transportation v. City of Atlanta*, 260 Ga. 699 (1990). V1-13 n.1. Appellants contend the SEB did not violate Ga. Const. Art I, Sec. II, Para. III. This issue was squarely before trial court and is now squarely before this Court. And in deciding this issue, this Court has the authority to articulate the scope of that constitutional provision.

application of law to the facts is subject to *de novo* appellate review." *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 381 (2022) (hereafter, "*BVMF*"). Ultimately, this Court "retain[s] discretion to apply the 'right for any reason' rule on *de novo* review," *Hardin v. Hardin*, 301 Ga. 532, 537 (2017) (citation omitted), which instructs that "a judgment right for any reason should be affirmed." *Gwinnett Cnty. v. Gwinnett I Ltd. P'ship*, 265 Ga. 645, 646 (1995); *cf. Shadix v. Carroll Cnty.*, 274 Ga. 560, 562 (2001) (applying doctrine even when ruling "was based upon faulty reasoning" by the lower court).

SUMMARY OF ARGUMENT

The trial court correctly determined Appellees have standing to challenge each of the rules promulgated by the SEB, and that those rules cannot be enforced because they conflict with the Georgia Election Code and violate the Georgia and U.S. Constitutions. Appellants' opening briefs add nothing new and rehash largely the same arguments and cases considered and rejected by the trial court.

This Court should affirm the trial court's ruling for two reasons. *First*, the trial court correctly found that Appellees possess standing. Specifically, Mr. Turner and Mr. Hall may challenge the SEB rules

because those rules threaten their individual, civil – *i.e.*, private – right to vote and have those votes properly counted and reported. They likewise may challenge the SEB rules as community stakeholders. Eternal Vigilance separately possesses organizational standing. These findings are supported by the evidence submitted, considered, and relied upon by the trial court.

Second, the trial court correctly determined Appellees prevailed on the merits of their claims. Specifically: (i) the new SEB rules contradict or conflict with the Election Code; (ii) the SEB acted outside the scope of its authority delegated from the General Assembly; (iii) any delegation of legislative power from the General Assembly to the SEB, or the SEB's exercise of a legislative function, is unconstitutional or otherwise impermissible because the General Assembly failed to provide the SEB with "sufficient" or "realistic" guidelines to facilitate that delegation; and (iv) the SEB constitutionally lacks authority to engage in the type of rulemaking it did at all. Each of these reasons are independent bases by which this Court should affirm the trial court's order and invalidate the SEB rules.

ARGUMENT

I. The trial court correctly found that Scot Turner, James Hall, and Eternal Vigilance possess standing to challenge the SEB's rules.

"Standing is a jurisdictional prerequisite necessary to invoke a court's judicial power under the Georgia Constitution." *Cobb Cnty. v. Floam*, 319 Ga. 89, 91 (2024). The threshold issue on appeal is therefore "[w]hether at least one plaintiff has direct or associational standing to assert each of the claims[.]" *BVMF*, 313 Ga. at 378. At least one of Mr. Turner, Mr. Hall, or Eternal Vigilance need only demonstrate "a cognizable injury that can be redressed by a judicial decision." *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 315 Ga. 39, 39 (2022) (hereafter, "*SCV*").[2]

The trial court correctly found Mr. Turner and Mr. Hall have standing as individual voters and community stakeholders, and Eternal Vigilance has organizational standing. V3-670–71.[3] These findings are supported by Appellees' verified complaints and affidavits submitted in

[2] It should be noted that Intervenors-Plaintiffs Georgia Conference of the NAACP and the Georgia Coalition for the People's Agenda, Inc. are Plaintiffs in this action. No one has challenged their standing. While Appellees have standing as well, at least one plaintiff has standing that has not been challenged.

[3] All record references refer to the record in Case No. S25A0362.

the trial court. V1-17–84. Appellants failed to rebut this evidence in the trial court and do not take issue with any factual finding on appeal. Thus, those factual findings must not be disturbed. *BVMF*, 313 Ga. at 381.

A. Voters possess individual standing to challenge actions that infringe on voting rights.

The U.S. Supreme Court has recognized that "the right to vote as the legislature has prescribed is fundamental[,]" and that right extends far beyond "the initial allocation of the franchise . . . to the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000). Voting "is a civil right deeply embedded in the Constitution," *Oregon v. Mitchell*, 400 U.S. 112, 138 (1970), which "protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Lest there be any doubt, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

That is why "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Baker v. Carr*, 369 U.S. 186, 206 (1962); *see also Pub. Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993) (relying on *Baker* and highlighting the difference between "a generalized grievance about Georgia's conduct of government" and "an

assertion that they are being denied the full scope of their individualized right to vote"). Standing as a voter extends beyond the casting of a ballot to the right to have that vote "correctly counted and reported" in accordance with the law. *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *see also Wisconsin v. City of New York*, 517 U.S. 1, 12 (1996) (referring to the "fundamental right . . . to have one's vote counted"); *Anderson v. United States*, 417 U.S. 211, 227 (1974) (emphasizing a voter's individual "right under the Constitution to have his vote fairly counted"); *Reynolds*, 377 U.S. at 554 ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted.") (citations omitted); *United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections.").

This Court has strengthened this principle under Georgia law. It has found that interference with an individual's private right to vote, and have that vote properly counted, certified, and reported, represents an "individualized" injury to a "private right," which belongs "to an individual as an individual." *SCV*, 315 Ga. at 47-48. This Court has "long

held that voters — by virtue of being voters — can have standing to constitutionally challenge election laws" because "the denial of the right to elect public officials is such an injury to the personal right of any voter as would authorize him to attack the constitutionality of an act." *BVMF*, 313 Ga. at 396 (Peterson, J., concurring) (citations and punctuation omitted). That is why Georgia courts are instructed to apply a more "relaxed" inquiry into the showing of an "injury" when a voter challenges an infringement on the right to vote. *Id.*

i. Mr. Turner and Mr. Hall have standing as individuals to challenge the new SEB rules.

Mr. Turner and Mr. Hall are Georgia citizens, registered voters, and taxpayers. V3-650–67. They have the unassailable right to vote and have their votes properly counted, certified, and reported. Both individuals have expressed genuine concern and uncertainty as to whether the new SEB rules will impair their right to vote and that their votes "will not be accurately counted or certified." *Id.* By challenging the new SEB rules, "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,'" *Baker*, 369 U.S. at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)), which is sufficient

for standing. *See SCV*, 315 Ga. at 47-48; *BVMF*, 313 Ga. at 396 (Peterson, J., concurring).

Moreover, Mr. Hall is a member of the Chatham County Board of Elections. V3-650-58. He separately expressed concern as to how he was supposed to "exercise [his] duties" as an election official regarding whether to "follow the Election Code or the SEB Rules." V3-656. Mr. Hall is "concerned that [he] will misinterpret or fail to be able to follow [his] duties" as an election official, which could cause him personal and reputational injury, including potential legal liability under O.C.G.A. § 21-2-33.1 or similar laws. V3-656–57. As the trial court found, because of the uncertainty and doubt injected into the Georgia voting framework by the SEB, Mr. Hall possessed prior to the 2024 general election, and continues to possess, a genuine "concern" that "he is exposing himself personally to legal liabilities and public opprobrium or scorn related to the actions he takes." V3-670. Prior to the trial court's injunction, Mr. Hall would not have known whether he was legally required to follow SEB's rules in exercising his duties. In sum, Mr. Turner and Mr. Hall

have articulated a cognizable injury from the challenged SEB rules to confer standing. And they have done so for *each* rule.[4] For example:

Rule 183-1-12-.02(c.2). This rule, known as the "Reasonable Inquiry Rule," allows election superintendents to premise or delay the certification of votes based on a subjective "reasonably inquiry into the tabulation and canvassing" of the election results that may vary (or conflict with) other local election precincts. This could foreseeably result in the improper counting or outright exclusion of Appellees' votes. Moreover, Mr. Hall would suffer injury when attempting to properly and legally fulfill his role as a member of the Chatham County Board of Elections given the uncertainty and unguided discretion afforded by this "reasonably inquiry" requirement.

Rule 183-1-12-.12. This rule, known as the "Examination Rule," could foreseeably invalidate Appellees' votes based on an election superintendent's consideration of information, such as e-mails, text messages, photographs, videotapes, and news articles that are not permitted prior to certification under Georgia law. Mr. Hall will also

[4] For a more thorough description of each challenged SEB rule and how they conflict with the Georgia Election Code, see *infra* at 31-52.

suffer injury if he would have, or will in the future, review and rely on this extraneous information as an election official during the tabulation process that is permitted by the rule, but prohibited by the Election Code.

Rule 183-1-14-.02(18). This rule, known as the "Absentee Ballot Return Rule," would have limited Appellees' available options for exercising their right to vote by preventing approved relatives from returning absentee ballots even though that practice is permitted under Georgia law. Mr. Hall suffers injury as an election official if he rejects a lawfully cast vote pursuant to the Election Code because a signature or photo identification of the courier was not provided as required by the rule (or vice versa).

Rule 183-1-14-.02(19). This rule, known as the "Video Surveillance Rule," could foreseeably lead to the removal of absentee drop boxes that Appellees would otherwise use to vote. It also increases the likelihood that any votes Appellees cast in non-video-monitored drop boxes will not be counted or reported. Mr. Hall also suffers injury as an election official if he removes an absentee drop box according to the rule that is otherwise lawful under the Election Code.

Rule 183-1-13-.05. This rule, known as the "Poll Watcher Rule," allows poll watchers expanded access to areas within the tabulation center that could foreseeably inject confusion and uncertainty into the voting, tallying, and certification process that could foreseeably lead to Appellees' votes not being accurately counted and reported. Mr. Hall also suffers injury as an election official if he permits poll watchers expanded access to areas permitted by the rule, but not by the Election Code (or vice versa).

Rule 183-1-12-.21. This rule, known as the "Daily Reporting Rule," contains new daily vote reporting requirements that could foreseeably impede Appellees' interests in local and state election officials reviewing and having access to the materials O.C.G.A. § 21-2-385(e) mandates and in the manner and times set forth in the statute rather than the rule. Mr. Hall also suffers injury as an election official if he reports vote tallies as required by the rule, but not by the Election Code (or vice versa).

Rule 183-1-12-.12(a)(5). This rule, known as the "Hand Count Rule," requires extraneous and onerous hand-counting requirements and could foreseeably result in Appellees' voters being delayed, improperly counted, or altogether disregarded. Mr. Hall also suffers injury as an

election official if he requires his staff to engage in this manual hand counting of ballots as required by the rule, but not by the Election Code (or vice versa).

ii. Appellants' arguments against individual standing are unpersuasive.

Appellants claim that Appellees' individual injuries cannot suffice for standing because they are allegedly "contingent on future events" and fail to identify a "particularized injury." State Br. at 22-23. Appellants are wrong. There is nothing "contingent" about Appellees' injuries. Whether the 2024 general election was conducted under the Election Code or the SEB rules made a real-world difference. Whether future elections are so held is also critically important. There is no "contingent future event" at issue. The SEB Rules passed. They were struck down. Whether they govern future elections is not "contingent" on anything but this Court's decision in whether to uphold the merits finding of the trial court.

Moreover, the "uncertain[ty]" shared by Mr. Turner and Mr. Hall as to "whether votes they cast," if governed by the new SEB rules, "will be legally counted and certified" is sufficient to establish standing under precedent from this Court and the U.S. Supreme Court. *See supra* at 9-

14. These injuries will manifest themselves during the next election cycle if the SEB rules are enforced. Moreover, it is virtually certain that Mr. Hall will suffer confusion and concern regarding his ability to correctly follow the law – and potential public scorn and legal action – in his role as a member of the Chatham County Board of Elections given the conflict between the Election Code and SEB rules.

Appellants also argue other Georgia voters may suffer similar injuries from the new SEB rules. But that does not defeat standing. Georgia law is clear that "voting rights are individually cognizable for litigation purposes, *even if* they are shared among the general public." *Camp v. Williams*, 314 Ga. 699, 708 (2022) (emphasis in original). Even under more stringent federal standing requirements, "where a harm is concrete, though widely shared, the [U.S. Supreme] Court has found 'injury in fact.'" *FEC v. Akins*, 524 U.S. 11, 24 (1998). And that occurs when "large numbers of voters suffer interference with voting rights conferred by law." *Id.*

Appellants cite *Lance v. Coffman*, 549 U.S. 437, 442 (2007) and *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1321 (N.D. Ga.), *aff'd*, 981 F.3d 1307 (11th Cir. 2020), but those cases merely stand for the

proposition that a plaintiff must show a particularized, personal injury. That is what Mr. Turner and Mr. Hall established. Those cases do not say standing is *defeated* merely because other voters may be similarly aggrieved. Nor could they, as it is well established that "[a] plaintiff need not have the franchise wholly denied to suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). Indeed, "[l]ong before *Baker v. Carr*, the [U.S.] Supreme Court had acknowledged that a political interest, though shared with a large segment of the public, could serve in an otherwise appropriate case as a basis for standing." *McCaffrey v. Gartley*, 377 A.2d 1367, 1370 (Me. 1977) (citations omitted). The result should be the same here.

B. Mr. Turner and Mr. Hall also possess standing as community stakeholders.

Even if this Court were to determine that Mr. Turner and Mr. Hall lack individual standing, to challenge the legality of the rules implemented by the SEB, they "need[] only to establish standing as community stakeholders interested in their local government following the law." *Floam*, 319 Ga. at 91. That is because "[u]nlike federal law,"

Georgia courts may adjudicate disputes involving a "generalized grievance shared by community members, especially other residents, taxpayers, voters, or citizens."[5] *SCV*, 315 Ga at 39. Rather than seeking to vindicate private rights unique to each plaintiff, to assert standing, the "public wrongs" alleged need only be "violations of public rights and duties that affect[ ]the whole community, considered as a community." *Id.* at 48 (quotation omitted).

Moreover, "taxpayers and citizens have standing to enforce a public duty." *Id.* at 60. The same is true of "voters, because they, like citizens and taxpayers, are community stakeholders." *Id.* That means that "[v]oters may be injured when elections are not administered according to the law . . . so voters may have standing to vindicate public rights." *Id.* at 60-61. Both Mr. Turner and Mr. Hall are taxpayers, citizens, and community stakeholders in their relative communities.

[5] While a Georgia plaintiff must sustain a redressable, "cognizable injury that can be redressed by a judicial decision . . . that injury need not always be individualized." *SCV*, 315 Ga. at 39 (cautioning that "[c]ourts are not vehicles for engaging in merely academic debates or deciding purely theoretical questions"). By contrast, under federal standing doctrine, "private plaintiffs [cannot] enforce public rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to [them]." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 348 (2016) (Thomas, J., concurring).

In *Cobb County v. Floam*, this Court considered whether "the Cobb County Commission [ ] asserted an unprecedented power to change acts of the General Assembly" by passing an amendment that altered the commission district boundaries. 319 Ga. at 89. Two Cobb County citizens filed suit seeking to invalidate that amendment as unconstitutional. *Id.* Cobb County argued the citizens lacked standing because they challenged the constitutionality of a governmental act and, therefore, needed to show "more particularized injury similar to the federal Article III injury-in-fact requirement." *Id.* at 89, 92. This Court disagreed and held that the citizens had standing because they were "residents of Cobb County" and constituted "community stakeholders in that government." *Id.* at 95. The Court emphasized the history of community stakeholder standing, noting that "for nearly 100 years prior to the adoption of the 1983 Georgia Constitution, Georgia had allowed citizen, taxpayer, resident, or voter suits to challenge various county and city actions," even if the plaintiff did not demonstrate "a particularized injury because those community stakeholders had a cognizable interest in having their government follow the law." *Id.* at 91. According to the Court, the citizens

had "standing to enforce" local officials to fulfill their "duty to follow the law." *Id.* at 95.

Other decisions support this doctrine. For example, in *SCV*, this Court noted that "[v]oters may be injured when elections are not administered according to the law or when elected officials fail to follow the voters' referendum for increased taxes to fund a particular project." 315 Ga. at 60-61. And in *Barrow v. Raffensperger*, this Court determined that a voter had standing to seek a writ of mandamus compelling the Secretary of State to hold a previously cancelled election even without an injury that was "special" to her. 308 Ga. 660, 667 (2020); *see also Rothschild v. Columbus Consol. Gov't*, 285 Ga. 477, 479-80, (2009) (plaintiffs' allegations that defendants failed to perform a public duty promised to voters was sufficient to establish standing); *Manning v. Upshaw*, 204 Ga. 324, 326-27 (1948) (plaintiff, as a "citizen and a voter" of Alpharetta, may maintain a petition for mandamus to compel the mayor and city council members to call for an election to elect their successors).

Appellants do not disagree that this doctrine is valid and may confer standing onto community stakeholders to ensure the government

is following the law in the election context. Appellants instead argue it cannot apply here because its scope is limited to only permit challenges to *local* actions at the *municipal* level. State Br. at 17-19. This Court has previously remarked that community stakeholder cases typically "arise in the context of suits against local governments involving a public duty." *SCV*, 315 Ga. at 61 n.19. But it has declined to squarely address the precise question raised here – "[w]hether the same principle would hold true for suits against state government entities."[6] *Id.*

Floam is instructive. In that case, the Court noted that although a "more particularized injury" might be needed to "challenge the constitutionality of *state* statutes," the "county commission is not a part of State government, much less a branch co-equal with the State's judicial branch." 319 Ga. at 92 (emphasis in original). The situation is similar here. Appellees are challenging rules that would require local election officials to act in violation of the Election Code, *not* the constitutionality of a state statute. Appellees therefore need not show a more particularized injury. *See SCV*, 315 Ga. at 63 ("Since they are not

[6] Separation-of-powers concerns, and specifically the Georgia Constitution's Take-Care Clause, motivated the Court's hesitancy to extend its holding to suits seeking to force state officials to "follow[ ] the law." *Id.* But Appellees are not challenging any statute or seeking to force any executive official to affirmatively do anything.

challenging the constitutionality of a statute, the Plaintiffs do not need to have alleged an individualized injury."). It is true the SEB is a state executive agency. But Appellees do not argue its creation as an entity is unconstitutional. Rather, Appellees seek to "enforce a public duty" by ensuring that local election officials will "follow the law" as articulated in the Election Code. Those election officials cannot do so if the SEB has promulgated conflicting rules. Although neither *Floam* nor *SCV* addressed this exact issue, the reasoning underpinning both supports Appellees' standing as community stakeholders.[7]

C. Eternal Vigilance possesses organizational standing.

The trial court also correctly found Eternal Vigilance has standing as an organization. An organization may "sue in its own right if it meets the same standing test applicable to individuals." *BVMF*, 313 Ga. at 381–82. This means that Eternal Vigilance must show: "(1) an injury in fact, (2) a causal connection between the injury and the alleged wrong, and (3)

[7] It is notable that Georgia courts have historically permitted public rights litigation against state government entities in other contexts. *See* J. Randy Beck, *State Constitutional law "Standing to Litigate Public Rights in Georgia Courts*," 75 Mercer L. Rev. 297, 310 (2023). For example, Georgia "embraced the widely-accepted Anglo-American practice of relying on *qui tam* informers to enforce legal duties of public officials." *Id.* Such standing been recognized even if some officials "subject to suit . . . seem to be state officials, such as customs officers enforcing quarantine regulations or lumber inspectors appointed by the state legislature." *Id.*

the likelihood that the injury will be redressed with a favorable decision." *Id.* at 381-82. Based on the unrebutted evidence, the trial court found Eternal Vigilance met all three elements.

Appellants take issue with only the first element and argue Eternal Vigilance failed to establish a "particularized injury." State Br. at 24-25. Appellants are wrong. The unrebutted evidence, as summarized by the trial court, establishes that:

- "Eternal Vigilance is a multi-issue advocacy organization whose *core function* includes defending elections from attacks that erode public faith in electoral outcomes based on misinformation and disinformation."
- It is led by its President, Mr. Turner, who recently "testified before Congress about the damage misinformation and disinformation does to public confidential in elections."
- "The loss of public confidence in election institutions—stemming from the illicit creation and exercise of the SEB Rules will *directly impact and impair* Eternal Vigilance Action's efforts *and missions* to ensure clarity and public confidence in those institutions."
- "[A]ttempting to minimize and correct this damage, uncertainty and loss of public confidence in the election institutions *has already cause and will continue to cause a diversion of Eternal Vigilance Action's time and resources* in order to analyze and create remedies to attempt to combat and correct the negative public impact stemming from the unlawful creation and exercise of the SEB Rules at issue through education of the public and local and state officials."

V3-670–71 (emphasis added).

The State failed to rebut any of these facts below. It likewise does not challenge any of the trial court's factual findings on appeal. Those fact determinations are not clearly erroneous and must not be disturbed.

Rather than address the facts, Appellants claim Eternal Vigilance cannot avail itself of organizational standing as a matter of law. According to Appellants, Eternal Vigilance relies on a strained application of a diversion of resources theory of standing that has been foreclosed. Not so.

In *Havens Realty Corp. v. Coleman*, the U.S. Supreme Court found an organization had standing to seek injunctive and declaratory relief because it alleged that the challenged actions "perceptibly impaired" its ability to pursue one of its core organizational principles to "provide counseling and referral services for low-and moderate-income homeseekers." 455 U.S. 363, 379 (1982). The Court in *Havens* made clear that this "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

Forty years later, this Court in *BVMF* affirmed and clarified *Havens*, holding that under Georgia law, "an organization suffers an injury in fact for purposes of standing when the defendant's actions impair the organization's ability to provide its services or to perform its activities and, as a consequence of that injury, *require a diversion of an organization's resources* to combat that impairment." 313 Ga. at 386 (emphasis added). The Court did not, as Appellants suggest, somehow foreclose a diversion of resources theory of standing. This Court instead merely clarified that "the diversion of resources *to litigation*, standing alone" is not enough for organizational standing. *Id.* (emphasis added). Applying the facts, this Court found no organizational standing because "there was *no evidence* at the final hearing" that the challenged state regulation "impaired [the organization's] ability to carry out its voter advocacy programs." *Id.* at 387 (emphasis added). Here such evidence was presented and unrebutted.

The U.S. Supreme Court recently returned to organizational standing in *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 395 (2024) (hereafter, "*FDA*"). In *FDA*, the Court rejected the idea that an organization could "manufacture" or "spend its way into

standing simply by expending money to gather information and advocate against the defendant's action." *Id.* at 394. However, as established decades ago in *Havens*, the Court recognized that organizational standing based on a diversion of resources theory is permissible when the challenged "actions directly affected and interfered with [the organization's] *core business activities*." *Id.* at 395 (emphasis added).

These cases make clear that, although an interest in spending money for litigation is not enough for organizational standing, a diversion of resources from a core activity because of a challenged action is sufficient. *See also Curling v. Raffensperger*, 50 F.4th 1114, 1121 (11th Cir. 2022) (holding that "voting advocacy organizations" possess "standing to sue when a policy will force them to *divert personnel and time* to educating volunteers and voters and to resolving problems that the policy presents on election day") (emphasis added) (citations and punctuations omitted); *Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1119 (N.D. Ga. 2020) (holding nonprofit organization possesses organizational standing to challenge actions by a state election board when "defendant's illegal acts impair the organization's ability to engage in its own projects," which

may include "increasing voter participation through advocacy and educating voters on election procedures," when those acts "forc[e] the organization to *divert resources in response*") (emphasis added)

Eternal Vigilance fits squarely within this doctrine. The unrebutted facts show that Eternal Vigilance has been, and will continue to be, harmed by diverting its resources away from its core mission because of the new SEB rules. Eternal Vigilance is not attempting to "spend" its way into standing. The diversion of resources here is not premised on Eternal Vigilance's opposition to the new SEB rules or solely to litigate against them. To the contrary, as the trial court found, one of Eternal Vigilance's "core functions" is "defending elections from attacks that erode public faith in electoral outcomes based on misinformation and disinformation." V3-670. If the SEB rules are enforced, Eternal Vigilance will be forced to divert its time, money, and efforts that it normally would have used for those core activities to instead "analyze and create remedies to attempt to combat and correct the negative public impact stemming from the unlawful creation and exercise of the SEB Rules at issue through education of the public and local and state officials." V3-670–71. This

diversion is the type of injury in fact necessary for organizational standing under Georgia and Federal law.

II. The trial court correctly found Appellees' claims justiciable.

Appellants claim Appellees' request for declaratory relief is not "justiciable" and that the trial court issued an impermissible "advisory opinion." State Br. at 28-30. Appellants are wrong. Appellees sought an injunction and declaration as to the legality of the SEB rules to guide their future electoral activities. This was not "advisory," as the outcome at the trial level shows. The SEB rules were enjoined. Thus, they were not used in the 2024 general election, and may not be used in any future elections. These are concrete, real-world results.

As set forth in their Complaint, Appellees sought to *enjoin* the SEB Rules pursuant to Ga. Const. Art. I, Sec. II, Para. V, which requires the plaintiff to seek a declaration prior to securing injunctive relief. Accordingly, Appellees sought a declaration to get *injunctive relief* pursuant to the express terms and procedure provided by the Georgia Constitution. The declaratory relief was not "advisory," it was sought to secure the specific injunctive relief requested and as the Georgia

Constitution expressly provides. This is what the trial court awarded. Appellants ignore this altogether.

Moreover, looking at the Declaratory Judgment Act, separately from the Georgia Constitution, its purpose "is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]" O.C.G.A. § 9-4-1. The statute must "be liberally construed and administered." *Id.* Declaratory relief is available "where an actual controversy exists," which extends to "cases where a *justiciable controversy* exists." *Higdon v. City of Senoia*, 273 Ga. 83, 85 (2000) (emphasis added); *see also Heron Lake II Apartments, LP v. Lowndes Cnty. Bd. of Tax Assessors*, 306 Ga. 816, 820 (2019) ("To state a claim for declaratory judgment, a party need only allege the existence of a justiciable controversy in which future conduct depends on resolution of uncertain legal relations."). A justiciable controversy exists "when it is definite and concrete, rather than being hypothetical, abstract, academic, or moot." *Heron Lake*, 306 Ga. at 820; *see also Atlanta Cas. Co. v. Fountain*, 262 Ga. 16, 17 (1992) (finding declaratory relief appropriate when the plaintiff "adequately demonstrated a need for a legal judgment that would control its future action").

The trial court's order implicitly determined Appellees established a justiciable controversy. The trial court was correct. Appellees faced, and will face, concrete harm if the new SEB rules are enforced. This includes concerns that local election officials will not follow the Election Code, voting options will become unavailable, Appellees' votes may not be properly counted or reported, and for Mr. Hall, confusion, public animus, or potential personal liability in future elections. And that is why Appellees sought the injunction—to prohibit that harm.

During the evidentiary hearing, the trial court pressed one of Appellants' counsel for their "best case" that Appellees' request for declaratory relief would be "tantamount to an advisory opinion." V3-784. Counsel in response quibbled that there is no "immediate imminent injury" and pointed to this Court's decision in *Cobb County. v. Floam*. *Id*. at 784-85. But Appellants' reliance on *Floam* is flawed. In that case, this Court merely recited the general rule that a declaratory judgment claim is improper "when a declaration of rights would not direct the plaintiff's *future* conduct or involved only a determination of rights that had already accrued." *Floam*, 319 Ga. at 97 (emphasis in original). The plaintiffs in *Floam* only alleged "several *past injuries*" regarding

"uncertainty" as to "which district they reside." *Id.* at 99 (emphasis added). As such, the Court determined that their injuries were not "prospective" in nature as required for declaratory relief. *Id.* But the Court made clear that a plaintiff need only show a "threat of wrongful acts and injuries yet to come," nothing more. *Id.*

Appellees did establish such a "threat" here and the ruling affected their conduct and the conduct of the SEB. In contrast to *Floam*, Appellees did not allege past injuries in their Complaint, as they brought this *before* the 2024 general election to seek recourse in that and future elections. If the new SEB rules are enforced in the future, each of Mr. Turner, Mr. Hall, and Eternal Vigilance will suffer future individualized injuries during the next election cycle. *See supra* at 9-16. This harm is not "hypothetical, abstract, academic, or moot," *Heron Lake*, 306 Ga. at 820; rather, declaratory relief is needed to "control" the "future action[s]" of each Appellee in casting their votes and advocating on behalf of voter education. *Atlanta Cas.*, 262 Ga. at 17. Thus, Appellees' claim for declaratory relief is justiciable and does not call for an advisory opinion.

III. The trial court correctly vacated the SEB rules because each contradicts or conflicts with the Election Code.

The Georgia Constitution broadly vests the General Assembly with the sole authority to legislatively enact rules and procedures governing elections. Ga. Const. Art. II, Sec. I-III. The General Assembly exercised this authority by enacting the Election Code. In over 500 annotated pages, the General Assembly set forth a clear framework by which elections are to proceed in Georgia. The SEB attempted to usurp the General Assembly's authority and upend the Election Code by enacting contradictory rules. Rather than administering or effectuating a statute, the SEB instead undermined the General Assembly.

The SEB cannot do so. Georgia courts have said that administrative agencies, such as the SEB, cannot create rules that expand, change, or contravene statutory directives. To allow the SEB, an unelected administrative body, to contravene the General Assembly's carefully tailored election scheme would amount to the SEB legislating in a manner prohibited by the Georgia Constitution. It would further risk descending Georgia elections into uncertainty and potential chaos, something that adherence to the Election Code is designed to prevent.

The SEB itself knows it lacked authority to enact these rules. Before passage of several rules, the SEB sought guidance from the Georgia Attorney General as to the legality of its actions.[8] V1-67–73. The Attorney General unambiguously responded that "several of the proposed rules, if passed, very likely exceed the [SEB's] statutory authority and in some instances appear to conflict with the statutes governing the conduct of elections." *Id.* (highlighting that the SEB "risks passing rules that may easily be challenged and determined to be invalid"). This was the State's position as expressed through its chief legal counsel. And it mirrors Appellees' position. The State told the SEB it could not promulgate rules contrary to, or in the absence of, statutory authority. Yet the SEB ignored that counsel and pushed forward. Because each of the new SEB rules violate this directive, the Court should affirm the trial court's order.

A. Any SEB Rule that contradicts the Election Code is invalid and unreasonable.

Administrative agencies like the SEB possess "no constitutional authority to legislate." *HCA Health Servs. of Ga., Inc. v. Roach*, 265 Ga.

[8] The Attorney General's Memorandum specifically addressed Rules 183-1-13-.05, 183-1-12-.21, and 183-1-12-.12(a)(5). But the law and rationale cited in the memorandum comports with Appellees' arguments regarding all of the challenged rules.

501, 502 (1995). Their authority is limited to taking "action that carries into effect those laws already passed by the General Assembly[.]" *N. Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 543 (1998). This Court has developed a two-part test to determine the validity of a state administrative rule: "whether it is authorized by statute and whether it is reasonable." *Dep't of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995) (quotation omitted). Any such rule "which exceeds the scope of or is inconsistent with the authority of the statute upon which it is predicated is invalid." *Id.* In other words, "[a]n agency rule might be reasonable but unauthorized by statute, or authorized by statute but unreasonable." *Ga. Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32 (1975). Either way, the rule cannot stand. *Id.*

Authorized by statute. A state administrative rule is not "authorized by statute" if it is "inconsistent with"—or "exceeds the scope of"—its statutory predicate. *Ga. Dep't. of Cmty. Health v. Dillard*, 313 Ga. App. 782, 785 (2012). A state agency is "not authorized to establish rules that conflict with legislation." *N. Fulton*, 269 Ga. at 543. Neither can it "enlarge the scope of, or supply omissions in, a properly-enacted statute," *id.*, nor "change a statute by interpretation, or establish different

standards within a statute that are not established by a legislative body." *Id.* at 544. A state agency likewise cannot act in the *absence* of a statute. *Camp*, 314 Ga. at 709 (2022) (Bethel, J., concurring) ("[F]or a government entity whose authority on the relevant point is purely a creature of statute, the absence of statutory authority is the absence of legal authority to act."); *see also Gebrekidan v. City of Clarkston*, 298 Ga. 651, 654 (2016) ("[T]he General Assembly speaks through its silence as well as its words[.]").

This Court has admonished state agencies for overstepping statutory limits. In *Premier Health Care Investments LLC v. UHS of Anchor, LP*, the Court held that the Georgia Department of Community Health ("DCH") lacked authority to enact a rule that imposed different requirements for when an institutional health servicer must obtain a certificate of need than imposed by the governing statute. 310 Ga. 32, 49-55 (2020). Similarly, in *N. Fulton*, the Court determined that the State Health Planning Agency could not pass a rule creating a new class of health care facilities, then exempting that class from the requirements of the statute. 269 Ga. at 544; *see also Tabletop Media, Ga. Lottery Corp. v. Tabletop Media, LLC*, 346 Ga. App. 498, 503 (2018) (Georgia Lottery

Corporation could not expand its authority beyond statutory limits); *O'Neal v. Ga. Real Est. Comm.*, 129 Ga. App. 211, 212 (1973) (rule exceeded statutory scope by creating a fourth classification for real-estate brokers when the statue only established three).

Reasonable. It is axiomatic that "nothing unreasonable can lawfully be prescribed . . . or, if prescribed, can be enforced." *Western & A.R. Co. v. Young*, 7 S.E. 912, 914 (1888). The question of "[w]hether such a rule is a reasonable one is a matter of law, to be determined by the court." *Burge v. Ga. Ry. & Elec. Co.*, 65 S.E. 879, 880 (1909). A rule is only reasonable if it "furthers" the "purpose of the statute delegating the regulatory authority." *Albany Surgical v. Dep't. of Cmty. Health*, 257 Ga. App. 636, 640 (2002). Reasonableness also looks to the "nature" of the rule's "impact on the public and the industry it regulates." *Ga. Oilmen's Ass'n v. Dep't of Revenue*, 261 Ga. App. 393, 398 (2003) (citing *Ga. Real Est. Comm'n*, 234 Ga. at 35).

B. Each of the new SEB rules are not authorized by statute and unreasonable.

Each new rule promulgated by the SEB fails under this standard. The General Assembly painstakingly set forth in the Election Code: (i) the statutory requirements regarding vote certification, O.C.G.A. § 21-2-

493; (ii) documentation provided to superintendents for vote certification and counting, O.C.G.A. § 21-2-70(9); (iii) how absentee ballots can be received, O.C.G.A. § 21-2-385; (iv) authorized drop box surveillance, O.C.G.A. § 21-2-382(c)(1); (v) authorized poll watcher locations, O.C.G.A. § 21-2-408(c); (vi) required absentee ballot reporting, O.C.G.A. § 21-2-385(e); and (viii) proscribed the authorized duties of poll officers, O.C.G.A. §§ 21-2-420(a), 21-2-436, and 21-2-483. Yet the new SEB rules disregard that framework by adding to or contradicting the statutes, or legislating in the absence of a governing statute. The Court must affirm the trial court's order to prevent the SEB from doing so.

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

The General Assembly enacted O.C.G.A. § 21-2-493 to establish how a superintendent must calculate and certify election returns. While the General Assembly did not specifically define the term "certify," it did exhaustively explain how such "certification" is to occur. For example:

- The superintendent is required to "[p]ublicly commence the computation and canvassing of the returns. . . [and] [u]pon completion of such computation and canvassing . . . tabulate[s] the figures for the entire county or municipality and sign, announce, and attest the same *as required by this Code section*." O.C.G.A. § 21-2-493(a) (emphasis added).

- The superintendent also must "before computing the votes cast in any precinct . . . compare the registration figure with the certificates returned by the poll officers showing the number of persons who voted in each precinct or the number of ballots cast" and determine if the "total vote returned . . . 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." O.C.G.A. § 21-2-493(b). If there is any discrepancy, the superintendent shall initiate an investigation "and no votes shall be recorded from the precinct until an investigation shall be had." *Id.* The superintendent may ultimately order "a recount or recanvass of the votes of that precinct." *Id.*

- "If any error or fraud is discovered, the superintendent shall compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented to him or her, and shall report the facts to the appropriate district attorney for action." O.C.G.A. § 21-2-493(i).

- O.C.G.A. § 21-2-493(k)-(l) details the process of certifying the votes and when the vote is to be reported.

The SEB eschewed this statutory scheme by promulgating Rule 183-1-12-.02(c.2). That Rule imposes a new definition of the term "certify" that changes the statutory requirement by which superintendents certify election results. It defines "certify" as follows:

> Certify the results of a primary, election, or runoff,' or words to that effect, means to attest, ***after reasonable inquiry*** that the tabulation and canvassing of the election are complete and accurate and that the results are a true and accurate accounting of all votes cast in that election.

Id. (emphasis added).

The trial court correctly found that Rule 183-1-12-.02(c.2) impermissibly conflicts with the certification framework of O.C.G.A. § 21-2-493. Nowhere in the detailed provisions of § 21-2-493—nor in any other provision of the Election Code—does the General Assembly permit or allow members of a county election board to premise or delay certification based on a "reasonably inquiry into the tabulation and canvassing" of the election results. O.C.G.A. § 21-2-493 describes the sole process the General Assembly has allowed regarding vote canvassing and certification, as well as the sole set of criteria upon which returns may be certified. A "reasonable inquiry" that would allow each local election board member to determine for themselves the processes that should occur in certification rather than following the process set out in the Election Code is not among them.

Appellants do not argue otherwise. Instead, they claim the SEB can add additional requirements to the Election Code because the General Assembly did not define a term. But it cannot, as that is "inconsistent with" and "exceeds the scope" of what was contemplated by the General Assembly. *Dillard*, 313 Ga. App. at 785. The SEB is not the legislature and cannot write new words into statutes. The Election Code does not

leave room in the process it sets forth in statute for certification to allow the SEB's attempt to legislate through rulemaking. *See Camp*, 314 Ga. at 709 (2022) (Bethel, J., concurring).

This rule is also unreasonable. The SEB does not define "reasonable inquiry" and the methods that might be employed to investigate and determine the validity of votes cast and counted are unknown, undefined, and may vary (or conflict) between local precincts. Rule 183-1-12-.02(c.2) facially allows a superintendent to exercise his or her subjective opinions, based on undefined criteria, "after reasonable inquiry" regarding whether "tabulation and canvassing of the election are complete and that the results are a true and accurate accounting of all votes cast in that election." Only if a superintendent satisfies that subjective inquiry and curiosity will a vote be "certified." Such a broad and subjective delegation of authority to superintendents is unworkable. It not only destabilizes and fragments the certification process, but also contradicts the Election Code by adding a certification criterion that is not statutorily fixed. Given the inconsistency between § 21-2-493 and Rule 183-1-12-.02(c.2), the latter is void.

ii. Rule 183-1-12-.12 contradicts O.C.G.A. §§ 21-2-493 and 21-2-70(9).

In promulgating O.C.G.A. §§ 21-2-493 and 21-2-70(9), the General Assembly detailed the only materials that superintendents may consider when canvassing and certifying votes. This statute clarifies that superintendents can "receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to authorities as may be prescribed by law." Rule 183-1-12-.12 requires that county boards make available to *any* individual member of a county board of election "all election related documentation created during the conduct of elections prior to certification results."

The trial court correctly found that Rule 183-1-12-.12 contradicts O.C.G.A. §§ 21-2-493 and 21-2-70(9). The mandate of that rule is unbounded in scope and would introduce into the certification process materials superintendents are not statutorily authorized to consider in tabulating, canvassing, and certifying election results. Such materials could include all "election related" emails, text messages, letters, lawsuits, photographs, videotapes, news articles, or other materials that happen to end up in the possession of a county board of election. For superintendents to consider such extraneous information "prior to

certification" is both unreasonable and contrary to the specific statutory materials that superintendents are to consider. Rule 183-1-12-.12 is therefore void.

iii. Rule 183-1-14-.02(18) contradicts O.C.G.A. § 21-2-385.

O.C.G.A. § 21-2-385(a) allows absentees voters to either personally mail or deliver absentee ballots, but "that mailing or delivery may [also] be made by the elector's mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector." The statute also allows for any "caregiver" of disabled elector to mail or deliver the absentee ballot of that elector. *Id.* There is no requirement for the courier of an absentee ballot to produce a signature or photo identification.

Notwithstanding, the SEB enacted Rule 183-1-14-.02(18) to fundamentally change how the General Assembly determined absentee votes may be delivered and received. That Rule states in relevant part:

> Any absentee ballot drop location, other than the United States Postal Service or authorized and defined drop box under Georgia Law, that receives absentee ballots shall

> require 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*. . . .

Id. (emphasis added).

In other words, Rule 183-1-14-.02(18) requires the person who delivers an absentee ballot directly to a county elections office to provide *both* a signature and photo identification, as well as an approved relation to the elector's name on the absentee ballot. This requirement is not in the Election Code. *See* O.C.G.A. § 21-2-385(a).[9] The trial court correctly determined Rule 183-1-14-.02(18) is void because the SEB has no authority to expand § 21-2-385(a)'s criteria or to place additional obstacles to the lawful submission of an absentee ballot. The rule is likewise unreasonable because the SEB has no authority to permit the rejection of votes lawfully delivered pursuant to the Election Code because a signature or photo identification of the courier is not provided.

[9] Rule 183-1-14-.02(18) applies only to absentee ballot return locations that are "other than the United States Postal Service or authorized and defined drop box under Georgia Law."

iv. Rule 183-1-14-.02(19) contradicts O.C.G.A. § 21-2-382(c)(1).

The General Assembly specifically addressed the security of absentee drop box locations in O.C.G.A. § 21-2-382(c)(1). That statute provides that "[t]he drop box location shall have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement official, or licensed security guard." *Id.* Yet, the SEB promulgated Rule 183-1-14-.02(19) as follows:

> At the close of the polls each day during early voting and after the last voter has cast his or her ballot, the poll officials shall initiate *video surveillance and recording* of a drop box at any early voting location. Such surveillance shall include visual recording of the drop box if there is one located at that site. *Any drop box that is not under constant and direct surveillance shall be locked or removed and prohibited from use. Video surveillance* may be live-streamed but must be recorded and will be considered part of the election documents and retained as provided in Code Section 21-2-390.

Id. (emphasis added).

The trial court correctly found that Rule 183-1-14-.02(19) is void because it adds an additional requirement to the legislative absentee ballot monitoring procedure, potentially eliminates legal avenues for absentee voting, and provides for the possibility that votes cast in drop boxes not video monitored may not be counted. That rule says that "any drop box that is not under constant and direct surveillance shall be locked

or removed and prohibited from use." *Id.* But that would lead to statutorily authorized drop boxes being taken out of use as legal depositories of absentee votes, which conflicts with § 21-2-382(c)(1) and is otherwise unreasonable.

Critically, in creating its emergency rules during the 2020 COVID pandemic, the SEB provided in Emergency Rule 183-1-14-.06-.14(4) (2020) that "[d]rop box locations must have adequate lighting and use a video recording device to monitor each drop box location. The video recording must either continuously record the drop box location or use motion detection that records one frame, or more, per minute until detection of the motion triggers continuous recording." *See also* SEB Rule 183-1-14-.06-.14(5) (2020) (discussing retention of drop box videos). In 2021, the General Assembly, in SB 202, statutorily provided that drop boxes would be available for absentee ballots. As to drop boxes, SB 202, which became in part O.C.G.A. § 21-2-382(c)(1), borrowed heavily from the SEB 2020 drop box rule. Importantly, and as pointed out by the trial court, the General Assembly expressly *declined* to adopt the video surveillance requirement in O.C.G.A. § 21-2-382(c)(1). The SEB sought to end-run the General Assembly's legislative authority over the Election

Code by jamming in additional requirement through rulemaking that the General Assembly considered and rejected. This the SEB cannot do.

v. Rule 183-1-13-.05 contradicts O.C.G.A. § 21-2-408(c).

O.C.G.A. § 21-2-408(c), which the General Assembly just amended in 2024 through House Bill 1207, governs "poll watchers" and permits poll watcher access to only "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." Rule 183-1-13-.05 expands the enumerated locations where poll watchers may be designated beyond those places specifically identified in O.C.G.A. § 21-2-408(c). It does so by providing that designated poll watchers "*shall*" be entitled to observe certain "designated places" including:

> [T]he check-in-area, the computer room, the duplication area, *and such other areas that tabulation processes are taking place including but not limited to provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing of mail in ballots, memory card transferring, regional or satellite check in centers* and any election reconciliation processes as the election superintendent may deem necessary to the assurance of a fair and honest procedures in the tabulating center.

Rule 183-1-13-.05 (emphasis added).

The trial court correctly found that Rule 183-1-13-.05 impermissibly contradicts O.C.G.A. § 21-2-408(c). The General Assembly's clear and narrow instructions plainly do not include Rule 183-1-13-.05's requirement that poll watchers be allowed access in the long list of additional "other areas that tabulations processes are taking place" to observe the count process. The only mandatory designated poll watching areas are those specified by the General Assembly and those the superintendent (i.e., local election board) "may deem necessary," not the SEB. Thus, the SEB rule attempting to replace the text of the Election Code with its own subjective preferences and have those preferences applied statewide is invalid.

vi. Rule 183-1-21-.21 contradicts O.C.G.A. § 21-2-385(e).

By promulgating O.C.G.A. § 21-2-385(e), the General Assembly requires the business daily reporting of the (i) "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"; (ii) "the number of persons who have voted at the advance voting sites"; and (iii) "the number of persons who have voted provisional ballots, the number of provisional ballots that have [been] verified or

cured and accepted for counting, and the number of provisional ballots that have been rejected."

Notwithstanding, Rule 183-1-21-.21 establishes additional requirements for reporting absentee ballot information by the county board of registrars beyond those contemplated by § 21-2-385(e). In particular, the Daily Reporting Rule requires "each registrar" to "establish a method of daily reporting to the public the total number of voters who have participated in the election or runoff" and to further categorize these votes "by method by which those voters participated (advance voting or absentee by mail)" and political and nonpartisan ballots cast. Rule 183-1-12-.21(1). This information is required to be published daily on the registrar's and the county election superintendent's website, or if no website is available in a public place "accessible 24 hours a day to the public." Rule 183-1-12-.21(3)-(6).

The trial court correctly found that Rule 183-1-21-.21 contradicts O.C.G.A. § 21-2-385(e). For instance, the Election Code only requires *business day* reporting, not *weekend* reporting. The Election Code likewise does not require reporting by *partisan* and *nonpartisan* votes, while the rule does. Additionally, the Election Code requires posting

certain information in a "place of public prominence," while the rule requires information to be posted in a place "accessible 24 hours a day to the public." Rule 183-1-12-.21 is therefore void because it impermissibly expands O.C.G.A. § 21-2-385(e) and unreasonably creates confusion in the voting process, especially given that these numbers are already posted daily by the Secretary of State's office, a process with which campaigns and other interested parties in Georgia are familiar.

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

The General Assembly carefully constructed a framework governing the calculation and tabulation of votes. O.C.G.A. § 21-2-436 sets forth the "duties of poll officers after the close of polls." This statute provides that at least two poll officers must remain at the polling location and:

> Before the ballot box is opened, the number of ballots issued to electors, as shown by the stubs, and the number of ballots, if any, spoiled and returned by electors and canceled, shall be announced to all present in the voting room and entered upon the general returns of votes cast at such primary or election.

Id.

Once this is completed, the poll officers must "compare the number of electors voting . . . with the number of names shown as voting by the

electors list, voter's certificates, and the numbered list of voters[.]" *Id.* Any differences in these numbers must "be reconciled" by the poll officers if possible, or if not possible, "noted on the general returns." *Id.* The poll officers must then place in separate packages "[t]he electors list, the voter's certificates, the numbered list of voters, and the stubs of all ballots used, together with all unused ballots, all spoiled and canceled ballots, and all rejected voter's certificates" prior to opening the ballot box. *Id.*

Moreover, O.C.G.A. § 21-2-483 mandates the procedures that must be followed at the tabulation center. For example, subsection (a) states that "[i]n primaries and elections in which optical scanners are used, the ballots shall be counted at the precinct or tabulating center under the direction of the superintendent." O.C.G.A. § 21-2-483(a). This statute further walks through the detailed method by which delivered ballots must be tabulated. *See* O.C.G.A. § 21-2-483(a)-(h). Finally, O.C.G.A. § 21-2-420(a) provides:

> After the time for the closing of the polls and the last elector voting, the poll officials in each precinct shall [1] complete the required accounting and related documentation for the precinct and [2] shall advise the election superintendent of the total number of ballots cast at such precinct and the total number of provisional ballots cast. The chief manager and at least one assistant manager shall [3] post a copy of the tabulated results for the precinct on the door of the precinct

> and then [4] immediately deliver all required documentation and election materials to the election superintendent. The election superintendent shall then ensure that such ballots are processed, counted, and tabulated as soon as possible and shall not cease such count and tabulation until all such ballots are counted and tabulated.

Id. (bracketed material added).

Nothing in these detailed procedures states or suggests that poll officers may hand count ballots. But Rule 183-1-12-.12(a)(5) does just that. That rule *requires* poll officers to "record the date and time that the ballot box was emptied and present to three sworn poll officers to independently count the total number of ballots removed from the scanner, sorting into stacks of 50 ballots, continuing until all the ballots have been counted separately by each of the three poll officers." *Id.* Put another way, that rule mandates that *all* ballots be counted *by hand* by *three* separate poll officers. *Id.* It then requires a reconciliation of the hand counted ballots with "numbers recorded on the precinct poll pads, ballot marking devices . . . and scanner recap forms," as well as a placement and sealing of hand counted ballots and scanner counted ballots. *Id.*[10]

[10] The rule affords discretion to the poll manager or assistant poll managers regarding when to start the hand count. Rule 183-1-12-.12(a)(5)(a). This will further create confusion and delay amongst the differing local voting precincts.

The trial court properly found Rule 183-1-12-.12(a)(5) contradicts the Election Code. It is those provisions set forth by the General Assembly that govern what poll officials must do following the close of polls. The General Assembly created separate processes in the Election Code to audit and challenge ballots and results. That is not the purview of the poll officials. Their job is to compile the ballots in the manner proscribed by O.C.G.A. §§ 21-2-420(a), 21-2-436, and 21-2-483 so that ballots are accurately and timely recorded, then certified by the superintendents. There is no statute permitting the hand counting of ballots, especially prior to their transmittal to the superintendent, and the SEB cannot amend the Election Code through rulemaking to include one. *See Camp*, 314 Ga. at 709 (2022) (Bethel, J., concurring).

Beyond unauthorized by the Election Code, Rule 183-1-12-.12(a)(5) is unreasonable. If permitted to take effect, that rule would inject confusion, uncertainty, and havoc into the vote computation process. To wit, after the close of a long day of polling at 7:00 p.m. on Election Day, three humans (prone to natural human error) will each have to choose a time to begin a hand count of *all* the ballots in their precinct and agree to a hand count prior to signing a "control document" regarding its

accuracy. *Id.* These same three humans would then be required to reconcile any discrepancies between their hand count and the mechanized vote counting results. *Id.* And this all must occur *before* ballots are submitted to the superintendent for certification. *Id.* These unnecessary, and highly problematic, steps not authorized by the Election Code will infect the ballot count process with doubt, delay, distrust, and confusion. The rule therefore cannot go into effect.

IV. The trial court correctly found that the General Assembly did not empower the SEB to promulgate any of its new rules.

Assuming the Court disagrees that each new SEB rule is inconsistent with the Election Code or otherwise unreasonable, it must still affirm the trial court's order because the General Assembly never empowered the SEB to promulgate these rules in the first place.[11]

[11] For the first time on appeal, Appellants argue the trial court should have availed itself of the "judicial restraint" doctrine. State Br. at 35-38. According to Appellants, because Appellees prevailed on their claim that the challenged SEB rules contradict the Election Code, the trial court should not have gone further to address constitutional issues and the non-delegation doctrine. *Id.* But Appellants never asked the trial court to cabin its ruling as such or otherwise briefed this issue. It is therefore not appropriate to raise now. *Reliance Tr. Co. v. Candler*, 294 Ga. 15, 18 (2013) ("Issues never raised at trial will not be considered for the first time on appeal."). Nonetheless, Appellants rely on *State v. Randall*, 318 Ga. 79, 81 (2024), but in that case this Court held the trial court erred by ruling *solely* on constitutional grounds when a non-constitutional route existed that would have achieved the same relief. The posture here is inapposite. The trial court addressed *both* the constitutional and non-constitutional avenues for relief, all of which are properly before this Court on

Antecedent to the core question of whether the General Assembly *can* delegate legislative power to the SEB is the threshold question of whether the General Assembly *did* in fact delegate such power. The answer to both questions is no.

No administrative body in Georgia can promulgate any regulation "without *clear legislative authority, if at all*." *Pope v. Cokinos*, 231 Ga. 79, 81 (1973) (emphasis added). That is because "[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle device[s]." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quotation omitted). This Court has cautioned that the General Assembly "does not, one might say, hide elephants in mouseholes." *State v. Hudson*, 303 Ga. 348, 353 (2018) (quoting *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001)).

Without considering whether the General Assembly *could* broadly delegate unbounded authority to the SEB, it clearly *did not* do so here. The General Assembly never conferred the SEB with sweeping regulatory authority to enact these rules. Appellants point only to the

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appeal. The Court should therefore not decline to address the important constitutional issues presented in this case.

SEB's enabling legislation as delegating such authority. But those statutes plainly do not do so. For example, O.C.G.A. § 21-2-31 merely outlines the general duties of the SEB, which include the ability to:

- "[P]romulgate 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"; and
- "[F]ormulate, 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"; and
- "[P]romulgate 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."

O.C.G.A. § 21-2-31(1)-(2), (7).

The SEB cannot stretch the scope of these statutes to cover its new rules, especially where those rules fly in the face of the Election Code's plain language. This type of generalized "enabling legislation" is not "an open book to which the agency may add pages and change the plot line." *West Virginia*, 597 U.S. at 723 (punctuation omitted) (quoting E. Gellhorn & P. Verkuil, *Controlling Chevron Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999)). If the General Assembly had intended to allow the SEB to enact an entirely new framework governing elections,

it would have clearly said so, not relied merely on "modest words, vague terms, or subtle devices." *Id.* (legislative bodies do not "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme") (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994)). This Court may instead "presume" the opposite; that the General Assembly "intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* (quoting *U.S. Telecom Ass'n. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*)).

At most, the General Assembly provided the SEB with authority to promulgate rules to ensure uniformity with the Election Code in the "practices and proceedings" of poll officials, as well as the "legality" and "purity" of elections that are all "consistent with law." O.C.G.A. § 21-2-31(1)-(2). But the new SEB rules achieve the opposite. They are contrary to the Election Code (or untethered to a statute) and promote a lack of uniformity and distrust in the election process. This is buttressed by the fact that the General Assembly has enacted a host of changes to the Election Code since 2020, but *never* implemented any of the changes resembling the new SEB rules. And these statutes themselves, focused

on a fundamental right to vote, were made with *legislative* authority after much debate and opposition. Even these *statutes* have faced substantial litigation. The General Assembly did not simply punt to the SEB authority to legislate in this important, and controversial, arena.

Moreover, it is the duty of the SEB to "make such *recommendations* to the General Assembly as it may deem advisable relative to the conduct and administration of primaries and elections[.]" O.C.G.A. § 21-2-31(6) (emphasis added). In the face of legislative silence, the SEB cannot credibly claim any delegated authority to cause a sea change in Georgia election law.

V. The trial court correctly determined that the new SEB rules violate the established non-delegation doctrine.

Georgia's non-delegation doctrine, enshrined in Ga. Const. Art. I, Sec. II, Para. III, serves as a check on both legislative and executive overreach. It ensures that the core legislative function remains with elected representatives, rather than being handed off to the executive branch and administrative agencies. The General Assembly's purported delegation of authority to the SEB to make rules regulating elections raises two issues.

First, can the General Assembly delegate *any* legislative authority to the SEB. Although this Court has upheld certain rulemaking delegations, in recent years, this Court and the U.S. Supreme Court have emphasized the importance of revisiting and revitalizing the non-delegation doctrine. *Second*, even if some legislative delegation to an executive agency is permitted, this Court has made clear that it must be accompanied by some specific statutory guidance. *Premier Health*, 310 Ga. at 49-50. The General Assembly did not do so here.

A. The principle of non-delegation in Georgia prohibits the General Assembly from delegating its rulemaking authority to the SEB.

i. The evolution of Georgia's non-delegation doctrine in its Constitution.

Georgia courts interpret the Georgia Constitution according to its original public meaning. *Elliot v. State*, 305 Ga. 179, 181 (2019). The public meanings of those provisions when originally ratified is critical to understanding the meaning they carried when adopted. *Id.* at 182 (citing *Clarke v. Johnson*, 199 Ga. 163, 165 (1945) ("A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them.

Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption.")).

After Georgia signed the Declaration of Independence, it enacted its first Constitution in 1777. That document contained an express non-delegation provision declaring the three departments of government, executive, legislative and judiciary, "shall be *separate and distinct*, so that neither exercise[s] the powers properly belonging to the other." Ga. Const. of 1777, Art. I, Sec. II (emphasis added). Significantly, Georgia was one of only three colonies to write an express non-delegation provision in their state Constitution. Joel Hood, *Before There Were Mouseholes: Resurrecting the Non-delegation Doctrine*, 30 BYU J. Pub. L. 123, 136-41 (2016). At the time, the adjective form of "separate" meant "divided from the rest."[12] The adjective form of "distinct" meant "[d]ifferent; not the same in number or in kind" and "being apart, not conjunct."[13] Georgia's framers thus understood the executive and legislative branches as divided in all aspects.

[12] Samuel Johnson, Separate, Dictionary of the English Language (1773), available at https://johnsonsdictionaryonline.com/1773/separate_adj (last visited Jan. 28, 2025) (hereafter, "Johnson Dictionary").
[13] Johnson Dictionary, Distinct, available at https://johnsonsdictionaryonline.com/1773/distinct_adj (last visited Jan. 28, 2025).

Almost one hundred years later in 1877, Georgia amended its Constitution for the seventh time to what is considered Georgia's first modern Constitution. The amended Constitution contained a slightly altered non-delegation clause: "The legislative, judicial, and executive powers *shall forever remain separate and distinct;* and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided." Ga. Const. of 1877, Bill of Rights Art. I, Sec. I, Para. XXIII (emphasis added). This clear provision has carried through three more constitutional amendments and still stands today. *See* Ga. Const. Art. I, Sec. II, Para. III.

The stenographic report of the 1877 constitutional convention contains the first recorded debate over the "separate and distinct" clause. John C. Key, delegate from the Twenty-Eighth District, sought to amend this provision by inserting the clauses "and shall be confided to a separate body of magistracy" and the word "especially."[14] In response Hon. George F. Pierce, delegate from the Twentieth District responded that "the language is about as simple, clear and plain as it can be. *It means what*

[14] State of Georgia, "A Stenographic Report of the Proceedings of the Constitutional Convention Held in Atlanta, Georgia in 1877" (1877); *Current and Historical Georgia Constitutions & Related Materials*, https://digitalcommons.law.uga.edu/ga_constitutions/23, at 98 (last visited Jan. 28, 2025) (hereafter, "Stenographic Report of 1877").

it says and says what it means…" *Id.* (emphasis added). The proposed amendments were tabled, and the provision was adopted without the added language.

The "separate and distinct" provision was also discussed when debating whether the General Assembly should elect judges to the Supreme Court and Superior Court, as well as the Solicitor General.[15] During debate, Mr. Key proclaimed that the convention "declared that the departments of government shall forever remain separate and distinct, and it occurs to me that if one department is to elect the officers of another, that we are not keeping them separate and distinct." *Id.*

ii. Early decisions from this Court affirmed the concepts of separation of powers and non-delegation.

As Mr. Pierce stated in the constitutional convention of 1877, the "separate and distinct" provision of the Georgia Constitution was considered plain, simple, and clear. As this Court has instructed, the "constitutional non-delegation doctrine is rooted in the principle of separation of powers and mandates that the General Assembly not divest itself of the legislative power granted to it by . . . our Constitution by

[15] Stenographic Report of 1877, at 270-71.

delegating legislative powers to (for example) executive agencies." *Premier Health*, 310 Ga. at 49 (quotation and punction omitted); *see also Cazier v. Ga. Power Co.*, 315 Ga. 587, 593 n.5 (2023) (Peterson, J., concurring in the denial of certiorari) (noting that the Court has questioned the correctness of its non-delegation precedent).[16] Thus, a historical approach to the Georgia Constitution demonstrates that the framers were serious about non-delegation and intended the executive, legislative, and judicial powers to remain forever separate.

One of the earliest cases to discuss separation of powers in the context of the Georgia Constitution is *Beall v. Beall*, where two children of the deceased, who died intestate, claimed two-thirds of the decedent's estate. 8 Ga. 210, 214 (1850). The children were born out of wedlock, so their right to the property relied on an act passed by the General Assembly in 1843 legitimizing the children and declaring them capable

[16] In *Cazier*, Justice Peterson, concurring, wrote on the separate of powers clause as applied to judicial rulemaking. That concurrence was adopted in spirit in U.S. Supreme Court's rejection of federal *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). In *Loper Bright*, the U.S. Supreme Court found that *Chevron* deference to a regulator's interpretation of an ambiguous statute was not permissible under the separation of powers doctrine—as between the judiciary and the executive. In *Cazier*, Justice Peterson, again noted the concern articulated in *Premier Health* regarding whether even a legislatively guided delegation could survive scrutiny. It cannot.

to inherit. *Id.* However, the General Assembly's power to pass a law legitimizing children was in doubt, as it was arguably judicial in nature. *Id.* at 215. Addressing the issue, this Court recognized that "[f]rom the Constitution, the legislative department, as well as every other part of the Government, derives its power" and "of the Constitution, no alteration by the Legislature can be made or authorized." *Id.* at 219. Reiterating that the Georgia Constitution mandates the branches of government "shall be distinct," the Court concluded the Constitution distributed power to the General Assembly to enact this law. *Id.* at 227-29. But the Court warned that the powers of one branch cannot be delegated to another, as "there is no liberty, if the power of *judging* be not separated from the *legislative* and *executive* powers." *Id.* at 229 (emphasis in original).

Another instructive early decision is *Franklin Bridge Co. v. Wood*, 14 Ga. 80 (1853). In that case, the Franklin Bridge Company was incorporated under the Act of Legislature of 1843. *Id.* at 80. The company sued the defendant for his subscription to its stock, but the defendant claimed the company was illegally incorporated because the law was unconstitutional. *Id.* In considering the constitutional question, the

Court remarked that "the General Assembly is bound to exercise the power of making laws, thus conferred upon them, by the people, in the primordial compact, in the mode therein prescribed, and in none other; and *that a law made in any other mode is unconstitutional and void*." *Id.* at 83 (emphasis added). Addressing the separation of powers issue, the Court stated:

> [T]he Legislature is but the agent of their constituents; and that *they cannot transfer authority delegated to them to any other body*, corporate or otherwise-not even to the Judiciary, *a co-ordinate department of the government, unless expressly empowered by the Constitution to do so*. That to do this, would be to violate one of the fundamental maxims of jurisprudence . . . . That to do this, would not only be to disregard the constitutional inhibition, which is binding upon the representative, but by shifting responsibility, introduce innovations upon our system, which would result in the overthrow and ultimate destruction of our political fabric.

Id. (emphasis added).

The Court's language could not be clearer and echoes Mr. Pierce's statements in 1877. The non-delegation doctrine, rooted in separation of powers, means exactly what it says: no delegation of legislative authority. It is through this historical lens that the Court should re-examine the modern separation of powers and non-delegation doctrines and find that

the delegation of legislative power from the General Assembly to the SEB is unconstitutional.

iii. This Court should not defer a decision revitalizing Georgia's non-delegation doctrine because of certain precedent.

Although historical decisions from this Court reinforced the principle that the General Assembly cannot delegate legislative authority, the Court's jurisprudence has shifted over time. For example, 132 years after enaction of the original Georgia Constitution, this Court decided *Southern Ry. Co. v. Melton* and held that a rule promulgated by the Railroad Commission of Georgia did not violate the vesting clause of the Georgia Constitution, which afforded the legislative power of the state in the General Assembly. 65 S.E. 665, 673 (1909). The Court held so because the legislative act permitting such delegation set forth "with sufficient clearness the scope and purpose" necessary to enact the regulations. *Id.* at 674.

Nearly 70 years later, the Court returned to this doctrine in *Rich v. State*, 237 Ga. 291 (1976). In that case, the Court determined that the General Assembly's delegation of authority to the Georgia Residential Finance Authority was valid because the enabling legislation "manifests

a clear, definite statement of legislative intent," which permitted the appointment of members of the authority by the governor and the actions of the members. *Id.* at 298. The Court found that "[h]aving declared the purposes of the act, and enacted provisions to carry the same into effect, the General Assembly could properly confer on the governing board of the authority the powers of which complaint is made." *Id.* at 299.

Then in *State v. Moore*, the Court found some delegation of authority from the General Assembly to the Georgia Department of Transportation was proper considering "the mandatory consideration of guidelines provided by the statute." 259 Ga. 139, 142 (1989). Notwithstanding, this Court has continued to reiterate the viability of the non-delegation doctrine. *See Bohannon v. Duncan*, 185 Ga. 840, 842-43 (1938) ("The legislative department of the state, wherein the Constitution has lodged all legislative authority, will not be permitted to relieve itself by the delegation thereof. It cannot confer on any person or body the power to determine what the law shall be.").

These concepts culminated in the Court's decision in *Dep't of Transp. v. City of Atlanta*, 260 Ga. 699 (1990) (hereafter "*DOT*"). In *DOT*, this Court suggested that the General Assembly can delegate some

legislative authority "provided the General Assembly has provided sufficient guidelines for the delegatee." *Id.* at 703. The Court remarked that "where such delegations are made with sufficient guidelines, an executive official's exercise of the delegated power" from the General Assembly does not violate the non-delegation clause of the Georgia Constitution. *Id.* However, *DOT* drew a strong dissent from Presiding Justice George Smith, who noted that such "delegation is impermissible under our constitution" and "[a]ny attempt by the members of the executive branch of government to exercise the function of the legislative branch is unconstitutional and a criminal offense." *Id.* at 708 (Smith, P.J., dissenting).

More recently, several Justices of this Court have questioned this line of cases and expressed "doubts about whether [*DOT*] was rightly decided." *Premier Health*, 310 Ga. at 49 n.18; *see also Cazier*, 315 Ga. at 593 n.5 (Peterson, J., concurring) (reiterating that this Court has "questioned the soundness of *DOT*'s non-delegation holding"). In *Premier Health*, this Court identified "serious constitutional concerns" raised by a broader construction of non-delegation to reach the conclusion that a narrower statutory construction is required. 310 Ga. at 49.

Moreover, Justice Gorsuch's dissent in *Gundy v. United States*, 588 U.S. 128 (2019) signaled the U.S. Supreme Court's future openness to a narrower non-delegation doctrine. *See id.* at 149-79 (Gorsuch, J., dissenting). According to Justice Gorsuch, "[i]f Congress could pass off its legislative power to the executive branch, the vesting clauses and indeed the entire structure of the Constitution would make no sense." *Id.* at 155 (quotations and punctuations omitted). Other Justices agree with this approach. *See Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari) ("I write separately because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases"); *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty.").[17]

Given this Court's concerns and the text and history of the Georgia Constitution, *DOT* should be re-examined and overruled. *DOT* is

[17] Commentators have noted that five justices on the U.S. Supreme Court "seemed poised to revive the nondelegation doctrine" after *Gundy*; and that "all eight members of the Court participating in the case made clear the nondelegation doctrine is still a viable principle of jurisprudence." Jonathan H. Adler, *The Delegation Doctrine*, 2024 Harv. J. L. & Pub. Pol'y 12, at 12 n. 2 (2024).

constitutional in nature, *Premier Health*, 310 Ga. at 49; thus, this Court is permitted to "appl[y] *stare decisis* with less force." *Floam*, 319 Ga. at 94 n.5. Although *stare decisis* is considered "an important principle that promotes the rule of law," it does not represent "an inexorable command, nor a mechanical formula of adherence to the latest decision." *State v. Jackson*, 287 Ga. 646, 658 (2010) (citations and punctuation omitted). To determine "whether to reexamine a prior erroneous holding," this Court "must balance the importance of having the question *decided* against the importance of having it *decided right*." *Id.* (emphasis in original). This Court considers four factors when doing so: "the age of the precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning." *Id.* Each of these factors militate strongly in favor of overruling *DOT*.

Age of the precedent. *DOT* is of relatively recent vintage, having been decided in 1990. This Court has overruled similar and older precedent without trepidation. *E.g., State v. Hudson*, 293 Ga. 656, 661 (2013) (overruling 38-year precedent); *Jackson*, 287 Ga. at 659 (overruling 29-year precedent). In all events, that a decision "has been on

the books for some time" is not "alone" sufficient to preclude this Court from re-examining incorrect precedent. *Hudson*, 293 Ga. at 661.

Reliance interests at stake. This Court's limited approval of some delegation of authority from the General Assembly to an executive agency has not created any significant reliance interests. Reliance interests in the *stare decisis* context "refer to contract interests, property rights, and other substantive rights." *Lejeune v. McLaughlin*, 296 Ga. 291, 298 (2014); *see also Olevik v. State*, 302 Ga. 228, 245 (2017) ("Substantial reliance interests are an important consideration for precedents involving contract and property rights, where parties may have acted in conformance with existing legal rules in order to conduct transactions."). None of these interests are present here. The issue is purely constitutional in nature. This strongly favors overturning *DOT*. *See Jackson*, 287 Ga. at 658 (reliance interests are weak when precedent does not affect "property or contract issues" and "establishes no substantive rights"). Indeed, it would be nonsensical to perpetuate any reliance interest based on a fundamental misapplication of the Georgia Constitution.

Workability of the decision. This Court's recent decisions have openly questioned the workability and soundness of *DOT*. *Premier Health*, 310 Ga. at 49 n.18; *Cazier*, 315 Ga. at 593 n.5 (Peterson, J., concurring). Appellants may argue that overturning *DOT* would make it more difficult to enact voting regulations. But this Court has been clear that "difficulty is not reason enough to persist in [a] constitutional error." *Olevik*, 302 Ga. at 246. And the Constitution cannot be disregarded merely for the convenience of the General Assembly. Moreover, throughout the legal history of the separation of powers debate, the rule previously articulated by this Court that the General Assembly must provide "specific and reasonable" guidelines to make a delegation of rulemaking proper has led to little clarity, lots of litigation, and questions by this Court of the rule's viability. *See Premier Health*, 310 Ga. at 49, n. 18, and 51 (noting an open issue as to *DOT*'s viability, and saying parameters of *DOT* have not been clarified); *Kennestone Hosp. Inc. v. Emory Univ.*, 318 Ga. 169, 183, n. 7 (2014); *Cazier*, 315 Ga. at 593 n. 5 (Peterson, J. concurring); *State v. Almanza*, 304 Ga. 553, 556 n. 2 (2018). Thus, the current regime is not "workable" and clarification and

imposition of a simple rule comporting with the Georgia Constitution's plain language is needed.

Soundness of the reasoning. Critically, the reasoning in *DOT* is unsound. The decision does not address the text of the Georgia Constitution or its long history of separation of powers and non-delegation. This Court has acknowledged as much. The non-delegation doctrine "means what it says and says what it means," *see supra* at 59-60, yet *DOT* erroneously says that there is room for the General Assembly to pass off its legislative powers. That cannot be the case under a clear understanding of Georgia's history. As is the case here, precedent should be overturned if it "is not only wrong but obviously so" and bordering "unreasoned." *Johnson v. State*, 315 Ga. 876, 887 (2023); *see also Ammons v. State*, 315 Ga. 149, 171-72 (2022) (Pinson, J., concurring) ("If the past decision in question is unreasoned, or if it disregards the basic legal principles that courts use to do law, the argument for overruling is easier to make."); *cf. Beall*, 8 Ga. at 211 ("[I]t is both the right and duty of *all* Courts to declare all Acts void, which plainly and palpably violate the Constitution.") (emphasis in original). The band-aid should be pulled off now, *DOT* overruled, and legislative delegation to executive agencies

prohibited unless otherwise specially allowed in the Georgia Constitution.

iv. Appellants' arguments against application of the non-delegation doctrine are unpersuasive.

(1) The non-delegation argument is ripe for this Court's consideration.

Appellants' opening briefs fail to substantively engage with these bedrock principles of separation of powers and non-delegation. Instead, Appellants attempt to sidestep the discussion at all by claiming the trial court "rejected" Appellees' non-delegation argument and they did not "appeal that ruling." RNC Br. at 14; *see supra* fn.1. The Court should ignore Appellants' slight-of-hand. The trial court did not "reject" the non-delegation doctrine. To the contrary, the trial court in a footnote merely remarked that the question of whether the Georgia Constitution "completely bars State executive bodies from engaging in rulemaking is uncertain" and this Court has noted that "*DOT* may have been wrongly decided." V3-676. This is a correct statement of the law, not an opinion. *See Premier Health*, 310 Ga. at 49 n.18; *Cazier*, 315 Ga. at 593 n.5 (Peterson, J., concurring).

The trial court then went on to note that it was bound by *DOT* until overruled by this Court. V3-676. Thus, the trial court did not "reject" the

Appellees' argument; to the contrary, it thoughtfully considered the issue, correctly noted that it was bound by *DOT*, and teed it up for appropriate review in this Court – the only arena where *DOT* can be reconsidered. Appellants' contention that Appellees should have "appeal[ed] that ruling" is nonsensical. Appellees won on all counts in the trial court, so there was nothing to appeal. Again, the issue squarely before the Court is whether the trial court correctly determined Ga. Const. Art. I, Sec. II, Para. III prohibits the SEB rules. In making this determination, the Court has the right to determine the scope of that provision.

(2) Appellants' attempt to classify voting as a "public" right fails.

Appellants then object to the application of the non-delegation doctrine by suggesting that the SEB does not regulate "private conduct" and its "rulemaking is not an exercise of legislative power." RNC Br. at 16-20. In other words, Appellants claim the SEB can shrink or enlarge the right to vote because it regulates "public" rights and "privileges" that are not vested. *Id.* But no Georgia court has ever said that. Even if that were true, voting rights are not "public" in nature. The right to vote and have that vote correctly counted and reported is a private right.

This Court has distinguished between rights that belong to the public and those belonging to private individuals. *See Kennestone Hosp.*, 318 Ga. at 176-83; *SCV*, 315 Ga. at 47-48. But those cases were decided in the context of the retroactivity of a law enacted by the General Assembly, *Kennestone Hosp.*, 318 Ga. at 176-83, and the determination of standing. *SCV*, 315 Ga. at 47-48. And this Court has acknowledged the difficulty in drawing a "definitive line between these categories," although ultimately "the core of each category is relativity clear." *Kennestone Hosp.*, 318 Ga. at 176-77. Appellees have found no Georgia cases applying an alleged "public/private rights" distinction when considering the applicability of Ga. Const. Art. I, Sec. II, Para. III.[18]

But when looking at "rights," this Court "consider[s] not only the nature of the right, but also to whom it is afforded." *Deal v. Coleman*, 294 Ga. 170, 178 (2013). Sir William Blackstone – who this Court has "long accepted as the leading authority on the common law," *SCV*, 315 Ga. at

[18] Federal cases that have dealt with this "distinction" have largely done so in the context of whether Congress can assign the adjudication of a matter to a non-Article III tribunal, such as the U.S. Patent and Trademark Office. Even in that context, the U.S. Supreme Court has acknowledged that the cases "distguish[ing] between 'public rights' and 'private rights' ha[ve] not definitively explained the distinction" and the characterization of public rights "have not been entirely consistent." *Oil States Energy Servs. LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 334 (2018).

48 – described "private" rights as "belonging to individuals considered as individuals." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1768). Examples of such "private" rights include "an individual's common law rights in property and bodily integrity, as well as in the enforcement of contracts." *Deal*, 294 Ga. at 183 (citing Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015, 1020 (2006)); *see also Kennestone Hosp.*, 318 Ga. at 179 (noting that Georgia law has historically treated "rights of personal liberty and security, private property, and contract" as private).[19] The hallmark of these rights is that they "may become vested in particular persons" and cannot thereafter "be taken away by subsequent legislation." *Deal*, 294 Ga. at 178-79 (citations omitted).

"Public" rights, by contrast, were characterized by Blackstone as those belonging to "the whole community, considered as a community." 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at *2; *see also Kennestone*, 318 Ga. at 177 ("As a general matter, public rights are those shared by the People in common.") (quotation omitted); Woolhandler, 94

[19] *Cf.* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 287-88 (2008) (explaining that "[p]rivate rights now include not only those common-law rights that Blackstone enumerated but also those rights created by legislatures" and "[t]he Constitution also provides private rights").

Geo. L.J. at 1020 (noting that the "nineteenth century . . . conceived of public rights . . . to mean claims that were owned by the government—the sovereign people as a whole—rather than in persons' individual capacities"). This Court has highlighted that "[c]lassic examples" of public rights "include the public's shared rights to navigate public waters and use public highways," as well as "[t]he right to enforce compliance with penal law" and "of access to public records." *Kennestone*, 318 Ga. at 177-78. Unlike private rights, "public rights . . . can be modified by the People—through their elected representatives—as they see fit." *Deal*, 294 Ga. at 179.

The right to vote falls squarely within the "private" rights historically protected from legislative abridgment. This right is undeniably "individual and personal in nature." *Gill v. Whitford*, 585 U.S. 48, 49 (2018) (quoting *Reynolds*, 377 U.S. at 561); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885) (describing the "political franchise of voting . . . as a fundamental political right" and the "preservative of all rights").[20] That is because the "right to vote . . . do[es] not derive from the

[20] *See also Corfield v. Coryell*, 6 F.Cas. 546, 552 (C.C.E.D. Pa. 1825) (Washington, J.) (No. 3,230) (listing "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised" as among "the particular

state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

As explained in the standing context, the right to vote encompasses not only the casting of a vote, but having that vote "correctly counted and reported." *Gray*, 372 U.S. at 380; *see also id.* ("[T]he right to have one's vote counted has the same dignity as the right to put a ballot in a box."). A voter enjoys both "the personal right of the elector to cast his own vote and to have it honestly counted." *United States v. Saylor*, 322 U.S. 385, 389 (1944). And "to refuse to count and return the vote as cast" is considered "as much an infringement of that personal right as to exclude the voter from the polling place." *Id.* at 388-89.

Voting rights further display the hallmarks of a private right under Georgia law because the General Assembly cannot modify it in any manner it chooses. *See White v. Clements*, 39 Ga. 232, 265 (1869) (explaining that the state legislature is "forbidden" from exercising power to infringe the right to vote). For example, although the General

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privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental").

Assembly may pass statutes regarding the time, place, and manners of elections, it cannot alter core private voting rights. *Id.* At bottom, non-delegation principles apply here because any interference with the right to vote constitutes an "individualized" injury to a "private right" that belongs "to an individual as an individual." *SCV*, 315 Ga. at 39, 47-48. And here, the SEB's new rules are aimed squarely at these rights.

B. Even if some delegation of legislative power concerning elections and voting rights is permissible, the General Assembly failed to provide the SEB with "sufficient" or "realistic" guidelines.

Notwithstanding the non-delegation directive in Ga. Const. Art. I, Sec. II, Para. III, this Court on occasion has upheld certain limited, non-legislative delegations by the General Assembly to executive branch agencies, such as in *DOT*. However, such delegations must contain "sufficient" and "realistic" guidelines constraining the executive's rulemaking. *Premier Health*, 310 Ga. at 49-50. Absent such guidelines, a delegation is impermissible. *Id.*

This Court has not explained what constitutes "sufficient" or "realistic" guidance or carved out the precise boundaries of permissible rulemaking delegations. *Id.* at 51. The only concrete limitation is that "where . . . the General Assembly fails to establish guidelines for the

delegatee's exercise of authority or where it delegates such broad discretion that an agency is permitted to decide what violates a law passed by the General Assembly," then such an assignment violates the separation of powers and non-delegation doctrines. *Id.* at 50. In other words, while this Court has not decided "how much statutory guidance must accompany a delegation of legislative authority, or specific that guidance must be," the answer must be more than "none." *Id.* at 51.

In *Premier Health*, this Court invalidated a rule promulgated by the DCH that supplemented the General Assembly's statutory list of health-care businesses that required a certificate of need. *Id.* at 35-51. This Court held that a DCH rule that added to, or altered, the statutory scheme was impermissible and constitutionally suspect pursuant to the non-delegation provision in the Georgia Constitution. *See id.* (citations omitted). According to *Premier Health*, where there is not an express delegation constrained by sufficient and reasonable guidelines that results in "complete and unbridled" authority of the executive agency, such a delegation is impermissible. *Id.* at 52-53 (characterizing the rule as "an unconstitutional usurpation of the General Assembly's power").

Like the DCH in *Premier Health*, the General Assembly's purported delegation to the SEB is "complete and unbridled." *See id*. There is no express delegation by the General Assembly to the SEB that would allow the SEB to enact the challenged rules. And there are certainly no "sufficient" or "realistic" constrains in the Election Code regarding these rules. Appellants merely point to the SEB's enabling legislation. But this "guidance" does not raise any protective guardrails. *See supra* at 53-56. Allowing such rules to take effect would amount to "delegation running riot." *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). Appellants' position that the General Assembly's grant of broad rulemaking authority to the SEB is enough, without specific guidance on how the agency will make a particular rule, flies in the face of this Court's precedents and the plain language of Ga. Const. Art. I, Sec. II, Para. III.[21]

[21] Examples of rules that *might* conform with *DOT*'s current parameters would include the specific grant of authority for the SEB to establish internal procedures regarding its execution of the law to remove a local election official or its rules regarding the appointment of a performance review board. *See* O.C.G.A. §§ 21-2-33.2; 21-2-208. But these grants are not at issue here.

CONCLUSION

Based on the foregoing, the Court should affirm the trial court's order.[22]

Counsel for Respondents certifies that this submission does not exceed the 17,500-word limit as imposed by this Court's December 20, 2024 Orders in the consolidated cases.

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[22] The trial court also correctly found that the new SEB rules violate the Elections Clause of the U.S. Constitution, which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. Art. I, Sec. 4, Cl. 1. This provision means that "state legislatures—not . . . state governors, not other state officials—bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay). Because the General Assembly is the only body that may wield legislative power in Georgia, the SEB cannot prescribe these rules. Although the U.S. Supreme Court recently held that "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review," *Moore v. Harper*, 600 U.S. 1, 22 (2023), that case arose in the context of state *judicial* review, not state *agency rulemaking*, the latter of which is prohibited by Georgia's non-delegation doctrine.

Respectfully submitted this 28th day of January, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that there is a prior agreement with counsel for Petitioners and intervenors to allow documents in a PDF format sent via email to suffice for service. To that end, on the 28th day of January, 2025, I served a copy of the foregoing Brief of Appellees Eternal Vigilance Action, Inc., Scot Turner, and James Hall upon the counsel of record via e-mail:

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