Cases No. S25A0362, S25A0490

IN THE SUPREME COURT OF GEORGIA

REPUBLICAN NATIONAL COMMITTEE, et al.

Appellants,

v.

ETERNAL VIGILANCE ACTION, INC., et al.,

Appellees.

On Appeal from the Superior Court of Fulton County
Civil Action File No. 24CV011558

AMICUS BRIEF OF MUSCOGEE AND COBB COUNTY BOARDS OF ELECTIONS AND REGISTRATION IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITY

United States Supreme Court

United States Courts of Appeal

Georgia Court of Appeals

Georgia State Courts

United States Code

Statutes

Rules & Regulations

STATEMENT OF INTEREST

The Muscogee County Board of Elections and Registration (the "Muscogee Board") and the Cobb County Board of Elections and Registration (the "Cobb Board," together with the Muscogee, the "County Boards") file this brief to respectfully request this Court affirm that Ga. Comp. R. & Regs. 183-1-12-.12(a)(5) is unlawful.[1] As the "election superintendents" for their respective counties, the County Boards have the statutory duty to ensure elections are conducted honestly, fairly, uniformly, and in accordance with law. *See* O.C.G.A. § 21-2-70. They are deeply concerned about the State Election Board's ("SEB") adoption of a rule—over the objections of the Attorney General, the Secretary of State, and election officials and workers across the State only weeks before Election Day—requiring the hand counting of ballots (the "Hand Count Rule"). *See* Rule 183-1-12-.12(a)(5).

The Cobb Board has an action pending in the Fulton County Superior Court under Georgia's Administrative Procedure Act ("APA"), O.C.G.A. § 50-13-10 that challenges the validity of the six rules—including the Hand Count Rule—adopted at the SEB's September 20 meeting. *See Cobb County BOER v. SEB*, No. 24CV012491. In October, the Superior Court in that case granted

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[1] No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparation or submission of this brief.

an interlocutory injunction barring the Hand Count Rule from taking effect or being enforced. *See Cobb BOER v. SEB*, Order, Oct. 15, 2024. It found, in part, that petitioners "enjoy[ed] a substantial likelihood of success on the merits of their claim that the Hand Count Rule was adopted in violation of the Administrative Procedures Act." The Muscogee Board similarly has an action before the Muscogee County Superior Court specifically challenging the SEB's Hand Count Rule. *See Muscogee BOER v. SEB*, No. SU2024CV002288, Superior Court of Muscogee County, Georgia.

As election superintendents, the County Boards have substantial interests in the outcome of this litigation. In particular, the County Boards require declaratory relief on the validity of the Hand Count Rule to "guide and protect" them "from uncertainty and insecurity with respect to" the interaction between the SEB's rules and the County Boards' legal duties under the Georgia Election Code. At the same time, the County Boards also have an interest in ensuring that the SEB retains the authority to issue rules essential to their administration of Georgia's elections.

SUMMARY OF ARGUMENT

Georgia election officials narrowly escaped significant disarray leading into the 2024 Presidential election after the State Election Board passed irresponsibly timed and illogical rules which could have substantially altered

Georgia's election procedures. This Court rightly upheld the stay of the rule most concerning to *Amici*: the Hand Count Rule.

The SEB adopted the Hand Count Rule over strong objections from the Attorney General, Secretary of State, the Georgia Association of Voter Registration and Election Officials ("GAVREO"), election officials and workers across the state, voters, and many other stakeholders.[2] The Attorney General informed the SEB that the rule is "not tethered to any statute" and thus is "likely the precise type of impermissible legislation that agencies cannot do."[3] The Secretary of State warned that the Hand Count Rule "would require tremendous personnel resources and time," "could lead to significant delays in reporting," and "would disrupt existing chain of custody protocols under the law and needlessly introduce the risk of error, lost ballots, or fraud." [4] Despite these and many other objections, the SEB adopted the Hand Count Rule at its September 20 meeting.

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[2] GAVREO Comment to the SEB, dated Sept. 17, 2024, available at https://www.democracydocket.com/wp-content/uploads/2024/09/GAVREO-Comments-on-Posted-SEB-Rules-9-17-24.pdf.

[3] Attorney General's Memorandum, dated Sept. 19, 2024 ("AG Memo"), at 6, available at https://atlantaciviccircle.org/wp-content/uploads/2024/09/StateElectionBoard.pdf.

[4] Letter of Charlene McGowan, dated Sept. 16, 2024 ("McGowan Letter"), at 2, attached as Exhibit B to Brief of Muscogee and Cobb County Boards of Elections and Registration in Support of Respondents, filed Oct 21, 2024.

As the Attorney General and the Secretary of State have opined, the Hand Count Rule is both unlawful and counterproductive. Georgia's Election Code provides a detailed scheme for counting ballots but does not provide for hand counting at the precinct level on election night. Where a statute speaks plainly and comprehensively on a matter, the SEB cannot add extra requirements or procedures. *E.g., Dep't of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995); *Pope v. Cokinos*, 231 Ga. 79, 80–82 (1973). The County Boards filed an amicus brief prior to the November election, explaining how the SEB's last-minute enactment of several rules interfered with their ability to effectively administer the election. But, as that brief made clear, even with adequate time to prepare, the Hand Count Rule will increase risks to ballot security, lead to errors that undermine confidence in elections, and jeopardize the uniformity of election processes, all while failing to achieve its stated purpose.

The County Boards urge the Court not to overly restrict the SEB's authority, in general, but to ensure that the SEB enacts rules consistent with the Georgia Election Code and the SEB's own statutory mandate. The Hand Count Rule exceeds that authority, and the SEB should be prohibited from enforcing it.

ARGUMENT

The Hand Count Rule is not authorized by law and directly conflicts with the Georgia Election Code. This Court need not engage with the Fulton County Superior Court's broader constitutional analysis to conclude that the rule is invalid. It is enough that the SEB violated the clear bounds of the statutes that created it and cabin its rulemaking authority.

I. The SEB Cannot Promulgate Eleventh-hour Rules Without Exigency, and None Existed Here.

As *amici* explained at length in their prior brief, the SEB's decision to adopt new rules at the last-minute—without any underlying change in circumstances—would have created significant challenges for election administrators and voters. In short, such last-minute action is counter to "the fair, legal, and *orderly* conduct of ... elections." O.C.G.A. § 21-2-31(2) (emphasis added). Although there are situations in which unanticipated exigencies—for instance, the COVID pandemic—require the adoption of last-minute rule changes, this Court should establish a presumption that rules enacted shortly before an election—for instance, in the 90-days preceding election day—exceed the SEB's authority unless justified by a significant and unforeseen change in circumstances.

The idea that eleventh hour changes are disfavored has been recognized by the Supreme Court and the U.S. Congress. *See Purcell v. Gonzalez*, 549 U.S.

1, 4–5 (2006) (explaining that in the lead up to an election, court orders that alter the status quo can "result in voter confusion and [a] consequent incentive to remain away from the polls. As an election draws closer, that risk will increase"). Indeed, it is a "bedrock tenet of election law" that "[w]hen an election is close at hand, the rules of the road must be clear and settled" to avoid "unfair consequences." *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring). "Running elections state-wide is extraordinarily complicated and difficult"; it "require[s] enormous advance preparations by state and local officials, and pose[s] significant logistical challenges." *Id.* at 880. Implementing last-minute rules like those the SEB attempted to enact here would "require heroic efforts by . . . state and local authorities in the [last] few weeks—and even [such] heroic efforts likely would not be enough to avoid chaos and confusion." *Id.*; *see also Grace, Inc. v. City of Miami*, No. 23-12472, 2023 WL 5286232, at *1 (11th Cir. Aug. 4, 2023). "Even seemingly innocuous late-in-the-day . . . alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J. concurring).

Stability leading into election season is so important that the U.S. Congress has prohibited last-minute changes in the context of voter-roll maintenance. The National Voter Registration Act of 1993 mandates that "[a]

State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C.A. § 20507(c)(2). Congress enacted this provision based on the recognition that last-minute changes to the voter rolls could cause chaos, confusion, and disenfranchisement of eligible voters. *See e.g. Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014) ("Eligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote. This is why the 90 Day Provision strikes a careful balance: It permits systematic removal programs at any time *except* for the 90 days before an election because that is when the risk of disfranchising eligible voters is the greatest.").

The SEB only has statutory authority to adopt rules that will promote "uniformity" in election administration across the state and that are "conducive to the fair, legal, and orderly conduct of ... elections." O.C.G.A. § 21-2-31(1)–(2)(emphasis added). This statutory mandate necessarily incorporates the principle that last-minute rule changes are likely to cause disruption, disorder, and a lack of uniformity. To avoid similar situations in the future—in which election administrators are forced to direct time and resources away from vital election administration tasks to litigate against the SEB—this Court should make clear that last-minute rule changes

presumptively exceed the SEB's authority unless taken in response to a significant and unforeseen change in circumstances.

II. The Hand Count Rule Is Contrary to Law.

The SEB only has statutory authority to adopt rules that will promote "uniformity" in election administration across the state and that are "conducive to the fair, legal, and *orderly* conduct of … elections." O.C.G.A. § 21-2-31(1)–(2)(emphasis added). Furthermore, its rules must "carry into effect a law already passed," and must comply with the Georgia Administrative Procedures Act. *HCA Health Servs. of Ga., Inc. v. Roach*, 265 Ga. 501, 502 (1995). Far from promoting uniform, fair, legal, and orderly elections, the Hand Count Rule introduced uncertainty and divergence in procedures leading into the election; threatened security and transparency of election procedures; conflicted with existing law; and violated the Administrative Procedure Act.

a. The Hand Count Rule is Counter to the SEB's Mandate Because it Undermines the Security, Transparency, and Accuracy of the Count.

The SEB's stated purpose for the Hand Count Rule is "to ensure the secure, transparent, and accurate counting of ballots," Notice of Proposed Rulemaking at 2, but the rule actually undermines the security, transparency, and accuracy of the count. To start, any errors or misconduct that the Hand Count Rule could possibly uncover would already be uncovered by existing safeguards. Existing SEB rules require that the poll manager reconcile the

number of voters who check in at the polls with the number of ballots scanned and the number of ballots unable to be scanned. Rule 183-1-12-.12(a)(1)-(2) (as effective until 10/22/2024). If the numbers cannot be reconciled with each other, the poll manager is required to "immediately determine the reason for the inconsistency; correct the inconsistency, if possible[,] and fully document the inconsistency or problem along with any corrective measures taken." *Id.* This existing check would already detect any discrepancy in the number of ballots counted by the scanners, rendering the hand count entirely redundant. In addition, *amici* are required to conduct Logic and Accuracy tests for all of their machines prior to an election, Ga. Comp. R. & Regs. 183-1-12-.08, and participate in a state-wide risk limiting audit at the end. Ga. Code Ann. § 21-2-498. These requirements further ensure the accuracy of the ballot machines.

The Hand Count Rule is not only ineffective, it also undermines the uniformity of the practices and proceedings of election officials. The rule does so both by explicitly providing discretion to poll managers as to how to conduct the hand count and by incorporating ambiguities that will be interpreted differently by different officials. The Hand Count Rule provides that the decision of when to start the hand-counting process is up to the Poll Manager or Assistant Poll Manager, meaning poll managers in each precinct may decide to start at different times and for different reasons. *See* Rule 183-1-12-.12. It is not clear from the vague text of the rule whether a polling location with fewer

than 750 ballots per scanner must begin the hand count on Election Day or complete it that day, creating further room for nonuniformity. *See* Rule 183-1-12-.12. Additionally, the rule's description of the counting process itself is ambiguous. The Rule requires that poll workers count the ballots "independently" and "separately," which suggests that each of the three sworn poll officers must count all of the ballots in stacks of 50 before the next person begins. *See* Rule 183-1-12-.12. But the rule could also be read to allow a poll officer to count one stack of 50, pass that stack to the next person, and continue counting. Different poll officers are likely to interpret this provision differently, leading to dramatic differences in the amount of time required to conduct the hand count.

In addition to undermining uniformity, the Hand Count Rule creates new election security vulnerabilities. As the Secretary of State explained, "having poll workers handle ballots at polling locations after they have been voted introduces a new and significant risk to chain of custody procedures."[5] The Hand Count Rule also allows poll officers in larger precincts to move ballots and count them at a "place other than the polling location" after election day. Rule 183-1-12-.12. This introduces further opportunities for ballots to be

[5] Press Release, Georgia Secretary of State Brad Raffensperger, Raffensperger Defends Georgia's Election Integrity Act from Last Minute Changes Delaying Election Results (Aug. 15, 2024), https://sos.ga.gov/news/raffensperger-defends-georgias-election-integrity-act-last-minute-changes-delaying-election.

lost or tampered with. The existing protocols for cast ballots prioritize minimal handling and exposure outside of sealed containers. Rule Ga. Comp. R. & Regs. 183-1-12-.10(5); Rule 183-1-12-.12 (as effective until 10/22/2024). The Hand Count Rule, by contrast, multiplies the number of places in which cast ballots are outside the scanner and exposed to security risks. Given the number of precincts that would likely opt to conduct their counts on Election Day evening, it is unlikely that every precinct could be safeguarded by security personnel—thus seriously threatening the security of the ballots.

Finally, conducting a hand count of ballots on Election Night or the following day simply creates a logistical nightmare that increases the risk of errors and discrepancies, creates the potential for delayed results, and risks undermining confidence in Georgia elections. *Amici* know, from their experience conducting post-election audits, that even under the best of circumstances, hand counting ballots is a time-consuming exercise that can dramatically increase the risk of human error. But the Hand Count rule would require the hand counting of ballots under much more trying circumstances. Election workers—who have already been working since 5:30 or 6:00 A.M—would be expected to hand count ballots, potentially late into the night, and would be subject to a high degree of scrutiny with any discrepancies likely to fuel voter distrust. Thus, the Hand Count Rule would not make elections more

transparent but rather would contribute to voter confusion and mistrust of the election system.

b. The Hand Count Rule Was Not Enacted Consistent with the Georgia APA.

The Hand Count Rule violates the Georgia APA because the SEB failed to follow the proper procedures in adopting it. The APA mandates that "[n]o rule . . . shall be valid unless adopted in exact compliance with" the procedures set out in "subsection[] (a)" of section 50-13-4. O.C.G.A. § 50-13-4(d). "Failure to comply with these procedures will invalidate an amended rule." *Walker v. Dep't of Transp.*, 279 Ga. App. 287, 294 (2006). Section 50-13-4(a) in turn mandates that "[p]rior to the adoption, amendment, or repeal of any rule . . . the agency shall . . . [g]ive at least 30 days' notice of its intended action" and include a "synopsis" of the proposed rule. O.C.G.A. § 50-13-4(a)(1). "[I]n the case of a proposed amendatory rule, the synopsis also shall indicate the differences between the existing rule and the proposed rule." *Id.* § 50-13-4(a)(1). Section 50-13-4(a), also requires that the agency, upon request, "issue a concise statement of the principal reasons for and against its adoption and incorporate therein its reason for overruling the consideration urged against its adoption." O.C.G.A. § 50-13-4(a)(2). The SEB failed to comply with each of these requirements.

First, the SEB failed to respond to the dozens of individuals who offered specific objections to the Hand Count Rule. Second, the SEB's notice for its September 20 meeting stated only that it would "provide the public an opportunity to comment upon and provide input into the proposed rule amendments." Notice of Proposed Rulemaking at 1. The SEB provided no notice that it *intended to vote on or pass the rule* as required by O.C.G.A. § 50-13-4(a)(1). Although this discrepancy may appear minor, the Georgia APA's plain text demands "exact compliance" with § 50-13-4(a)'s notice requirement, in contrast to other procedures which only require "substantial compliance." O.C.G.A. § 50-13-4(d). The notice also failed to identify key changes in the Rule such as the removal of the requirement to securely seal and transport ballots to the office of the election superintendent.[6] Because the SEB failed to comply with O.C.G.A. § 50-13-4(a) in passing the Hand Count Rule, the Court "must . . . hold that the amendment[] [is] invalid." *Outdoor Advert. Ass'n of Ga. Inc. v. Dep't of Transp.*, 186 Ga. App. 550, 554 (1988).

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[6] The notice included a section titled "Differences Between The Existing Rule And The Proposed Amendments," that purported to show how the new rule amended the existing rule. However, the notice failed to include key changes. For example, the existing rule requires that after the ballots are removed from the scanner they must be placed "into a durable, portable, secure and sealable container to be provided for transport to the office of the election superintendent." The Hand Count Rule removes this important language, but the Notice of Proposed Rulemaking did not identify this edit as one of the changes being proposed.

c. Georgia Law Does Not Authorize the Hand Count Rule.

An agency rule is "invalid" if it "exceeds the scope of or is inconsistent with the authority of the statute upon which it is predicated." *Dep't of Hum. Res.*, 218 Ga. App. at 529. Such rules are an "unconstitutional usurpation of the General Assembly's power" to legislate. *N. Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 543 (1998). The SEB accordingly has "no inherent powers and no lawful right to act except as directed by the [enabling] statute." *Southern Co-op. Foundry Co. v. Drummond*, 76 Ga. App. 222, 224 (1947). The SEB can only promulgate rules "to carry into effect a law already passed" or otherwise "administer and effectuate an existing enactment of the General Assembly." *HCA Health Servs.*, 265 Ga. at 502. It cannot add extra requirements or procedures where the statute speaks plainly and comprehensively on a matter. The Hand Count Rule reaches beyond statutory authority and is therefore unlawful.

The Attorney General warned the SEB prior to its passage of the Hand Count Rule that the Rule is "not tethered to any statute" and thus is "likely the precise type of impermissible legislation that agencies cannot do." AG Comment at 6. That is correct. No statute comes close to authorizing the type of hand counting required by the Hand Count Rule, including the statutes cited as "[a]uthority" for the Rule. Notice of Proposed Rulemaking, Revisions to

Subject 183-1-12-.12 *Tabulating Results* (citing O.C.G.A. §§ 21-2-483(a), 21-2-436, 21-2-420(a)); *see also EVA v. SEB*, Order Granting Declaratory and Injunctive Relief at 7 ("This hand counting exercise is nowhere authorized by the General Assembly in the Election Code.").

As Appellants acknowledge, O.C.G.A. § 21-2-483 mostly governs procedures at the tabulation center and is, therefore, largely irrelevant to the Hand Count Rule, which mandates hand counting at the precinct level prior to tabulation. The SEB likely cited § 21-2-483(a) because the first sentence reads: "In 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) (emphasis added). But as this provision refers to the counting of ballots using optical scanners, hand counting is not authorized under this provision. *See* O.C.G.A. § 21-2-483(g)(1), (h); *see also* O.C.G.A. § 21-2-300(a).

Appellants recognize that O.C.G.A. § 21-2-436 is likewise inapplicable because it governs "[p]recincts [u]sing [p]aper [b]allots," not those using optical scanners. (Muscogee and Cobb Counties only use optical scanners.) This section also only provides for procedures "before the ballot box is opened," such as announcing "the number of ballots issued to electors" based on paper ballot stubs. O.C.G.A. § 21-2-436. In contrast, the Hand Count Rule mandates new

procedures after the poll manager and two witnesses "unseal and open each scanner ballot box." Rule 183-1-12-.12(a)(5).

The Hand Count Rule is not authorized by O.C.G.A. § 21-2-420, which provides that "the poll officials in each precinct shall complete the required accounting and related documentation for the precinct." O.C.G.A. § 21-2-420. Appellants argue that the Hand Count Rule "clarifies" the phrase "required accounting and related documentation," but this argument pushes the definition of the word "clarify" to the point of absurdity. The Hand Count Rule does not so much "clarify" the statutory requirement as it invents an entirely *new* requirement not contemplated by the statute. The term "required accounting" refers to the accounting expressly required by statute. *E.g.*, O.C.G.A. § 21-2-485. It cannot plausibly be read to implicitly require hand counting ballots at the precinct level, especially where the Legislature's comprehensive scheme for ballot counting and tabulation contains not even a hint of any such requirement.

The SEB can only adopt rules "to carry into effect a law already passed" or otherwise "administer and effectuate an existing enactment of the General Assembly." *HCA Health Servs.*, 265 Ga. at 502. It cannot write new laws from scratch. The Hand Count rule runs afoul of that principle and is, therefore, invalid.

d. The Hand Count Rule Conflicts with Existing Law.

The Hand Count Rule also exceeds the SEB's rulemaking authority because it is inconsistent with the Georgia Election Code, specifically O.C.G.A. § 21-2-420(a). Section 21-2-420(a) provides that after "the poll officials in each precinct shall complete the required accounting and related documentation," the chief manager and at least one assistant manager shall "*immediately* deliver all required documentation and election materials to the election superintendent" who must then "ensure that such ballots are processed, counted, and tabulated *as soon as possible*." O.C.G.A. § 21-2-420(a) (emphasis added). Because election materials include ballots, *see id.*, and these materials must "immediately" be delivered to the election superintendent, it would be impossible for poll managers to comply with O.C.G.A. § 21-2-420(a) while also conducting an hours- or days-long hand count process. The hand count would also frustrate the superintendent's ability to process, count, and tabulate the ballots "as soon as possible" as required by the statute.

III. Although the Hand Count Rule is Invalid, the SEB's Enactment of Regulations is Generally Constitutional and is Essential for the Uniform Administration of Elections.

Despite its recent foray into adopting last-minute, unnecessary, unlawful, and counterproductive rules, the SEB plays a crucial role in Georgia election administration. Appellees argue that the General Assembly's

delegation of rulemaking authority to the SEB is unconstitutional because the legislature has failed to provide "sufficient" and "realistic" parameters to cabin the SEB's discretion. *Amici* disagree. Georgia statute provides clear parameters for the SEB in enacting regulations.

This Court has held that "[t]he 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" the Georgia Constitution. *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 49 (2020) (internal quotation marks omitted). A delegation of authority to an administrative agency is proper under this doctrine so long as the general assembly provides sufficient guidance to ensure that the agency acts in an "administrative capacity" rather than a "purely legislative" capacity. *Id.* at 50 (quoting *Pitts v. State*, 293 Ga. 511, 517 (2013)). By contrast, a delegation of authority violates this doctrine only where, for example, "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." *Id.*

Here, Georgia statute provides that it is the duty of the SEB to "promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and

elections." O.C.G.A. § 21-2-31(1). It is further the SEB's duty to "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-2-31(2). When combined with Georgia's more than 500 pages of the Election Code, the SEB's role is circumscribed: it can only enact rules that carry into effect this detailed Election Code in a uniform, fair, legal, and orderly manner.

This Court has upheld delegations of authority that provided greater discretion. For instance, in *Pitts v. State*, 293 Ga. 511, 517 (2013), this Court considered the Legislature's delegation of authority to determine unexcused school absences and concluded that the Legislature had provided "realistic guidance" by instructing the State Board of Education, in a separate code provision, to consider "sickness and other emergencies which may arise in any school community." *Id.* Here, the Legislature has not only provided guiding considerations, it has provided hundreds of pages of detailed instructions and specifications. Although in this instance, the SEB strayed from the guardrails set in place by the General Assembly, the existing statutory scheme properly constrains the SEB to act in an administrative capacity and does not delegate legislative authority.

Although the SEB's role is limited, its rulemaking is nonetheless essential for the uniform administration of Georgia's elections. For all the

detail in Georgia's Election Code, there will always be gaps and ambiguities that, without administrative guidance, will lead to lack of uniformity. In many parts of the Election Code, the General Assembly has explicitly delegated authority to the SEB. For instance, Ga. Code § 21-2-498 requires that "[l]ocal election superintendents shall conduct precertification risk-limiting audits." The code defines the acceptable degree of risk, the deadline for conducting the audits, the types of ballots to be considered, and a requirement for public reporting, but delegates to the SEB the authority to enact rules, regulations, and procedures to govern the audit process. The SEB has properly done so. Ga. Comp. R. & Regs. 183-1-15-.04. In other parts of the Election Code, the General Assembly has not explicitly delegated authority, but the SEB's rules nonetheless provide important detail and clarification to election administrators. For example, O.C.G.A. § 21-2-374 requires the public testing of ballot scanners, and provides detailed instructions about how to conduct the tests. But the code does not fill in every detail, like how to provide notice or how to prevent the presence of the public from compromising the security of election equipment. The SEB has provided those details through Rule 183-1-12-.08. In these, and many, many other instances, from voter registration to the conduct of recounts, the SEB has provided essential guidance to *amici* and other election administrators. Absent this guidance, each county would need

to independently interpret and fill in gaps in the Georgia Election Code, leading to substantial variation in practices across the state.

To strike down the Hand Count Rule, this Court need not and should not reach the constitutional delegation question. "It is well established that this court will never decide a constitutional question if the decision of the case presented can be made upon other grounds." *Bd. of Tax Assessors of Columbus, Ga. v. Tom's Foods, Inc.*, 264 Ga. 309, 310 (1994); *see also Deal v. Coleman*, 294 Ga. 170, 171 n.7 (2013); *State v. Randall*, 318 Ga. 79, 82 (2024). The Hand Count Rule is invalid because it exceeds the SEB's authority, was improperly enacted, and conflicts with existing law—not because there is anything improper about the underlying delegation of rulemaking authority to the SEB.

CONCLUSION

For the foregoing reasons, this Court should invalidate the SEB's Hand Count Rule.

CERTIFICATION OF WORD COUNT

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and accurate copy of the foregoing document to all parties and counsel of record via United States mail. In view of the expedited nature of this appeal, I have also sent same by electronic mail to below-listed counsel:

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