Case Nos. S25A0362, S25A0490

In the

Supreme Court of Georgia

STATE OF GEORGIA,

Appellant,

and

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

BRIEF OF *AMICUS CURIAE* GEORGIA DEMOCRACY TASK FORCE IN SUPPORT OF PLAINTIFFS/APPELLEES

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INTRODUCTION

In the fall of 2024, weeks before the presidential election, the Georgia State Election Board ("SEB") proposed to adopt and implement a set of new rules governing the conduct of elections in the State (the "Rules"). In response to immediate legal challenges, including by the plaintiffs in this case, the new SEB Rules never took effect. Even though the SEB argued that the Rules were necessary for a secure election, the Georgia vote count for the November 2024 general election was accurate, efficient, and secure and was certified without challenge by any party.

Amicus curiae the Georgia Democracy Task Force ("Task Force") submits this brief in support of Plaintiffs and Appellees' arguments that the SEB's Rules are unauthorized and illegal. As the Task Force's brief shows, the SEB's Rules go far beyond any rulemaking power delegated by the General Assembly to the SEB, and in promulgating the Rules, the SEB was improperly attempting to legislate in violation of the separation of powers. In particular, where the General Assembly has by statute specifically addressed a subject or has chosen not to do so, the general statutory grant of rulemaking authority to the SEB does not permit the agency to make up and impose its own requirements that conflict with or go beyond specific statutes. Moreover, the Rules threaten to inject confusion and delay into the election

process and create serious potential for partisan or other improper manipulation by county election officials.

The SEB's Rules are unauthorized and unreasonable, and therefore unlawful. This Court should make clear that the Rules are invalid and will not be implemented.

INTEREST OF AMICUS

The Task Force is a bipartisan group, primarily composed of lawyers. The Task Force's aim is to defend the rule of law by safeguarding the integrity and the non-partisan administration of elections. The Task Force submitted comments to the SEB in opposition to the new Rules before their adoption and it appeared as amicus curiae in support of Plaintiffs in the Superior Court.

SUMMARY OF ARGUMENT

The doctrine of separation of powers constrains the ability of an executive agency such as the SEB to engage in legislative rulemaking. Where, as here, the General Assembly has by statute purported to grant rulemaking authority to an agency, the agency may only promulgate rules that are consistent with the statutory text and structure and that are reasonable. The SEB has violated these principles in promulgating the Rules at issue here. This brief addresses certain of the Rules and demonstrates how

the SEB exceeded its authority. The brief further illustrates the harm to the election process that is threatened by the Rules.

ARGUMENT

A. The State's Constitutional Structure Prohibits an Executive Agency From Usurping the Powers of the Legislature.

The SEB's Rules are impermissible because they represent the intrusion by an executive agency into the domain of the legislature, in violation of the central constitutional principle of separation of powers of the three branches of government. The principle that each branch is constrained to act within its defined powers is enshrined in Article I, Section II, Paragraph III of the 1983 Constitution, which provides that "[t]he 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." The "Separation of Powers Provision has been carried forward unchanged through every Georgia Constitution since 1877, and every previous Georgia Constitution contained a similar provision[.]" *Cazier v. Georgia Power Company*, 315 Ga. 587, 587 (2023) (Peterson, P.J., concurring).

The powers of each branch are clearly set forth in the constitutional text. "The legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and House of Representatives." Ga. Const. of

1983, art. III, § I, ¶ I. The Constitution provides that the "chief executive powers shall be vested in the Governor" who "shall take care that the laws are faithfully executed[.]" *Id.*, art. V, § II, ¶¶ I, II. And "[t]he judicial power of the state shall be vested exclusively in the . . . courts[.]" *Id.*, art. VI, § I, ¶ I.

Accordingly, executive branch agencies may not arrogate to themselves the power to enact laws that the Constitution confers upon the General Assembly. To be sure, "the General Assembly is empowered to enact laws of general application and then delegate to administrative officers or agencies the authority to make rules and regulations necessary to effectuate such laws." *Jackson v. Composite State Bd. of Med. Examiners of Ga.*, 256 Ga. 264, 265 (1986) (citation omitted). And, indeed, the General Assembly has granted the SEB authority to promulgate rules and regulations "conducive to the fair, legal, and orderly conduct of primaries and elections" and "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.G.C.A. § 21-2-31(1), (2).

Appellants rely on O.G.C.A. § 21-2-31 as the authority for the SEB's promulgation of the challenged Rules. *See* Appellant State of Georgia's Principal Brief ("State of Georgia Br.") at 6-7, 44-45; Opening Brief of Appellants the Republican National Committee and the Georgia Republican Party ("RNC Br.") at 3, 10, 15, 22, 25-32. But that broadly worded statute is

not an unlimited grant of permission to legislate. Administrative rules must be both "authorized by statute" and "reasonable." *Georgia Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975). The General Assembly's grant of authority to an agency to promulgate rules empowers the agency only to "adopt rules and regulations to carry into effect a law already passed" or otherwise "administer and effectuate an existing enactment of the General Assembly." *HCA Health Services of Ga., Inc. v. Roach*, 265 Ga. 501, 502 (1995) (citation omitted). Where the General Assembly has authorized an agency to promulgate rules to effectuate statutes, the agency "has no constitutional authority to legislate, and it certainly is not authorized to establish rules that conflict with legislation." *North Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 543 (1998). The Attorney General specifically made this point to the SEB when it opined, in response to the SEB's own request for the Attorney General's opinion on the legality of the Rules at issue here, that "several of the proposed rules . . . very likely exceed the Board's statutory authority and in some instances appear to conflict with the statutes governing the conduct of elections." Memorandum from Elizabeth Young, Senior Assistant Attorney General, to John Fervier, Chair, State Election Board, dated September 19, 2024 ("AG Memo") at 2.[1]

[1] https://www.documentcloud.org/documents/25169004-20240919-memo-to-state-election-board-re-proposed-rules-920-meeting/ (last viewed Feb. 5, 2025).

More specifically, a rule that adds extra requirements or procedures where the statute speaks plainly on a matter is inconsistent with the statute and invalid. *See Department of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995) (citing *Strickland v. Phillips Petroleum Co.*, 248 Ga. 582, 586 (1981)); *North Fulton Med. Ctr.*, 269 Ga. at 543-44 ("It is well established that administrative agencies . . . are not authorized to enlarge the scope of, or supply omissions in, a properly-enacted statute. Nor may administrative agencies change a statute by interpretation, or establish different standards within a statute that are not established by a legislative body." (footnotes omitted)).

Agency rulemaking where there is no statute is also invalid. Agencies have implied powers "only as are reasonably necessary to execute the express powers conferred." *Bentley v. State Bd. of Med. Examiners of Ga.*, 152 Ga. 836, 836 (1922). But for "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." *Camp v. Williams*, 314 Ga. 699, 709 (2022) (Bethel, J., concurring); *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; the broad scope and reticulated nature of the statutory scheme indicate that the legislature meant not only to preclude local regulation of the various particular matters to which the general law directly speaks, but also

to leave unregulated . . . the matters left unregulated in the interstices of the general law."); AG Memo at 3.

Appellants' assertion that the general grant of rulemaking authority in O.C.G.A. § 21-2-31 gives the SEB carte blanche to promulgate rules as it sees fit conflicts with these principles. It is further negated by the fact that the General Assembly has enacted multiple specific statutes that enumerate the precise subjects on which the General Assembly expects the SEB to regulate (and which, in many cases, the SEB has not done). *See* O.C.G.A. § 21-2-33.2(b) (requiring the SEB to "promulgate rules and regulations for conducting such preliminary investigation and preliminary hearing" regarding allegations that an election superintendent should be removed); O.C.G.A. § 21-2-108 (requiring SEB to "promulgate such rules and regulations as may be necessary for the administration of this part" addressing appointments of performance review boards). The SEB has promulgated no such rules or regulations.

Appellants' reliance on O.C.G.A. § 21-2-31 as authorization to ignore the specific statutes addressing particular election procedures, as well as those addressing specific tasks for the SEB, is contrary to the principle that "[w]here there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general

provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision." *Mayor, etc., of Savannah v. Savannah Elec. & Power Co.*, 205 Ga. 429, 436–37 (1949) (citation omitted).

It is the province of the courts to declare what is the law. "At the core of the judicial power is the authority and responsibility to interpret legal text." *Cazier*, 315 Ga. at 587 (Peterson, J., concurring, quoting *City of Guyton v. Barrow*, 305 Ga. 799 (2019)). As shown below, the trial court properly struck down the challenged rules because they are unauthorized by and in conflict with the Election Code and are unreasonable.

B. The SEB Rules Are Not Authorized and Are Unreasonable Because They Conflict With and/or Impermissibly Expand Provisions of the Election Code.

1. SEB Rule 183-1-12-.02—the Reasonable Inquiry rule.

By statute, Georgia law imposes a mandatory duty on an election superintendent to "certif[y]" election results: "Such returns *shall be certified* by the superintendent not later than 5:00 P.M. on the Monday following the date on which such election was held and such returns shall be immediately transmitted to the Secretary of State." O.C.G.A. § 21-2-493(k) (emphasis added).

In amending SEB Rule 183-1-12-.02, the SEB created a new, extra-statutory definition of "certify" in this context:

> "Certify the results of a primary, election, or runoff," or words to that effect, means 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.

Rule 183-1-12-.02(c)(2). The SEB Rule is unauthorized because it goes beyond and alters the statutory requirements, and it is an unreasonable interpretation of the statute.

First, the Rule contradicts the plain words of the statutory ministerial duty to certify election results by a date certain. The duty imposed by the statute is mandatory, not discretionary. *See, e.g., Bacon v. Black,* 162 Ga. 222, 133 S.E. 251, 253 (Ga. 1926) ("[t]he duties of the managers or superintendents of election who are required by law to assemble at the courthouse and consolidate the vote of the county are purely ministerial"); *see also* cases discussed *infra*. The Rule adds the discretionary concept of "reasonableness" directly into the definition of certification, injecting ambiguity and subjectivity into the certification process.

Second, the Rule further deviates from the statute by permitting a superintendent to delay certification based on his or her own asserted and unsupported suspicion of fraud or error, or concern as to whether he or she is comfortable guaranteeing that "the results are a true and accurate accounting of all votes cast in that election" or that the inquiry was sufficiently "reasonable." This is contrary to the statutory scheme, which

expressly states that superintendents must certify the results *first* and that concerns of fraud and error must be addressed *second*. O.C.G.A. § 21-2-493(i) states: "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." (Emphasis added.) The Rule ignores the extensive verification measures that are created and imposed by statute to address grounds for concern regarding the results—including that candidates may challenge the results of the election in court only *after* certification has taken place.

Georgia case law is well established that the courts (not individual county superintendents) have the responsibility to make the determination as to whether an election result is invalid. More than a century ago, the Georgia Supreme Court called out the very problem that the Rule introduces into the certification process, holding that an election superintendent has *no authority to decline to certify votes because of suspected fraud*. *Tanner v. Deen*, 108 Ga. 95, 33 S.E. 832, 835-36 (Ga. 1899). Superintendents, the court explained, "were not selected for their knowledge of the law," and therefore had no authority to make legal determinations as to the validity of any election returns. *Id.* The court continued:

> Were the law otherwise, it would be within the power of one superintendent to withdraw from his duties, or refuse to sign the certificate, and thus render illegal and void the election in that precinct. If he were a violent partisan, and saw the election going against his party, he might refuse to discharge his duty, and by this conduct perhaps defeat the will of the people in his district or in his county, or possibly even in his state.

Id. at 834; *see also Davis v. Warde*, 155 Ga. 748, 118 S.E. 378, 391-392 (Ga. 1923) ("The canvassing board cannot go behind the returns of the election officers to determine the result of an election . . . . The duties of canvassers are purely ministerial; they perform the mathematical act of tabulating the votes of the different precincts as the returns come to them . . . . [T]he determination as to the result of an election by a canvass of the returns by the city council is not a judicial act, but is purely a matter of calculation") (citations omitted); *Bacon,* 162 Ga. 222, 133 S.E. at 253 ("[t]he duties of the managers or superintendents of election who are required by law to assemble at the courthouse and consolidate the vote of the county are purely ministerial. The determination of the judicial question affecting the result in such county elections is confined to the remedy of contest as provided by law."); *Thompson v. Talmadge*, 201 Ga. 867, 876-77 (1947) (the 1945 Georgia Constitution imposed on the General Assembly the "mathematical process of adding the number of votes" and, "[t]he General Assembly, as canvassers of the election returns in this case, were subject to the general, if not indeed the

universal, rule of law applicable to election canvassers . . . that they are given no discretionary power except to determine if the returns are in proper form and executed by the proper officials and to pronounce the mathematical result, unless additional authority is expressed. They can neither receive nor consider any extraneous information or evidence, but must look only to the contents of the election returns.").

The fact that the superintendent's duty to certify elections is a mandatory one is further supported by Georgia law regarding election contests. *See* O.C.G.A. § 21-2-520 et seq. Election contests in court are the vehicle prescribed by statute to correct an election result if in fact there was any misconduct, fraud, or irregularity that puts the outcome of the election in question. *See* O.C.G.A. § 21-2-522; *Bacon,* 162 Ga. 222, 133 S.E. at 253 ("The determination of the judicial question affecting the result in such county elections is confined to the remedy of contest as provided by law."). For an election contest to occur, election boards must *first* complete their mandatory duty of certifying the election. *See* O.C.G.A. § 21-2-524 (petition to contest the election shall be filed within five days after certification).

An election board's refusal to complete its mandatory duty of certifying an election stands in the way of this established statutory mechanism and in fact makes it more difficult to correct an election result in situations where such a remedy would be appropriate. Election contests are the legally

established processes for adjudicating elections where facts, not mere surmise, put the result in question. The judicial process offers distinct and obvious advantages over county election boards in resolving election disputes. Courts have both the authority and the procedural mechanisms to thoroughly examine evidence, subpoena relevant documents, compel witness testimony under oath, and apply rigorous legal standards in evaluating claims of irregularities or fraud. Judges, as impartial arbiters, can weigh competing claims and evidence in an adversarial setting, ensuring a fair and thorough examination of any election challenges; this leads not only to a better result, but also to an outcome that those disappointed in the result still have reason to respect. Simply put, the statutes contemplate that election contests will be adjudicated in court, and the established judicial process provides a level of scrutiny and due process that cannot be replicated in the certification phase by local election officials. County election boards do not have a proper role to play in this process, but instead must complete their mandatory duty of certifying results to allow the established process to begin.

The importance of timely, consistent, and lawful certification of election results by county election boards across Georgia cannot be overstated, but the Rule will predictably open the door to county election boards failing to complete their mandatory legal duty to timely certify election results. Appellant State of Georgia argues that the rule "does not contain any

provisions altering the certification process or that permit election officials 'to delay certification.'" (State of Georgia Br. at 42.) But the Rule cannot be given effect without permitting a delay in certification if a superintendent asserts that there has not been time or opportunity to complete a "reasonable inquiry" and/or that the superintendent is not able to certify that the results "are a true and accurate accounting of all votes cast in that election." In fact, before the Rule was invalidated by the Superior Court in this case, some members of election boards across Georgia openly expressed their intention to withhold certification of some or all ballots that did not survive their "reasonable inquiry" that is required by the Rule. *See, e.g.*, Plaintiff's Trial Brief in *Adams v. Fulton County, Georgia,* Civil Action No. 24CV011584, at 3-4 ("election superintendents—whether multi-member bipartisan boards or individual judges—must exercise discretion when determining whether election returns are accurate and without mistake, error, or fraud and can be certified as true and correct").

Appellants also assert that the absence of a definition of "certify" in the Election Code means that a definition promulgated by the SEB necessarily cannot "conflict with any competing definition" (State of Georgia Br. at 42) and that the SEB may "reasonably define[] a term the General Assembly didn't define for itself." (RNC Br. at 25.) In other words, Appellants appear to assert that there is no limitation on the SEB's ability to define *any* term

included, but not defined, in an Election Code provision. But it clearly goes beyond the SEB's statutory authority, and is unreasonable, for the SEB to define a statutory term in a manner that fundamentally changes the meaning of the statute. Here, the Rule changes the meaning of a superintendent's ministerial duty to "certify" into an exercise of discretionary and subjective evaluation of the results. The RNC Brief asserts that "[a]n election official can both conduct a reasonable inquiry into the accuracy of a count *and* certify election results." (RNC Br. at 26.) The trouble is that the statute only requires the latter; the Rule requires both. And the Rule attempts to take the determination of whether fraud or other circumstances require a new election out of the hands of the courts (where the General Assembly placed it) and put it into the hands of unelected local boards of elections.

The SEB's redefinition of certification goes beyond the SEB's authority by altering the statutorily imposed structure of elections in Georgia. The Rule defies existing state statutes, injects unnecessary delay and individual subjectivity into the election process, and usurps the role of courts in adjudicating election contests.

2. SEB Rule 183-1-14-.02(18)—the Absentee Ballot rule.

Georgia law provides for no-excuse absentee voting and the Election Code allows voters multiple ways to return their absentee ballots, including

by personally mailing or delivering the ballot, or by mail or delivery made by certain authorized persons[2] or caregivers. O.C.G.A. § 21-2-385(a). The statute imposes specific requirements "[i]n order to verify that the absentee ballot was voted by the elector who requested the ballot": "the elector shall print the number of his or her Georgia driver's license number or identification card . . . in the space provided on the outer oath envelope. The elector shall also print his or her date of birth in the space provided in the outer oath envelope." *Id.* O.C.G.A. § 21-2-386 sets forth a detailed process for the receiving registrar or clerk to verify the information set forth on the absentee ballot envelope: comparing the elector's driver's license or state ID number and date of birth stated on the envelope with voter registration records and verifying that the elector signed the oath. "If the elector has signed the elector's oath, the person assisting has signed the required oath, if applicable, and the identifying information entered on the absentee ballot envelope matches the same information contained in the elector's voter registration record, the registrar or clerk shall so certify by signing or initialing his or her name below the voter's oath. Each elector's name so certified *shall be listed*

[2] The authorized persons are 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." O.C.G.A. § 21-2-385(a).

by the registrar or clerk on the numbered list of absentee voters prepared for his or her precinct."[3] O.C.G.A. § 21-2-386(a)(1)(B) (emphasis added).

In new Rule 183-1-14-.02(18), the SEB purports to impose additional requirements in order for an absentee ballot that is delivered by an authorized person to be received and processed. Going beyond the statutory requirements for the *voter* to sign the ballot and provide information about (not a copy of) his or her identification, the Rule imposes a set of requirements on the person who delivers an absentee ballot on behalf of another voter, as the statute expressly permits. The Rule requires that in delivering an absentee ballot, the authorized person delivering the ballot must provide to election officials his or her signature, photo ID, and "approved relation to the elector's name on the absentee ballot." The information is to be recorded on an absentee ballot form, and "[t]he form shall serve as a written record of the name of the elector, the name of the person delivering the absentee ballot, the relation to voter, signature of the person depositing the ballot, and type of ID of the person delivering the absentee ballot." "[A]ny ballot delivered without a signed chain of custody shall be

[3] "[T]he person assisting" an absentee voter refers to a person who provides actual assistance in voting the ballot to "[a] physically disabled or illiterate elector" and is distinct from a person who delivers another person's absentee ballot. *See* O.C.G.A. § 21-2-385(b) ("A physically disabled or illiterate elector may receive assistance in preparing his or her ballot from any person of the elector's choice other than such elector's employer or the agent of such employer or an officer or agent of such elector's union").

considered a provisional absentee ballot"—in other words, not counted unless and until the absentee voter is able to cure the provisional ballot.[4]

The SEB's addition of requirements imposed on a person dropping off another voter's absentee ballot is not authorized by statute and is unreasonable. The statute imposes detailed requirements on an absentee voter in preparing the ballot to be submitted and in the manner of submission, and it requires any superintendent or other person accepting absentee ballots to verify only specified information and, if that information is verified, to include the ballot on the numbered list of absentee voters. But the SEB Rule allows the superintendent not to include a ballot but rather to put it aside as provisional. The rule places an additional requirement on voters who choose to let an authorized relative or caregiver return their ballot for them and imposes on such voters an additional and burdensome task in curing a provisional ballot if the deliverer cannot or does not provide identification and signature. In imposing the extra burden on citizens who seek to vote by absentee ballot, the SEB has acted beyond its rulemaking authority.

[4] By exempting only United States Postal Service delivery from the absentee ballot form requirement, the rule appears to require other common carriers, such as UPS and FedEx, to complete the absentee form in order for the ballot to be counted. A citizen's right to have his or her vote counted should not be conditioned on the willingness of an unrelated, commercial third party to complete the absentee ballot form.

Appellants' asserted defenses of the SEB's authority to promulgate the Rule are insufficient. They correctly note that "[t]he statute does not provide any mechanism for election officials to ensure that the person delivering the absentee ballot is the voter or a member of his family," but concludes that the Rule "helps ensure compliance with section 21-2-385." (RNC Br. at 28-29.) But nothing in the statutes suggests that the General Assembly believed that this assurance was necessary, even while it decided to require election officials receiving absentee ballots to review and cross-check detailed information from the voter himself or herself and permit election officials to "reject" absentee ballots when they are unable to verify information on the ballot envelope about the voter. In any event, nothing about the deliverer's photo ID can verify or establish his or her relationship with the voter.

Appellants attempt to defend the SEB's authority by arguing in effect that the SEB may promulgate any rule that is not expressly negated in the statute. It asserts that legislative silence on a "particular administrative topic" gives the agency free rein to "regulat[e] in that space." (State of Georgia Br. at 44.) But the SEB misinterprets the legislative "silence" because "the broad scope and reticulated nature of the statutory scheme indicate that the legislature meant . . . to leave unregulated . . . the matters left unregulated in the interstices of the general law." *Gebrekidan*, 298 Ga. at 654. Moreover, the "topic" here is the procedural requirement for an absentee

voter to complete and submit an absentee ballot and have it counted, and the General Assembly was not "silent." It directly "regulate[d] in that space" by specifying in great detail the information that must be provided and verified, and it did not include the requirements of the Rule.

3. SEB Rule 183-1-14-02(19)—the Video Surveillance rule.

The Election Code contains a detailed statutory provision addressing the establishment and maintenance of drop boxes for the delivery of absentee ballots during the period of advance voting. O.C.G.A. § 21-2-382(c)(1). The statute specifically addresses security, requiring 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.*

The SEB, however, promulgated a Rule that dispenses with the statutory requirement and replaces it with something different. Rule 183-1-14-.02(19) provides 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.

Rule 183-1-14-.02(19) (emphasis added). The SEB's Rule plainly is unauthorized by statute and is unreasonable as it alters the meaning of the statutory requirement for "constant surveillance" and imposes a harsh consequence—with the potential to deprive compliant absentee voters of their vote—that the General Assembly did not impose.

By statute, the requirement that a drop box "be under constant surveillance" does not require, or even contemplate, that a portion of the surveillance must occur by video. Rather, the constant surveillance is accomplished by specified individuals: "an election official or his or her designee, law enforcement official, or licensed security guard." But under the Rule, compliance with the statute is not sufficient. Even if the drop box is under constant surveillance after closing hours by one of the named individuals, the Rule would be violated unless there is video surveillance as well or instead. Plainly, the statute does not allow this.

The State's sole defense of the SEB's authority to promulgate the Rule is to assert that "video surveillance is but one mechanism of 'constant surveillance.'" (State of Georgia Br. at 46.) The RNC Brief similarly asserts that the Rule "reasonably implemented" and is "complimentary [sic] of" the statutory requirement of constant surveillance. (RNC Br. at 29-30.) Neither brief acknowledges that the video requirement after closing is an additional

requirement that is different from, and displaces, the surveillance described in the statute.

The statute also does not allow the Rule's provision that a drop box that is not "under constant *and direct* surveillance" (with "direct" not required by the statute) will be "locked or removed and prohibited from use." While the Rule does not specify what would happen to absentee ballots already deposited into a drop box that is subsequently "locked or removed and prohibited from use," it is plausible that the SEB intends to require rejection or cancellation of all absentee ballots contained in the drop box, and to do so without notice to the voters who have properly completed their absentee ballots and deposited them in the drop box. In this way, the Rule converts a statute designed to make absentee voting more accessible into one that can result in the nullification of proper ballots. The RNC Brief asserts that the Rule implements the part of the statute addressing when a drop box will be "closed," stating that "closed" is not defined in the statute, so the SEB may reasonably require that drop boxes that are closed but are not under video surveillance when advance voting is not taking place at the location may be "locked or removed." (RNC Br. at 30.) But the Rule goes much further than merely authorizing a drop box to be "locked or removed"; it also *requires* that such a box be "prohibited from use." Closing a drop box so that it is not used outside of allowable times, as the statute requires, is not the same as

removing the drop box from use altogether, as the Rule requires. Indeed, there may be some counties where video surveillance is impossible. In those cases, the Rule's requirement to prohibit the use of that drop box would directly contradict the General Assembly's express requirement that all counties provide at least one drop box.

If there were any doubt that the General Assembly did not authorize the new limits that the Rule places on absentee voting, the General Assembly's own actions confirm it. In 2020, the SEB adopted emergency rules for voting during the COVID pandemic, including a rule requiring video surveillance of drop boxes. *See* SEB Emergency Rule 183-1-14-0.6-.14(4), (5). In 2021, the General Assembly enacted SB 202, which included a provision authorizing the use of drop boxes that borrowed liberally from the SEB Emergency Rule, but it intentionally did not adopt the SEB's video surveillance requirement. Thus, not only is the SEB Rule's video surveillance requirement not authorized by statute, but also it is an affront to the will of the General Assembly. The RNC Brief rejects "the idea that the General Assembly's failure to adopt a requirement bars agencies from adopting a similar rule." (RNC Br. at 30.) However, in a case like this one, where the evidence is that the legislature was aware of and considered the agency's proposal and intentionally omitted it from the statute, an agency that proceeds to insert its rejected rule into the regulatory scheme contravenes,

and clearly exceeds, its authority under the statute. *See Transportation Ins. Co. v. El Chico Restaurants, Inc.*, 271 Ga. 774, 776 (1999) ("We must presume that the Legislature's failure to include the limiting language was a matter of considered choice."); *Hollowell v. Jove*, 247 Ga. 678, 682 (1981).

4. SEB Rule 183-1-12-.12(a)(5)—the Hand Counting rule.

The Election Code requires that, after the polls are closed, ballot boxes be unsealed and the ballots transferred to sealed containers delivered to the tabulation center, with verification that the seals have not been broken, whereupon the containers are to be opened, and the ballots removed and prepared for processing by the tabulating machines. O.C.G.A. § 21-2-483(c). "The chief manager and at least one assistant manager shall post a copy of the tabulated results for the precinct on the door of the precinct and then *immediately* deliver all required documentation and election materials to the election superintendent." O.C.G.A. § 21-2-420(a) (emphasis added).

However, the SEB's Rule 183-1-12-.12 interferes with and potentially delays the statutory process by imposing new, precinct-level processes between the removal of the ballots from the sealed ballot box and their placement in sealed containers for delivery to the tabulation center. The Rule requires the poll manager and two sworn poll officers to unseal ballot boxes, but then, rather than directly place the ballots into a sealed container for immediate delivery to the tabulation center, each of the three poll officers

must independently count the ballots. Once all three counts match, each poll officer must sign a control document. If discrepancies arise between the hand count and machine-recorded totals, the poll manager must resolve and document the inconsistency. The counted ballots are resealed in labeled and signed containers. Rule 183-1-12-.12(a)(5).

Before the SEB adopted the amendment, it requested an opinion on its legality from the Office of the Attorney General. The Department of Law advised the SEB that the Rule would not withstand judicial scrutiny. It opined:

> There are thus no provisions in the statutes cited in support of these proposed rules that permit counting the number of ballots by hand at the precinct level prior to delivery to the election superintendent for tabulation. Accordingly, these proposed rules are not tethered to any statute—and are, therefore, likely the precise type of impermissible legislation that agencies cannot do.

See AG Memo at 6. In particular, the Attorney General's Office made clear that the amendment conflicts with the process for tabulating results mandated by statute. The Election Code requires that ballots be delivered to the tabulation center in sealed containers that are verified as not having been broken, whereupon the containers are to be opened, and the ballots removed and prepared for processing by the tabulating machines. O.C.G.A. § 21-2-483(c). But the SEB chose to disregard the Attorney General's opinion

(as well as the General Assembly's statutes), with one SEB member explaining "the opinion doesn't mean that we have to take it."[5]

The Hand Counting rule exceeds the SEB's statutory authority and is unreasonable in that it threatens to undermine the legitimacy of the election process rather than preserve it. The Rule breaks the chain of custody of the ballots. Instead of assuring that the printed ballots are transferred directly from the ballot box to a sealed container for delivery to the tabulating center, the Rule *requires* that each ballot be handled by three separate people conducting independent counts in a public setting. In so doing, the Rule exposes the process to potential partisan manipulation, or at least to accusations of such nefarious conduct. The hand counting process, subject to the variable competence and honesty of individual poll workers as well as simple human error, necessarily would be less efficient, less consistent, and less dependable than machine counts, and often less accurate as well.[6] And

[5] Grant Blankenship, *State Election Board passes new rule ordering hand count of ballots. Election officials aren't happy*, Georgia Public Broadcasting, Sept. 20, 2024, https://www.gpb.org/news/2024/09/20/state-election-board-passes-new-rule-ordering-hand-count-of-ballots-election (last viewed Feb. 5, 2025).

[6] *See* Stephen N. Goggin et al., *Post-Election Auditing: Effects of Procedure and Ballot Type on Manual Counting Accuracy, Efficiency, and Auditor Satisfaction and Confidence*, 11 ELECTION L.J.: RULES, POLITICS AND POLICY, No. 1 (March 5, 2012) at https://doi.org/10.1089/elj.2010.0098 (last viewed February 3, 2025) ("[M]anual audits can vary in their accuracy and efficiency, as well as their appearance of validity to the auditors and outside observers. While many argue manual audits are the 'gold standard' by which we must evaluate computerized ballot totals due to the insecure nature of such machines, we must be careful to remember that even the most basic tasks performed by humans can and do introduce error into the process.").

by requiring that the three officers reach the same result before the ballots can be delivered to the tabulation center, the Rule threatens to create intolerable delay in the reporting of results (in contravention of the statutes that require quick reporting of the results) and introduces the possibility of bad faith actions by an individual officer who could alone cause delay and/or prevent the tabulation of legally cast votes.

Appellants RNC offer *no argument at all* in defense of the SEB's authority to promulgate the Rule, instead merely deferring to the State's arguments because the RNC has "nothing to add." (RNC Br. at 7.) This clearly represents a concession that the Rule is indefensible. Moreover, the State's Brief itself fails to support the SEB's Rule. The State says only that the hand count required by the Rule does not inherently cause delay in tabulating votes and that the possibility that it may cause delay is speculative. (State of Georgia Br. at 49-50.) It further attempts to clarify that the Rule concerns only counting of the paper ballots and not of the votes represented by those ballots, but it fails to address the concerns for chain-of-custody and physical handling that the Rule plainly presents.

CONCLUSION

The Rules are invalid for the reasons discussed herein and in the Appellees' Briefs. The Task Force urges the Court to so hold.

This brief is 6,556 words and thus does not exceed Rule 20(5)'s word-count limit.

Respectfully submitted this 7th day of February, 2025.

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CERTIFICATE OF SERVICE

Case Nos. S25A0362, S25A0490

I HEREBY CERTIFY that on February 7, 2025, I caused to be served a true and correct copy of the foregoing AMICUS CURIAE BRIEF upon all recipients below by deposit in the United States Postal Service, with sufficient postage thereon for delivery. In addition, I caused a courtesy copy to be sent by electronic mail on February 7, 2025 to counsel for the parties, as indicated.

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