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

REPLY BRIEF OF APPELLANTS THE REPUBLICAN NATIONAL COMMITTEE AND THE GEORGIA REPUBLICAN PARTY

Alex B. Kaufman
Georgia Bar No. 136097
Kevin T. Kucharz
Georgia Bar No. 713718
CHALMERS, ADAMS, BACKER & KAUFMAN, LLC
100 N. Main St., Ste. 340
Alpharetta, GA 30009
(404) 625-8000

William Bradley Carver, Sr.
Georgia Bar No. 115529
HALL BOOTH SMITH, P.C.
191 Peachtree Street NE, Ste. 2900
Atlanta, GA 30303
(404) 954-5000

Gilbert C. Dickey*
Conor D. Woodfin*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

* *Pending admission pro hac vice*

Counsel for the Republican National Committee and the Georgia Republican Party, Inc.

Table of Contents

Table of Authorities ii
Introduction 1
Argument 3
I. The affirm-for-any-right-reason principle is not a license to raise new arguments on appeal. 3
II. Plaintiffs don't address their pleading failures. 4
III. Plaintiffs have not shown that the seven rules are an unconstitutional exercise of the legislative power. 6
A. Plaintiffs have not shown that the Election Board wields legislative power. 8
B. The two rules that arguably implicate private conduct do not regulate private rights. 10
C. The General Assembly cabined the Board's rulemaking with sufficient guidelines. 16
IV. Plaintiffs barely defend the trial court's Elections Clause ruling. 18
V. Plaintiffs have not shown a statutory conflict. 19
Conclusion 22
Certificate of Service 24

Table of Authorities

Cases

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,
576 U.S. 787 (2015) 2, 18

B & B Hardware, Inc. v. Hargis Indus.,
575 U.S. 138 (2015) 11, 12, 13, 14

Beall v. Beall,
8 Ga. 210 (1850).....8, 9

Cazier v. Ga. Power Co.,
315 Ga. 587 (2023).....21

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008) 11

Dade Cnty. v. State,
201 Ga. 241 (1946).....5

Dep't of Hum. Res. v. Anderson,
218 Ga. App. 528 (1995).....3

Dep't of Transp. v. Ass'n of Am. R.Rs.,
575 U.S. 43 (2015) .....passim

Dep't of Transp. v. City of Atlanta,
260 Ga. 699 (1990).....5

Franklin Bridge Co. v. Wood,
14 Ga. 80 (1853).....9

Ga. Dep't. of Cmty. Health v. Dillard,
313 Ga. App. 782 (2012).....19

Ga. R.R. v. Smith,
70 Ga. 694 (1883).....2, 14

Ga. Real Est. Comm'n v. Accelerated Courses in Real Est.,
234 Ga. 30 (1975).....6, 21

Gwinnett Cnty. v. Gwinnett I Ltd. P'ship,
265 Ga. 645 (1995).....3

HCA Health Servs. of Ga., Inc. v. Roach,
265 Ga. 501 (1995).....21

Kennestone Hosp., Inc. v. Emory Univ.,
318 Ga. 169 (2024)..... 11, 12, 13, 16

Maner v. Dykes,
183 Ga. 118 (1936) 8, 9

McDonald v. Bd. of Election Comm'rs of Chi.,
394 U.S. 802 (1969) 11

Moore v. Harper,
600 U.S. 1 (2023) 19

N. Fulton Med. Ctr. v. Stephenson,
269 Ga. 540 (1998) 20, 21

New Ga. Project v. Raffensperger,
976 F.3d 1278 (11th Cir. 2020) 15

Phinizy v. Eve,
108 Ga. 360 (1899) 16

Pitts v. State,
293 Ga. 511 (2013) 16

Powers v. Inferior Ct. of Dougherty Cnty.,
23 Ga. 65 (1857) 8, 10

Premier Health Care Invs., LLC v. UHS of Anchor, L.P.,
310 Ga. 32 (2020) ..... passim

Pub. Serv. Comm'n of Second Dist. v. N.Y. Cent. R.,
193 A.D. 615 (N.Y. App. Div. 1920) 8

Reliance Tr. Co. v. Candler,
294 Ga. 15 (2013) 3, 4

Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs,
315 Ga. 39 (2022) 8, 12

State v. Dews,
R. M. Charlton Rep. 397 (Ga. Super. Ct. 1835) 8

Stegall v. Sw. Ga. Reg'l Hous. Auth.,
197 Ga. 571 (1944) 5

Tully v. Okeson,
977 F.3d 608 (7th Cir. 2020) 11

United States v. Grimaud,
220 U.S. 506 (1911) 13, 14

Wallin v. State,
248 Ga. 29 (1981) 4, 5

Wasserman v. Franklin Cnty.,
__ Ga. __, 2025 WL 309390 (Jan. 28, 2025) 11, 12, 13

Wellness Int'l Network, Ltd. v. Sharif,
575 U.S. 665 (2015) 12

Statutes

O.C.G.A. §12-8-64 17
O.C.G.A. §15-19-31 1
O.C.G.A. §15-2-17 1
O.C.G.A. §15-2-18 1
O.C.G.A. §20-2-131 18
O.C.G.A. §20-2-240 18
O.C.G.A. §21-2-208 4
O.C.G.A. §21-2-31 .....4, 16
O.C.G.A. §21-2-33.2 4
O.C.G.A. §21-2-35 17
O.C.G.A. §21-2-408 20
O.C.G.A. §21-5-2 18
O.C.G.A. §21-5-6 18
O.C.G.A. §31-12-3 18
O.C.G.A. §31-12-3.1 18
O.C.G.A. §31-6-40 19
O.C.G.A. §32-6-90 18
O.C.G.A. §40-2-36 18
O.C.G.A. §50-13-3 16
O.C.G.A. §50-13-7 17
O.C.G.A. §8-3-206 17

Other Authorities

Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*,
133 Harv. L. Rev. 164 (2019) 13, 16

Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*,
23 Federalist Soc'y Rev. 238 (2022) 9

Introduction

Appellees undercut the trial court's opinion by urging this Court to affirm a judgment "right for any reason." The NAACP thus begins its argument by steering this Court away from the trial court's constitutional errors, preferring to focus on the statutory claims instead. NAACP Br. 6-8. On that point, the NAACP disagrees with the Plaintiffs, who argue that "[t]his Court should not defer a decision" on the delegation issue. Pls.' Br. 64. But the right-for-any-reason principle does not get parties out of ordinary appeal and preservation rules, and it's not an invitation to truffle hunt for arguments never presented below.

Plaintiffs urge the Court to upset its nondelegation precedent, but they offer nothing to replace it. All parties agree that only the General Assembly can exercise the legislative power. But that only raises the question whether the State Election Board exercised legislative power. It did not, since it provided instructions to election officials, not a general rule of private conduct.

Plaintiffs, however, equate all rulemaking with legislation. That definition calls into question a host of rulemaking powers far afield from core legislative power. This Court, for example, has "full power and authority to make all rules" as "may be necessary for carrying the Constitution into effect and regulating the court's proceedings thereunder." O.C.G.A. §15-2-17. It can "prescribe, modify, and repeal rules of procedure, pleading, and practice in civil actions." *Id.* §15-2-18(a). And it can "adopt rules" for "the organization and government of the unified state bar." *Id.* §15-19-31. Each of these rulemaking powers is just as broad as the rulemaking powers the General Assembly gave to

the State Election Board. But "it has never been claimed" that "the power given to the judges of the supreme and superior courts of this state to establish rules" which "are binding and must be obeyed" is "unconstitutional because they had not been passed by the legislature and read three times, and on three separate days, in each house of the general assembly." *Ga. R.R. v. Smith*, 70 Ga. 694, 698 (1883).

Under Plaintiffs' reasoning that all rulemaking violates the nondelegation doctrine, each of these powers would be unconstitutional. Their arguments don't account for the *object* of regulation, even though that's always been a defining feature of the legislative power. "[T]he core of the legislative power" is the power to create "generally applicable rules of private conduct." *Dep't of Transp. v. Ass'n of Am. R.Rs.* [*AAR*], 575 U.S. 43, 76 (2015) (Thomas, J., concurring in the judgment). This Court makes rules governing state judges and the legal profession. And the State Election Board makes rules governing state election officials. Neither make "generally applicable rules of private conduct." *Id.* The Court should thus reverse the trial court's nondelegation ruling.

Appellees' other arguments fare no better. Plaintiffs argue that the Elections Clause applies differently to state agencies, but they ignore Supreme Court precedent saying the opposite. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814 (2015). On the statutory arguments, Appellees don't identify a conflict between the rule and any statute. They argue that statutory text exhaustively describes the subject matter for each rule, but they don't make a textual case to support that argument. *See Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 44-46 (2020).

For these reasons, this Court should reverse the trial court's judgment.

Argument

I. The affirm-for-any-right-reason principle is not a license to raise new arguments on appeal.

Both sets of Appellees distance themselves from the trial court's opinion, urging this Court to affirm on other grounds. They're not shy about this move—the NAACP begins its brief trying to steer the Court away from the trial court's constitutional errors. NAACP Br. 6-8. Plaintiffs go further, preferring new arguments and claims to the ones they raised below. But this Court has long held that "'[i]ssues never raised at trial will not be considered for the first time on appeal.'" *Reliance Tr. Co. v. Candler*, 294 Ga. 15, 18 (2013). Plaintiffs acknowledge that principle. Pls.' Br. 52 n.11. But it forecloses a number of their arguments.

Plaintiffs argue for the first time that the seven rules are unreasonable. Plaintiffs acknowledge that "'whether [a rule] is authorized by statute'" is a different issue from "'whether it is reasonable.'" Pls.' Br. 33 (quoting *Dep't of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995)). But in the trial court they argued only statutory authorization, not reasonability. (V1-39, 57-61; V2-435-437; V3-747). Each of these "'[i]ssues'" was "'never raised at trial,'" and thus should "'not be considered for the first time on appeal.'" *Reliance Tr.*, 294 Ga. at 18.

Plaintiffs resist waiver by arguing that this Court can affirm a "'judgment right for any reason.'" Pls.' Br. 4 (quoting *Gwinnett Cnty. v. Gwinnett I Ltd. P'ship*, 265 Ga. 645, 646 (1995)). But that principle applies to "any reason" that "is apparent from the record." *Gwinnett Cnty.*, 265 Ga. at 646. It does not

dispose of the party-presentation rule, giving appellees a free pass to raise new arguments or claims "for the first time on appeal" just because they seek affirmance. *Reliance Tr.*, 294 Ga. at 18. This Court should not entertain claims not pleaded, and arguments not raised.

II. Plaintiffs don't address their pleading failures.

Plaintiffs challenge the Election Board's rulemaking authority, but their complaint does not specify the "particular part" of "the statute" that they challenge with "fair precision." *Wallin v. State*, 248 Ga. 29, 30 (1981) (cleaned up). Plaintiffs' response brief doesn't address that deficiency. *See* Pls.' Br. 27-30. Instead, it makes things worse. Plaintiffs attack the Election Board's "authority to engage in the type of rulemaking it did." Pls.' Br. 5. But Plaintiffs never identify the "type" of rulemaking they find unlawful. They hardly mention the Board's different rulemaking powers. *See* O.C.G.A. §21-2-31(1), (7), (10). And when they do, those powers are just an "example" of rulemaking they find objectionable. Pls.' Br. 54.

Plaintiffs might not distinguish between the Board's rulemaking powers because they want all of those powers declared unlawful. The trial court understood Plaintiffs' position that way, noting that "Plaintiffs further contend" that the Georgia Constitution "precludes the SEB from engaging in any rulemaking at all." (V1-13 n.1). Now, however, Plaintiffs appear to walk back that position by conceding that some Election Board rules "*might* conform" with this Court's nondelegation precedent. Pls.' Br. 80 n.21 (citing O.C.G.A. §§21-2-33.2; 21-2-208). Plaintiffs argue that those "grants are not at issue here." *Id.* But that's just a late admission that their complaint never identified the

"'particular part'" of "'the statute'" that they challenge. *Wallin*, 248 Ga. at 30. The stakes of Plaintiffs' claims thus remain unclear.

The upshot of this vagueness issue is that the Court need not reach the merits of the Plaintiffs' constitutional claims.[1] At a minimum, the Court should distinguish the facial claim that all rulemaking is unlawful from the as-applied claims that the seven rules are unlawful. Plaintiffs sought both. They demanded a declaration that "the SEB lacks constitutional authority to promulgate rules." (V1-41). And they requested an injunction "prohibiting the State of Georgia and the SEB … from enacting any SEB Rules and to require the State of Georgia and the SEB … to delete all SEB Rules from its rolls." (V1-42). The trial court declined to enter that relief, noting that binding precedent permits "limited and guided rulemaking in some circumstances." (V1-13 n.1) (citing *Dep't of Transp. v. City of Atlanta*, 260 Ga. 699, 703 (1990)). The trial court thus did not facially enjoin all rulemaking or vacate all rules. Instead, it enjoined only the seven particular rules at issue in this case. (V1-15-16).

Plaintiffs suggest that their facial all-rulemaking-is-unlawful argument is still live because the Court could enjoin each individual rule by holding that all agency rulemaking violates the nondelegation doctrine. Pls.' Br. 72-73. In

[1] In some circumstances the failure to adequately specify the challenged provisions of a statute can go to justiciability in this Court. *See Dade Cnty. v. State*, 201 Ga. 241, 244-45 (1946) (addressing appeal to this Court premised on challenge to constitutionality of statute). Though it decides whether the plaintiff has "raise[d] any question for determination," *Stegall v. Sw. Ga. Reg'l Hous. Auth.*, 197 Ga. 571, 585 (1944), here it is probably best viewed as a pleading rule going to the merits of the claim. *See id.* (finding that "all attacks upon the statutes fail"); *Wallin*, 248 Ga. at 30 (explaining that attack on statute was "insufficient"); *contra* GOP Br. at 12-14.

theory, that's true—the Court could enjoin the seven individual rules if it were to reason that all Election Board rulemaking is unlawful, but Plaintiffs never explain how raising the argument excuses them from pleading which provisions of the law are unconstitutional and how. The NAACP sensibly warns against such "broad, and wholly unnecessary, constitutional reasoning." NAACP Br. 7. And as the Defendants' briefs have explained, the reasoning is also wrong.

After dispelling this confusion, the Court should clarify that the issue before it is whether the seven individual rules are lawful. Applying the nondelegation doctrine to that issue (as the trial court did) makes little sense. As the GOP Intervenors explained, there's a difference between whether a *statute* granting rulemaking powers comports with the nondelegation doctrine (a facial claim), and whether an individual *rule* is authorized by statute (an as-applied claim). GOP Br. 12-13. The facial nondelegation test that Plaintiffs urge the Court to jettison asks whether the statute granting rulemaking power "is accompanied by sufficient guidelines." *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 49-50 (2020) (cleaned up). The as-applied test asks whether each rule is "authorized by statute" and "not contrary to law." *Ga. Real Est. Comm'n v. Accelerated Courses in Real Est.*, 234 Ga. 30, 35 (1975). The trial court mixed up these tests when it concluded that "there are no guidelines" for the "Rules." (V1-13). This Court should avoid that same error.

III. Plaintiffs have not shown that the seven rules are an unconstitutional exercise of the legislative power.

Plaintiffs' historical account of the nondelegation doctrine is largely correct, and largely irrelevant. *See* Pls.' Br. 57-64. Plaintiffs conclude that the

history shows that "[t]he non-delegation doctrine" prohibits the "delegation of legislative authority." Pls.' Br. 63. But that only raises the question whether the Board exercised legislative authority. The answer to that question requires more than an assertion that the powers of government must be separate. *See* Pls. Br. 57-64. Plaintiffs must show that the rules at issue are legislative in nature. They haven't met that burden.

Plaintiffs assume that any "rulemaking" must be an exercise of legislative power, but the GOP Intervenors rebutted that assumption in their opening brief. The GOP Intervenors explained that the rules here direct government officials how to do their jobs, not private parties how to conduct their lives. GOP Br. 16-20. And even the rules that arguably affect private parties don't regulate their private rights—at most, they affect statutorily conferred privileges, which is not an exercise of the core legislative power. GOP Br. 20-23. Indeed, elsewhere in their brief, Plaintiffs appear to concede that some executive rulemaking "might" be permissible. *See* Pls.' Br. 80 n.21. But they don't explain why some rulemaking is legislative and other rulemaking is not.

Ruling for Plaintiffs in this case would require the Court not only to overturn its current precedent, but to replace it with a sound nondelegation jurisprudence, which Plaintiffs don't provide. Defining the legislative power is a necessary step in any nondelegation case, especially if this Court were to reexamine its precedent. Plaintiffs haven't done that work. The Court should thus reject their nondelegation arguments and reverse the trial court's ruling.

A. Plaintiffs have not shown that the Election Board wields legislative power.

The "[l]egislative power is that which declares what the law shall be" by prescribing "a rule of civil conduct." *State v. Dews*, R. M. Charlton Rep. 397, 400 (Ga. Super. Ct. 1835).[2] More simply, the legislative power "is the power to make law." *Powers v. Inferior Ct. of Dougherty Cnty.*, 23 Ga. 65, 80 (1857). "[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct." *AAR*, 575 U.S. at 76 (Thomas, J., concurring in the judgment). This Court agrees: "Blackstone defines law as 'a rule of civil conduct, prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong.'" *Maner v. Dykes*, 183 Ga. 118, 118 (1936) (quoting 1 William Blackstone, Commentaries 44). In other words, the "[l]aw is a rule of civil conduct prescribed by the law-making power in the state." *Id.* (cleaned up) (quoting *Pub. Serv. Comm'n v. N.Y. Cent. R.*, 193 A.D. 615, 623 (N.Y. App. Div. 1920)). This Court has long recognized the core legislative power is "to pass *all laws*," meaning "a *rule* prescribed for the civil conduct of the *whole community*." *Beall v. Beall*, 8 Ga. 210, 222 (1850).

Plaintiffs assume that any "rulemaking" is an exercise of legislative power regardless of whether it prescribes a general rule governing private conduct. That is the necessary premise of their argument that all "rulemaking," Pls.' Br. 57, amounts to the "power of making laws," *Franklin Bridge Co. v.*

[2] *See also Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 315 Ga. 39, 50 & n.8 (2022) (approvingly citing *Dews* and noting that the superior court was the highest appellate court at the time).

Wood, 14 Ga. 80, 80 (1853). They make no other argument for why the seven rules in this case are an exercise of legislative power.

But the fact that something appears in the form of a rule does not make it an exercise of legislative power. As explained, the nature of the power exercised decides whether an act is legislative. *See AAR*, 575 U.S. at 76 (Thomas, J., concurring in the judgment) (making rules of private conduct). Even Plaintiffs' own cases confirm that it is the substance of the government action that controls in separation-of-powers cases. *See Beall*, 8 Ga. at 222 (recognizing authority of Legislature to enact private act with consent). Thus, a law instructing courts to "pass[] [a] rule or order" recognizing corporations was not an unconstitutional delegation because it called for "simply a ministerial act." *Franklin Bridge*, 14 Ga. at 85.

As the GOP Intervenors explained, GOP Br. 18-19, most of the rules here fall comfortably outside the legislative power. At least five of the seven rules at issue govern only "the conduct of government officials," not the "actions of nongovernment parties in the private sector." Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc'y Rev. 238, 248 (2022). The Reasonable Inquiry Rule, the Examination Rule, the Drop-Box Surveillance Rule, the Daily Reporting Rule, and the Hand Count Rule each fall in that category. Plaintiffs don't contend otherwise. These regulations are not "generally applicable rules of private conduct." *AAR*, 575 U.S. at 77 (Thomas, J., concurring in the judgment). So those rules are not an exercise of the "legislative power," and present no delegation problem. *Maner*, 183 Ga. at 118. Even for the two rules that arguably implicate private parties (the Drop-Box ID Rule and the Poll

Watcher Rule), Plaintiffs make no affirmative argument that the rules are otherwise "legislative," so they haven't carried their burden even to raise an initial delegation problem.

In sum, Plaintiffs don't try to define the "legislative power" or explain how the Election Board makes "laws." They want to jettison current precedent, but they offer nothing in its place. Plaintiffs assume—but have not shown—that the rules are an exercise of the "legislative power." For that basic reason, their nondelegation claims fail.

B. The two rules that arguably implicate private conduct do not regulate private rights.

At least five of the seven rules don't touch on public or private rights at all. *See supra* Section III.A. Those rules don't implicate "the power to make law" because they do not concern "the creation, or the destruction of *any* right." *Powers*, 23 Ga. at 80. But the Drop-Box ID Rule and the Poll Watcher Rule at least arguably implicate the "private conduct" of citizens who deliver ballots and monitor polls. *AAR*, 575 U.S. at 77 (Thomas, J., concurring in the judgment). This is where public and private rights are most relevant. Plaintiffs err by applying the private-rights doctrine to all seven rules, when at least five of those rules don't implicate any individual rights at all—public or private. Plaintiffs make at least three other mistakes: They misunderstand the GOP Intervenors' argument as an "attempt to classify voting as a 'public' right." Pls.' Br. 73. They confuse private rights with anything that *affects* a private right, no matter how remote. And they assume without evidence that the rules they challenge will result in votes not being "'correctly counted and reported.'" *Id.* at 77. Each mistake is a reason to reject their arguments.

First, the GOP Intervenors did not argue that voting is a public right. "[P]rivate rights are 'those belonging to an individual as an individual.'" *Wasserman v. Franklin Cnty.*, __ Ga. __, 2025 WL 309390, at *4 (Jan. 28, 2025). "[T]he right to vote" was thus generally "classified" as a "private right[]." *Id.* Absentee voting, by contrast, is not a right "belonging to an individual as an individual,'" *id.*, because it's not a right at all, *see McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). "[T]he fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter's preferred manner, such as by mail." *Tully v. Okeson*, 977 F.3d 608, 613 & n.3 (7th Cir. 2020) (collecting cases). Absentee voting is, at most, a statutory entitlement conferred by the State. *See Kennestone Hosp., Inc. v. Emory Univ.*, 318 Ga. 169, 180-81 (2024). "That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment).

Likewise, poll-watching and drop-boxes are limited licenses or accommodations for specific groups. They are "quasi-private rights, or statutory entitlements," which are "privileges or franchises that are bestowed by the government on individuals," *B & B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (cleaned up). As this Court recognized, "[c]ertain 'privileges' or 'franchises' that originate with and are granted by the State may be considered public rights even when held by individuals." *Kennestone Hosp.*, 318 Ga. at 180. Whatever they are called, these statutorily

created privileges do not bear the same core legislative character as "the power to change or modify the law to create duties and liabilities that never existed before." *Sons of Confederate Veterans*, 315 Ga. at 43.

To be sure, not every act of the General Assembly regulates a private right. The General Assembly legislates on a variety of subjects, including both public and private rights. But "'there are certain core functions' that require the exercise of a particular constitutional power and that only one branch can constitutionally perform." *B & B Hardware*, 575 U.S. at 171 (Thomas, J., dissenting). The "core of the judicial power," for example, is "the power to resolve a controversy about the relative rights and obligations of the parties before it, and to bind those parties to that judgment." *Wasserman*, 2025 WL 309390, at *9. While regulating private rights falls in that "core" legislative function, "the legislative and executive branches may dispose of public rights at will" (subject to statutory constraints) without raising the same separation-of-powers concerns. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 713 (2015) (Thomas, J., dissenting).

Plaintiffs point out that the public-rights doctrine usually arises in cases about adjudication in the executive branch. *See* Pls.' Br. 74 n.18. This Court has also applied the doctrine in the context of constitutional standing, *see Sons of Confederate Veterans*, 315 Ga. at 55, and in the context of retroactivity, *Kennestone Hosp.*, 318 Ga. at 176. But those cases just apply the doctrine to different government powers: the core of the legislative power *regulates* private rights through generally applicable rules, while the "core of the judicial power" *disposes* of private "rights and obligations of the parties before it." *Wasserman*,

2025 WL 309390, at *9. Those cases don't say that public rights are relevant only to adjudication. Nor could they. The public-rights doctrine, or the "distinction between 'rights' and 'privileges,'" is just one tool in helping define the legislative and judicial powers. Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164, 180 (2019). The distinction is thus "relevant to the nondelegation doctrine" in the "rules and regulations" context, not just the adjudication context. *Id.* at 179-80; *see also, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 521 (1911) (rejecting nondelegation challenge to agency rulemaking because the rules regulated the "privilege" of access to public land).

In short, Plaintiffs say much about the right to vote. But they say nothing about the right to drop off ballots for another voter, or the right to watch polls. The first step in any nondelegation case is identifying what power is being exercised. And Plaintiffs have not shown that a private right is at stake, which is the "core" of the legislative power.

Second, Plaintiffs confuse private rights with anything that *affects* a private right. Sometimes, regulations have downstream consequences for private rights even if they don't regulate private rights directly. Trademark registration is a good example. Even though "the right to adopt and exclusively use a trademark appears to be a private property right," "[t]rademark *registration* under the Lanham Act has the characteristics of a quasi-private right." *B & B Hardware*, 575 U.S. at 172 (Thomas, J., dissenting) (emphasis added); *accord Kennestone Hosp.*, 318 Ga. at 179. That's because "registration is merely a statutory government entitlement." *B & B Hardware*, 575 U.S. at 172

(Thomas, J., dissenting). The same is true of many election procedures such as voter registration, absentee voting, drop-boxes, and poll-watching. Each is "statutory government entitlement," *id.*, and thus does not raise the same delegation concerns when regulated by the executive branch, *see Grimaud*, 220 U.S. at 521. Plaintiffs' theory would transform almost any procedural rules—including, for example, internal court procedures—into an exercise of legislative power so long as some private right could be implicated.

That public-rights regulations sometimes have the 'force and effect of law' does not necessarily make those regulations an exercise of the 'legislative power.' As this Court has observed, "[l]egislative grants of power to the officers of the law to make rules and regulations which are to have the force and effect of laws, are by no means uncommon in the history of our legislation." *Ga. R.R.*, 70 Ga. at 698. It's usually the imposition of "coercive power" on private parties that transforms a public-rights regulation into a private-rights regulation. *AAR*, 575 U.S. at 89 (Thomas, J., concurring in the judgment); *see also id.* (Alito, J., concurring) (noting the regulations "inherently have a 'coercive effect,' on private conduct"). Here, none of the regulations set "generally applicable rules of private conduct." *Id.* at 70 (Thomas, J., concurring in the judgment). They tell government officials—not voters or citizens—what to do and how to do it.

The right to vote is a private right. But Plaintiffs haven't connected any of the Election Board's rules with a regulation of the right to vote. Even statutes that change how people vote (such as ballot deadlines), without more, "do[] not implicate the right to vote at all." *New Ga. Project v. Raffensperger*, 976

F.3d 1278, 1281 (11th Cir. 2020). Much less do the rules here implicate the right to vote, when they don't change who can vote or how they vote. Plaintiffs claim that "the SEB's new rules are aimed squarely at" the private right to vote. Pls.' Br. 78. But they neither support nor explain that claim.

Third, even if Plaintiffs were correct that the nondelegation doctrine is implicated by remote effects on the right to vote, they've provided no evidence that the rules they challenge will result in votes not being correctly counted or reported. Plaintiffs speculate that the Reasonable Inquiry "could foreseeably result in the improper counting or outright exclusion of Appellees' votes." Pls.' Br. 11. They claim that the Drop-Box Surveillance Rule "increases the likelihood that any votes … cast in non-video-monitored drop boxes will not be counted or reported." Pls.' Br. 12. And they fear that the Hand Count Rule "could foreseeably result in Appellees' voters being delayed, improperly counted, or altogether disregarded." Pls.' Br. 13. Plaintiffs provide no evidence of these claims. Even if they had presented evidence, it would at most mean that the rules have some effect on private rights, not that the regulations set "generally applicable rules of private conduct." *AAR*, 575 U.S. at 70 (Thomas, J., concurring in the judgment). The rules that Plaintiffs challenge are several degrees removed from private rights. Plaintiffs have not carried their burden to show that the rules are an exercise of the legislative power.

* * *

This case does not require the Court to decide the full scope of the public-rights doctrine. "[C]lassifying governmental power is an elusive venture," but "it is no less important for its difficulty." *AAR*, 575 U.S. at 76 (Thomas, J.,

concurring in the judgment). This Court knows that difficult questions about that doctrine counsel applying it carefully, not giving up entirely. *See Kennestone Hospital*, 318 Ga. at 183. Here, the Court need only observe that the rules Plaintiffs challenge do not implicate private rights (such as the right to vote), and thus do not bear one of the core hallmarks of the "legislative power." *Phinizy v. Eve*, 108 Ga. 360, 360 (1899). That distinction is "relevant to the nondelegation doctrine." Bamzai, *supra*, at 180. And Plaintiffs have not explained how the rules are otherwise an exercise of legislative power.

C. The General Assembly cabined the Board's rulemaking with sufficient guidelines.

Under this Court's nondelegation precedents, "the delegatee is not performing a legislative function, that is, it is not making a purely legislative decision, but is acting in an administrative capacity by direction of the legislature." *Pitts v. State*, 293 Ga. 511, 517 (2013). Plaintiffs criticize this Court's nondelegation precedent because they believe it authorizes "some delegation of legislative power" in certain circumstances, but at the same time, they argue that the Board's rules must fall even under that standard. Pls.' Br. 78. As explained, the Board "is not performing a legislative function." *Pitts*, 293 Ga. at 517. Even if it were, the Board meets this Court's sufficient-and-realistic-guidelines test.

The GOP Intervenors outlined the numerous statutory constraints on the Board's rulemaking. *See* GOP Br. 22-23. The General Assembly gave the Board rulemaking over specific subjects. *See* O.C.G.A. §21-2-31. It ordered the Board's rulemaking to achieve specific ends. *See id.* The Board must follow detailed procedures to announce and promulgate each rule. *See id.* §§50-13-3 to -

7. Emergency rules come with their own set of detailed procedures. *See id.* §21-2-35. And the Board is constrained by over "500 annotated pages" in the Georgia Election Code that "set forth a clear framework by which elections are to proceed in Georgia" and cabin its gap-filling function. Pls.' Br. 31. The "number and type of conditions the General Assembly has imposed" on the Election Board "to guide its exercise of authority" show that it has sufficient and realistic guidelines. *Premier Health Care*, 310 Ga. at 50.

Plaintiffs don't address these statutory features. Instead, they assert that the number of guidelines is "none," and that the Board's "enabling legislation … does not raise any protective guardrails." Pls.' Br. 80. But saying it doesn't make it so. Plaintiffs make no attempt to explain "how much statutory guidance must accompany a delegation of legislative authority, or how specific that guidance must be." Pls.' Br. 79. To reject Plaintiffs' argument, the Court thus need only observe that the General Assembly's guidance to the Election Board is greater than "none." *Id.*

Plaintiffs also don't distinguish other rulemaking powers even broader than the Election Board's. For example, the Commission on Equal Opportunity can make "such rules and regulations as may be necessary to carry out" its statutes. O.C.G.A. §8-3-206(d)(5). The Board of Natural Resources can "[a]dopt, promulgate, modify, amend, and repeal rules and regulations" that "the board may deem necessary to provide for the control and management of hazardous waste to protect the environment and the health of humans." *Id.* §12-8-64. The Department of Public Health can make all "appropriate rules and regulations" to require persons "to submit to vaccination against contagious or infectious

disease where the particular disease may occur, whether or not the disease may be an active threat." *Id.* §31-12-3(a). And it can make "rules and regulations as are necessary and appropriate" to implement a "state-wide vaccination registry for children." *Id.* §31-12-3.1(g)-(i). The State Ethics Commission has similarly broad rulemaking authority, *see id.* §§21-5-2, 21-5-6, as does the Commissioner of Agriculture, *id.* §10-4-5(d), the State Revenue Commissioner, *id.* §40-2-36(e), the State Board of Education, *id.* §§20-2-240; 20-2-131(1), (3), and the Department of Transportation, *id.* §32-6-90. Plaintiffs' approach would mean that each of these statutory authorities is an unconstitutional delegation even under this Court's precedential standard.

Plaintiffs haven't shown that the Election Board lacks sufficient or realistic guidelines. The Court should thus reject the Plaintiffs' nondelegation arguments.

IV. Plaintiffs barely defend the trial court's Elections Clause ruling.

The Plaintiffs address the Election Clause issue in a footnote. Pls.' Br. 81 n.22. And they don't respond to the GOP Intervenors' arguments. The GOP Intervenors explained that the "trial court erred by granting independent relief on a claim Plaintiffs didn't plead." GOP Br. 24. Plaintiffs don't respond to that argument, which is the simplest reason to reverse. Even if this Court were to reach the merits, *Arizona State Legislature v. Arizona Independent Redistricting Commission* forecloses Plaintiffs' claim. 576 U.S. 787, 824 (2015). Although Plaintiffs don't address that case, it rebuts their assertion that the Supreme Court treats "state agency rulemaking" differently under the Elections Clause. Pls.' Br. 81 n.22 (emphasis omitted). "[T]he Court in *Arizona State Legislature*

recognized that whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution." *Moore v. Harper*, 600 U.S. 1, 25 (2023). Here, too, the Election Board remains subject to the State Constitution.

V. Plaintiffs have not shown a statutory conflict.

Appellees have not identified a statute that is "'inconsistent with'" the rules. *Ga. Dep't. of Cmty. Health v. Dillard*, 313 Ga. App. 782, 785 (2012). Plaintiffs argue that there's no "room" for each rule because the statute says all that could be said on the subject. Pls.' Br. 39. An assumed premise of their argument is that the statutes are exhaustive—a rule with "new words" that aren't in the statute necessarily "contradicts the Election Code." Pls.' Br. 38-39. But Plaintiffs don't support the premise that the statutes are exhaustive. Instead, they assume that they are. For example, Plaintiffs assert that the General Assembly "exhaustively explain[ed]" the certification process. Pls.' Br. 36. They claim it established the "sole" criteria for certification. Pls.' Br. 38. They argue that it provided the "only" materials that superintendents can consider. Pls.' Br. 40. And they assert that it designated the "only" places that poll watchers can access. Pls. Br. 45. But none of those adjectives appears in the statute. They're the Plaintiffs' unsupported gloss.

When this Court found in *Premier Health* that the list of health services in O.C.G.A. §31-6-40(a) is exhaustive, it didn't just observe that the statute contains a list. The Court carefully assessed the statutory language to conclude that the plain meaning of the list is "exhaustive" rather than "illustrative." *Premier Health Care Invs.*, 310 Ga. at 44. The Court analyzed the statute's text

(39-43), context (43-46), and history (46-48) to reach that conclusion. Only then did the Court have the premise necessary to conclude that the statute's plain meaning (an exhaustive list) conflicts with the rule (which added to the list). If the statutory analysis had come out the other way, and the Court had concluded that the list was "non-exhaustive," there would have been no conflict with a rule adding to the list.

Plaintiffs, however, provide no reason to read the statutes as the "exhaustive" or "sole" or "only" criteria. Plaintiffs don't show, for example, that the statutory list of poll-watcher areas is exhaustive. Nor could they, since the provision "include[s]" only a short list of areas and explicitly contemplates "other areas" being added. O.C.G.A. §21-2-408(c). Courts "often afford expansive constructions to statutes when a variant of 'include' is followed by a list of only a few items." *Premier Health Care Invs.*, 310 Ga. at 42. And on the Reasonable Inquiry Rule, Plaintiffs admit that "the General Assembly did not specifically define the term 'certify.'" Pls.' Br. 36. They suggest that because the General Assembly didn't provide a definition, neither can the Election Board. But at most, Plaintiffs have identified a "'gap'" in the statute, not a contradiction. *Premier Health Care Invs.*, 310 Ga. at 43. Each of Plaintiffs' statutory arguments rests on the false premise that if the statute doesn't already contain the rule, the rule contradicts the statute.

Appellees can't avoid this fatal problem by arguing that a rule cannot "enlarge the scope" of the statute. *N. Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 543 (1998); *see* Pls.' Br. 33-34; NAACP Br. 8-10. That principle recognizes "the General Assembly's power 'to define the thing to which the statute … is to

be applied.'" *N. Fulton Med. Ctr.*, 269 Ga. at 543 (quoting *HCA Health Servs. of Ga., Inc. v. Roach*, 265 Ga. 501, 503 (1995)). An agency thus does not have "complete and unbridled authority" to determine what entities "are subject to" the statutes it enforces. *HCA Health Servs.*, 265 Ga. at 503. Neither can an agency issue a rule "granting to itself" new powers or "exempt[ing]" certain regulated parties from statutory and regulatory "requirements." *N. Fulton Med. Ctr.*, 269 Ga. at 542. Rather, the law—as passed by the General Assembly and interpreted by the courts—determines an agency's powers and jurisdiction; the agency can't define those for itself. *See Cazier v. Ga. Power Co.*, 315 Ga. 587, 589 (2023) (Peterson, J., concurring). So while the Election Board could not, for example, expand its jurisdiction with a rule defining "election" to include board elections of private corporations, Plaintiffs don't explain how the rules here arrogate new powers or jurisdiction to the Election Board. Again, *Premier Health* disproves Plaintiffs' no-new-words principle.

In a final effort to invalidate the rules, Plaintiffs introduce a new claim that each rule is unreasonable. But reasonableness is a different claim from statutory conflict. Plaintiffs essentially admit as much: "'An agency rule might be reasonable but unauthorized by statute, or authorized by statute but unreasonable.'" Pls.' Br. 33 (quoting *Ga. Real Est. Comm'n v. Accelerated Courses in Real Est.*, 234 Ga. 30, 32 (1975)). They even brief the two claims separately. *See* Pls.' Br. 33-35. But Plaintiffs never pleaded reasonability. (V1-39, 57-61). They never briefed reasonability. (V2-435-437). And at trial, counsel for Plaintiffs conceded that at least some of the rules are "not … necessarily unreasonable." (V3-747) ("They are imposing an additional requirement, which is the

presentation of an identification and a signature. I'm not saying that those are necessarily unreasonable things to do, but what I'm saying is that they don't have the authority to do it, and the only people that do is the General Assembly."). The Court should not entertain a claim that Plaintiffs not just forfeited, but conceded, below.

In any event, the Court is not positioned to evaluate in the first instance "the 'nature' of the rule's 'impact on the public and the industry it regulates.'" Pls.' Br. 35. And Plaintiffs provide no evidence supporting their claims that the rules "would inject confusion, uncertainty, and havoc into the vote computation process." Pls.' Br. 51. Indeed, most of their claims about the "impact" of the rules are admittedly speculative. They predict that the rules "could foreseeably result" in adverse consequences. Pls.' Br. 11-13. This Court should reject that unsupported speculation.

Conclusion

For the foregoing reasons, the Court should reverse the trial court's judgment.

This submission does not exceed Rule 20's word-count limit.

Respectfully submitted this 7th day of February, 2025.

/s/ William Bradley Carver, Sr.

Alex B. Kaufman
Georgia Bar No. 136097
Kevin T. Kucharz
Georgia Bar No. 713718
CHALMERS, ADAMS, BACKER & KAUFMAN, LLC
100 N. Main St., Ste. 340
Alpharetta, GA 30009
(404) 625-8000

William Bradley Carver, Sr.
Georgia Bar No. 115529
HALL BOOTH SMITH, P.C.
191 Peachtree Street NE, Ste. 2900
Atlanta, GA 30303
(404) 954-5000

Gilbert C. Dickey*
Conor D. Woodfin*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

* *Pending admission pro hac vice*

Counsel for the Republican National Committee and the Georgia Republican Party, Inc.

Certificate of Service

I hereby certify that there is a prior agreement with counsel to allow documents in a PDF format sent via email to suffice for service. To that end, on the 7th day of February 2025, I served a copy of the foregoing Brief of Appellants Republican National Committee and the Georgia Republican Party, Inc. upon the counsel of record via e-mail:

Christopher S. Anulewicz, Esq.
Jonathan R. DeLuca, Esq.
Wayne R. Beckermann, Esq.
BRADLEY ARANT BOULT CUMMINGS LLP
Promenade Tower, 20th Floor
1230 Peachtree Street, NE
Atlanta, GA 30309
canulewicz@bradley.com
jdeluca@bradley.com
wbeckermann@bradley.com

Marc James Ayers, Esq.
BRADLEY ARANT BOULT CUMMINGS LLP
1819 5th Avenue North
Birmingham, AL 35203
mayers@bradley.com

Bryan F. Jacoutot, Esq.
Diane Festin LaRoss, Esq.
Bryan P. Tyson, Esq.
CLARK HILL PLC
3630 Peachtree Road
Suite 550
Atlanta GA 30326
bjacoutot@clarkhill.com
dlaross@clarkhill.com
btyson@clarkhill.com

Raechel Kummer, Esq.
MORGAN, LEWIS & BOCKIUS LLP
One Oxford Centre
Thirty-Second Floor
Pittsburgh, PA 15219
raechel.kummer@morganlewis.com

Katherine Vaky, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, D.C. 20004
katherine.vaky@morganlewis.com

Ezra D. Rosenberg, Esq.
Julie M. Houk, Esq.
Pooja Chaudhuri, Esq.
Alexander S. Davis, Esq.
Heather Szilagyi, Esq.
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Ste. 900
Washington, D.C. 20005
erosenberg@lawyerscommittee.org
jhouk@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
adavis@lawyerscommittee.org
hszilagyi@lawyerscommittee.org

Theresa J. Lee, Esq.
Sophia Lin Lakin, Esq.
Sara Worth, Esq.
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
tlee@aclu.org
slakin@aclu.org
sw_vrp@aclu.org

Cory Isaacson, Esq.
Caitlin May, Esq.
Akiva Freidlin, Esq.
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC.
P.O. Box 570738
Atlanta, GA 30357
cisaacson@acluga.org
cmay@acluga.org
afreidlin@acluga.org

Gerald Weber, Esq.
LAW OFFICES OF GERALD WEBER
P.O. Box 5391
Atlanta, GA 31107
wgerryweber@gmail.com

This 7th day of February, 2025,

/s/ William Bradley Carver, Sr.