IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ETERNAL VIGILANCE ACTION, INC., SCOT TURNER, and JAMES HALL Plaintiffs, v. STATE OF GEORGIA, Defendant.	CIVIL ACTION FILE NO. 24CV011558

AMENDED MOTION OF AMICI CURIAE ERIC JOHNSON, ALLEN PEAKE, BRETT HARRELL, TOM KIRBY, MIKE DUDGEON, JODI LOTT, KEN PULLIN, MARC MORRIS, HEATH CLARK, AND RIGHTCOUNT, INC. TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Amici, Eric Johnson, Allen Peake, Brett Harrell, Tom Kirby, Mike Dudgeon, Jodi Lott, Ken Pullin, Marc Morris, Heath Clark ("Legislators"), and RightCount, Inc. ("RightCount"), file this amended motion to move this Court for leave to file an amicus brief in support of Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief. The Motion and attached brief are identical to the ones previously submitted with the exception of three exhibits attached to the brief. These exhibits were referenced in the brief's previous version but were inadvertently not attached to the version initially submitted to this Court.

As explained in the attached brief, amici are former or current members of the Georgia General Assembly and registered Georgia voters, and Right Count is a non-

profit, nonpartisan organization established to conduct research and educate fellow citizens around election integrity issues.[1] RightCount's mission is to help fortify and protect the rule of law in the tabulation of voting across the United States. It carries out this mission by ensuring that the constitutional standards, laws and procedures for vote counting and certification are upheld in the states like Georgia. RightCount's state coalitions are composed of like-minded civic, business, law enforcement, veteran and faith leaders who believe in the rule of law and integrity of the American electoral process.

Legislators and RightCount have a strong interest in ensuring that Georgia's elections are governed by validly enacted rules and regulations that serve to legitimize the electoral process. Legislators and RightCount have a strong interest in ensuring that the ballots they cast are tabulated and certified as intended by Georgia's General Assembly. Legislators and RightCount seek to assist the Court by offering its unique perspective regarding the consequences of allowing the State Election Board ("SEB") to unlawfully legislate by promulgating specific rules that are not authorized by statute and unreasonable.

WHEREFORE, amicus requests that this Court accept and consider this **BRIEF OF AMICI CURIAE ERIC JOHNSON, ALLEN PEAKE, BRETT HARRELL, TOM KIRBY, MIKE DUDGEON, JODI LOTT, KEN PULLIN, MARC MORRIS, HEATH CLARK, AND RIGHTCOUNT, INC. IN SUPPORT**

[1] More information regarding RightCount and its mission may be found at its website: https://www.rightcount.org/.

OF PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, attached as Exhibit A.

Respectfully submitted, this 10th day of October, 2024

/s/ J. Matthew Maguire, Jr.

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CERTIFICATE OF SERVICE

This is to certify that I have served all counsel and/or parties of record to this action with a copy of the foregoing **AMENDED MOTION OF AMICUS CURIAE ERIC JOHNSON, ALLEN PEAKE, BRETT HARRELL, TOM KIRBY, MIKE DUDGEON, JODI LOTT, KEN PULLIN, MARC MORRIS, HEATH CLARK, AND RIGHTCOUNT, INC. TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** with the Clerk of Court using Odyssey which will automatically send email notification of such filing to the following attorneys of record:

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Exhibit A

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INTRODUCTION

"Beware the abuse of Power. Both by those we disagree with, as well as those we may agree with."

– Dr. Ben Carson, former U.S. Surgeon General, Secretary of the Department of Housing and Urban Development, and Republican presidential candidate.

On September 4 and September 20, 2024, the Georgia State Election Board ("SEB") exceeded its limited, delegated authority by adopting unconstitutional rules that will bog down the administration of future elections—including the presidential election to occur in one month's time—with vague and cumbersome processes. The

SEB acted willfully in adopting these rules after receiving a clear, written warning from the Georgia Attorney General's Office that they are unconstitutional. *See* Sept. 19, 2024 E. Young Memo to SEB Chair J. Fervier, p. 2, attached as **Exhibit 1**.

The SEB's new rules usurp the General Assembly's exclusive authority to regulate elections. Ga. Const. of 1983, Art. II, § 2, ¶ I. *See also* U.S. Const., Art. 1, §4. This executive branch encroachment into an area that is within the exclusive control of the legislative branch violates the separation of powers doctrine that has been a cornerstone of the Georgia Constitution since its adoption in 1777. Ga. Const. of 1983, Art. I, § 2, Par. III. The Georgia Legislature has a sacred duty to uphold Georgia citizens' constitutional right to vote. Ga. Const. of 1983, Art. II, § 1, Para. II. And the statutory scheme they have put in place does just that. The attempts of the State Election Board interfere with that statutory scheme and make Georgia's election procedures more vulnerable to subjectivity, partisanship, manipulation and delay.,

These are not obscure or nuanced constitutional issues to be debated in law school hallways. The stakes are real. It is for this reason that Legislators and RightCount urge the Court to discharge its "solemn duty" to preserve the constitutional separation of powers by invalidating the SEB's new rules. *Macon & Augusta R. Co. v. Little*, 45 Ga. 370, 400 (1872) ("It is not only the right but the solemn duty of the Courts to pass upon the constitutionality of laws"); *Albany Surgical, P.C. v. Dep't of Cmty. Health,* 257 Ga. App. 636, 638 (2002) (applying same duty to agency rules).

STATEMENT OF INTEREST

Amici, Eric Johnson, Allen Peake, Brett Harrell, Tom Kirby, Mike Dudgeon, Jodi Lott, Ken Pullin, Marc Morris, Heath Clark are proud former or current members of the Georgia General Assembly who intend to participate in the upcoming November 5th, 2024 election. RightCount is a non-profit, nonpartisan organization dedicated to upholding the rule of law by ensuring that the constitutional standards, laws, and procedures for vote counting and certification are upheld in states like Georgia.

Amicus curiae Eric Johnson is a former member of both the Georgia House of Representatives and the Georgia State Senate. As a state senator, Eric Johnson served as the Senate President Pro Tempore while representing the 1st District, comprising all of Bryan and Liberty counties and part of Chatham County. Eric Johnson remains engaged in efforts to protect and promote election integrity in Georgia and is the Georgia State Chair of RightCount. He is concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus curiae Allen Peake is a former member of the Georgia House of Representatives. As a House member, he served on the Appropriations, Ways and Means (as Vice-Chair), Health & Human Services, and Small Business Development Committees, while representing the 141st District in Bibb County. He also served on the House Republican Caucus Leadership Team as the Secretary/Treasurer. Peake remains engaged in efforts to protect and promote election integrity in Georgia. He is

concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus curiae Brett Harrell is a former member of the Georgia House of Representatives. As a House Member, Brett Harrell served as Chair of the Ways and Means Committee and Vice Chair of the Rules Committee while representing the 106th District, comprising of parts of Gwinnett County. Brett Harrell remains engaged in efforts to protect and promote election integrity in Georgia. He is concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus curiae Tom Kirby is a former member of the Georgia House of Representatives. As a House member, Tom Kirby served as Vice Chair of the Industry and Labor Committee, while representing the 114th District comprising of parts of Gwinnett, Barrow, Walton and Rockdale counties. Tom Kirby remains engaged in efforts to protect and promote election integrity in Georgia. He is concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus curiae Mike Dudgeon is a former member of the Georgia House of Representatives. As a House Member, Mike Dudgeon served as Vice Chair of the Education Committee while representing the 25th District, comprising of parts of Fulton and Forsyth counties. Mike Dudgeon remains engaged in efforts to protect and

promote election integrity in Georgia. He is concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus curiae Jodi Lott is a current member of the Georgia House of Representatives. As a House Member, Jodi Lott serves on the Appropriations, Intragovernmental Coordination and Public Health committees, while representing the 131st District, comprising of parts of Columbia County. She is engaged with efforts to protect and promote election integrity in Georgia. She is concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus curiae Ken Pullin is a former member of the Georgia House of Representatives. As a House Member, Ken Pullin served on the House Agriculture and Consumer Affairs and Small Business Development Committees while representing the 131st District comprising of Upson County and parts of Lamar and Pike counties. Ken Pullin remains engaged in efforts to protect and promote election integrity in Georgia. He is concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus curiae Marc Morris is a former member of the Georgia House of Representatives. As a House Member, Marc Morris served on the Appropriations and the Banks & Banking Committees while representing the 26th District, comprising of parts of Forsyth County. Marc Morris remains engaged in efforts to protect and promote election integrity in Georgia. He is concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus curiae Heath Clark is a former member of the Georgia House of Representatives. As a House Member, Heath Clark served as Chair of the Defense and Veterans Affairs Committee while representing the 147th District, comprising of parts of Houston County. Heath Clark remains engaged in efforts to protect and promote election integrity in Georgia. He is concerned by the SEB's efforts to exercise legislative power exclusively reserved for the General Assembly.

Amicus Curiae RightCount seeks to accomplish its mission by recruiting coalitions of like-minded civic, business, law enforcement, veteran and religious leaders who believe in the rule of law and that the integrity of our electoral voting processes are of paramount importance in our constitutional republic. RightCount assembles its coalition leaders to foster efforts to remind the public of the importance of security and integrity in the vote counting process and raise awareness of threats to constitutional and legal procedures related to vote counting if and when they arise. Finally, the organization also seeks to mobilize community voices to applaud election officials for carrying out their duties in the face of partisan opposition and to support those same officials when they are pressured to stray from their legal and constitutional obligations.

RightCount and its coalition leaders have an interest in voiding these illegally promulgated SEB regulations to further the mission of upholding the rule of law and the integrity of the state's electoral processes. RightCount and its coalition members' efforts to foster the credibility and trustworthiness of the electoral process are

undermined by the SEB's illegal promulgation of election rules that conflict with the Election Code.

ARGUMENT AND CITATION TO AUTHORITIES

A. General Constitutional and Statutory Framework

Like the U.S. Constitution, the Georgia Constitution has always required separation between the three branches of government to prevent the consolidation of power into one group. As U.S. Founding Father James Madison explained, "[n]o political truth is ... stamped with the authority of more enlightened patrons of liberty" than the separation of powers because "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands ... may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961). The separation of powers doctrine has been a cornerstone of the Georgia Constitution since its 1777 adoption and its current iteration perfectly encapsulates James Madison's vision: "The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others[.]"[2] Ga. Const. Art. I, § 2, Par. III.

The Georgia Constitution vests ***exclusive*** responsibility in the legislative branch for the passage of laws that regulate elections:

> The General Assembly shall provide by law for a method of appeal from the decision to allow or refuse to allow any person to register or vote and ***shall provide by law for a procedure whereby returns of all elections by the people shall be made to the Secretary of***

[2] While Ga. Const. Art. I, Sec. II, Par. III does provide certain "exceptions" to this rule, none are applicable here.

State.

Ga. Const. of 1983, Art. II, § 2, ¶ I (emphasis added). *See also Wheeler v. Bd. of Trustees of Fargo Consol. Sch. Dist.*, 200 Ga. 323, 334 (1946) ("The legislative branch of our government is charged with the duty of providing the manner of holding elections and providing for the ballot, and what shall go on the ballot—of course subject to the limitations contained in the constitution.").

In recognition of its constitutional duty, the General Assembly enacted a comprehensive and detailed Georgia Election Code, O.C.G.A. § 21-2-1, *et seq*., that spans over 500 pages in the Official Code of Georgia. Among these laws is O.C.G.A. § 21-2-30, which creates a statewide, bipartisan body called the State Election Board that consists of a chairperson elected by the entire General Assembly, an elector chosen by a majority of the Georgia Senate, an elector chosen by a majority of the Georgia House, a member selected by the Georgia Republican Party, and a member selected by the Georgia Democratic Party. O.C.G.A. § 21-2-30(a).

As is relevant to this action, the SEB's duties are statutorily defined to include:

> 1. 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;
>
> 2. 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; and, upon the adoption of each rule and regulation, the

board shall promptly file certified copies thereof with the Secretary of State and each superintendent;

. . . .

5. To investigate, or authorize the Secretary of State to investigate, when necessary or advisable the administration of primary and election laws and frauds and irregularities in primaries and elections and to report violations of the primary and election laws either to the Attorney General or the appropriate district attorney who shall be responsible for further investigation and prosecution. Nothing in this paragraph shall be so construed as to require any complaining party to request an investigation by the board before such party might proceed to seek any other remedy available to that party under this chapter or any other provision of law;

6. To make such recommendations to the General Assembly as it may deem advisable relative to the conduct and administration of primaries and elections;

7. To promulgate rules and regulations ***to define uniform and nondiscriminatory standards*** concerning what constitutes a vote and what will be counted as a vote for each category of voting system used in this state;

. . . .

10. To take such other action, ***consistent with law***, as the board may determine to be conducive to the fair, legal, and orderly conduct of primaries and elections.

O.C.G.A. § 21-2-31 (emphasis added).

The highlighted provisions in Code section 21-2-31—requiring the SEB to act in ways that are consistent with the law (i.e., the Georgia Election Code) and promote uniformity—underscore the separation of powers truism that a creature of statute like

the SEB, "has only such powers as the Legislature has expressly or by necessary implication conferred upon it." *Bentley v. State Bd. of Med. Examiners of Ga.*, 152 Ga. 836, 836 (1922). Thus, the SEB's rules cannot survive judicial scrutiny unless they are found to be: (1) authorized by statute, and (2) reasonable. *Georgia Real Estate Comm. v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975). *See also Mulligan v. Selective HR Solutions, Inc.*, 289 Ga. 753, 756 (2011) ("It is within the purview of this Court to consider the validity of an agency rule by determining whether it comports with the legislative enactment which authorizes the rule") (citation omitted).

"An agency rule might be reasonable but unauthorized by statute, or authorized by statute but unreasonable. In either event, it could not stand." *Georgia Real Est. Comm'n v. Accelerated Courses in Real Est., Inc.*, 234 Ga. 30, 32 (1975). In determining whether the new SEB rules are authorized by statute, the Court must consider not only the many instances in which they directly conflict with statutes (as will be discussed below), but it should also consider those instances in which the rules purport to fill a void the General Assembly never intended to be filled. *See, e.g., Camp v. Williams*, 314 Ga. 699, 709, 879 S.E.2d 88, 95 (2022) ("I also trust that the Court's opinion in this case will provide sufficient guidance in any future such situation and will reinforce that, 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.") (Bethel, J., concurring).[2]

Additionally, the Court cannot defer to the SEB's construction of a statute it administers unless the Court determines, after applying the rules of statutory construction, that the statute remains ambiguous. *Dep't of Cmty. Health v. Houston Hosps., Inc.*, 365 Ga. App. 751, 761 (2022) ("[W]e only defer to an agency's interpretation ... when we are unable to determine the meaning of the legal text at issue. As a result, when a statute is 'not ambiguous after we apply canons of statutory construction[,] ... [o]ur case law ... does not support any deference to the Department's interpretation of the relevant CON statutes, or to its interpretation of its own unambiguous regulations'") (quoting *Premier Health Care Invs.*, 310 Ga. 32, 38, n.5 (2020). *Accord: Kennestone Hosp., Inc. v. Emory Univ.*, 318 Ga. 169, 170 (2024) ("In the rare event that a genuine ambiguity remains, the court must then (and only then) consider whether to settle on the agency's interpretation of the rule.").

As discussed in more detail below, the SEB's new rules cannot withstand constitutional scrutiny because they directly conflict with the Georgia Election Code and they are patently unreasonable.

[2] Chief Justice Boggs, Presiding Justice Peterson, and Justices Warren and Colvin also joined in the concurrence.

B. SEB Rules Conflict with the Georgia Election Code Provisions and Are Therefore Invalid

While all of the SEB rules that the Plaintiffs are challenging are invalid attempts to legislate in an area reserved for the General Assembly, SEB Rule 183-1-12.02(c.2) (effective Sept. 4, 2024) and SEB 183-1-12-.12(a)(5) (effective Sept. 20, 2024) stand out because they conflict directly with the Georgia Election Code. They are discussed below to highlight the extent of the SEB's overreach.

i. Rule 183-1-12.02(c.2)

New SEB Rule 183-1-12.02(c.2) requires local election superintendents to conduct a "reasonable inquiry" into the tabulation and canvassing of the election results before certifying the same and submitting them to the Georgia Secretary of State. *See* SEB Notice of Proposed Rulemaking (183-1-12-.02(c.2), attached as **Exhibit 2**. The SEB introduced this important change in the superintendent's duties by amending the definition of the term "certify" without providing any guidelines or parameters as to how this inquiry is to be conducted. This new rule stands in stark contrast to the Georgia Election Code which defines a certification process that is mandatory in nature and limits the superintendent's investigatory powers to only those situations in which the number of ballots cast exceed the number of electors in the precinct (and even then expressly provides that such votes should be justly certified after an investigation has occurred). *See* O.C.G.A. §§ 21-2-70(9); -493(b)[3]; -493(i).

[3] And even then, O.C.G.A. § 21-2-493(b) strictly delineates the parameters of the investigation to be performed: "The superintendent shall then examine all the registration and primary or election

The General Assembly never authorized and, indeed, expressly prohibits the SEB's purported expansion of the superintendent's duties, and it has good reason for doing so. The Georgia Election Code vests the SEB with the power to investigate "frauds and irregularities in primaries and elections" and to report violations either to the Attorney General or to the appropriate district attorney for further investigation and prosecution. O.C.G.A. § 21-2-31(5). This legislative scheme makes perfect sense because the General Assembly created the SEB to be a statewide, bipartisan body with specific investigatory authority. O.C.G.A. § 21-2-70(9). It makes far more sense to have a 5-person body representing both political parties and all corners of the state to conduct an investigation into alleged "frauds and irregularities" of election results than the local superintendent who actually administered the election in question.

To the extent the SEB contends that the Georgia Election Code somehow authorizes election superintendents to conduct such inquiries (which it does not), such an authorization would be an unconstitutional delegation of legislative authority to the SEB because it contains no standards or guidance as to how the reasonable inquiry is to be conducted. In *Premier Health Care Investments, LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 53 (2020), for example, the Georgia Supreme Court held that an agency rule purporting to require a certificate of need in circumstances where the authorizing

documents whatever relating to such precinct in the presence of representatives of each party, body, and interested candidate." The only discretion accorded to the superintendent is whether to include "a recount or recanvas of the votes of that precinct and a report of the facts of the case to the district attorney where such action appears to be warranted." *Id.*

statute did not require one exceeded the agency's rulemaking authority and was therefore invalid). *Id.* (citing *Ga. Franchise Practices Comm. v. Massey-Ferguson, Inc.*, 244 Ga. 800, 802, (1979) (portions of Franchise Practices Act unconstitutional because they "unlawfully delegate[d] legislative responsibility" by granting an agency "broad discretion" and "the power to define instances in which the Act will apply but fail[ed] to set up guidelines for making these determinations").

Additionally, it is not difficult to imagine the legal challenges that will result from a superintendent's attempts to comply with this new duty to conduct a reasonable inquiry. What if the superintendent determines that it is reasonable to personally interview every elector who cast a ballot? Or what if the superintendent decides there are no circumstances to trigger an inquiry but a challenger disagrees? And how does this standardless duty to inquire comport with O.C.G.A. § 21-2-493(k), which requires the superintendent to exercise his or her ***mandatory*** duty to certify results within six days of the election.[4] *See, generally, Thompson v. Willson*, 223 Ga. 370, 372–73 (1967) (mandamus is a proper remedy for voter who claimed his write-in vote was not counted to compel election officials to perform their duty).

Under the long-existing statutory scheme put in place by the General Assembly, certification of election results has always been considered a non-discretionary,

[4] This tight, six-day deadline reflects the General Assembly's strong desire "to avoid election uncertainty and the confusion and prejudice that can come in its wake," and that "the swift resolution of election contests is vital for the smooth operation of government." *Miller v. Hodge*, __ Ga. __, 2024 WL3801827, *3 (Ga. Supr., Aug. 13, 2023) (citing *Plyman v. Glynn County*, 276 Ga. 426, 427 (2003)).

ministerial duty. In *Tanner v. Dean*, 33 S.E. 832 (Ga. 1899), the Georgia Supreme Court expressly warns against a situation where a single superintendent, perhaps motivated by extreme partisanship, refuses to do his duty in an attempt to void an election in an attempt to "defeat the will of the people in his district or in his county, or possibly even in his state. *Id.* at 834. In that case, the Court granted a writ of mandamus ordering the superintendents to include even votes from a disputed precinct in their certified returns. *Id.* at 836. In *Davis v. Warde*, 118 S.E. 378 (Ga. 1923), the Court again held that "the duties of canvassers are purely ministerial; they perform the act of tabulating votes of the different precincts as the returns come to them." *Id.* at 391.

Additional Georgia Supreme Court cases continue to reiterate that tabulating and certifying the votes is a ministerial duty. For instance, in *Thompson v. Talmadge*, 201 Ga. 867, 877 (1947), the Court held that election canvassers "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..." *Id. See also Bacon v. Black* 133 S.E. 251 (Ga. 1926) (holding that "superintendents of elections have neither power nor authority to examine or recount ballots cast in a county election for the purpose of correcting errors").

The fact that Georgia law has long held that certification of election returns is a ministerial duty (and granted writs of mandamus to force superintendents to comply with that duty) proves that the SEB's certification rule does not comport with Georgia law. The General Assembly can change statutory law in response to a court decision,

but an administrative agency cannot. By attempting to insert even a modicum of discretion into the certification process with their "reasonable inquiry" rule, the SEB attempts to put mandamus relief beyond the reach of interested candidates, political parties or voters who seek redress in the courts to enforce election results. Mandamus relief is not appropriate to control the manner in which a review or investigation is conducted if the public official has discretion in that regard. *See, e.g., Love v. Fulton Cnty. Bd. of Tax Assessors*, 348 Ga. App. 309, 318 (2018) ("Given that the Tax Board is afforded discretion in how to conduct an investigation, mandamus relief would be appropriate only if the Board failed entirely to conduct an investigation and reach a decision regarding the tax status of the Stadium Company's interest in the New Stadium.). The General Assembly may change the law in response to a court decision interpreting statutory law, but an attempt by an administrative agency to overturn long held and controlling opinions of the Georgia Supreme Court is clearly beyond their authority and the "reasonable inquiry" rule should be struck down.

Finally, the duty to conduct an inquiry with no parameters whatsoever creates a situation in which 159 election superintendents could conduct 159 inquiries of varying scope, depth and duration. This conflicts with the General Assembly's directive that the SEB develop rules that "obtain uniformity in the practices and proceedings of superintendents." O.C.G.A. § 21-2-30 (a)(1).

SEB Rule 183-1-12.02(c.2) is unconstitutional because it directly conflicts with several provisions of the Georgia Election Code and because it is unreasonable.

ii. Rule 183-1-12-12(a)(5)

The second rule, SEB 183-1-12-.12(a)(5), modifies the process by which votes are tabulated by requiring three poll officers to independently hand-count ballots before delivering them to the superintendent for tabulation. *See* SEB Notice of Proposed Rulemaking (183-1-12-.12(a)(5), attached as **Exhibit 3**. As with SEB Rule 183-1-12.02(c.2), this rule is invalid because it is neither authorized by statute nor reasonable.

SEB 183-1-12-.12(a)(5) directly conflicts with O.C.G.A. §§ 21-2-483 and 21-2-420(a) which require poll managers—and poll managers only—to secure ballots at the precinct level, advise the superintendents of the total number of ballots cast, and "immediately deliver" the ballots to the superintendents. O.C.G.A. § 21-2-483(a) then requires that the ballots be counted under the superintendent's direction in the tabulation center. The new SEB rule, by contrast, allows persons other than the superintendent and his or her deputies to handle ballots in places other than tabulation centers, thus subverting the clear will of the General Assembly.

SEB 183-1-12-.12(a)(5) is unreasonable because it imposes burdensome and unrealistic expectations on election officials. According to the Georgia Secretary of State's Office, close to 5 million Georgia voters cast ballots in the 2020 presidential election.[5] O.C.G.A. § 21-2-493(k) requires election results to "be certified by the superintendent not later than 5:00 P.M. on the Monday following the date on which

[5] https://results.enr.clarityelections.com/GA/105369/web.264614/#/summary.

such election was held and such returns shall be immediately transmitted to the Secretary of State." O.C.G.A. § 21-2-493(k). Forcing three different poll officers to hand-count their allocation of approximately 5 million ballots before the superintendent tabulates and certifies the votes will make what is already a difficult and stressful process even more so. In addition to causing certain delays, the requirement for a second layer of ballot counting (and hand-counting at that) by several individuals injects the potential for human error, fraud and manipulation into a detailed and well-crafted statutory process that mitigates against those risks.

CONCLUSION

The SEB's brazen usurpation of the General Assembly's exclusive authority to legislate cannot survive constitutional scrutiny. None of the rules the Plaintiffs are challenging in this action pass constitutional scrutiny, with the two specifically highlighted in this amicus brief being perhaps the most egregious examples of the SEB's intentional overreach of its legislative mandate. It now falls upon this Court to restore the balance of power between the three branches of government by declaring invalid the unconstitutional rules recently promulgated by the Board.

Respectfully submitted, this 10th day of October, 2024

s/ J. Matthew Maguire, Jr.

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Counsel for Eric Johnson, Allen Peake, Brett Harrell, Tom Kirby, Mike Dudgeon, Jodi Lott, Ken Pullin, Marc Morris, Heath Clark, and RightCount, Inc.

Exhibit 1

GEORGIA DEPARTMENT OF LAW
40 Capitol Square SW
Atlanta, Georgia 30334-1300

CHRISTOPHER M. CARR
ATTORNEY GENERAL

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(404) 656-3300

ATTORNEY-CLIENT PRIVILEGED INFORMATION

September 19, 2024

MEMORANDUM:

TO: John Fervier
Chairman
State Election Board

FROM: Elizabeth Young
Senior Assistant Attorney General

RE: Request for Comments on Proposed Rules in Advance of September 20, 2024 State Election Board Meeting

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This memorandum is in response to the Board's request for comments from our office regarding the proposed rules to be considered by the Board at its September 20, 2024 meeting.

As an initial matter, this office does not typically engage in a broad review of an agency's proposed rules to ensure that the agency's proposed rules are consistent with law. As an administrative board with rulemaking authority, it is the Board's obligation to formulate its proposed rules to be consistent with law and conducive to the fair, legal and orderly conduct of primaries and elections. O.C.G.A. § 21-2-31(2). The Board should evaluate the legality of any proposed rule prior to publication and voting. Should the Board desire specific legal advice concerning any proposed rule or action, the Board should seek such advice in writing addressed to this office. This office cannot search through email correspondence to which it is simply copied to determine whether or not the Board has made a passing comment to seek legal advice on any particular topic. In addition, seeking unspecified comment on any proposed rule is unhelpful. In its request for legal advice, the Board should specify the matter upon which it seeks legal advice and ask a specific question to be answered through the Chair. This is the best manner in which to seek advice and allows this office to answer those questions on which the Board needs advice and avoids any misinterpretation of the Board's request and allows for an efficient and deliberate response.

In the instant matter, in an effort to assist the Board, we make this limited exception to our usual practice to offer the following expedited comments upon the rules proposed for

consideration at the September 20 meeting based on the Board's request. We make this exception here because a review of the proposed rules reveals several issues including that several of the proposed rules, if passed, very likely exceed the Board's statutory authority and in some instances appear to conflict with the statutes governing the conduct of elections. Where such is the case, and as outlined below, the Board risks passing rules that may easily be challenged and determined to be invalid.

Please note the following:

As a general matter, the passage of any rules concerning the conduct of elections are disfavored when implemented as close to an election as the rules on the September 20 agenda. The United States Supreme Court in *Purcell v. Gonzalez* recognized that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. 1, 4-5 (2006). Federal courts have thus generally refrained from enjoining state election laws in the months prior to an election. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring); *see also League of Women Voters of Florida, Inc. v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022) (*Purcell* applies when voting was set to begin in less than four months). The Board itself has utilized the *Purcell* principle in defense of certain Senate Bill 202 provisions. *See In re Ga. Senate Bill 202*, 622 F.Supp.3d 1312, 1343-44 (N.D. Ga. 2022) ("[State Defendants, which include the members of the State Election Board] argue that the Court should withhold relief under the *Purcell* doctrine and the Eleventh Circuit's application of that doctrine in *League* because in-person early voting for the general election will begin in mid-October, and a late change to the law will pose a significant risk of voter confusion and harm to the electoral process."). Thus, the Board should also consider how the passage of any rules well within the period where courts have agreed that *Purcell* applies may affect the application of the principle in the future.

I. The Board's general rule-making power is limited to rules that do not exceed or conflict with the Georgia Election Code.

"[T]he 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). The test of validity of an administrative rule is twofold: (1) is it authorized by statute, and (2) is it reasonable? *Georgia Real Estate Comm. v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975).

The Board's power to adopt rules is solely derived from statutes passed by the General Assembly. The General Assembly has granted the Board authority to promulgate rules and regulations as will be conducive to the fair, legal, and orderly conduct of primaries and elections, *see* O.C.G.A. § 21-2-31(2); and further to promulgate rules and regulations 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).

However, a broad grant of statutory authority to promulgate rules is not an unlimited grant of authority. *See Ga. Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975) (administrative rules must be both authorized by statute and reasonable) (discussing *Eason v. Morrison*, 181 Ga. 322 (1935)). Only the General Assembly has the constitutional authority to legislate. *See HCA Health Services of Ga., Inc. v. Roach*, 265 Ga. 501, 502 (1995). Although the General Assembly may grant "administrative authority to promulgate rules for the enforcement of the General Assembly's enactments" to agencies like the Board, the agency's authority can only extend 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." *Id.* Thus, a regulation that adds extra requirements or procedure where the statute speaks plainly on a matter is inconsistent with the statute and may likely be subject to a legal challenge. *See Dep't of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995) (agency regulation that added a requirement before a modification order of child support took effect was inconsistent with the clear authority of the statute).

Operating where there is *no* statute is also similarly impermissible: while agencies have implied powers "as a reasonably necessary to execute the express powers conferred," *Bentley v. State Bd. of Med. Examiners of Ga.*, 152 Ga. 836, 836 (1922), the Supreme Court of Georgia has recently warned that "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.").

Thus, the Board's authority to promulgate rules and regulations is limited to the administration or effectuation of the statutes in the Georgia Election Code. The Board should therefore take all precaution to ensure that any rule adopted and promulgated by the Board neither conflicts with nor expands any statute; otherwise, the Board runs substantial risk of intruding upon the General Assembly's constitutional right to legislate. When such intrusion occurs, the Board rule is highly likely to be ruled invalid should it be challenged.

Finally, to the extent that a proposed rule merely mirrors the language of a statute without more, it does not accomplish anything. To the extent that a rule mirrors a statute but adds or alters the statute's requirements, the rule will likely be subject to an easy legal challenge.

II. Proposed Rules

There are several proposed rules before the Board that appear to either impermissibly conflict with or otherwise expand the scope of Georgia statutes.

1. Proposed Rules **183-1-12-.01** and **183-1-12-.19**

These rules seek to change the form of the ballots and require that the Secretary of State and the counties post "freely accessible link[s]" to a list of electors prior to advance voting and maintain such data files for free download for a minimum of ten consecutive years, respectively. Thus, the proposed rules seek to direct actions that are, by statute, within the purview of the Secretary of State. *See* O.C.G.A. § 21-2-50(a)(1), (15); O.C.G.A. § 21-2-225(c). As such, the proposed rules do not fall within the Board's regulatory power under O.C.G.A. § 21-2-31 thus very likely exceeds the Board's scope of authority to promulgate.

2. Proposed Rule **183-1-13-.05**

This rule seeks to expand the enumerated locations where poll watchers may be designated beyond those places identified in the statute. O.C.G.A. § 21-2-408(c), which the original rule, Ga. Comp. R. & Regs. 183-1-13-.05, tracks almost exactly, specifically provides that poll watchers may be designated by the superintendent to serve in "the check-in area, the computer room, the duplication area, and such other areas as the superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center." Under the canon of statutory construction "expression *unius est exclusio alterius*" ("the mention of one thing implies the exclusion of another"), a list of items in a statute is presumed to exclude items not specifically listed, and the omission of additional locations from the statute is regarded by the courts as deliberate. *See, e.g. Barnes v. State Farm Fire & Cas. Co.*, 2024 Ga.App. LEXIS (Aug. 26, 2024).

The proposed rule goes beyond the statutorily-designated list of places a superintendent may decide to place poll watchers and instead supplants the superintendent's discretion with the Board's own. This too does not carry into effect a law already passed by the General Assembly but rather expands upon the statute; the rule, if adopted, would then very likely be subject to legal challenge as invalid.

3. Proposed Rule **183-1-14-.11**

This rule goes beyond merely administering or effectuating an existing statute by adding additional requirements that would make it inconsistent with the statute. The proposed rule purports to require that absentee ballots be mailed "by United States Postal Service or other delivery service which offers tracking[.]" However, the General Assembly did not specify the use of tracking for the mailing of absentee ballots. *See* O.C.G.A. § 21-2-

384(a)(2) ("[T]he board of registrars or absentee ballot clerk shall *mail or issue* official absentee ballots to all eligible applicants….") (emphasis added).

The proposed rule further requires that county boards of registrars maintain as public record the tracking records for each ballot mailed to the electors. However, the Board has no authority to promulgate rules regarding the classification or retention of documents. *See* O.C.G.A. § 21-2-31 (promulgate rules for the fair, legal, and orderly conduct of elections). Thus, promulgation of the rule would very likely go beyond the scope of the Board's authority and be subject to challenge as invalid

4. Proposed Rule **183-1-12-.21**

This rule seeks to expand on the reporting requirements set forth in O.C.G.A. § 21-2-385(e). The statute already provides a fairly detailed process by which county boards of registrars or absentee ballot clerks must report information regarding the ballots issued, received, or rejected during the advance voting period. *See* O.C.G.A. § 21-2-385(e). The proposed rule seeks to go beyond the statute to require, among other expansions, additional information regarding the substance of the ballots (i.e., the number of political party or nonpartisan ballots cast). However, the General Assembly did not include that information as information that must be reported pursuant to O.C.G.A. § 21-2-385(e). Accordingly, the rule, if promulgated, would similarly likely go beyond the scope of the statute and the Board's authority.

5. Proposed Rules **183-1-12-.12(a)(5)** and **183-1-14-.02(8), (13)**

These rules refer to the process of hand-counting ballots on Election Day and during the advance voting period, respectively, to produce a vote total to compare to the ballot count produced by the ballot scanners. Crucially, these Proposed Rules purport to amend provisions to allow for hand-counting ballots at the precinct-level, which would appear to occur prior to submission to the election superintendent and consolidation and tabulation of the votes. *Compare* Ga. Comp. R. & Regs. 183-1-12-.12(a) ("After the Polls Close") *with* Ga. Comp. R. & Regs. 183-1-12-.12(b) ("Consolidation of Results"); Ga. Comp. R. & Regs. 183-1-14-.02(8) ("At the close of voting on any day *during the advance voting period*…); Ga. Comp. R. & Regs. 183-1-14-.02(13) ("The ballot scanner and ballot containers shall then be secured *until time for the tabulation of votes*.").

However, the statutes upon which these rules rely do not reflect any provision enacted by the General Assembly for the hand-counting of ballots prior to tabulation.

For example, O.C.G.A. § 21-2-483 details procedures *at* the tabulation center: in primaries and elections in which optical scanners are used, after the seal on each container of ballots is inspected and verified as not having been broken, the container with the ballots is opened, the ballots are removed, "and the ballots shall be prepared for processing by the *tabulating machines*." O.C.G.A. § 21-2-483(c) (emphasis added).

Then, "[u]pon completion of the tabulation of the votes, the superintendent shall cause to be completed and signed a ballot recap form[.]" O.C.G.A. § 21-2-483(d). O.C.G.A. § 21-2-436 is similarly inapplicable; that statute contemplates the duties of the poll officers after the close of polls in precincts in which *paper ballots* are used, not ballot scanners or voting machines.

O.C.G.A. § 21-2-420(a) does provide that "the poll officials in each precinct shall complete the required accounting and related documentation for the precinct and shall advise the election superintendent of the total number of ballots cast at such precinct and the total number of provisional ballots cast." However, neither the statutes that prescribe the duties of poll officers after the close of the polls for precincts using voting machines, *see* O.C.G.A. § 21-2-454, nor the precincts using optical scanners, *see* O.C.G.A. § 21-2-485, suggest that the General Assembly contemplated that a hand-count of the ballots would be part of the "required accounting."

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 HCA Health Services of Ga., Inc.*, *supra*.

We hope that this expedited informal analysis is helpful to the Board. Should there be further questions directed to this office as described herein, we will endeavor to assist the Board further.

cc: Mrs. Sara Tindall Ghazal (via email correspondence)
Dr. Janice W. Johnston (via email correspondence)
Mr. Rick Jeffares (via email correspondence)
Mrs. Janelle King (via email correspondence)
Mr. Michael Coan (via email correspondence)

Exhibit 2

STATE ELECTION BOARD

NOTICE OF PROPOSED RULEMAKING

Revisions to Subject 183-1-12-.02. *Definitions*

TO ALL INTERESTED PERSON AND PARTIES:

Notice is hereby given that pursuant to the authority set forth below, the Georgia State Election Board, (hereinafter "SEB") proposes the attached amendments to Subject 183-1-12-.02 (Definitions).

This notice, together with an exact copy of the proposed new rules and a synopsis of the proposed rules, is being distributed to all persons who have requested, in writing, that they be placed on a distribution list. A copy of this notice, an exact copy of the proposed rule amendments, and a synopsis of the proposed rule amendments may be reviewed during normal business hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, except official state holidays, at the Office of the Secretary of State, Elections Division, 2 Martin Luther King Jr. Drive, S.E., 8th Floor West Tower, Atlanta, Georgia 30334. These documents will also be available for review on the State Election Board's web page at https://sos.ga.gov/index.php/elections/state_election_board Copies may also be requested by contacting the State Election Board at 470-312-2715.

To provide the public an opportunity to comment upon and provide input into the proposed rule amendments, a public hearing will be held on Tuesday, August 6, 2024, at 9:00 A.M. The meeting will take place in Room 341, at the Georgia State Capitol Building in Atlanta, Georgia. Information regarding how to join and provide public comment at the meeting will be available on the State Election Board's webpage at https://sos.ga.gov/index.php/elections/state_election_board

Public comments given at the meeting will be limited to two minutes per person. Additional comments may be given using the following means and must be received by noon August 5, 2024 to be considered by the State Election Board:

- Electronically by emailing SEBPublicComments@sos.ga.gov
- By mailing comments to:

State Election Board
C/O Alexandra Hardin
2 Martin Luther King Jr. Drive, S.E.
8th Floor West Tower Suite 802
Atlanta, Georgia 30334

This notice is given in compliance with O.C.G.A. §50-13-4.

This 3rd day of July 2024.

John Fervier
Chair, State Election Board

Posted: July 3rd, 2024

SYNOPSIS OF THE PROPOSED RULE OF THE STATE ELECTION BOARD RULE 183-1-12-.02. *Definitions*

Purpose: The purpose of the rule is to explicitly define certification, and to establish clear, standardized criteria for officially confirming the results of an election

Main Features: The main features of the amendments to this rule are that it adopts the U.S. Election Assistance Commission's definition of certification, while stating explicitly that certifying officials should properly conduct a reasonable inquiry in arriving at the certification decision.

DIFFERENCES BETWEEN THE EXISTING RULE AND THE PROPOSED AMENDMENTS OF THE STATE ELECTION BOARD, RULE 183-1-12-.02. *Definitions*

NOTE: Underlined text is proposed to be added.

Rule 183-1-12-.02 *Definitions*

(1) As used in this rule, the term:

(a) "Ballot" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(b) "Ballot scanner" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(c) "Ballot Style" shall mean the specific offices, candidates, and questions displayed on an electronic ballot marker or paper ballot for voters according to their assigned precinct.

(c.2) "Certify the results of a primary, election, or runoff," or words to that effect, means to attest, after reasonable inquiry that the tabulation and canvassing of the election are complete and accurate and that the results are a true and accurate accounting of all votes cast in that election.

(d) "Electronic ballot marker" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(e) "Election management system" is an electronic system that contains databases for elections, allows for the creation of ballots, generates ballot scanner memory cards, and computes tabulated results, amongst performing other election functions.

(f) "Electronic poll book" shall mean an electronic device that contains a list registered voters with sufficient information to look up voters, check them in, and encode voter access cards that bring up the correct ballot on an electronic ballot marker.

(g) "Election Superintendent" or "superintendent" means a county board of elections and registrations, a county board of elections, a judge of the probate court, or an elections supervisor or director so designated by a county board or judge of the probate court. For

municipal elections, the term shall include the municipal counterparts set forth in O.C.G.A. § 21-2-2.

(h) "Enclosed space" shall mean that area within a polling place enclosed with a guardrail or barrier closing the inner portion of such area so that only such persons as are inside such guardrail or barrier can approach within six feet of the ballot box, voting compartments, voting booths, voting machines, electronic ballot markers, or ballot scanners.

(i) "Opening of the Polls" shall mean the commencement of voting in a particular primary, election, or runoff. Opening of the polls does not refer to the unlocking or opening of the doors of the polling place. Similarly, the term "Closing of the Polls" shall mean the cessation of voting in a particular primary, election, or runoff and not the locking or closing of the doors of the polling place.

(j) "Poll officer" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(k) "Polling place" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(l) "Precinct" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(m)"Voter Access Card" shall mean the electronic card issued to a voter which is inserted into an electronic ballot marker to bring up the voter's correct ballot.

(n) "Zero Tape" shall mean a tape printed out by a ballot scanner unit which shows that no votes have been tabulated by the scanner for that election.

(o) "Voting system" or "voting system components" shall include electronic ballot markers, printers, ballot scanners, election management systems, electronic poll books, and voter access cards.

Authority: O.C.G.A. § 21-2-31, 21-2-70

COPY OF THE PROPOSED NEW RULE

Rule 183-1-12-.02 ***Definitions***

(1) As used in this rule, the term:

(a) "Ballot" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(b) "Ballot scanner" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(c) "Ballot Style" shall mean the specific offices, candidates, and questions displayed on an electronic ballot marker or paper ballot for voters according to their assigned precinct.

(c.2) “Certify the results of a primary, election, or runoff,” or words to that effect, means to attest, after reasonable inquiry that the tabulation and canvassing of the election are complete

and accurate and that the results are a true and accurate accounting of all votes cast in that election.

(d) "Electronic ballot marker" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(e) "Election management system" is an electronic system that contains databases for elections, allows for the creation of ballots, generates ballot scanner memory cards, and computes tabulated results, amongst performing other election functions.

(f) "Electronic poll book" shall mean an electronic device that contains a list registered voters with sufficient information to look up voters, check them in, and encode voter access cards that bring up the correct ballot on an electronic ballot marker.

(g) "Election Superintendent" or "superintendent" means a county board of elections and registrations, a county board of elections, a judge of the probate court, or an elections supervisor or director so designated by a county board or judge of the probate court. For municipal elections, the term shall include the municipal counterparts set forth in O.C.G.A. § 21-2-2.

(h) "Enclosed space" shall mean that area within a polling place enclosed with a guardrail or barrier closing the inner portion of such area so that only such persons as are inside such guardrail or barrier can approach within six feet of the ballot box, voting compartments, voting booths, voting machines, electronic ballot markers, or ballot scanners.

(i) "Opening of the Polls" shall mean the commencement of voting in a particular primary, election, or runoff. Opening of the polls does not refer to the unlocking or opening of the doors of the polling place. Similarly, the term "Closing of the Polls" shall mean the cessation of voting in a particular primary, election, or runoff and not the locking or closing of the doors of the polling place.

(j) "Poll officer" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(k) "Polling place" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(l) "Precinct" shall have the meaning set forth in O.C.G.A. § 21-2-2.

(m)"Voter Access Card" shall mean the electronic card issued to a voter which is inserted into an electronic ballot marker to bring up the voter's correct ballot.

(n) "Zero Tape" shall mean a tape printed out by a ballot scanner unit which shows that no votes have been tabulated by the scanner for that election.

(o) "Voting system" or "voting system components" shall include electronic ballot markers, printers, ballot scanners, election management systems, electronic poll books, and voter access cards.

Authority: O.C.G.A. § 21-2-31, 21-2-70

Exhibit 3

STATE ELECTION BOARD

NOTICE OF PROPOSED RULEMAKING

Revisions to Subject 183-1-12-.12 *Tabulating Results*

TO ALL INTERESTED PERSON AND PARTIES:

Notice is hereby given that pursuant to the authority set forth below, the Georgia State Election Board, (hereinafter "SEB") proposes the attached amendments to Subject 183-1-12-.12 (Tabulating Results).

This notice, together with an exact copy of the proposed new rules and a synopsis of the proposed rules, is being distributed to all persons who have requested, in writing, that they be placed on a distribution list. A copy of this notice, an exact copy of the proposed rule amendments, and a synopsis of the proposed rule amendments may be reviewed during normal business hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, except official state holidays, at the Office of the Secretary of State, Elections Division, 2 Martin Luther King Jr. Drive, S.E., 8th Floor West Tower, Atlanta, Georgia 30334. These documents will also be available for review on the State Election Board's web page at: https://sos.ga.gov/page/proposed-state-election-board-rules-and-rule-amendments . Copies may also be requested by contacting the State Election Board at: ahardin@sos.ga.gov .

To provide the public an opportunity to comment upon and provide input into the proposed rule amendments, a public hearing will be held on Friday, September 20, 2024 at 9:00 A.M. The meeting will take place at the Georgia State Capitol, Room 341.

Information regarding how to join and provide public comment at the meeting will be available on the State Election Board's webpage at: https://sos.ga.gov/page/state-election-board-meetings-events .

Public comments given at the meeting will be limited to two minutes per person. Additional comments may be given using the following means and must be received by noon on September 19 to be considered by the State Election Board.

- Electronically by emailing SEBPublicComments@sos.ga.gov
- By mailing comments to:

State Election Board
C/O Alexandra Hardin
2 Martin Luther King Jr. Drive, S.E.
8th Floor West Tower Suite 802
Atlanta, Georgia 30334

This notice is given in compliance with O.C.G.A. §50-13-4.

This 21st day of August 2024.

John Fervier
Chair, State Election Board

Posted: August 21, 2024

SYNOPSIS OF THE PROPOSED RULE
OF THE STATE ELECTION BOARD
RULE 183-1-12-.12 *Tabulating Results*

Purpose: The purpose of the rule is to ensure the secure, transparent, and accurate counting of ballots by requiring a systematic process where ballots are independently hand-counted by three sworn poll officers. The rule mandates detailed documentation, sealing, and certification of ballot counts, with provisions for resolving inconsistencies and communicating any counting that occurs outside the polling location to relevant parties.

Main Features: The main features of the amendments to this rule are that requires the poll manager and two sworn poll officers to unseal ballot boxes, remove and record the ballots, and have three poll officers independently count them. Once all three counts match, they sign a control document. If discrepancies arise between the hand count and recorded totals, the poll manager must resolve and document the inconsistency. The counted ballots are sealed in labeled containers, signed to ensure integrity.

DIFFERENCES BETWEEN THE EXISTING RULE AND THE PROPOSED AMENDMENTS OF THE STATE ELECTION BOARD, RULE 183-1-12-.12 *Tabulating Results*

NOTE: Underlined text is proposed to be added.

Rule 183-1-12-.12(a)(5)

5. The poll manager and two witnesses who have been sworn as poll officers as provided in O.C.G.A. § 21-2-94 and 21-2-95 shall unseal and open each scanner ballot box, remove the paper ballots from each ballot box, record the date and time that the ballot box was emptied and present to three sworn precinct poll officers to independently count the total number of ballots removed from the scanner, sorting into stacks of 50 ballots, continuing until all of the ballots have been counted separately by each of the three poll officers. When all three poll officers arrive at the same total ballot count independently, they shall each sign a control document containing the polling place, ballot scanner serial number, election name, printed name with signature and date and time of the ballot hand count. If the numbers recorded on the precinct poll pads, ballot marking devices [BMDs] and scanner recap forms do not reconcile with the hand count ballot totals, the poll manager shall 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. A separate container shall be used for the hand counted paper ballots from each ballot box and the container shall be labelled with the polling place, ballot scanner serial number, the number assigned to the ballot scanner for that election, the scanner counts of the ballots from the tabulation tape, and the hand count ballot total as certified by the three poll officials. The container shall be sealed and signed by the poll manager and two of the three hand count poll officers such that it cannot be opened without breaking the seal. The poll manager and two witnesses shall sign a label affixed to the container indicating that it contains all the hand counted ballots from the indicated scanner box and no additional ballots.

a. The decision about when to start the process described in this rule is up to the Poll Manager or Assistant Poll Manager. This decision can be made at the end of Election Day, or if a scanner possesses more than 750 ballots on Election Day, the Poll Manager can choose to start the next day and finish during the week designated for county certification. This decision should take into account factors such as staffing requirements, fatigue, and concerns about efficiency and accuracy.

b. If the ballot counting is to take place after Election Day, the relevant ballots, tabulation tapes, enumerated voter lists, and polling information shall be sealed in a tamper-proof container and the number of the seal noted. The counting shall occur in the County election office on the next business day following Election Day and must conclude prior to any scheduled or announced post-election audits. The process must be completed within the designated county certification period.

c. Counting will take place as mentioned in this rule. The process of opening, counting, and resealing ballots must be conducted in the presence of the relevant poll manager or assistant poll manager. These procedures must be conducted publicly to ensure transparency.

d. If the counting of ballots takes place at any time or place other than the polling location, the supervisor of elections must immediately communicate the date, time, and place of such action with all candidates on the ballot and the county chair of both major political parties no later than 10:00 pm on Election Day. The poll manager shall post such information on the outside windows of the polling location together with all other information required to be so posted.

Authority: O.C.G.A. §§ 21-2-483(a), 21-2-436, 21-2-420(a)

COPY OF THE PROPOSED NEW RULE

Rule 183-1-12-.12(a)(5)

5. The poll manager and two witnesses who have been sworn as poll officers as provided in O.C.G.A. § 21-2-94 and 21-2-95 shall unseal and open each scanner ballot box, remove the paper ballots from each ballot box, record the date and time that the ballot box was emptied and present to three sworn precinct poll officers to independently count the total number of ballots removed from the scanner, sorting into stacks of 50 ballots, continuing until all of the ballots have been counted separately by each of the three poll officers. When all three poll officers arrive at the same total ballot count independently, they shall each sign a control document containing the polling place, ballot scanner serial number, election name, printed name with signature and date and time of the ballot hand count. If the numbers recorded on the precinct poll pads, ballot marking devices [BMDs] and scanner recap forms do not reconcile with the hand count ballot totals, the poll manager shall 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. A separate container shall be used for the hand counted paper ballots from each ballot box and the container shall be labelled with the

polling place, ballot scanner serial number, the number assigned to the ballot scanner for that election, the scanner counts of the ballots from the tabulation tape, and the hand count ballot total as certified by the three poll officials. The container shall be sealed and signed by the poll manager and two of the three hand count poll officers such that it cannot be opened without breaking the seal. The poll manager and two witnesses shall sign a label affixed to the container indicating that it contains all the hand counted ballots from the indicated scanner box and no additional ballots.

a. The decision about when to start the process described in this rule is up to the Poll Manager or Assistant Poll Manager. This decision can be made at the end of Election Day, or if a scanner possesses more than 750 ballots on Election Day, the Poll Manager can choose to start the next day and finish during the week designated for county certification. This decision should take into account factors such as staffing requirements, fatigue, and concerns about efficiency and accuracy.

b. If the ballot counting is to take place after Election Day, the relevant ballots, tabulation tapes, enumerated voter lists, and polling information shall be sealed in a tamper-proof container and the number of the seal noted. The counting shall occur in the County election office on the next business day following Election Day and must conclude prior to any scheduled or announced post-election audits. The process must be completed within the designated county certification period.

c. Counting will take place as mentioned in this rule. The process of opening, counting, and resealing ballots must be conducted in the presence of the relevant poll manager or assistant poll manager. These procedures must be conducted publicly to ensure transparency.

d. If the counting of ballots takes place at any time or place other than the polling location, the supervisor of elections must immediately communicate the date, time, and place of such action with all candidates on the ballot and the county chair of both major political parties no later than 10:00 pm on Election Day. The poll manager shall post such information on the outside windows of the polling location together with all other information required to be so posted.

Authority: O.C.G.A. §§ 21-2-483(a), 21-2-436, 21-2-420(a)

CERTIFICATE OF SERVICE

This is to certify that I have served all counsel and/or parties of record to this action with a copy of the foregoing **BRIEF OF AMICI CURIAE ERIC JOHNSON, ALLEN PEAKE, BRETT HARRELL, TOM KIRBY, MIKE DUDGEON, JODI LOTT, KEN PULLIN, MARC MORRIS, HEATH CLARK, AND RIGHTCOUNT, INC. IN SUPPORT OF PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** with the Clerk of Court using Odyssey which will automatically send email notification of such filing to the following attorneys of record:

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Respectfully submitted, this 10th day of October, 2024.

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