IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Eternal Vigilance Action, Inc., et al, **Plaintiffs,** **v.** **State of Georgia, et al,** **Defendants.**	**CIVIL ACTION** **FILE NO. 24CV011558**

STATE OF GEORGIA'S PRE-TRIAL BRIEF

INTRODUCTION

Plaintiffs[1] do not and cannot demonstrate that any of the SEB Rules threaten their right to vote. The SEB Rules do not implicate Plaintiffs' ability to register to vote, to receive a ballot, to understand that ballot, or to cast that ballot (whether by absentee ballot or in person). Moreover, all parties to this suit, including the State Election Board, agree that the SEB Rules cannot and must not be read to modify the superintendent's

[1] "Plaintiffs" as used herein refers to Plaintiff and all Intervenor-Plaintiffs in this case.

obligation to certify the results "not later than" 5:00 p.m. on Tuesday following Election Day.[2] Since certification is mandatory, the SEB Rules do no harm to Plaintiffs' purported "right to have their vote counted."

In sum, there is no controversy before the Court about whether certification will occur or when it will occur. There is, therefore, no injury to Plaintiffs' (or anyone's) right to vote or have their vote counted, nor do the Plaintiffs need guidance from the Court to clear up uncertainty about their future conduct.

As such, and as a threshold matter, the Court should find that these Plaintiffs lack standing to challenge the SEB Rules, and they have not demonstrated a justiciable controversy entitling them to a declaratory judgment.

If necessary to reach the issue, the Court should also find that the Rules at issue were a valid exercise of the SEB's rulemaking authority, as

[2] While O.C.G.A. § 21-2-493(k) requires certification "not later than 5:00 P.M. on the *Monday* following the date on which such election was held," that Monday is Veterans' Day, and therefore a state and federal holiday. As a result, the deadline shifts to Tuesday.

they do not conflict with any provision of the Georgia Code, and are within the scope of the authority granted to the SEB by the General Assembly.

ARGUMENT AND CITATION TO AUTHORITY

I. PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OR LEGALITY OF THE RULES.

At best, Plaintiffs' concern as to certification is speculative and hypothetical, which, as discussed below, is insufficient to confer standing. Without standing, Plaintiffs' claims must be dismissed.

Whether Plaintiffs have standing is a "threshold question," one that is a "jurisdictional prerequisite necessary to invoke a court's judicial power under the Georgia Constitution." *Perdue v. Barron*, 367 Ga. App. 157, 160 (2023); *Cobb County v. Floam*, 319 Ga. 89, 91 (2024).

In May of this year, Georgia's Supreme Court again emphasized that "a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." *Cobb Cnty*, 319 Ga. at 92 (*citing Reid v. Town of Eatonton*, 80 Ga. 755 (1888)); *see also*, *Sons of Confederate Veterans v.*

Henry Cnty. Bd. Of Comms., 315 Ga. 39, 54 n. (2022) ("We have long held that Georgia courts may not decide the constitutionality of statutes absent an individualized injury to the plaintiff.") A litigant must therefore show a "particularized injury" to challenge a state action. *Id.* (*compare Sons of Confederate Veterans* 315 Ga. at 67 (2)(d)(ii) (holding that where "a local government owes a legal duty to community stakeholders, the violation of that legal duty . . . [confers standing], even if the plaintiff at issue suffered no individualized injury"). This "particularized injury" gateway to judicial review "is akin to the Article III injury-in-fact requirement," and it is "rooted in principles of separation of powers." *Cobb Cnty.*, 319 Ga. at 92.

In this case, involving a challenge to a state action, Plaintiffs must demonstrate that each challenged regulation directly injures each Plaintiff's purported interest, and that the alleged injury is not "contingent upon future events[.]" *Board of Natural Resources v. Monroe Cnty.*, 252 Ga. App. 555, 558 (2001) (county failed to identify how the rules would jeopardize its right to carry out statutory duties, identifying only a "generalized economic interest" and therefore lacked standing); *see also*,

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006) (holding that standing is not dispensed in gross, and that each plaintiff must demonstrate standing as to each claim pursued.). In other words, Plaintiffs must each demonstrate standing individually with respect to each challenged regulation. *Id.*

Plaintiffs, comprised of voters and voter advocacy organizations, argue that the regulations at issue somehow infringe upon the "right of Georgians to vote and to have their votes counted." (Compl. ¶ 1.) Yet they have failed to demonstrate how any of the referenced regulations pose a present or imminent threat to those rights. Plaintiffs have failed to even allege (and how could they?) that any of the regulations threaten their "right to vote." Plaintiffs do not allege *how* the SEB has created any obstacles to any of the Plaintiffs' right to register to vote, receive a ballot, understand a ballot or cast that ballot.

With respect to the "right to have a vote counted," Plaintiffs do not and cannot demonstrate any injury beyond those that might result from mere hypotheticals "contingent upon future events." *Monroe Cnty.*, 252 Ga. App. at 558. Rather, Plaintiffs argue that the SEB Rules either exceed

the SEB's authority or reveal an unconstitutional delegation of power. These arguments, lacking evidence of an injury in fact, simply do not support standing, and instead reflect policy disagreements that do not belong in the Court.

In support of its theory of organizational standing, Eternal Vigilance ("EVA"), specifically, has alleged that

> [It] is a multi-issue advocacy organization with a significant focus on election policy. Its board of directors are a group of activists, scholars, and former elected officials. A core function and activity of Eternal Vigilance Action is to defend the institution of elections from attacks that erode public faith in electoral outcomes and are often based on misinformation and disinformation. ***In pursuit of its mission, Eternal Vigilance Action educates communities, coordinates efforts and resources, and lobbies elected officials. As such, Eternal Vigilance Action has organizational standing to challenge the enforceability of the SEB Rules at issue, because the resulting damage and uncertainty – and the loss of public confidence in our election institutions – stemming from the illicit creation and exercise of the SEB Rules (as described in detail below) will directly impact-- and impair Eternal Vigilance Action's efforts and mission to ensure clarity and public confidence in those institutions. Furthermore, attempting to minimize and correct this damage, uncertainty and loss of public confidence in the election institutions has caused and will continue to cause a diversion of Eternal Vigilance Action's time and resources in order to analyze and create remedies to attempt to combat and correct the negative public impact stemming from the illicit creation and***

exercise of the SEB Rules at issue through education of the public and local and state officials.

(Compl. ¶ 2) (emphasis added). The NAACP and GCPA similarly assert standing, arguing, *inter alia*, that the regulations will cause them to redirect their resources to respond to the regulations to the detriment of other priorities, and further that the regulations "frustrate" their respective missions. (*See* Compl. ¶¶ 11-20.)

The voter advocacy Plaintiffs specifically claim organizational standing. In *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375 (2022), the Georgia Supreme Court adopted the U.S. Supreme Court case of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) ("*Havens*"), as "seminal federal precedent" concerning organizational standing. Specifically, Georgia's Supreme Court, relying on *Havens*, held that "an organization suffers an injury in fact for purposes of standing when the defendant's actions impair the organization's ability to provide its services or to perform its activities and, as a consequence of that injury, require a diversion of an organization's resources to combat that impairment." *Black Voters Matter Fund, Inc.*, 313 Ga. at 386. The Court

refused to read *Havens* to hold that an organization's diversion of resources to litigation suffices to confer standing. *Id.*

Since that time, the United States Supreme Court in *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 393–96 (2024), clarified the reach of *Havens*' holding on organizational standing:

> Under this Court's precedents, organizations may have standing "to sue on their own behalf for injuries they have sustained." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, n. 19, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). In doing so, however, organizations must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals. *Id.*, at 378–379 . . . [and a] plaintiff must show "far more than simply a setback to the organization's abstract social interests."
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> …
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> The medical associations respond that under *Havens* . . . standing exists when an organization diverts its resources in response to a defendant's actions. That is incorrect. Indeed, that theory would mean that all organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies. *Havens* does not support such an expansive theory of standing.

Concluding, the Court explained that while the plaintiffs' legal, moral, ideological, and policy objections to the regulations were sincere, "those

kinds of objections alone do not establish a justiciable case or controversy . . . ." *Id.* at 395.

To summarize, neither the voter plaintiffs nor the voter advocacy Plaintiffs have demonstrated an injury sufficient to confer standing in this case. And, while the State does not contest the sincerity of Plaintiffs' convictions, sincere convictions cannot support standing alone, and Plaintiffs' claims must be dismissed.

II. PLAINTIFFS CANNOT DEMONSTRATE A "JUSTICIABLE" CONTROVERSY ENTITLING THEM TO DECLARATORY JUDGMENT.

Because none of the Plaintiffs seek relief or clarification as to the propriety of their own future conduct, any declaratory judgment issued by this Court would constitute an illegal advisory opinion. While Plaintiffs argue that the SEB Rules are invalid and *might* cause harm, a court "has no province to determine whether or not a statute, in the abstract, is valid." *Fourth Street Baptist Church of Columbus v. Board of Registrars*, 253 Ga. 368, 369 (1984) (*citing Cooks v. Sikes*, 210 Ga. 722 (1954)). As such, to "enter a declaratory judgment based on the alleged *possibility* of a "future contingency" like those alleged by Plaintiffs would constitute "an

erroneous advisory opinion" that "must be vacated." *Baker v. City of Marietta*, 271 Ga. 210, 215 (1999) (internal citations omitted).

Under the Declaratory Judgment Act, superior courts may "declare rights and other legal relations of any interested party" seeking such declaration either in "cases of actual controversy," O.C.G.A. § 9-4-2(a), or "justiciable controversy." *Id. at* 214 (citing O.C.G.A. § 9-4-2(b)). A justiciable controversy requires "circumstances showing a necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest." *U-Haul Co. of Az. v. Rutland*, 348 Ga. App. 738, 747 (2019); see also O.C.G.A. § 9-4-1. To emphasize the point, a claim for declaratory relief is not proper "when a declaration of rights would not direct the *plaintiff's*" conduct in the future. *See, e.g.*, *Cobb Cnty.*, 319 Ga. at 97 (emphasis added).

A plaintiff must allege more than a "hypothetical, abstract, academic or moot" controversy. *Strong v. JWM Holdings, LLC*, 341 Ga. App. 309, 315 (2017) (citing *Burton v. Composite State Bd. of Med. Examiners*, 245

Ga. App. 587, 588 (2000)); *U-Haul Co.*, 348 Ga. App. at 745 (plaintiff must show interest is not merely academic or hypothetical). Mere disagreement about the "abstract meaning" or validity of a statute or ordinance is insufficient to warrant declaratory judgment. *See City of Atlanta v. Atlanta Indep. Sch. Sys.*, 307 Ga. 877, 879-80 (2020). There must be "some *immediate legal effect* on the parties' conduct, rather than simply burning off an abstract fog of uncertainty." *Perdue v. Barron*, 367 Ga. App. at 163 (emphasis in original) (citation omitted). "[A] declaratory judgment will not be rendered based on a possible or probable future contingency because such a ruling would be an erroneous advisory opinion." *Strong*, 341 Ga. App. at 315 (internal citation and punctuation omitted). Thus, the goal of a declaratory judgment action "is to permit one who is walking in the dark to ascertain where he is and where he is going, to turn on the light before he steps rather than after he has stepped in a hole." *Perdue*, 367 Ga. App. at 164. To summarize, therefore, Plaintiffs must demonstrate why a declaratory judgment would inform *their* conduct and prevent *them* from "stepping into a hole."

Plaintiffs declaratory judgment claims appear premised upon the notion that "certification" may be delayed as a result of the Rules. But accepting this position would require this Court to ignore the fact to which all Parties in this action agree: certification pursuant to O.C.G.A. § 21-2-493(k) "shall" take place "not later than" 5:00 p.m. on Tuesday following Election Day. Thus, regardless of any regulations, old or new, certification must occur at that time on that day. This interpretation is simply not in dispute, and Plaintiffs' attempts to support their concerns otherwise are manufactured out of whole cloth.

To conclude, Plaintiffs have failed to allege or demonstrate that "*they* are at risk of taking some undirected future action incident to their rights and that such action might jeopardize their interests." *Cobb Cnty.*, 319 Ga. at 520 (emphasis in original). And "because [Plaintiffs] do not allege or argue that [they] face[] any uncertainty or insecurity as to [their] own future conduct . . . a declaratory judgment [would be] merely advisory and dismissal of a claim for such relief is required." *Williams v. Dekalb Cnty.*, 308 Ga. 265, 271 (2020).

III. THE SEB DID NOT EXCEED ITS AUTHORITY IN PROMULGATING THE RULES, AS THE RULES CAN, AND THEREFORE MUST, BE READ AS CONSISTENT WITH THE GEORGIA CODE.

The State of Georgia will address arguments as to each rule, individually, as follows:

SEB Rule 183-1-12.02(c.2) – "Reasonable Inquiry Rule"

The Reasonable Inquiry Rule defines "certify the results of a primary, election, or runoff," or words to that effect, to mean "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." Ga. Comp. R. & Regs. 183-1-12-.02(c.2). Plaintiffs argue that this definition runs contrary to the Election Code because "[c]ertify can only mean what the General Assembly says it means in the context of the Election Code." (Compl. ¶ 36). Yet Plaintiffs acknowledge in the same paragraph that the General Assembly has not defined "certify" in the Election Code. (*Id.*).

Further, Plaintiffs argue that the Reasonable Inquiry Rule *might* allow members of a county election board, either collectively or

individually, "to delay certification," thus rendering it "inconsistent with the statutory framework." (*Id.*). But this hypothetical ignores two vital facts. First, the Reasonable Inquiry Rule does not contain any provisions that permit election officials "to delay certification." (Compl. ¶ 36.) Second, the SEB itself agrees that the law means what it says: certification pursuant to O.C.G.A. 21-2-493(k) "shall" take place "not later than" 5:00 p.m. on Tuesday following Election Day.

As such, Plaintiffs cannot demonstrate an injury beyond the hypothetical of a rogue election official refusing to comply with what everyone agrees the law requires. Furthermore, a declaration that the Reasonable Inquiry Rule does not permit election officials to delay certification would have no "*immediate legal effect* on the [Plaintiffs'] conduct." *Perdue v. Barron*, 367 Ga. App. at 163 (emphasis in original) (citation omitted). It would constitute nothing more than "burning off an abstract fog of uncertainty," which requires this Court to ignore the Parties' collective agreement on the mandatory nature of certification. *Id.*

Finally, "[A]ll presumptions are in favor of the constitutionality of a statute or regulation." *Ga. Dep't of Cmty. Health v. Northside Hosp.*

Inc., 295 Ga. 446, 448 (2014) (citing *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 490 (2011)) (internal punctuation omitted). *See also Albany Surgical, P.C.*, 257 Ga. App. at 638 ("All duly enacted regulations carry a presumption of validity."). "When a statute ... is capable of two constructions, constitutional under one construction and unconstitutional under the other, it is the duty of the court to adopt that construction which will sustain its constitutionality." *City of Newman v. Atlanta Laundries*, 174 Ga. 99, 99 (1932). Thus, because this Court can plausibly read the Reasonable Inquiry Rule as consistent with the Election Code, the Court is bound to construe it accordingly. The canon of constitutional doubt also applies equally to the analysis of each subsequent rule.

SEB Rule 183-1-12.12 – "Examination Rule"

The Examination Rule permits board members to examine "all election related documentation created during the conduct of elections prior to certification of results." Ga. Comp. R. & Regs. 183-1-12-.12(f)(6). Like the Reasonable Inquiry Rule, the Examination Rule does not grant election officials the authority to delay certification, nor do

Plaintiffs even suggest that it does. *See id.* 183-1-12-.12(g). Instead, Plaintiffs argue that the Examination Rule is contrary to O.C.G.A. § 21-2-493, which "provides the time, manner, and method in which election-related documentation must be produced and maintained." (Compl. ¶ 41 (*citing* O.C.G.A. § 21-2-493).) Here, the Examination Rule can be read not to exceed the scope or be otherwise inconsistent with O.C.G.A. § 21-2-493 because it does not **require** individual board members to do anything; it merely provides that they "shall be ***permitted*** to examine all election related documentation created . . ." Ga. Comp. R. & Regs. 183-1-12-.12(f)(6) (emphasis added). They shall be permitted to examine documents if they so choose, but whether they choose to or choose not to, they *must* certify by the statutory deadline.

As such, Plaintiffs again fail to demonstrate how their purported rights are harmed, beyond mere hypotheticals based upon contingent future events. A declaratory judgment on the Examination Rule would constitute an illegal advisory opinion because although Plaintiffs may have sincere concerns about the Examination Rule, *they* face no uncertainty with respect to *their* conduct as a result of the Examination

Rule. None of them allege that they play a role in the certification process, and a declaratory judgment on the Examination Rule would not inform *their* conduct or prevent *them* from stepping "into a hole." *Perdue*, 367 Ga. App. at 164 (2023).

SEB Rule 183-1-14-.02(18) – "Absentee Drop Box Rule"

Plaintiffs' allegations about the Absentee Drop Box Rule face similar issues. For one, none of the Plaintiffs has even alleged that they might possibly be affected by it. The advocacy Plaintiffs are nonprofit organizations incapable of voting and neither of the individual Plaintiffs alleges that he intends to vote absentee – much less presented any evidence that he plans to vote absentee by depositing his ballot at an "absentee ballot drop location, other than the United States Postal Service or authorized and defined drop box under Georgia law." Ga. Comp. R. & Regs. 183-1-14-.02(18).

As they do with the Reasonable Inquiry and Examination Rules, Plaintiffs suggest that the Absentee Drop Box Rule may delay certification. (*See* Compl. ¶ 49 (alleging that the Absentee Drop Box Rule "is inconsistent with the statutory framework" because "the results must

be certified per the Election Code and within the timeframes and parameters set")). Again, the SEB agrees with that certification mandate, and, as such, Plaintiffs' concerns about the Absentee Drop Box Rule's implementation are nothing more than the type of "hypothetical, abstract, academic or moot" controversy not appropriate for declaratory relief. *Strong*, 341 Ga. App. at 315.

SEB Rule 183-1-14-.02(19) – the "Video Surveillance Rule"

The Video Surveillance Rule requires video surveillance and recording of a drop box "at any early voting location" at the close of the polls "each day during early voting and after the last voter has cast his or her ballot." Ga. Comp. R. & Regs. 183-1-14-.02(19). Plaintiffs argue that this is contrary to the Election Code because "[n]othing in the Election Code permits the video surveillance and recording of a drop box." (Compl. ¶ 54.) As Plaintiffs then immediately acknowledge, however, O.C.G.A. § 21-2-382(c)(1) expressly requires drop box locations to "have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement official, or licensed security guard." The Video Surveillance Rule can be read not to exceed

the scope of O.C.G.A. § 21-2-382(c)(1) because video surveillance is but one mechanism of "constant surveillance." If anything, in 2024, when recording devices are ubiquitous and inexpensive, requiring video surveillance *after the polls close* is less burdensome and more efficient than requiring constant surveillance by a human being.

SEB Rule 183-1-13-.05 – the "Poll Watcher Rule"

As with the previous regulations being challenged, Plaintiffs offer no more than speculation and conjecture that a poll watcher in the tabulation center *might* interfere with a voter's right to exercise the franchise or have their vote counted. Beyond that, nothing in the old or the new version of SEB Rule 183-1-13-.05 (or its authorizing statute, Ga. Code Ann. § 21-2-408(c)) impacts in any way the manner in which a poll watcher exercises his or her duties.

The changes from the previous version of the regulation and the new version are limited to additional language in one sentence:

> Such designated places shall include the check-in area, the computer room, the duplication area, and such other areas **that tabulation processes are taking place including but not limited to provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing**

> **of mail in ballots, memory card transferring, regional or satellite check-in centers and any election reconciliation processes** as the election superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center.

Ga. Comp. R. & Regs. r. 183-1-13-.05 (emphasis added). *Cf.* O.C.G.A. § 21-2-408(c) ("Such designated locations shall include the check-in area, the computer room, the duplication area, and such other areas as the superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center.").

The substance of the prior version of the regulation, the regulation as amended, and the authorizing statute is the same. The number of poll watchers does not change, who appoints the poll watchers does not change, and in the statute and both versions of the regulation, the poll watchers are allowed to go in "locations designated by the election superintendent within the tabulating center." All of this is subject to the discretion of the superintendent, as he or she "may deem necessary to the assurance of fair and honest procedures in the tabulating center."

The additional language in the regulation was intended by the Board to clarify existing law, not add to or alter it, regarding the discrete issue

of the location *within the tabulating center* these poll watchers can be situated. (*See* Am. Compl., **Exhibit B**.)

As indicated by the use of the words "shall include," the statute and the previous version of the regulation provide an illustrative but not exhaustive list of where in the tabulating center the superintendents may choose, in their discretion, to situate these poll watchers. In promulgating the new regulation, the Board set forth additional illustrative but not exhaustive examples of locations within the tabulating center where superintendents can situate these poll watchers. Because where the poll watchers are situated is within the discretion of the superintendent in any event, the impact of the clarifying language in the regulation is negligible. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Regardless, the regulation fits within the statutory mandate of § 21-2-408(c).

SEB Rule 183-1-12-.21 – the "Daily Reporting Rule"

The Daily Reporting Rule does not prevent any voter from exercising his or her franchise, nor does it relate to the counting of actual votes. This rule simply requires the reporting of certain statistical

information on voter participation—information that *does not* include for whom the votes were cast. Thus, this rule does not affect voters in any way. It is, at most, an additional task required of election administrators, and one that closely tracks and is consistent with the requirements of the Election Code. Plaintiffs are not injured in any way by this rule and they have, as such, no standing to challenge it.

Georgia Code Annotated § 21-2-385 requires reporting on (1) the number of persons to whom absentee ballots have been issued; (2) the number of persons who have returned absentee ballots: (3) the number of absentee ballots that have been rejected; (4) the number of persons who have voted at the advance voting sites in the county or municipality; (5) the number of persons who have voted provisional ballots; (6) the number of provisional ballots that have verified or cured and accepted for counting; and (7) the number of provisional ballots that have been rejected.

The regulation, on the other hand, is far less detailed. As far as reporting for the general election is concerned, the regulation only reiterates the statutory requirement to report the total number of voters

who have participated. It further requires reporting of "the method by which those voters participated (advance voting or absentee by mail)," and "the date on which the information was provided." These requirements help fulfill the statutory mandate of transparency and are, therefore, not contrary to the statute. Beyond that, for the general election, registrars are required to establish a *method* of daily reporting by the beginning of the advanced voting period, which again helps fulfill the statutory mandate and is squarely within the Board's regulatory authority.

SEB Rule 183-1-12-.12(a)(5) – the "Hand Count Rule"

Finally, and as with each of the prior Rules, the "Hand Count Rule" does not and cannot be read to delay certification of the votes. Again, all Parties agree, *including the entity that created the Hand Count Rule*, that certification must occur by the date specified, and the hand counting of ballots cannot and does not interfere with that requirement. To argue that it *may* do so is entirely speculative, and precisely the type of "abstract" or "hypothetical" alleged harm that can neither confer standing on the Plaintiffs and Intervenor-Plaintiffs, nor create a "justiciable controversy" that permits this Court to issue a declaratory judgment.

Moreover, and as noted above, there are remedies that are clearly and immediately available to Plaintiffs in the event the hypothetical scenarios they express concern about—events like delayed hand counting that *might* delay certification—actually do occur. For example, a party injured by such an event could file a mandamus action to compel certification. In addition, the Election Code itself provides a remedy for exactly the concerns Plaintiffs profess to have. In O.C.G.A. § 21-2-522, the Election Code permits a lawsuit in the event of, among other things, "[m]isconduct, fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result," and/or "any error in counting the votes or declaring the result of the primary or election." *See also,* O.C.G.A. § 21-2-524 (providing the framework for a challenge like those permitted in O.C.G.A. § 21-2-522).

In other words, there are remedies to address the Plaintiffs' and Intervenor-Plaintiffs' concerns when those concerns *actually manifest*. And courts like this one will then have before it an "actual controversy," with events that have already accrued, and with the benefit of being able

to examine evidence of an actual injury – that which is decidedly lacking here.

IV. THE GENERAL ASSEMBLY PROVIDED SUFFICIENT AND REALISTIC GUIDELINES GOVERNING THE SEB'S RULE-MAKING AUTHORITY.

As a preliminary matter, Plaintiffs cannot press their constitutional non-delegation position without attacking SEB's entire existence—and, therefore, the enforceability of *all* SEB rules. Even assuming, *arguendo*, these arguments are correct, which is denied, an order on constitutionality less than a month before a general election (with the Presidential race on the ballot) would create far more chaos and confusion than anything Plaintiffs have alleged based on the extant rules. *See Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5 (2006); *In re Georgia Senate Bill 202*, 688 F. Supp. 3d 1300, 1319 (N.D. Ga. 2023) (applying *Purcell* principle to Georgia election statute).

If the Court wishes nevertheless to entertain this argument, Plaintiffs' argument should be rejected. Plaintiffs fail to articulate, except in vague terms themselves, exactly how they contend the legislature's

delegation of rulemaking authority to the Board is neither "sufficient" nor "realistic."

Preliminarily, Plaintiffs erroneously aver that the "uniformity" requirement is the only guidance or parameters the Legislature gave to the Board. (*See* Complaint at ¶ 12.) This is a partial and selective quotation from the requirement in O.C.G.A. § 21-2-31(1) that the Board "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*." (emphasis added).

Plaintiffs overlook other provisions of the Georgia Code concerning the Board's rulemaking authority. *See* § 21-2-31(2) (Board shall "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* …." (emphasis added); § 21-2-31(7) (board shall "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"); § 21-2-32(a) (Board is authorized to "institute or to intervene as a party in any [court] action… seeking mandamus, injunction, or other relief, to compel compliance with any election or primary law of the state or with any valid rule or regulation of the board … "); § 21-2-33.2 (Board is authorized to "promulgate rules and regulations for conducting such preliminary investigation and preliminary hearing" regarding performance review proceedings for superintendents); § 21-2-35 (Board is authorized to "adopt emergency rules or regulations in circumstances of imminent peril to public health, safety, or welfare").

The delegation of rulemaking authority to the Board is not a new development in Georgia law. Since 1964, when the State Election Board was first created as part of the passage of Georgia's first uniform Election Code, O.C.G.A. § 21-2-31 and its predecessor legislation has provided rulemaking authority to the Board in similar terms. *See* Ga. Op. Att'y Gen. No. 05-3 (Apr. 15, 2005) (discussing history of 1964 Election Code and Board and noting the Board was created and "authorized to adopt rules and regulations consistent with the law 'as will be conducive to the fair,

legal and orderly conduct of elections' and to file those rules with the Secretary of State.") (*quoting* former O.C.G.A. § 34 202(b)).

As discussed above, the statutory authorization for rulemaking is comprehensive in its design to ensure smooth and orderly administration of elections, while still leaving the Board sufficient discretion to fill in the details of how these goals are accomplished, provided they act consistent with the law. Further, this is a normal and typical rulemaking delegation. *See* § 21:16. Definiteness, 1A Sutherland Statutory Construction § 21:16 ("The necessity to provide standards flexible enough to insure effective application of legislative policy to changing circumstances often requires the use of words such as 'reasonable,' 'competent,' 'proper,' 'fair,' etc. Without such words the legislative standard may frequently be evaded without violating the law … Although attractive, an absolute standard often results in an unworkable statute; for without discretionary powers, an administrator may stand by and watch a statute be emasculated through acts which escape the letter of the law though they violate its spirit. Consequently, establishing broad general standards which direct, but do not sharply limit, administrative action is desirable.").

That non-delegation doctrine "is 'rooted in the principle of separation of powers' and 'mandates that the General Assembly not divest itself of the legislative power granted to it by Art. 3, Sec. 1, Para. 1, of our Constitution' by delegating legislative powers to (for example) executive agencies." *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 49 (2020) (quoting *Dep't of Transp. v. City of Atlanta*, 260 Ga. 699, 703 (1990)). The Supreme Court of Georgia has emphasized, however, "that the General Assembly's 'delegation of legislative authority is permissible when it is accompanied by *sufficient guidelines* for the delegatee.'" *Id.* (quoting *Pitts v. State*, 293 Ga. 511, 517 (2013)). This makes sense, because, "in our complex society," the General Assembly "cannot find all facts and make all applications of legislative policy." *Dep't of Transp*, 260 Ga. at 703.

Moreover, the non-delegation doctrine cannot be applied in a vacuum. Also relevant is the canon of constitutional doubt, which as noted, provides that "[i]f a statute is susceptible of more than one meaning, one of which is constitutional and the other not," the Supreme Court of Georgia interprets "the statute as being consistent with the

Constitution." *S&S Towing & Recovery, Ltd.*, 309 Ga. at 119 (quoting *Cobb Cnty. Sch. Dist. v. Barker*, 271 Ga. 35, 37 (1999)). "To that end, the canon of constitutional doubt militates against not only those interpretations that would render the statute unconstitutional, but also those that would even raise serious questions of constitutionality." *Premier Health*, 310 Ga. at 48 (citation and punctuation omitted).

As demonstrated above, each of the SEB Rules can and, therefore, must, be read as consistent with the statute. *S&S Towing*, 309 Ga. at 119. More broadly, the SEB Rules are entirely within the narrow and sufficiently defined ambit of the rulemaking authority that the General Assembly afforded the SEB in O.C.G.A. § 21-2-31. As such, there is no violation of the non-delegation doctrine, and Plaintiff EVA's arguments otherwise should be denied.

CONCLUSION

The Court should dismiss Plaintiffs' Complaint or otherwise find the Rules valid.

Respectfully submitted this 11th day of October, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2024, I filed the foregoing **STATE OF GEORGIA'S PRE-TRIAL BRIEF** with the Clerk of Court using the Court's electronic filing system, which will automatically send email notification of such filing to all counsel of record.

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