

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

ETERNAL VIGILANCE ACTION,
INC., SCOT TURNER, JAMES HALL,
Plaintiffs,

v.

STATE OF GEORGIA,
Defendant.

Civil Case No. 24CV011558

**BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS' FIRST AMENDED
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

“One of the most important and sacred rights possessed by an American citizen is to vote for whom he pleased, and to have that vote counted.” *Griffin v. Trapp*, 205 Ga. 176, 181 (1949). If a vote is not certified, it does not count. Failure to properly certify the election results is therefore voter disenfranchisement.

Two new rules (collectively, the “Certification Rules”) adopted by the State Election Board (the “SEB”)¹ risks disenfranchising Georgia voters by threatening to transform the certification of county election results from a ministerial accounting function into a discretionary act. One new rule (the “Heekin Rule”) would require county election administrators to conduct an “inquiry” into

¹ Georgia State Election Board, *Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.02 Definitions* (July 3, 2024), <https://sos.ga.gov/sites/default/files/2024-07/Notice%20of%20Proposed%20Rulemaking%20-%20183-1-12-.02.pdf>, codified at Ga. Comp. R & Regs. 183-1-12.02 at (1)(c.2); Georgia State Election Board, *Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.12 Tabulating Results* (July 18, 2024), <https://sos.ga.gov/sites/default/files/2024-07/Notice%20of%20Proposed%20Rulemaking%20-%20183-1-12-.12%28a%295.pdf>, codified at Ga. Comp. R & Regs. 183-1-12-.12 at (f)-(g).

the election before certifying the results. That discretion conflicts with the statutory mandate to certify the vote totals after completing very specific, straightforward, and circumscribed verification procedures. Ga. Comp. R & Regs. 183-1-12-.02(1)(c.2). The second new rule (the “Grubbs Rule”) would equip any individual county election board member with unfettered access to “examine all election related documentation” before certification, allow county boards to devise their own “method[s]” for counting votes whenever they claim to suspect “fraud,” and condition certification on new requirements that appear nowhere in the election code. Ga. Comp. R & Regs. 183-1-12-.12(f)–(g). These rules also purport to vest in the county boards of elections the authority to investigate and address fraud or error that Georgia law bestows on courts and prosecutors.

A third new rule (the “Hand Count Rule”)² adds another pre-certification hurdle to Georgia’s process for collecting and tabulating ballots. Under the Hand Count Rule, counties must continuously hand-count all ballots and remedy inconsistencies between the electronic scanner counts and the hand counts where possible. This needs to be completed before the county’s certification of election results. This pre-certification hand count is an onerous and unnecessary step that threatens to disrupt the tabulation process and conflicts with Georgia law, which comprehensively details the procedures for counting ballots. The risk of county-wide disenfranchisement is exacerbated when the Hand Count Rule is read alongside the Certification Rules, which invite any individual county election board member to use hand-count delays or negligible differences between the scanner and hand counts as a purported reason to delay or deny certification.

² Georgia State Election Board, *Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.12 Tabulating Results* (Aug. 21, 2024), https://sos.ga.gov/sites/default/files/2024-08/seb-notice_of_proposed_rulemaking_183_1_12_.12a5_hand_count.pdf, codified at Ga. Comp. R & Regs. 183-1-12-.12 at (a)(5).

These rule changes pose a danger because a county election board—or even a single member thereof—could read them to enlarge the power of county election boards beyond the scope prescribed by law. By improperly suggesting that timely certification is optional and dependent on prerequisites with no standards or basis in law, the new Certification Rules invite any local officials from Georgia’s 159 counties to try to obstruct or manipulate certification if they disagree with the choices made by voters. The Hand Count Rule makes Georgia’s elections even more vulnerable to that obstruction by requiring an additional and unnecessary pre-certification process, that places poll workers who are not equipped, trained, or resourced to safeguard the security of ballots in an untenable position. The Hand Count Rule also separately exceeds the SEB’s statutory authority where Georgia law already comprehensively prescribes the methods for counting ballots and ensuring accurate results. Without clarification or constraint from this Court, the rule changes could foment chaos and confusion as soon as polls close, while potentially stripping millions of Georgians of their fundamental right to vote, likely impacting Black voters and other historically disenfranchised voters disproportionately.

Amici are Georgia voters and organizations dedicated to protecting its members’ fundamental right to vote. Amici write to emphasize that the SEB’s three new rules lay the groundwork for unprecedented election subversion that would harm Georgia voters. If these rule changes are allowed to take effect without constraint, unelected and unaccountable local election administrators could claim the legal authority to reject or delay certification while they conduct their own freelance investigations into any rumored election glitch or anomaly, jeopardizing Georgia’s compliance with state and federal certification deadlines. Officials could even attempt to exclude certain ballots from the certified count simply by claiming fraud. Should local officials invoke the new rules as a basis to disrupt certification, voters would be forced to flood courts

across the state with emergency lawsuits to protect their right to have their ballots counted. Any disruption to the certification process will fuel dangerous election denialism that would undermine our democratic system and confidence in our elections and jeopardize the peaceful transfer of power.

This Court should not allow the SEB to turn a routine administrative function that is clearly required by Georgia law into a new tool for voter disenfranchisement. Nor should this Court allow the SEB to make Georgia’s elections vulnerable to non-certification through a burdensome, unnecessary, and *ultra vires* hand-count process. The risk that Georgians’ votes could be nullified by the very people tasked with safeguarding them is intolerable in a representative democracy. The Court should grant Plaintiffs’ requested relief to ensure that voters—not partisan officials—determine election outcomes.

STATEMENT OF INTEREST

Amici Elbert Solomon, Porch’s Miller, Ava Bussey, Bryan Nguyen, and Raynard LaNier, Jr. are proud Georgia voters who intend to make their voices heard in local, statewide, and national contests this November, and do not want their votes nullified. They are from five counties; in all those counties, election board members have previously attempted to weaponize certification to block ballots from counting toward the official results. Amici do not want to see similar efforts succeed in the upcoming election as a result of unnecessary and unlawful new tabulation and certification rules. Amici League of Women Voters of Georgia (“the League”), Delta Sigma Theta Sorority, Inc. (the “Deltas”), and the New Georgia Project are non-profit, nonpartisan organizations whose work advances voter participation and civic engagement, particularly among communities of color. The League and the Deltas are also membership organizations dedicated to protecting their members’ fundamental right to vote. Amici oppose the SEB’s attempt to legitimize

election subversion through the certification process. Amici's arguments apply only to the two Certification Rules and the Hand Count Rule. Importantly, Amici take no position regarding the Plaintiffs' facial challenge that the Georgia General Assembly insufficiently delegated rulemaking authority to the SEB such that the SEB's promulgation of any rule is unconstitutional.

Amicus curiae Elbert Solomon is a resident and registered voter in Spalding County, Georgia. Mr. Solomon identifies as Black. He is active in local politics and a consistent voter for decades. As a teenager in Mississippi during the civil rights movement, Mr. Solomon understood that the ability to cast a vote and to have that vote counted has not always been protected. Those experiences inform his civic engagement work today. Mr. Solomon attends Spalding County Board of Elections meetings regularly and was very concerned when a board member recently voted against certifying election results. He worries that his vote will not be counted if his county fails to certify election results. Mr. Solomon is alarmed by the prospect of disenfranchisement in the upcoming election. Should he actually be disenfranchised, decades after he fought to secure his voting rights, Mr. Solomon would lose confidence in the electoral system and civil rights progress in Georgia.

Amicus curiae Porch'se Miller is a resident and registered voter in DeKalb County, Georgia. She identifies as Black. Ms. Miller is active in local and statewide politics as well as a consistent voter. She is a military veteran and cast her first vote by absentee ballot at age 18 from her station in Germany. Based on this experience, she is particularly concerned about the recent demonization and unfounded suspicion of absentee ballots. She was disturbed to learn two members of her county board of elections voted not to certify the results in previous elections. She is concerned with nullification of any votes, but especially with her votes for down-ballot races. She notes that she rarely votes a "straight ticket" on any ballot and worries that voices like hers

will not be heard if the DeKalb County Board of Elections fails to certify results. If her county fails to certify the results, she will lose confidence in the electoral system.

Amicus curiae Ava Bussey is 18 years old and a registered Cobb County voter. She identifies as multiracial. Ms. Bussey is excited to exercise her right to vote and cast a ballot for president for the first time. Because of her experiences growing up in Cobb County, Ms. Bussey has always been aware and educated about racial gerrymandering and the dilution and suppression of Black votes in particular. She is very protective of her right to vote and believes we should all be working toward removing impediments to voting rather than installing more. She believes that voting is the only way to guarantee that her opinion is counted in the political process. She was very concerned when one of her county board of elections members voted not to certify results in recent elections. She is concerned about the risk of non-certification in the November election, which could mean that her ballot in her very first election year would not be counted. She is also worried that non-certification could result in the disenfranchisement of other Cobb County voters in the upcoming election. If she were disenfranchised because her board of elections' failure to certify results, Ms. Bussey would lose confidence in our political system.

Amicus curiae Bryan Nguyen is 18 years old and a registered Gwinnett County voter. Mr. Nguyen identifies as Vietnamese-American. He turned 18 years old last November and became eligible to vote. He participated in his first election this March and also served as a poll worker in Gwinnett County in the May election. He is excited to participate in his first presidential election this November and has been looking forward to voting since he learned about the right to vote in elementary school. Mr. Nguyen is active in his community and works to organize his peers around LGBTQ+ issues and climate change. He understands his protected right to vote includes both his right to cast a ballot and to have that ballot counted. He was very concerned that two members of

his board of elections voted not to certify results in recent elections, is concerned that Gwinnett County could fail to certify results in this November election, and believes he could be disenfranchised should his county fail to certify results. Mr. Nguyen comes from a family of irregular voters, but he intends to remain engaged and become a consistent voter. He would be disheartened if his ballot in his first election year was not counted, and it would lower his confidence in our political system.

Amicus curiae Raynard LaNier, Jr. is a resident and registered voter in Fulton County, Georgia, and has exercised his right to vote since turning 18. As a child, he would accompany his mother—who was Ralph David Abernathy’s personal assistant—to demonstrations, including activities related to protecting the right to vote. Mr. LaNier continues his family’s legacy in the civil rights movement by organizing and participating in voter registration and get-out-the-vote efforts. He believes that his right to vote includes both the right to cast a ballot and to have that ballot counted. He was very concerned that one of his county board of elections members voted not to certify results in recent elections. He is concerned about the risk of Fulton County failing to certify results of the November election. He believes that he is at risk of disenfranchisement and would be disappointed and discouraged if his ballot, including his votes for down-ballot races, was not counted. It would lower his confidence in our political system.

Amicus curiae League of Women Voters of Georgia (the “League”) is a non-partisan, nonprofit membership organization that is part of the League of Women Voters of the United States, which has state and local leagues in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Hong Kong. The League fights to protect the rights of all eligible voters and often focuses its work on underrepresented communities to expand access for Black and Latinx voters and other historically marginalized communities who have been left out of the democratic

process. The League is dedicated to encouraging its members to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. As such, it has an interest in preventing the disenfranchisement of its members and other eligible voters, including those it may have supported in exercising their right to vote.

Amicus curiae are sorors of Delta Sigma Theta Sorority, Inc. (“the Deltas”), a national, nonpartisan, not-for-profit membership service organization, comprised predominately of Black women, that was founded in 1913 on the campus of Howard University and incorporated under the laws of the District of Columbia. Six weeks after the organization was initially formed in 1913, several of its founding members marched in the historic Suffragist March under the Delta Sigma Theta Sorority, Inc. banner—the Deltas’ first public act. The Deltas’ participation in the march involved personal risk and indignity, as they were not welcomed by some white suffragists, who insisted that the Black women march at the end of the procession. Civic engagement has remained a core tenet of the Deltas’ mission since its founding, as democracy and justice can only be achieved through voting. Thus, voter registration and voter education programs, as well as combatting voter suppression, are some of the organization’s top social action priorities. As such, Deltas have an interest in protecting against the disenfranchisement of its members and other eligible voters.

Amicus curiae New Georgia Project (“NGP”) is a nonpartisan, non-profit organization that works across Georgia to increase the civic participation of historically marginalized communities, including communities of color, working class communities, low-income communities, and communities of unhoused Georgians, through nonpartisan voter registration, voter education, and get out the vote efforts, as well as by organizing and advocating on issues important to those communities. NGP is dedicated to encouraging the voters it serves to exercise their right to vote

as protected by the Constitution and the Voting Rights Act of 1965. As such, it has an interest in preventing the disenfranchisement of those and other eligible voters.

Amicus curiae Secure Families Initiative (“SFI”) is a nonpartisan 501(c)(4) not-for-profit organization comprised of military spouses and family members. SFI was founded as a standalone organization in 2021 and is affiliated with the 501(c)(3) organization, Secure Families Foundation (“SFF”). SFI represents military members and their families serving abroad in at least 8 different countries. Member families are also posted to military bases within the United States. SFI’s mission is to mobilize diverse military partners, parents, kids, and veterans to vote and advocate for their communities. Recognizing military members make enormous sacrifices to strengthen and defend our country, SFI seeks to influence issues of foreign policy and national security that especially impact SFI’s members. SFI has members registered in Georgia. SFI’s members in Georgia include registered absentee voters and registered voters planning to vote in person. As a result, SFI has a unique interest in ensuring that their members are not disenfranchised, as well as all military and overseas voters in Georgia.

BACKGROUND

The SEB recently adopted three rules. The Certification Rules could be implemented in a manner that conflicts with state law. A third rule—the Hand Count Rule—clearly conflicts with state election law. All three of these rules, if left unaddressed by this Court, would dramatically interfere with counties’ ability to fulfill their obligation to timely certify election returns. Further, left unchecked, all three would encourage local officials dissatisfied with the outcome of an election to launch baseless, drawn-out investigations that could derail the orderly process of vote-counting, sow chaos and distrust in the democratic process, and disenfranchise Georgia voters, in particular Black voters and other voters of color.

I. Under Georgia Law, County Election Superintendents Have a Nondiscretionary Duty to Certify and Transmit Results by a Date Certain, Which in Turn Ensures the Timely Certification of Presidential Elections by Georgia’s Secretary of State and Governor.

Georgia law imposes on the entity acting as the county’s “elections superintendent”—which in most counties is the entirety of the county’s election board and in a minority of counties is a single probate judge³—a mandatory duty to certify local election results by a date certain and to immediately transmit those results to the Secretary of State. O.C.G.A. §§ 21-2-493(k), 21-2-497. Specifically, Georgia law provides that election “returns *shall* be certified by the superintendent” by 5:00 P.M. on the Monday after the election, and then “*shall* be immediately transmitted to the Secretary of State.” O.C.G.A. §§ 21-2-493(k) (emphasis added), 21-2-497 (emphasis added). These duties to certify and transmit results by a date certain are nondiscretionary, as denoted by the statute’s use of the word “shall.”⁴

The superintendents’ timely certification and transmission of election results enables the state’s Secretary and Governor to fulfill their statutory obligations to certify the presidential election by certain prescribed dates. Under Georgia election law, in elections affecting more than one county, after county superintendents certify and transmit election results to the Georgia Secretary of State, the Secretary must “tabulate, compute, and canvass” the votes, O.C.G.A. § 21-2-499(a), and then—“*shall*” certify the results “no later than 5:00 P.M. on the seventeenth day following the date on which the election was conducted.” O.C.G.A. § 21-2-499(b). For presidential elections, the Secretary sends the returns to the Governor, who enumerates the votes again and

³ See O.C.G.A. § 21-2-2(35)(A) (defining “Superintendent” as “the county board of elections [or] the county board of elections and registration . . . if a county has such”).

⁴ See, e.g., *Hall Cnty. Bd. of Tax Assessors v. Westrec Properties, Inc.*, 303 Ga. 69, 75 (Ga. 2018) (“The word ‘shall’ is generally construed as a word of command. The import of the language is mandatory.”).

then “*shall* certify the slates of electors no later than 5:00 P.M. on the eighteenth day following the date on which such election was conducted.” *Id.* (emphasis added). Again, the presence of “shall” means that the Secretary and Governor have a mandatory obligation to certify by the specified date.

II. To Ensure Timely Certification, the State’s Statutory Scheme Strictly Delineates the Role of the Superintendent and Bars the Superintendent from Engaging in Tasks That Could Delay Certification, Such as Pre-Certification Investigations Into Voter Fraud and Pre-Certification, Precinct-Level Hand Counts.

Georgia’s statutory scheme ensures that superintendents meet their important statutory deadlines for certifying and transmitting election results by limiting their ability to engage in activities that may cause undue delay. For instance, while superintendents have the authority to order a recount to address certain observed discrepancies relating to the tabulation of the count, O.C.G.A. § 21-2-495(a)-(b), they are not authorized to investigate allegations of erroneous or fraudulent election returns, O.C.G.A. § 21-2-493(i). Indeed, the Georgia Supreme Court has explained that a superintendent’s duties during an election are nothing more than “ministerial.” *See, e.g., Thompson v. Talmadge*, 201 Ga. 867, 876 (1947) (“[A]ny and all persons who are merely authorized to canvass” were not “exercising or authorized to exercise any discretion, but were simply performing the ministerial act of disclosing to the public the official election returns”); *Brockett v. Maxwell*, 73 Ga. App. 663, 663 (App. Ct. 1946); *Bacon v. Black*, 162 Ga. 222 (1926).

Under the state’s statutory scheme, any anomalies found at any step of the tabulation and computation processes are not addressed by delaying or refusing certification or engaging in endless counting and recounting of ballots by hand, but instead by *post*-certification investigations and challenges. *See* O.C.G.A. §§ 21-2-493, 21-2-520. Specifically, the state’s election code provides: “If any error or fraud is discovered, the superintendent *shall* compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented to him or her, and shall

report the facts to the appropriate district attorney for action.” O.C.G.A. § 21-2-493(i) (emphasis added). Additionally, the state’s election code provides extensive procedures for candidates and electors alleging irregularity to contest the election in Superior Court. *See* O.C.G.A. § 21-2-520, *et seq.*

In sum, timely county-level certification and transmission of election results is an early and crucial step in ensuring that Georgia voters are heard at the local, state, and federal levels. A delay or denial of county certification could actually interfere with Georgia’s existing legal mechanisms for identifying and addressing fraud or error, which occur after certification.

III. Georgia’s Comprehensive Tabulation Laws Do Not Contemplate Precinct-Level Hand Counts.

Georgia law strictly prescribes tabulating procedures to ensure the results are true and accurate. After the close of polls on Election Day, the poll manager and at least one assistant manager at each precinct must complete any required accounting and documentation under the election code. O.C.G.A. § 21-2-420(a). But this accounting does not contemplate a hand count at the precinct level. That is because the precinct poll manager and at least one assistant manager must then “immediately deliver” the ballots to the election superintendent, O.C.G.A. § 21-2-420(a), and it is not until the ballot boxes arrive at the tabulating center that the seal on each container of ballots is inspected and then opened for processing by the tabulating machines, O.C.G.A. § 21-2-483(c). No part of the election code permits hand-counting ballots at the precinct level, and for good reason. Ballot boxes are sealed to ensure their security and integrity until they can arrive at the county-wide tabulating center, which is set up to count ballots according to statutory procedures and safeguards. Precincts, on the other hand, are not set up for, nor are poll workers trained for, the rigorous and statutorily prescribed exercise of counting ballots, nor are they equipped and trained to safeguard the security of ballots or to ensure they are not tampered

with. In fact, extrajudicial accounting procedures at the precinct-level, especially hand counts, may be inconsistent between precincts and *introduce* errors into the counting process.

As previously discussed, Georgia law also details the procedures for addressing perceived ballot count discrepancies, none of which include a precinct-level hand count before certification. *See* O.C.G.A. § 21-2-493; O.C.G.A. § 21-2-520. Thus, additional precinct-level, hand counting procedures would only delay the tabulation of results and increase the likelihood of accounting errors.

IV. The New Rules Disturb the Statutory Framework.

The SEB is charged with “promulgat[ing] rules and regulations so as to obtain uniformity . . . in the practices . . . of superintendents.” O.C.G.A. § 21-2-31(1). In so doing, the SEB must “formulate, adopt, and promulgate such rules and regulations, *consistent with law*, as will be conducive to the fair, legal, and orderly conduct of primaries and elections.” O.C.G.A. § 21-2-31(2) (emphasis added). The SEB recently considered and adopted three rules that attempt to alter the statutory scheme. The Certification Rules, if left unaddressed, may be implemented inconsistent with law and the Hand Count Rule is plainly not “consistent with law.”

A. The Heekin Rule

On March 26, 2024, a member of the Fulton County Board of Registration and Elections named Michael Heekin⁵ submitted a rulemaking petition to the SEB seeking to require a “reasonable inquiry” into the election before certifying the returns. Specifically, Heekin proposed to amend SEB Rule 183-1-12.02 to change the process for certifying election results under the guise of including a new definition of certification that does not appear in the Georgia Code. The

⁵ The potential for the rule change to disrupt certification was obvious, because Mr. Heekin had only days earlier voted against certifying the results of the presidential preference primary in Fulton County, without offering any evidence that the results were not “a true and accurate accounting of all votes cast in that election.” *See infra* at pp. 17-18.

Heekin Rule provides as follows:

“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.

The SEB voted to adopt the Heekin Rule by a 3-2 margin.⁶ It became effective on September 4, 2024, twenty days after it was filed with the Secretary of State’s office. *See* O.C.G.A. § 50-13-6(a).

B. The Grubbs Rule

On June 17, 2024, Salleigh Grubbs, Chair of the Cobb County Republican Party and a member of the Executive Committee of the Georgia Republican Party, proposed amendments to Rule 183-1-12-.12 that would add novel conditions on county election certification.⁷ Perhaps most dramatically, the Grubbs Rule provided that “[b]oard members shall be permitted to examine all election related documentation created during the conduct of elections prior to certification of results.” Additionally, it proposed to amend Rule 183-1-12-.12.1(f)(2)–(4) to add brand-new numerical checks before certification that are inconsistent with the election code. In subsection (f)(5), the Grubbs Rule added two sentences that distort the statutory command that, even if error or fraud is suspected, the “superintendent shall compute and certify the return justly” and inform the district attorney of the issues after certification, *see* O.C.G.A. § 21-2-493(i); instead, the Grubbs Rule allows the county boards to “determine a method to compute the votes justly,” inviting extra-legal discretion into the process and in all probability leading to different procedures being applied in different counties. The SEB voted to adopt the rule by a 3–2 margin. The Grubbs

⁶ Georgia House of Representatives, *State Election Board Meeting, August 6, 2024*, 7h 8h:23m:50s, YouTube (Aug. 6, 2024), <https://www.youtube.com/live/rBiqOdOiD9s?feature=shared&t=30230>.

⁷ *See* Salleigh Grubbs, *Petition for Rule Changes pursuant to GA Regs. 183-1-1-.01* (June 17, 2024), (https://sos.ga.gov/sites/default/files/forms/Petition%20-%20Grubbs_Redacted.pdf).

rule went into effect on September 16, 2024.⁸

C. The Hand Count Rule

On September 20, 2024, the SEB voted to adopt amendments to Rule 183-1-12-.12. The amendments force poll workers at every precinct to continuously hand-count every ballot starting as early as the close of Election Day and continuing through the end of the county certification period.⁹ The Rule assigns three poll workers to open each scanner ballot box—which are normally kept sealed for security until they arrive at the county-wide tabulating center—as ballots are cast, which requires each poll worker to count and recount the ballots until they all arrive at the same number of ballots separately, mandates that poll workers compare the hand counts to the scanner counts, and instructs the precinct poll manager to “correct the inconsistency” where possible.¹⁰ Importantly, the rule does not describe what or how “corrective measures” should be taken or what happens when the inconsistency cannot be corrected.¹¹ The Hand Count Rule will go into effect on October 10, 2024.¹²

ARGUMENT

This Court should once again affirm that county election superintendents are obligated to certify elections by a date certain by providing the requested declaratory and injunctive relief. If the Court does not grant Plaintiffs’ requested relief now regarding the three new rules described herein, the new rules threaten to disrupt county-level certification across the state and potentially strip thousands of Georgians of the fundamental right to vote. Implementation of the new rules will interject chaos, confusion, and uncertainty into the election process and results. The Court

⁸ See Ga. Comp. R. & Regs. r. 183-1-12-.12.

⁹ See *supra* n.2.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Ga. Comp. R. & Regs. r. 183-1-12-.12.

should act now to protect voters from the SEB’s anti-democratic, *ultra vires* acts before voting begins.

I. Mandatory Certification Is Part of a Comprehensive Statutory Scheme That Safeguards the Right to Vote.

“There is a sanctity to elections under our system of self-government, wherein the will of the people . . . is the supreme law.” *Miller v. Hodge*, No. S24A0490, 2024 WL 3801827, at *4 (Ga. Aug. 13, 2024) (cleaned up). The right to vote is enshrined in Georgia’s Constitution, Ga. Const. art. II, § 1, ¶ II, and it is axiomatic that the right to vote includes the right to have your vote counted.¹³ *See, e.g., Griffin v. Trapp*, 205 Ga. 176, 181 (1949); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Certification ensures that the will of the people is formally recognized and then enacted. Disrupting certification threatens the right to vote because, if elections results are not certified, the votes do not count.

Certification is not optional. It is a nondiscretionary, ministerial duty mandated by the Legislature, and it has been recognized as such for more than a century.¹⁴ The election code directs election superintendents to “receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to such authorities as may be prescribed by law.” O.C.G.A. § 21-2-70(9). The certification process outlined in the Georgia Code does not grant election superintendents an iota of power to delay, alter, or obstruct that process. Indeed, certification is mandatory even if the superintendent believes that the returns themselves are somehow erroneous or fraudulent. *See* O.C.G.A. § 21-2-493(i).

That is because certification is just one step in a comprehensive statutory scheme that

¹³ *See, e.g., Griffin v. Trapp*, 205 Ga. 176, 181 (1949); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *United States v. Classic*, 313 U.S. 299, 315 (1941).

¹⁴ *See, e.g., Tanner v. Deen*, 33 S.E. 832, 835 (Ga. 1899); *Bacon v. Black*, 162 Ga. 222, 226 (Ga. 1926).

safeguards election integrity and a delay or denial of county certification would actually interfere with the legal mechanisms for addressing suspected fraud or error. Although election fraud is exceedingly rare,¹⁵ and the Georgia Secretary of State’s office has called the 2020 presidential election “the most secure election in the state’s history,”¹⁶ the Legislature has designed robust and redundant verification procedures to ensure the accuracy of the count both before and after certification. The election code imposes several specific, pre-certification duties on county superintendents, including logic and accuracy testing of voting equipment, risk-limiting audits for the returns, and recanvassing if discrepancies are observed. O.C.G.A. § 21-2-374(b); O.C.G.A. § 21-2-379.6(c); O.C.G.A. § 21-2-498(b); O.C.G.A. § 21-2-495(b). Post-certification, the election code allows candidates and voters to file election contests in the courts. O.C.G.A. § 21-2-521. This reflects the Legislature’s considered judgment that courts are best positioned to adjudicate claims of fraud or misfeasance, as judges routinely preside over truth-seeking inquiries subject to the rules of evidence, the norms of party presentation, and the checking function of public accountability.

II. The Rule Changes Threaten to Disrupt Certification and Harm Georgia Voters.

The Certification Rules impose new conditions on certification and attempt to rewrite the Legislature’s instructions on how to handle claims of fraud or error. Similarly, the Hand Count Rule adds new, onerous procedures that open the counting process to errors. Together, the new rules threaten to allow rogue county board members to delay certification, manipulate the certified

¹⁵ Reuters Fact Check, *Re-examining how and why voter fraud is exceedingly rare in the U.S. ahead of the 2022 midterms*, Reuters (June 2, 2022), <https://www.reuters.com/article/fact-check/re-examining-how-and-why-voter-fraud-is-exceedingly-rare-in-the-us-ahead-of-th-idUSL1N2XP2AI/>.

¹⁶ Stanley Dunlap, *Georgia election board dismisses claims of 'ballot harvesting' in 2020 election*, Georgia Recorder (May 18, 2022), <https://georgiarecorder.com/2022/05/18/georgia-election-board-dismisses-claims-of-ballot-harvesting-in-2020-election/>.

count, and deny the results of the election, which would disempower Georgia voters and defy the mandates of Georgia law.

A. The rule changes invite rogue local officials to obstruct certification.

Under Georgia law, election superintendents are required to certify county results by 5:00 PM on the Monday after election day. O.C.G.A. § 21-2-493(k). Several features of the Certification Rules and the Hand Count Rule encourage individual election officials to defy that mandatory deadline, putting certification at risk.

First, the Heekin Rule’s new definition of “certification” seemingly makes certification contingent upon a “reasonable inquiry” by county boards into the returns—a contingency not enumerated or contemplated anywhere in the Georgia Code. Ga. Comp. R & Regs. 183-1-12-.02(1)(c.2). The Heekin Rule does not define “reasonable” or “inquiry” or place any guardrails on such inquiry’s timing, subject, or scope. It also does not say how many board members are needed to conduct an inquiry, what happens after the inquiry, for how long such an inquiry can extend, or what recourse voters have if a board member claims their “inquiry” is not complete by the certification deadline. These ambiguities open the door for county board of election members to attempt to stop certification by pursuing a long-term inquiry that extends beyond the statutory deadlines.

Second, the Grubbs Rule bars election superintendents from counting any votes from a precinct unless and until it perfectly reconciles “the total number of ballots cast to the total number of unique voter ID numbers.” Ga. Comp. R & Regs. 183-1-12-.12(f)(4). This requirement is similarly found nowhere in the statute, which authorizes the superintendent to suspend recording of the returns from a particular precinct only where “the total vote returned . . . exceeds the number of electors in such precinct[.]” O.C.G.A. § 21-2-493(b) (emphasis added). The statute does not

authorize, let alone require, the superintendent to suspend certification of precinct totals while it investigates *any* apparent discrepancy between the number of ballots and number of voters. The Grubbs Rule thus fashions an entirely new benchmark that could result in obstruction and delay.

Third, the Grubbs Rule invites individual “[b]oard members” to delay certification until they have personally inspected “all election related documentation created during the conduct of elections.” Ga. Comp. R & Regs. 183-1-12-.12(f)(6). This new examination prerogative presents another invitation for rogue election board members to attempt to tie up certification with their own unauthorized fishing expeditions seeking to uncover non-existent fraud.

The rule change represents a massive expansion of authority for individual election board members, who comprise only *part* of an election “superintendent” and have no statutory investigatory power as individuals at all.¹⁷ County election boards generally consist of political appointees from the two major political parties in the county,¹⁸ so a rule that aggrandizes the power of a single board member also upsets the balance of power and invites partisan gamesmanship.

The rule’s sweeping language contains no limitations whatsoever on what documents these individual board members may demand, or why, or from whom. And it would require the production of those documents in the few days after election day, when election workers are already extraordinarily busy fulfilling their statutory duties, making timely tabulation and certification of the returns even harder.

¹⁷ See O.C.G.A. § 21-2-40(b) (allowing for the creation of local election boards of “not fewer than three members” to carry out the “powers and duties of the election superintendent”).

¹⁸ See, e.g., Fulton County, *Board of Registration & Elections*, https://fultoncountyga.gov/-/media/Departments/Clerk-to-the-Commission/Boards_Authorities/2-22-2024-Updates/BOARD-OF-REGISTRATION-AND-ELECTIONS.pdf (last visited Sept. 9, 2024); Dekalb County Board of Registrations & Elections, *Board Details*, <https://dekalbcountyga.granicus.com/boards/w/968f9572ef2211df/boards/7129> (last visited Sept. 9, 2024).

Fourth, the Hand Count Rule allows any of the election officials in Georgia’s 159 counties to use the error-prone process of precinct-level hand-counting as an excuse for those officials to delay or deny certification under the ambiguous Certification Rules. For example, any inconsistency found by a precinct poll manager under the Hand Count Rule¹⁹ may create a pretext for an extended “reasonable inquiry” under the Heekin Rule, Ga. Comp. R & Regs. 183-1-12-.02(1)(c.2), or demands to inspect “election documentation” under the Grubbs Rule, Ga. Comp. R & Regs. 183-1-12-.12(f)(6).

Any local certification delays could have cascading effects across the state. The Secretary of State must certify Georgia’s statewide results by 5:00 PM on the 17th day after election day, and the Governor must certify Georgia’s slate of presidential electors by 5:00 PM on the 18th day. O.C.G.A. § 21-2-499(b). Failure of the counties to timely and faithfully certify their results could embroil the Secretary in unnecessary and time-consuming confrontations with local officials, potentially risk compliance with important deadlines set out under state and federal law, and potentially nullify the will of the people—this year and in every subsequent election.

These are not hypothetical concerns. Since 2020, an alarming number of Georgia officials have refused to perform their statutorily mandated certification duties and demanded burdensome document production as a condition of certification, without offering any actual reason to doubt the returns.²⁰ That includes elections officials in each and every county where the individual amici live and are registered to vote. This past March, the sponsor of the Heekin Rule opposed a motion to certify the results of the presidential preference primary in Fulton County—despite acknowledging that the statements of votes cast were “all in order”—because he considers “chain

¹⁹ *Supra* n.2.

²⁰ Citizens for Responsibility and Ethics in Washington, *Election Certification Under Threat*, 34–42 (Aug. 2024), <https://perma.cc/UCD3-K2ZS>.

of custody” to be “the weakest link” in elections even “predating the American Revolution.”²¹ He did not offer evidence that the chain of custody was actually broken in Fulton or offer any other reason that the results should not be certified.²² To date, none of the Georgia officials who have recently opposed certification have had any legal authority to do so, but the Certification Rules could open the door for them to try to launch their own independent investigations, request voluminous documentation at will, or delay certification in defiance of duly enacted statutes.

B. The rule changes invite county officials to try to manipulate the certified count.

The rule changes also lay the groundwork for rogue local officials to attempt to manipulate the certified count and selectively disenfranchise Georgia voters.

The Grubbs Rule invites election boards to throw out votes they disagree with by invoking the shibboleth of election fraud. Under the election code, a superintendent that discovers “fraud or error” still “shall compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented to him or her,” and then refer the issue to law enforcement. O.C.G.A. § 21-2-493(i). In other words, the superintendent “shall” certify “regardless” of any purported fraud. The Grubbs Rule attempts to subvert this clear directive by providing that, if “error” or “fraud is discovered, the Board shall *determine a method* to compute the votes justly.” Ga. Comp. R & Regs. 183-1-12-.12(f)(5) (emphasis added). In other words, the rule purports to vest in the board the authority to investigate and address fraud or error that Georgia law bestows on courts and prosecutors. The rule provides no guardrails on, or limiting principles for, what sort of “method” county boards can adopt, giving them free rein to make it up as they go along. And by directing election boards to “determine” their own “method[s]” for “justly” computing the votes whenever

²¹ Fulton Government Television, *Fulton County Board of Registration & Elections Meeting March 18, 2024*, 38:14–39:42, 44:54, YouTube (Mar. 18, 2024), <https://perma.cc/ZK2L-YDC3>.

²² *Id.*

they claim to discover fraud, the rule improperly suggests that they can simply bypass the courts and make their own decisions about which ballots should “justly” count. This is both at odds with the Georgia election code and profoundly undemocratic. The Hand Count Rule similarly allows poll managers to take “corrective measures” to correct any inconsistencies between ballot scanner and hand counts—all before tabulation occurs at the county-wide level—without limit.²³

C. The rule changes provide cover for election officials to deny the election results.

Even if the results are timely and accurately certified, the rule changes create new reasons for local officials to deny the election results, fueling dangerous election denialism that could itself subvert the will of the people.

We have been here before. The smallest perceived discrepancies and glitches have sparked widespread misinformation campaigns and conspiracy theories that undermined the peaceful transfer of power. In 2020, the election board of Coffee County, Georgia, refused to certify the results of the presidential election after a recount on the basis of a 50-vote discrepancy.²⁴ The board blamed voting machines for the difference, even though the elections director admitted she “was unsure whether she had scanned a batch of 50 ballots twice, which,” in the words of the Secretary of State, “would account for the 50-vote discrepancy.”²⁵ One member of that elections board then illegally permitted presidential campaign affiliates to copy large troves of records and data to fuel

²³ *Supra* n.2.

²⁴ Office of Georgia Secretary of State Brad Raffensperger, *Secretary of State’s Office Opens Investigation into Coffee County’s Handling of Recount* (Dec. 9, 2020), <https://sos.ga.gov/news/secretary-states-office-opens-investigation-coffee-countys-handling-recount>.

²⁵ *Id.*

an extra-judicial investigation into voting machines.²⁶ No evidence of interference with the machines was uncovered, but conspiracy theories related to those machines ballooned online and “reinforced the Stop the Steal movement, which ultimately led to violence.”²⁷ The new rules make similar or worse situations even more likely, threatening to unlawfully thwart the will of the people.

III. The Rule Changes Subject Georgians to Unequal Risks of Disenfranchisement and Would Disproportionately Risk Disenfranchising Black Voters and Other Voters of Color.

All of these potential disruptions to the certification process create intolerable risks of disenfranchisement for Georgia voters. They could also result in the selective disenfranchisement of voters according to the whims of unelected county election board members.

If allowed to stand, the vagueness and ambiguity baked into the rule changes all but guarantee arbitrary and uneven enforcement. The new rules purport to give local officials unfettered discretion to conduct their own investigations and devise their own methods of computation in cases of purported fraud, “virtually guaranteeing a crazy quilt of” approaches to certification “from county to county.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019). Election officials in some counties will readily comply with their mandatory certification duties while others will attempt to delay, block, or manipulate certification according to their own preferences. Some county board members may invoke the Grubbs Rule and the Hand Count Rule to challenge only certain types of ballots or returns from certain precincts as fraudulent.

²⁶ Anna Bower, *What the Heck Happened in Coffee County, Georgia?*, LAWFARE (Aug. 15, 2023), <https://perma.cc/T7TM-9VHB>; Kate Brumback, *Security footage shows Georgia county Republican chair, election official present during breach of voting equipment*, PBS NEWS (Sept. 6, 2022), <https://perma.cc/DG68-EQ77>.

²⁷ See Center for an Informed Public, Digital Forensic Research Lab, Graphika, & Stanford Internet Observatory, *The Long Fuse: Misinformation and the 2020 Election*, Election Integrity Partnership, 91–97 (May 8, 2024), <https://perma.cc/DV9L-NW27>.

If these rules are permitted to go into effect unchecked, voters will be subjected to disparate risks of disenfranchisement simply because of where they live, or even who they are assumed to have voted for. This kind of haphazard and arbitrary election administration is irreconcilable with the ministerial nature of the certification process. It is also unconstitutional. *Id.* (disapproving state law permitting local officials to reject absentee ballots on the basis of a standardless signature-matching requirement that subjected eligible voters to arbitrary disenfranchisement). Whether voters will have an equal voice in Georgia cannot come down to the whims of individual county election board members.

Amici are also concerned that the rules changes heighten the risk that delays or denials of certification could be used to disenfranchise voters, especially Black voters and other voters of color. The Certification Rules, for example, could lead to baseless inquiries and unfettered examination of election-related materials in predominantly Black precincts, skewing countywide election results. Likewise, obstruction of the certification process in certain counties would disproportionately affect Black voters. Fulton County, for example, is home to 15% of Black voters statewide.²⁸ These concerns are not unfounded. The SEB has recently opened inquiries regarding mass voter challenges in eight counties in Georgia, including Fulton.²⁹ Like Fulton County, several of the counties listed in the investigation have a significant population of Black voters.

IV. The Rule Changes Will Undermine Amici's Faith in Democracy.

If the rule changes are permitted to go into effect without relief from this Court, amici will be forced to cast a ballot without the certainty that it will be counted. The risk of

²⁸ *Election Data Hub*, Georgia Secretary of State.<https://sos.ga.gov/election-data-hub> (last accessed September 30, 2024).

²⁹ *Georgia's State Election Board Approved an Investigation Into Failed Voter Registration Challenge*, Georgia Public Broadcasting, <https://www.gpb.org/news/2024/09/24/georgias-state-election-board-approved-investigation-failed-voter-registration> (last accessed September 24, 2024).

disenfranchisement to amici is too great to ignore. All individual amici live in counties where at least some county board members have *already* voted not to certify results in recent elections, without legal authority to do so and without offering any proof of election fraud. Amici would lose confidence in our democracy if their county boards successfully disrupted certification in future elections, including the November 2024 election. Some amici, like Ava Bussey and Bryan Nguyen, are new voters who would be profoundly disheartened if their first-ever vote in a presidential election contest was not counted. Other amici, like Elbert Solomon, remember the rampant voter suppression of the Jim Crow era and do not want to see their State go backwards. Other amici, like Porch'se Miller and Secure Families Initiative, have served in the military or have members who have served. They go out of their way to vote from abroad and would be disheartened to see that sacrifice undermined. It is especially disappointing to individual amici like Bryan Nguyen who has served as a poll worker in past elections, and to amici organizations, many of whose members have served as poll workers, that those charged with protecting voters' rights could use the Hand Count Rule to thrust poll workers into the election spotlight during a heated election all to provide cover for election denialism. Amici recognize that voter suppression takes many forms, and ask the Court not to allow the routine and nonpolitical process of election certification to become a tool of voter disenfranchisement.

By granting Plaintiffs' requested relief to declare the three rules inconsistent with the law that mandates certification and is therefore invalid, and the Hand Count Rule, separately inconsistent with law for the reasons provided in this amicus brief, this Court will give amici and voters across the state confidence in the democratic process. The Court should reject the SEB's unlawful attempt to disrupt the Legislature's mandatory certification scheme and election

administration procedure and instead defend Georgians' fundamental right to vote and to have their votes counted.

Respectfully submitted, this 9th day of October, 2024.

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**Motion for Pro Hac Vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2024, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** was electronically filed with the Court using the Court's eFileGA electronic filing system, which will automatically send an email notification of such filing to all attorneys of record, and was additionally served by emailing a copy to the currently known counsel of named parties and proposed intervenors as listed below:

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