

**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

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**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**

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Amici, Eric Johnson, Allen Peake, Brett Harrell, Tom Kirby, Mike Dudgeon, Jodi Lott, Ken Pullin, Marc Morris, Heath Clark (“Legislators”), and RightCount, Inc. (“RightCount”), move this Court for leave to file an amicus brief in support of Plaintiffs’ Verified Complaint for Declaratory and Injunctive Relief.

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.<sup>1</sup> RightCount’s mission is to help fortify and protect the rule of law in the tabulation of voting across the United States. It carries

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

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

Respectfully submitted, this 9<sup>th</sup> day of October, 2024

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*Eternal Vigilance Action, Inc., James Hall and Scot Turner v. State of Georgia*  
24CV01155

**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**

## 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 **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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AND INJUNCTIVE RELIEF**

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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 5<sup>th</sup>, 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 1<sup>st</sup> 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 141<sup>st</sup> 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 106<sup>th</sup> 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 114<sup>th</sup> 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 25<sup>th</sup> 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 131<sup>st</sup> 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 131<sup>st</sup> 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 26<sup>th</sup> 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 147<sup>th</sup> 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[.]”<sup>2</sup> 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*

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<sup>2</sup> 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).<sup>2</sup>

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.

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<sup>2</sup> 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)<sup>3</sup>; -493(i).

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<sup>3</sup> 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

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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 recanvass 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.<sup>4</sup> *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,

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<sup>4</sup> 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.<sup>5</sup> 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

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<sup>5</sup> <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 9<sup>th</sup> day of October, 2024

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*s/ J. Matthew Maguire, Jr.*

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*Eternal Vigilance Action, Inc., James Hall and Scot Turner v. State of Georgia*  
24CV01155

**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**

**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:

Christopher Scott Anulewicz  
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