

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ETERNAL VIGILANCE ACTION, INC., et)
al.)
)
Plaintiffs,)
)
v.) CIVIL ACTION NUMBER: 24CV011558
)
STATE OF GEORGIA, et al.)
)
Defendants.)

ORDER GRANTING DECLARATORY AND INJUNCTIVE RELIEF

This matter came before the Court for a hearing on Wednesday, October 16, 2024. The Court, having considered the filed pleadings, briefing of the parties, and oral argument, finds as follows:

The substantive facts in this case are undisputed. In September 2024, the State Election Board promulgated a number of rules challenged by the Plaintiffs. In particular, Plaintiffs challenge SEB Rules 183-1-12.02(c.2), 183-1-12.12(.1)(6), 183-1-14-.02(18), 183-1-14-.02(19), 183-1-13-.05, 183-1-12-.21, and 183-1-12-.12(a)(5). The 2024 Election is to take place on November 5, 2024 and early voting started on October 15, 2024. The SEB Rules at issue were passed approximately a month before early voting began. The questions presented are legal ones regarding whether SEB had the authority to promulgate the rules at issue and whether these rules are legally enforceable in light of the Election Code, the Georgia Constitution, and the U.S. Constitution.

For the reasons set forth below, the Court finds: (1) Plaintiffs have standing to assert the claims in their Complaint and Amended Complaint; (2) SEB Rules 183-1-12.02(c.2), 183-1-12.12(.1)(6), 183-1-14-.02(18), 183-1-14-.02(19), 183-1-13-.05, 183-1-12-.21, and 183-1-12-

.12(a)(5) are unsupported by the any provision of Georgia’s Election Code and are in fact contrary to the Election Code; (3) the SEB lacks authority to promulgate these challenged rules; (4) the SEB has no constitutional authority to promulgate these rules because the General Assembly did not provide “sufficient” or “realistic” parameters guiding the SEB’s rulemaking here; (5) the U.S. Constitution prohibits the SEB from enacting election rules regarding the election of federal officers; (6) declaratory relief is warranted; and (7) an injunction is warranted prohibiting the enforcement of the challenged and rules and vacating the same.

CONCLUSIONS OF LAW

A. Plaintiffs Have Standing to Assert Their Complaint

Plaintiffs Scot Turner and James Hall are voters, taxpayers, and community stakeholders who have an interest in their government following the law. *See Cobb Cnty. v. Floam*, 319 Ga. 89, 91, 901 S.E.2d 512, 515 (2024). Citizens, residents, voters and taxpayers, such a s Turner and Hall are injured when their governments do not follow the law. *Sons of Confederate Veterans v. Henry County Bd. of Comm’rs*, 315 Ga. 39, 61, 880 S.E.2d 168, 185 (2022). Turner and Hall have further established that they are uncertain regarding their rights and obligations as voters in this State and that they are uncertain regarding whether votes they cast in the 2024 election will be legally counted and certified. Additionally, Hall, in his individual capacity, is concerned about his role as a member of the Chatham County Board of Elections regarding whether to follow the SEB’s rules or the Election Code. Hall is concerned that absent clarification on this issue, he is exposing himself personally to legal liabilities and public opprobrium or scorn related to the actions he takes.

Plaintiff Eternal Vigilance Action, Inc. similarly has standing here. Eternal Vigilance is a multi-issue advocacy organization whose core function includes defending elections from attacks that erode public faith in electoral outcomes based on misinformation and disinformation. Eternal

Vigilance’s president, Plaintiff Turner, has testified before Congress about the damage misinformation and disinformation does to public confidence in elections. Eternal Vigilance has organizational standing here. *See Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 381–82, 870 S.E.2d 430, 437 (2022). The loss of public confidence in election institutions – stemming from the illicit creation and exercise of the SEB Rules 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 already 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 unlawful creation and exercise of the SEB Rules at issue through education of the public and local and state officials. Accordingly, under the standards set forth by the Georgia Supreme Court, Eternal Vigilance Action can maintain this challenge to the SEB Rules as an “injured” party with organizational standing.

B. The Challenged Rules Are Not Supported By The Election Code

All rules enacted by the SEB must be consistent with the Existing Election Code and the Georgia Constitution. *Ga. Real Estate Comm’n v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975). Stated another way, the SEB’s authority can only extend to “adopt rules and regulations to carry into effect a law already passed” or otherwise “administer and effectuate an existing enactment of the General Assembly.” *Id.* Absent such statutory predicate, the SEB has no authority whatsoever to pass a rule. Additionally, the SEB may not impose legal requirements that expand or contradict a law of the General Assembly. *See Premier Health Care Invs. LLC v. UHS of Anchor, LP*, 310 Ga. 32, 49 (2020), *passim*; *North Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 544 (1998); *Tabletop Media, Georgia Lottery Corp. v. Tabletop Media, LLC*, 346 Ga. App. 498,

503 (2018).

As such, administrative agencies may not “establish different standards within a statute that are not established by a legislative body.” *N. Fulton Med. Ctr. V. Stephenson*, 269 Ga. 540, 543-44 (1998). An administrative agency can only act to implement existing statutory schemes; they hold no authority to create new requirements or otherwise expand their own authority. *See id.* The duties of the SEB are outlined in O.C.G.A. § 21-2-31. The statute reads, in relevant part:

It shall be the duty of the State Election Board:

- (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; ...
- (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;

O.C.G.A. § 21-2-31 (2024). “The test of the validity of an administrative rule is twofold: whether it is authorized by statute and whether it is reasonable.” *Dep’t of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995). Moreover, an administrative rule is invalid if it “exceeds the scope of or is inconsistent with the authority of the statute upon which it is predicated.” *Polo Golf & Country Club Homeowners Ass’n v. Cunard*, 310 Ga. 804, 814 (2021).

As detailed below, the rules at issue exceed or are in conflict with specific provisions of the Election Code. Thus, the challenged rules are unlawful and void.

1. SEB Rule 183-1-12-.02(c.2) Contradicts O.C.G.A. § 21-2-493

O.C.G.A. § 21-2-493 sets forth the certification procedures and requirements that superintendents must adhere to when certifying election returns. SEB Rule 183-1-12-.02(c.2)

provides that to “certify” election returns, a superintendent must “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 “reasonable inquiry” provision of this rule is not part of O.C.G.A. § 21-2-493’s certification process and it adds an additional and undefined step into the certification process. As such, it is inconsistent with and unsupported by O.C.G.A. § 21-2-493. SEB Rule 183-1-12-.02(c.2) is thus void and unenforceable.

2. SEB Rule 183-1-12-.12 Contradicts O.C.G.A. § 21-2-493 and 21-2-70(9)

SEB regulation 183-1-12.12 allows county boards to make available to any individual member of a county board of election “all election related documentation created during the conduct of elections prior to certification results. This provision is directly inconsistent with the Election Code, which provides the time, manner, and method in which election-related documents must be produced and maintained. *See* O.C.G.A. 21-2-493. The SEB rule creates a statutorily unbounded scope under which superintendents can consider unauthorized materials when tabulating, canvassing, and certifying election results. Thus, this provision is void as it is inconsistent with the statutory framework, void and unenforceable.

3. SEB Rule 183-1-14-.02(18) Contradicts O.C.G.A. § 21-2-385

SEB Rule 183-1-14-.02(18) requires that a person delivering an absentee ballot provide a “signature and photo ID” at the time the absentee ballot is delivered. O.C.G.A. § 21-2-385(a) provides that absentee ballots may be mailed, or hand delivered by a voter’s “mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector.” Additionally, this provision allows a “caregiver” of any disabled elector to mail or deliver that elector’s ballot. Neither statute requires presentment of a signature or photo ID by the authorized person delivering the ballot. The SEB thus has no authority

to require such presentment as a condition of accepting and counting an otherwise properly delivered ballot. Thus, SEB Rule 183-1-14-.02(18) is unsupported by and contrary to O.C.G.A. § 21-2-385(a) and is unenforceable and void.

4. SEB Rule 183-1-14-.02(19) Contradicts O.C.G.A. § 21-2-382(c)(1)

SEB Rule 183-1-14-.02(19) demands video surveillance and recording of authorized drop boxes after the polls closed. The rule further provides for the removal and closure of any drop boxes not so monitored. O.C.G.A. § 21-2-382(c)(1) provides for certain monitoring of drop box locations, however it does not require video monitoring and it does not allow for the removal or closure of authorized drop boxes that are not video monitored. Indeed, the General Assembly in enacting this provision and statutorily authorizing absentee drop boxes in S.B. 202, specifically declined to adopt the video surveillance requirement that had existed in Emergency Rule 183-1-14-.06-.14(4) (2020). The SEB cannot by rule require something the General Assembly both did not legislate and specifically considered and declined to enact. Thus, SEB Rule 183-1-14-.02(19) is unsupported by and contrary to O.C.G.A. § 21-2-382(c)(1) and is unenforceable and void.

5. SEB Rule 183-1-13-.05 is void because it contradicts O.C.G.A. § 21-2-408

Rule 183-1-13-.05 expands the mandatory designated poll watching areas, despite the Election Code specifically delineating mandatory poll watching areas in O.C.G.A. 21-2-408. The Election Code requires designated poll watchers at “the check-in area, the computer room, the duplication area, and such other areas as the superintendent may deem necessary.” But the SEB expanded these mandatory locations to include “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.” This is contrary to and exceeds the limited mandatory poll watching areas promulgated by the General Assembly in O.C.G.A. § 21-2-408. Thus, this Rule 183-1-13-

.05 is inconsistent with the statutory framework and void.

6. SEB Rule 183-1-21-.21 Contradicts O.C.G.A. § 21-2-385(e)

In SEB Rule 183-1-21-.21, the SEB sets forth additional requirements for reporting absentee ballot information by the county board of registrars beyond that which is contemplated in O.C.G.A. § 21-2-385(e). The Election Code requires business daily reporting, rather than weekend reporting as added by the SEB regulation. The Election Code also does not require reporting by partisan and nonpartisan votes, while the SEB regulation does. And the Election Code requires posting certain information in a place of public prominence, but the rule requires information to be posted in a place accessible 24 hours a day to the public. This rule impermissibly expands upon and contradicts what is outlined in the Election Code. Thus, this provision is void as it is inconsistent with the statutory framework.

7. SEB Rule 183-1-12-.12(a)(5) is void because it contradicts O.C.G.A. §§ 21-2-420, 21-2-436, and 21-2-483

SEB 183-1-12-.12(a)(5) requires poll managers and poll officers to engage in a cumbersome process of ballot hand-counting after the close of polls on election day and prior to transmitting the ballots to the superintendents for certification. This hand counting exercise is nowhere authorized by the General Assembly in the Election Code. In fact, the rule vastly expands the authority and obligations of poll officials in preparing ballots pre-delivery to the superintendents and pre-certification. O.C.G.A. §§ 21-2-240, 21-2-436, and 21-2-483 all proscribe the duties of poll officers after the polls close. Hand counting is not among them. Thus, SEB 183-1-12-.12(a)(5) is void as inconsistent with the statutory framework.

C. The Rules Violate Ga. Const. Art. I, Sec. II, Par. III and Art. II, Sec. II, Par. I¹

Ga. Const. Art. I, Sec. II, Para. III provides that “[t]he 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 . . .” (emphasis added). The General Assembly is the sole branch of Georgia government that may legislate. *See* Ga. Const. Art. III, Sec. I, Par. I. And pursuant to Ga. Const. Art. II, Sec. II, Par. I, it is responsible for providing “by law for a procedure whereby returns of all elections by the people shall be made to the Secretary of State.” The General Assembly carried out these functions when it enacted the Election Code.

“The constitutional 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*, 310 Ga. at 49. The General Assembly may delegate some rulemaking authority to an executive agency, like SEB, but such a delegation must contain “sufficient” and “realistic” guidelines constraining the executive agency’s rulemaking. *See Premier Health Care*, 310 Ga. at 49-50. Without such guidelines, delegation is impermissible. Here, there are no guidelines providing for the challenged SEB Rules above.² Thus, the SEB lacked constitutional authority to enact them pursuant to Ga. Const. Art. I, Sec. II, Par. III.

¹ Plaintiffs further contend that Ga. Const. Art. I, Sec. II, Par. III, precludes the SEB from engaging in any rulemaking at all. Whether this constitutional provisions completely bars State executive bodies from engaging in rulemaking is uncertain, though the Georgia Supreme Court has permitted limited and guided rulemaking in some circumstances. *See Dep’t of Transp. v. City of Atlanta*, 260 Ga. 699, 703 (1990) (“*DOT*”) (which permitted some delegation where there is proper guidance from the General Assembly). The Georgia Supreme Court has indicated that *DOT* may have been wrongly decided. *See Premier Health Care*, 310 Ga. at 49, n.18; *Cazier v. Georgia Power Co.*, 315 Ga. 587, 593 n.5 (2023) (Peterson, J. concurring). But until the Georgia Supreme Court overrules *DOT*, it binds this Court.

² This footnote is to make clear that the Court is not making a determination on the Constitutionality of the SEB itself, simply that the rules listed above lacked delegated authority.

Additionally, the Georgia Constitution provides that only the General Assembly may provide for a law for a procedure whereby returns of all elections by the people are made to the Secretary of State.” The Election Code accomplishes this and the SEB has no authority to legislate otherwise.

Because all of the challenged rules violate these constitutional limitations, they are unenforceable and void.

D. The Rules Violate U.S. Const. art. I, § 4, cl. 1

U.S. Const. art. I, § 4, cl. 1 provides that the times, places and manners of holding an election for U.S. Senators and Representatives shall be prescribed in each state by the Legislature thereof. This federal constitutional duty may not be delegated by a state legislature to any other state body. *See Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay); *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay); *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. —, 144 S. Ct. 1221, 1258 (2024) (Thomas, J., concurring in part) (quotations omitted). Thus, the SEB’s rules affecting the time, place and manner of the as to the election of U.S. Representatives in the coming election are unconstitutional and void.

E. Declaratory Relief Is Proper

There is a genuine, justiciable controversy between the parties and Plaintiffs are uncertain regarding whether the challenged SEB rules are enforceable and whether the SEB has the authority to promulgate these rules. An answer to these questions prior to the counting and certification of the election, and prior to additional absentee and other ballots being cast is critical to the upcoming 2024 Election.

Ga. Const. Art. I, Sec. III, Par. V(b)(1) provides that this Court can enter a declaration that

the acts of the State or any arm of the State are outside of their authority or in violation of the laws of this State, the Constitution of this State, or the Constitution of the United States. Additionally, O.C.G.A. § 9-4-1, *et al.* (the Georgia Declaratory Judgment Act) provides a statutory mechanism for a party securing declaratory relief against the State.

Because this Court has determined that SEB Rules 183-1-12.02(c.2), 183-1-12.12(1)(6), 183-1-14-.02(18), 183-1-14-.02(19), 183-1-13-.05, 183-1-12-.21, and 183-1-12-.12(a)(5) are contrary to the laws of the State of Georgia, the Constitution of the State of Georgia, and the Constitution of the United States and that the SEB had no authority to implement these rules, the Court here **DECLARES THAT THESE RULES ARE ILLEGAL, UNCONSTITUTIONAL AND VOID.**

Additionally, Ga. Const. Art. I, Sec. III, Par. V(a) provides that “[l]egislative acts in violation of his Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.” To the extent that Defendants contend the Election Code permitted the delegation of rulemaking authority to the SEB, then such a delegation violates Ga. Const. Art. I, Sec. II, Par. III, Ga. Const. Art. II, Sec. II, Par. I, and U.S. Const. art. I, § 4, cl. 1 this Court so **DECLARES.**

F. Injunctive Relief is Proper

Ga. Const. Art. I, Sec. II, Para. V(b)(1) provides that after awarding declaratory relief the Court may enjoin the actions declared unlawful. Because the Court has now declared above that SEB Rules 183-1-12.02(c.2), 183-1-12.12(1)(6), 183-1-14-.02(18), 183-1-14-.02(19), 183-1-13-.05, 183-1-12-.21, and 183-1-12-.12(a)(5) are unlawful and unconstitutional, it now follows that the Court hereby **ENJOINS THE STATE OF GEORGIA AND THE SEB FROM ENFORCING, REQUIRING COMPLIANCE WITH, OR OTHERWISE UTILIZING SEB**

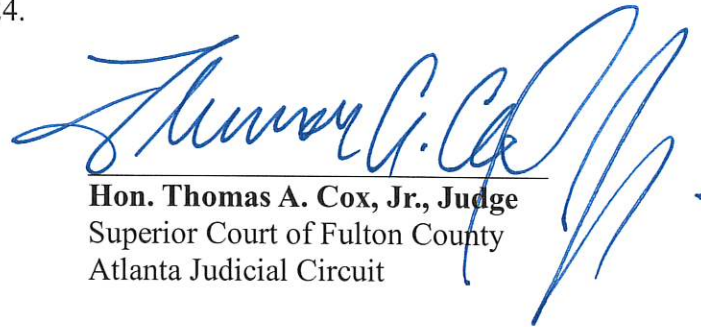
Rules 183-1-12.02(c.2), 183-1-12.12(1)(6), 183-1-14-.02(18), 183-1-14-.02(19), 183-1-13-.05, 183-1-12-.21, and 183-1-12-.12(a)(5).

Additionally, the State and the SEB are hereby **DIRECTED TO IMMEDIATELY REMOVE THESE RULES FROM THEIR ROLES AND OFFICIAL REPORTING AND TO IMMEDIATELY INFORM ALL STATE AND LOCAL ELECTION OFFICIALS THAT THESE RULES ARE VOID AND ARE NOT TO BE FOLLOWED THROUGH THE SAME MECHANISMS THAT THE SEB PROVIDED SUCH RULES TO THE STATE OR LOCAL ELECTION OFFICIALS OR THROUGH THE SAME MECHANISMS THAT THEY INFORMED THE STATE OR LOCAL ELECTION OFFICIALS OF THESE RULES.**

8. Final Judgment

Pursuant to the foregoing, this is the **FINAL JUDGMENT** of this Court regarding this matter and this matter is closed.

SO ORDERED, this 16th of October, 2024.


Hon. Thomas A. Cox, Jr., Judge
Superior Court of Fulton County
Atlanta Judicial Circuit