Case Nos. S25A0362 & S25A0490

In the
Supreme Court of Georgia

STATE OF GEORGIA,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Consolidated Appellants,

v.

ETERNAL VIGILANCE ACTION, INC., *et al.*,

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*,

Appellees.

On Appeal from the Superior Court of Fulton County
Civil Action File No. 24CV011558

RESPONSE BRIEF OF APPELLEES GEORGIA STATE CONFERENCE OF THE NAACP AND GEORGIA COALITION FOR THE PEOPLE'S AGENDA

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INTRODUCTION

For decades, Georgia State Conference of the NAACP ("Georgia NAACP") and Georgia Coalition for the People's Agenda, Inc. ("GCPA") (together, "Intervenor-Appellees") have worked to protect voters in the State of Georgia. They intervened in this case for that same reason. The Georgia State Election Board ("SEB") has authority to create certain rules for the management of the State's elections, but those rules must be consistent with existing Georgia law. *HCA Health Servs. of Ga., Inc. v. Roach*, 265 Ga. 501, 502 (1995); O.C.G.A. § 21-2-31(2). The SEB flouted those parameters when it passed a flurry of rules that have no basis in law and were not needed in fact, including an amendment to Rule 183-1-12-.12(a)(5)(a) ("Hand Counting Rule"), which newly mandated the hand counting of paper ballots by three separate poll officers at the local precincts, either on Election Day or beginning the following day. The Hand Counting Rule conflicts with multiple provisions of the Election Code, would create burdens and cause chaos for election workers, and threatens to disenfranchise voters across the State. Throughout this action, and here again in their opening briefs, Appellants have failed to grapple with the numerous specific conflicts between the Hand Counting Rule and the statutes that govern the conduct of elections and the conduct of state agencies. Looking to Georgia statutory law makes evident

that the Hand Counting Rule is not "consistent with law," and is thus outside the authority of the SEB.

STATEMENT OF FACTS

The Hand Counting Rule originated via a June 6, 2024 petition, submitted by Fayette County Board of Elections member Sharlene Alexander, seeking a rule change to mandate the hand counting of ballots at polling locations by three poll workers before tabulation by the election superintendent. (V2-502–09).[1] The petition asserted that "it was a long-standing tradition in Fayette County" to hand count ballots at polling places, which it stopped in conformance with guidance from the Georgia Secretary of State clarifying the related statutory requirements. (V2-505, 510). In her petition, Ms. Alexander asserted that hand counting is good policy, but she did not provide any legal authority supporting hand counting. (V2-505–07). Indeed, the statutes referenced in support of the petition actually undermine it. Section 21-2-483(a) does not provide for the counting of ballots at the precinct level but at the tabulation center, and by her own admission, under Section 21-2-420(a), "there isn't a reconciliation of the ballots themselves at the polling place currently." (V2-509).

[1] All citations to the trial court record refer to the record in Case No. S25A0362.

When the petition was first taken up at the SEB's July 9, 2024 meeting, SEB Member Janice Johnston described the proposed rule as "a Christmas present," and clarified that its dictates would apply to early in-person voting and voting on Election Day.[2] The SEB continued its discussion of the petition at its August 19, 2024 meeting, where Ms. Alexander again acknowledged that the proposed rule would change how elections then operated under statute. She asserted that the proposed rule "advances election integrity by providing a checkpoint outside of the electronic system, which, today, that's all we have." Ms. Alexander emphasized her belief that, "to me, this is just common sense, to have something outside of that electronic system."[3] However, one person's view of "common sense" is not statutory authority. SEB Chair John Fervier cautioned against the Rule, noting that "the overwhelming number of officials that I've heard from on this rule oppose it," and emphasizing that "this is a legislative issue and ought to go through the legislature not through this board."[4]

Two days later, on August 21, 2024, the SEB advanced the petition in two Notices of Proposed Rulemaking: one rewriting Rule 183-1-12-.12(a)(5) to

[2] Transcript, State Election Board Meeting at 235:6–7 (July 9, 2024), available at https://sos.ga.gov/sites/default/files/2024-08/seb-transcript_7_9_24.pdf.
[3] Video: State Election Board Meeting at 4:07 (Aug. 19, 2024), https://gasos.wistia.com/medias/cta38wtjkj.
[4] *Id.* at 54:15.

require hand counting of all ballots cast on Election Day, and one rewriting Rule 183-1-14-.02 to require daily hand counting of ballots during early in-person voting once a ballot box reaches 1,500 ballots cast.

Bearing out the Chair's comments, election officials and poll officers across the state denounced the hand counting proposal. Secretary of State Brad Raffensperger, the State's chief election officer, called the proposed Hand Counting Rule "misguided" and "activist," stating it would "impose last-minute changes in election procedures outside of the legislative process" and "delay election results and undermine chain of custody safeguards." (V2-512–13).

The Georgia Association of Voter Registration and Election Officials (GAVREO), which comprises hundreds of election workers across the state, urged the SEB to reject the proposed Hand Counting Rule, warning that "dramatic changes at this stage will disrupt the preparation and training processes already in motion for poll workers, absentee voting, advance voting and Election Day preparation." (V2-517).

And, prior to the September 20, 2024 SEB meeting at which the Hand Counting Rule was taken up, the Office of the Attorney General ("AG"), chief legal officer of the State and counsel to the SEB, O.C.G.A. §§ 45-15-3, 45-15-12, took the rare action of sending the SEB expedited comments on the legality of the proposed rules, opining that each change was outside of the

SEB's delegated rulemaking authority. The AG emphasized that "the Board's authority to promulgate rules and regulations is limited to the administration or effectuation of the statutes in the Georgia Election Code," and that "no provisions in the statutes cited in support of these proposed rules . . . permit counting the number of ballots by hand at the precinct level prior to delivery to the election superintendent for tabulation." (V2-521, 524). The AG further declared that "these proposed rules are not tethered to any statute—and are, therefore, likely the precise type of impermissible legislation that agencies cannot do." (V2-524).

The Secretary of State, AG, and GAVREO were right.

During the September 20, 2024 meeting, the Chair warned that the proposed Hand Counting Rule exceeded the SEB's delegated rulemaking powers. Before passing the new Hand Counting Rule, all members of the SEB were aware and on notice that the SEB was engaging in unlawful rulemaking unauthorized by and in conflict with Georgia statutes. Nevertheless, notwithstanding the AG's legal advice and in defiance of the practical implementation concerns, especially given Georgia's 2,500+ precincts, raised by hundreds of election administrators, the SEB exceeded its delegated rulemaking authority and passed the unlawful Hand Counting Rule anyway.

Shortly after the Rule was passed, but before it went into effect, Appellees in this action amended their complaint to add challenges to this

and other newly passed Rules. (V1-56–63). Recognizing the necessity of protecting their members, Georgia NAACP and GCPA moved to intervene and filed their complaint in intervention—also before the Rule went into effect—on October 1, 2024. (V1-90–146). Their motion to intervene, and that of Appellants Republican National Committee, were granted. (V1-241–44). The Superior Court held an evidentiary hearing on October 16, 2024. Due to the expediency demanded by the looming November 2024 General Election, the Superior Court issued its judgment that same day.

ARGUMENT

I. A Judgment "Right for Any Reason" Should be Affirmed.

As the lower court found, the rules promulgated by the SEB conflict with the Election Code and are thus outside the Board's authority. Appellants take issue with the Superior Court's broad statements about the SEB's constitutional authority, but none of those statements were necessary to the holding. The lower court issued its ruling on numerous grounds, and the Court need not consider the broad grounds regarding the non-delegation doctrine or the federal Elections Clause.

Indeed, the Superior Court need not have reached these constitutional questions in light of the general rule of constitutional avoidance. *See State v. Randall*, 318 Ga. 79, 81 (2024) (holding that "inquiry into the constitutionality of a statute generally should not be made by the trial courts

if a decision on the merits can be reached without doing so") (citation omitted); *Harper v. Burgess*, 225 Ga. 420, 421 (1969) ("It is an established rule of this court that it will never decide a constitutional question if the decision of the case presented can be made upon other grounds.") (citations omitted). Rather, much narrower grounds resolve the dispute between the parties: the particular rules conflict with the Election Code and thus exceed the SEB's statutory authority. That the challenged rules conflict with statute is sufficient in itself to affirm. *See Gwinnett Cnty. v. Gwinnett I Ltd. P'ship*, 265 Ga. 645, 646 (1995) ("[A] judgment right for any reason should be affirmed.").

Affirming on these grounds does not require this Court to opine on the broad, and wholly unnecessary, constitutional reasoning of the Superior Court. Even where a lower court offers some erroneous reasoning, if the judgment is otherwise right—as is the case here, *see infra* Section II—this Court will affirm. *See, e.g.*, *Nat'l Tax Funding, L.P. v. Harpagon Co., LLC.*, 277 Ga. 41, 45 (2003) (Supreme Court will affirm a judgment "right for any reason, even if it is based on erroneous reasoning"); *Jones v. Trussell*, 221 Ga. 271, 273 (1965) (noting "the well established rules that the reasons assigned by the trial judge for his judgment constitute no part of the judgment").[5]

[5] To the extent that Appellants contend that the "erroneous legal theory" exception

Indeed, since the lower court correctly based its judgment on the grounds that the challenged rules are unsupported by the Election Code, (V1-8–12), even were the Court to conclude that other portions of the trial court's reasoning were incorrect, the Court should still affirm.

II. The SEB Lacks the Authority to Promulgate the Hand Counting Rule.

As a state agency, the SEB only has the authority to issue rules that are authorized by statute. *HCA Health Servs. of Ga.*, 265 Ga. at 502. While the SEB has been authorized to promulgate certain rules, a statutory grant of rulemaking authority is not an unlimited grant of authority. *See Ga. Real Est. Comm'n v. Accelerated Courses in Real Est., Inc.*, 234 Ga. 30, 32–33 (1975) (administrative rules must be both authorized by statute and reasonable). As such, the Election Code is the touchstone for whether any given rule is beyond the authority of the SEB. The SEB can only "adopt rules

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to the "right for any reason" standard applies here, their argument is meritless and should be rejected. In *City of Gainesville v. Dodd*, while recognizing that past precedent reflected application of both of these standards, this Court clarified that "when an appellate court recognizes that the trial court's legal analysis was flawed, the efficiency of the judicial system as a whole is advanced when the appellate court examines the record and applies the law to any unaddressed ground that will resolve the case." 275 Ga. 834, 838 (2002). In that case, twelve grounds were advanced at the trial court, but only two were ruled upon by the trial court and briefed in the appellate court. This Court affirmed the appellate court's application of the "erroneous legal theory" exception so that arguments could be advanced regarding and the trial court could make the decision in the first instance as to the other ten grounds. *Id.* at 839. It was only "[u]nder these circumstances" that this Court blessed the application of that exception. *Id.* No such circumstances exist here, and the "right for any reason" rule should be applied.

and regulations to carry into effect a law already passed" or otherwise "administer and effectuate an existing enactment of the General Assembly." *HCA Health Servs. of Ga.*, 265 Ga. at 502 (citation omitted). Where, as here, a rule "attempts to add" requirements or procedures inconsistent with statute, it is invalid. *Dep't of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995). It is not enough merely to invoke the SEB's authorizing statute to bless every rule promulgated by that body. Rather, even if a state agency has been granted certain authority to promulgate rules, any "agency rule" that is "unauthorized by statute" is not consistent with law and thus "[can]not stand." *Ga. Real Est. Comm'n*, 234 Ga. at 32.

The SEB is authorized to promulgate only those "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) (emphases added), and to promulgate rules and regulations to "obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the *legality* and purity in all primaries and elections[,]" O.C.G.A. § 21-2-31(1) (emphasis added). Appellants invoke the originating statute, *see, e.g.*, State Br. 11, 32, 45; RNC Br. 3, 10, 15, but fail to contend with the fact that the Hand Counting Rule is flatly inconsistent with other portions of the Election Code. This fact likewise makes the Rule

inconsistent with the SEB's authorizing act, which allows only those rules that are "consistent with law," O.C.G.A. § 21-2-31(2).

None of the statutes cited by the SEB provide a basis for the Hand Counting Rule; on the contrary, the cited statutes are either inapposite or directly contradict the Hand Counting Rule. And further, the Rule is inconsistent with other portions of the Election Code. As such, the Hand Counting Rule does not "carry into effect a law already passed" or otherwise "merely administer and effectuate an existing enactment of the General Assembly." *HCA Health Servs. of Ga.*, 265 Ga. at 502. These provide the only permissible scope of agency rules. As such, the Hand Counting Rule cannot stand.

A. The statutes cited by the SEB as the basis of its authority do not support the promulgation of the Hand Counting Rule.

Appellants barely contend with the conflict between the Hand Counting Rule and portions of the Election Code. *See* State Br. 49–51 (citing and discussing no Code provisions); RNC Br. 7 (indicating they have "nothing to add" to State's arguments regarding the Rule).

To begin, the three statutory provisions identified by the Superior Court as providing no basis for the Hand Counting Rule are the same three provisions invoked by the SEB *itself* as authority for the Rule. (V2-551). It is only reasonable that the Superior Court addressed the same statutes that the

SEB relied upon. Indeed, the statutory requirements for passing a rule mandate the inclusion of "a citation of the authority pursuant to which the rule is proposed for adoption[.]" O.C.G.A. § 50-13-4. If the SEB's own citations do not provide the authority to pass a given rule, the rule is then not "consistent with law," O.C.G.A. § 21-2-31(2), as it necessarily fails to comply with Section 50-13-4.

The SEB cited Sections 21-2-483(a), 21-2-436, and 21-2-420(a) as the bases for its authority to adopt the Rule, but those statutes provide no such power. Appellants cite not once either Section 21-2-436 or Section 21-2-483(a), perhaps illustrating their admission that those provisions are inapposite, as they govern procedures at locations other than the precincts where the Hand Counting Rule would apply.

As to the third of these cited provisions, Appellants offer no argument that Section 21-2-420(a) authorizes the Hand Counting Rule.[6] And rightfully so: This Section provides a general directive for poll officers in each precinct to "complete the required accounting and related documentation for the precinct" and to "advise the election superintendent of the total number of ballots cast at such precinct and the total number of provisional ballots cast." O.C.G.A. § 21-2-420(a). It also calls for the public posting of those totals.

[6] The State cites Section 21-2-420(a) not once, and the RNC includes it only in its recitation of the facts, RNC Br. 7.

O.C.G.A. § 21-2-420(b). The "required accounting" referenced in this section is then defined in subsequent statutory provisions, depending on the type of voting system used in the precinct in question. *See* O.C.G.A. §§ 21-2-436, 21-2-454, 21-2-485. Section 21-2-420(a) must be read in concert with these provisions that detail the required accounting, particularly as this Court has consistently recognized that when construing statutes, they must be read as a whole. *See La Fontaine v. Signature Rsch., Inc.*, 305 Ga. 107, 108 (2019); *McLeod v. Burroughs*, 9 Ga. 213, 218 (1851). None of the statutory accounting provisions provide a basis to allow for hand counting, and indeed, the Hand Counting Rule conflicts with the required statutory procedures. *See infra* Section II.B. Because none of the statutory provisions invoked by the SEB provide authority for the Hand Counting Rule, it is not "consistent with law," O.C.G.A. § 21-2-31(2), as it runs afoul of Section 50-13-4.

B. The Hand Counting Rule conflicts with numerous provisions of the Georgia Election Code.

The General Assembly has specified statutory duties to be carried out by poll officers upon the closing of the polls. *See* O.C.G.A. §§ 21-2-436,[7] 21-2-

[7] Section 21-2-436 applies only to precincts using paper ballots marked by hand, while the Hand Counting Rule applies to voting "conducted via ballots marked by electronic ballot markers and tabulated by ballot scanners" and "through the use of an optical scanning voting system." *See* Ga. Comp. R. & Regs. 183-1-12-.01. Thus, this provision is entirely inapposite. Even were certain precincts using paper ballots, the Hand Counting Rule also conflicts with the statutory provisions governing the closing of the polls for these types of elections because Section 21-2-

454, 21-2-485. The Hand Counting Rule conflicts with these statutes, which mandate the particular steps that poll officers must take immediately upon the closing of the polls on Election Day.

In precincts using voting machines, "[a]s soon as the polls are closed and the last elector has voted," poll officers must "immediately lock and seal" the machines. O.C.G.A. § 21-2-454(a). Poll officers must then canvass the returns by "read[ing] from the counters or from one of the proof sheets" the "result as shown by the counter numbers." O.C.G.A. § 21-2-455(a). The Hand Counting Rule conflicts with these statutory provisions. The statute—contrary to the Hand Counting Rule—requires that the machines be "immediately" locked and the number of votes cast to be determined from the counter on the machine. O.C.G.A. § 21-2-454. The Hand Counting Rule conflicts with the directive of Section 21-2-454 that the machines be locked "immediately," O.C.G.A. § 21-2-454(a), because the Rule calls for a prolonged process in which multiple poll workers repeatedly handle and count ballots and reconcile their counts, and it allows poll workers to delay starting that atextual exercise until the next day, (V2-550–52). Further, the statute clearly

436 provides that poll workers count the number of ballots cast based on the stubs and seal all related materials *before* the opening of the ballot box, making it impossible to comply with both Section 21-2-436 and the Hand Counting Rule.

specifies how the number of votes cast is to be determined, and it is not by hand counting. O.C.G.A. § 21-2-454(b).

In precincts using optical scanning voting equipment, "[a]s soon as the polls are closed and the last elector has voted," if tabulation occurs at a central count location, poll officers are required to "[s]eal the ballot box and deliver the ballot box to the tabulating center," and once delivered, examine the ballots and separate the write-in votes. O.C.G.A. § 21-2-485(1). Counting at the tabulation center occurs "under the direction of the superintendent." O.C.G.A. § 21-2-483(a). If tabulation happens at the precinct, "[a]s soon as the polls are closed and the last elector has voted," poll officers are to "[f]eed ballots from the auxiliary compartment of the ballot box, if any, through the tabulator," and after all ballots are put through the tabulator, "cause the tabulator to print out a tape with the total votes cast in each election." O.C.G.A. § 21-2-485(2); *see also* (V2-498–500). Again, the statute expressly provides for how the number of votes cast is to be ascertained, and it is not by hand counting.

The use of "immediately" and "[a]s soon as" in Sections 21-2-454 and 21-2-485 underscores that the Hand Counting Rule has no basis in statute, as it introduces a lengthy process that need not even begin until the day after polls close, (V2-550–52). In assessing the meaning of statutes, Georgia courts begin their analysis with "familiar and binding canons of construction,"

including "avoid[ing] a construction that makes some language mere surplussage." *Traba v. Levett*, 369 Ga. App. 423, 426 (2023) (citation omitted); *see also Lucas v. Beckman Coulter, Inc.*, 303 Ga. 261, 263 (2018). To find that the Hand Counting Rule does not conflict with the statutes governing the procedures at the close of polls would require impermissibly disregarding the language "immediately" and "[a]s soon as" in Sections 21-2-454 and 21-2-485.

The Hand Counting Rule also conflicts with a number of other provisions of the Election Code, such that it is plain that the Rule is not effectuating the Legislature's enactments, *see HCA Health Servs. of Ga.*, 265 Ga. at 502, and does not advance the "orderly conduct of primaries and elections[,]" O.C.G.A. § 21-2-31(2).

The Hand Counting Rule provides that after hand counting by three poll officers, the officers must "each sign a control document containing the polling place, ballot scanner serial number, election name, printed name with signature and date and time of the ballot hand count." (V2-550–52). No such form otherwise exists for the conduct of Georgia elections, and the Code empowers the Secretary of State to provide to the superintendents "all blank forms . . . and such other supplies as the Secretary of State shall deem necessary and advisable[.]" O.C.G.A. § 21-2-50(a)(5). The Secretary of State has not provided this "control document," and as the Secretary has already made clear in his statement criticizing the illegality of the challenged rules,

he does not consider the Hand Counting Rule (and thus its related materials) to be "necessary and advisable[.]" O.C.G.A. § 21-2-50(a)(5). To the extent the Hand Counting Rule relies on someone other than the Secretary to create the "control document," it directly conflicts with statute.

The Hand Counting Rule also requires that "[i]f the numbers recorded on the precinct poll pads, ballot marking devices [BMDs] and scanner recap forms do not reconcile with the hand count ballot totals, the poll manager shall immediately determine the reason for the inconsistency; [and] correct the inconsistency, if possible . . . ." (V2-550). But assigning this task to the relevant poll manager reassigns these statutory responsibilities from the superintendent to any one of many poll managers, something an agency rule may not do. *See Anderson*, 218 Ga. App. at 529 (regulation invalid where it reassigned decisions that were left to the Department's discretion by statute to another official). Section 21-2-493(b) authorizes county superintendents to "compare the registration figure with the certificates returned by the poll officers showing the number of persons who voted in each precinct or the number of ballots cast" and if there is a discrepancy, to "investigate[]" the issue. O.C.G.A. § 21-2-493(b). The Hand Counting Rule makes it so that instead of any such discrepancies being investigated by the superintendent as contemplated by statute, poll managers now have the first, and potentially only, opportunity to address the issue.

By its own terms, the Hand Counting Rule allows for the process described in the Rule "to start the next day and finish during the week designated for county certification." (V2-550–51). But the Georgia Election Code requires that "[a]s soon as possible but not later than 11:59 P.M. following the close of the polls on the day of" the Election, the superintendent must publicly post and report to the Secretary of State the "number of ballots cast at the polls on the day of the . . . election," among other things. O.C.G.A. § 21-2-421(a)(1). The Hand Counting Rule makes it impossible for the superintendent to comply with this statutory duty, as determining the number of ballots cast need not even begin until the next day.

Appellants studiously ignore all of these conflicts with the Election Code. But this review of the Code makes clear that the Hand Counting Rule is not authorized by statute and, as such, it cannot stand. *See Ga. Real Est. Comm'n*, 234 Ga. at 32. Thus, the judgment of the Superior Court enjoining the Hand Counting Rule is correct and should be affirmed by this Court.

III. Intervenor-Appellees Georgia NAACP and GCPA Have Standing.

Though not addressed by Appellants, Intervenor-Appellees Georgia NAACP and GCPA each have standing, both in their own right and on behalf of their members, to pursue this action.

A. Georgia NAACP and GCPA have organizational standing.

"There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy[.]" *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 381 (2022) (citation and quotation marks omitted). Georgia NAACP and GCPA demonstrated actual injury to themselves as organizations because the Hand Counting Rule would "impair the organization[s'] ability to provide [their] services or to perform [their] activities and, as a consequence of that injury, require a diversion of [the organizations'] resources to combat that impairment." *Id.* at 386. Contrary to the State's argument when attempting to undermine EVA's standing, State Br. 10, 15, this Court has never broadly held that diversion of organizational resources cannot confer standing. Georgia NAACP and GCPA do not seek to establish organizational harm by pointing to expenditures on this litigation or on advocacy in opposition to the Hand Counting Rule, so the State's arguments about the lack of organizational standing fall flat with respect to both Intervenor-Appellees.

The State also wrongly contends that the recent U.S. Supreme Court decision in *Food & Drug Administration v. Alliance for Hippocratic Medicine* ("*AHM*"), 602 U.S. 367 (2024), upended this settled Georgia precedent. State Br. 27. But, in fact, in *AHM*, the U.S. Supreme Court agreed with this Court's

reasoning in *Black Voters Matter Fund* by reaffirming that an organization suffers a cognizable injury when a defendant's actions have "directly affected and interfered with [the plaintiff organization's] core business activities." *AHM*, 602 U.S. at 395. The U.S. Supreme Court further explained that "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *Id.* at 394. It left undisturbed the settled law that an organization can establish standing where it must divert resources from its core activities because of a challenged policy. Here, Georgia NAACP and GCPA's injury is not based on "expending money to gather information and advocate against the defendant's action," *id.*, but rather on diverting resources from their core activities because of the Rule. And even if the State did correctly represent the impact of *AHM*—which it did not—the case remains that "nothing in the Georgia Constitution requires that we follow federal law on standing." *Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners*, 315 Ga. 39, 45 (2022).

As underscored by the Secretary of State, the Hand Counting Rule put ballot security at risk, "threaten[ing] to undo much of the hard work" that Georgia NAACP and GCPA had done to "register[] voters and mobiliz[e] them to the polls in the first place[.]" (V1-130, 132; V2-531, 540–45). The Rule

would delay the delivery of the actual votes to tabulation centers, contrary to the State's claims that the new Rule would merely entail the counting of ballot receipts unmoored from actual votes, State Br. 50. Georgia law calls for ballot boxes to be sealed "[a]s soon as the polls are closed" and delivered to the tabulating center. O.C.G.A. § 21-2-485(a). The ballots at issue are not mere receipts, but are the actual ballots filled out and voted by Georgia voters. The law does not permit the electronically tabulated aggregation of the votes cast to be separated from the paper ballots. Thus, the Hand Counting Rule endangers the chain of custody of actual votes required by the Legislature, precisely as the State's chief election officer had warned.

And the Rule would directly impede Georgia NAACP and GCPA's core business activities of "registering, educating, and activating voters to show up at the polls" and "helping voters [cure] provisional ballots" by forcing them to redirect their limited "staff and volunteer time away from planned activities and campaigns to troubleshoot any issues that arise from the application and administration of the Hand Counting Rule on Election Day." (V1-129–30, 131–32; V2-533, 544–45). That is precisely the type of evidence of harm that was missing in *Black Voters Matter Fund*, 313 Ga. at 387, but has been recognized as sufficient to confer organizational standing, *see id.* at 385 n.16 (collecting cases where such expenditures were sufficient to confer standing). Georgia NAACP and GCPA do not rely on actions taken in

opposition to the Hand Counting Rule to demonstrate standing, like the expenditures found insufficient to confer standing in *AHM*, but rather they point to expenditures that draw resources away from their core business activities as a result of the Hand Counting Rule's operation.

B. Georgia NAACP and GCPA also have associational standing.

Associational standing permits an organization

> to sue on behalf of its members when the members would otherwise have standing to sue in their own right; the interests the association seeks to protect are germane to the association's purpose; and neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members.

Sawnee Elec. Membership Corp. v. Ga. Dep't of Revenue, 279 Ga. 22, 24 (2005) (quoting *Aldridge v. Ga. Hosp. & Travel Ass'n*, 251 Ga. 234, 236 (1983)). Georgia NAACP and GCPA satisfy each of these requirements.

"[V]oting is a personal right" and infringement upon that right is a cognizable injury in Georgia. *Black Voters Matter Fund*, 313 Ga. at 388. Indeed, "voting rights are individually cognizable for litigation purposes, *even if* they are shared among the general public." *Camp v. Williams*, 314 Ga. 699, 708 (2022) (citation omitted). Georgia NAACP and GCPA members are Georgia voters who face an immediate, heightened risk of disenfranchisement because of the Rule.

Moreover, the Hand Counting Rule undermines the lawful administration of elections across Georgia, contravening existing statutes and upending established processes for election administration. Under settled Georgia law, Georgia NAACP and GCPA members thus face a cognizable actual and imminent injury in fact. *See Sons of Confederate Veterans*, 315 Ga. at 60 ("Voters may be injured when elections are not administered according to the law[.]"); *Barrow v. Raffensperger*, 308 Ga. 660, 667 (2020) (plaintiff had a "right as a Georgia voter" to pursue a claim to conduct an election pursuant to legal mandates).[8] When this action was brought and decided, the November 2024 election was well underway, with absentee ballot applications being accepted and advanced voting ongoing. The State is wrong in contending that the threatened injuries were only "hypothetical." State Br. 20. The injuries identified will come to pass if the Hand Counting Rule is in effect; they are not contingent upon any other future event.

[8] The State incorrectly contends that this Court's recognition of a "less-individualized kind of injury as satisfying the standing requirement" is limited to mandamus actions. State Br. 18 n.4. *Sons of Confederate Veterans*, where this Court recognized such an injury, was not a mandamus action, *see* 315 Ga. at 41 (case was one "seeking injunctive relief and damages"). Nor was the suit in *Camp*, where this Court again recognized that "voting rights are individually cognizable for litigation purposes, *even if* they are shared among the general public." 314 Ga. at 708 (citation omitted). Notably, in *Sons of Confederate Veterans*, this Court underscored that while the recognition of the sufficiency of such an injury earlier arose in the mandamus context, the Court has "applied this general rule more broadly." 315 Ga. at 58 (citations omitted).

Beyond the personal risk of disenfranchisement and the right of these voters to have elections conducted in compliance with the law, Georgia NAACP and GCPA members are Georgia residents, voters, and taxpayers with individual standing to prevent the unlawful expenditure of public funds. (V1-128–31; V2-526–35, 537–47). *See Williams v. DeKalb Cnty.*, 308 Ga. 265, 272 (2020) (plaintiff's "status as a taxpayer generally affords him standing to seek to enjoin the unlawful expenditure of public funds"); *League of Women Voters of Atlanta-Fulton Cnty., Inc. v. City of Atlanta*, 245 Ga. 301, 303–04 (1980) (taxpayer standing); *Keen v. City of Waycross*, 101 Ga. 588, 592–93 (1897) (same).

That citizen standing in Georgia focuses on local, rather than state, expenditures does not undermine this conclusion, as the State asserts, State Br. 17–19. Here, the Hand Counting Rule will force *local* election officials to unlawfully divert vital public resources from tabulating properly cast ballots to illegitimately hand counting individual ballots and attempting to resolve any purported "discrepancies" they may find.

And the "particularized injury" requirement only attaches to *constitutional* challenges to state *statutes*. *Cobb Cnty. v. Floam*, 319 Ga. 89, 92 (2024); *see also Sons of Confederate Veterans*, 315 Ga. at 39–40. Intervenor-Appellees do not challenge the constitutionality of any state statute. Rather, they challenge agency action that would force the

expenditure of county funds. Thus, on behalf of their Georgia resident, voter, and taxpayer members, Georgia NAACP and GCPA have associational standing to challenge the Hand Counting Rule.

Protecting the right to vote is central to both organizations' missions. (V2-527–28, 538–40). Thus, Intervenor-Appellees satisfy the germaneness requirement for associational standing. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1315–17 (11th Cir. 2021) (holding that a lawsuit challenging state voter identification law was germane to the purposes of the Alabama NAACP). And their standing to challenge the Hand Counting Rule does not require participation of their individual members. *Black Voters Matter Fund*, 313 Ga. at 387. Where, like here, an organization seeks declaratory and injunctive relief, "individual participation of the organization's members is 'not normally necessary.'" *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008) (quoting *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996)). Georgia NAACP and GCPA sought equitable relief that "if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 515 (1975). Accordingly, this is a "proper case" for associational standing. *Id.*

IV. Georgia NAACP and GCPA Are Entitled to a Declaratory Judgment.

While the State ignores the presence of Georgia NAACP and GCPA in the case, its contentions with respect to entitlement to declaratory judgment are flatly wrong if applied to Intervenor-Appellees. Georgia NAACP and GCPA agree with Appellants that under this Court's precedent, to obtain declaratory relief, a plaintiff must "allege[] threatened future injury that a declaration would prevent them from suffering," *Floam*, 319 Ga. at 99, and "that they are at risk of taking some undirected future action incident to their rights and that such action might jeopardize their interests," *id.* at 100 (emphasis omitted). Georgia NAACP and GCPA did just that.

First, they faced an imminent threat of future injury because of the Hand Counting Rule, and a declaratory judgment invalidating the Rule would prevent those injuries from occurring. Hand counting is unreliable, disrupts chain of custody procedures, introduces the potential for spoliation of ballots, jeopardizes ballot secrecy, and could result in accidental or deliberate counting delays that threaten the timely certification of election returns. (V1-129–31; V2-512–14, 531, 541–43, 556–57). Second, Intervenor-Appellees alleged—and proved with evidence—that their voting members faced uncertainty about how they could act to avoid disenfranchisement if the rule remained in place. Unlike in *Floam*, where the election had already occurred

and those plaintiffs therefore had "no decision to make about where to vote," 319 Ga. at 100, Intervenor-Appellees' voting members *did* have crucial decisions to make about how to protect their right to vote if the Hand Counting Rule were allowed to take effect. Their voting members had to decide whether to vote on Election Day, when the Hand Counting Rule would have applied, or to instead endeavor to vote during in-person advanced voting or apply to vote by mail. (V2-560). And Intervenor-Appellees had to advise their members on those same questions. (V2-560–61). Therefore, Intervenor-Appellees demonstrated that they were "insecure about some future action they plan to take" and had a clear "need [for the court] to declare rights upon which their future conduct depends." *Floam*, 319 Ga. at 101. As such, they were entitled to a declaratory judgment.

CONCLUSION

For the foregoing reasons, this Court should affirm the lower court's judgment with respect to the Hand Counting Rule.

RULE 20 CERTIFICATION

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted this 28th day of January, 2025,

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