IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JULIE ADAMS, Plaintiff	* *	CIVIL ACTION
v.	*	24CV011584
FULTON COUNTY *et al.*, Defendants	*	Judge McBurney

FINAL ORDER

In this second iteration of her suit, Plaintiff Adams, a member of the Fulton County Board of Registration and Elections (FCBRE)[1] -- and thus a superintendent of elections in Fulton County[2] -- seeks a declaratory judgment that her duties as an FCBRE member/ superintendent, including certification of election results, are discretionary and that, as a superintendent, she is entitled to "full access" to what she has identified as "election materials."[3] On 1 October 2024, the Court held a bench trial on Plaintiff's claims, alongside the claims raised in *Abhiraman et al. v. State Election Board et al.*, 24CV010786. Having considered the record made then, along with the many briefs filed

[1] Plaintiff identifies herself in her styling of the case as a member of the "Fulton County Board of Elections and Registration *a/k/a* Fulton County Board of Registrations and Elections." (Emphasis added). Why an active member of a board might harbor uncertainty as to the name of that board was explained in n.2 of Adams's second complaint: apparently the Board's name at its legislative conception was the "Board of Elections and Registration" (and such boards, common throughout the state, are referred to as such in O.C.G.A. § 21-2-2(35)(A); *see also* O.C.G.A. § 21-2-40). At some point, Fulton County's Board liberated itself from its given name and now in its official records -- many of which have been introduced into evidence in this case and its predecessor, 24CV006566 -- the Board refers to itself as the "Board of Registration and Elections." The Court will use the Board's chosen name here.

[2] *See* O.C.G.A. §§ 21-2-2(35)(A) and 21-2-40.

[3] The specifics of Plaintiff's request for declaratory relief are hard to pin down, as they shift throughout her pleading. Plaintiff first sets out in ¶ 96 of her complaint a list of "disputes and controversies," mostly dealing with an apparent power struggle between the FCBRE and its Elections Director. The complaint then narrows the sought-after relief in the title language of Count I to a request for a declaration that (1) FCBRE is the superintendent of elections in Fulton County and (2) votes on certification are discretionary. (Complaint at 29). Finally -- and what the Court will address in this Order -- in her formal prayer for relief Plaintiff asks for a declaration that (1) the duties of FCBRE members are "discretionary, not ministerial in nature," and (2) FCBRE members are "required" to have "full access" to certain "Election Materials" controlled by the Elections Director.

by the parties and *amici*,[4] the Court GRANTS in part and DENIES in part the relief Plaintiff is pursuing.

PROCEDURE

Plaintiff is seeking a declaratory judgment, that is, she seeks "relief from uncertainty and insecurity with respect to [her] rights, status, and other legal relations." O.C.G.A. § 9-4-1. This Court has jurisdiction over such claims via the interlocking provisions of O.C.G.A. § 9-5-2 and Article I, Section 2, Paragraph V of the Georgia Constitution (waiving sovereign immunity for declaratory relief actions against the State or any political subdivision thereof).[5]

Plaintiff has standing to bring her twin claims for declaratory judgment because she has sufficiently alleged that she faces "uncertainty and insecurity with respect to the propriety of some future act or conduct which is properly incident to [her] alleged rights, and which future action without such direction might reasonably jeopardize [her] interest." *Cobb Cnty. v. Floam*, 319 Ga. 89, 97 (2024), quoting *Aldridge v. Fed. Land Bank of Columbia*, 203 Ga. 285, 291 (1948); see also *City of Atlanta v. Hotels.com*, 285

[4] The amicus briefs were filed in the predecessor case, 24CV006566, but remain applicable and were considered here.

[5] An intriguing jurisdictional issue present but not raised in this case is the addition of defendant intervenors to the litigation. Our Supreme Court has strictly enforced the plain meaning of Paragraph V(b)(2) of Article I, Section II of the Constitution ("Actions filed pursuant to this Paragraph naming as a defendant any individual, officer, or entity other than as expressly authorized under this Paragraph shall be dismissed"). "Shall" here really does means shall (*see* n.10 below): suits bringing more than a declaratory judgment action or naming any defendant other than the State (or a county or municipality) must be dismissed. *See, e.g., First Ctr., Inc. v. Cobb Cnty.*, 318 Ga. 271 (2024) (affirming dismissal on sovereign immunity grounds of action brought against county and county officials because suit named officials alongside county *and* raised claims beyond declaratory judgment); *see also* Fulton County Civil Action 24CV006566. Here, Plaintiff (on her second go-around) properly brought her claim for declaratory relief solely against Fulton County. (Her previous suit named the FCBRE and the County's Elections Director.) Subsequently in this case, the Democratic National Committee and the Democratic Party of Georgia sought to intervene as defendants. This Court found that both were entitled to do so (with no opposition from Plaintiff or the County) and authorized their intervention. Presumably this would *not* be a basis to dismiss the complaint under Paragraph V(b)(2) because the action, *as filed*, named only the County. Time (and some other case) will tell.

Ga. 231, 234-235 (2009) ("[T]o state a claim for declaratory judgment, a party need only allege the existence of a justiciable controversy in which future conduct depends on resolution of uncertain legal relations."). Put into concrete terms in the context of this case, Plaintiff insists that it is proper for her, as a co-election superintendent who has taken an oath to "prevent any fraud, deceit, or abuse"[6] to exercise discretion in certifying election results -- a conclusion, which, if correct, would empower her to refuse to certify if she believed the results to be incorrect or not sufficiently reliable to merit certification. And yet Plaintiff has been threatened with civil litigation (and even the specter of referral for criminal prosecution under O.C.G.A. § 21-2-596) if she does not auto-certify election results -- outcomes which may be entirely appropriate if the superintendent's role in certifying election results is mandatory and Plaintiff fails to do so.[7] Plaintiff's demand for a declaration must be met so that she, her colleagues on the FCBRE, and other superintendents around the State understand the scope of their authority when called upon to certify election results.

SUBSTANCE

"Although the right to vote is fundamental, forming the bedrock of our democracy, it is also clear that states are entitled to broad leeway in enacting reasonable, even-handed legislation to ensure that elections are carried out in a fair and orderly manner." *Rhoden v. Athens-Clarke Cnty. Bd. of Elections*, 310 Ga. 266, 278 (2020) (cleaned up)[8]. Over many

[6] O.C.G.A. § 21-2-70(15)(B).

[7] Similarly with Plaintiff's claim concerning access to "election materials": while the contours of this dispute are less clear -- the County contends that Plaintiff was supplied with everything she asked for that could be produced within the tight time frame the Election Code provides -- there is nonetheless a controversy over whether Plaintiff should have access to the information she believes is essential to properly and faithfully performing future actions (*i.e.*, certification of election results) as superintendent.

[8] *See* https://www.ncbar.org/nc-lawyer/2023-08/cleaned-up-citations-a-bold-new-option-to-bluebook-rule-5/

years, our State Legislature has, in Chapter Two of Title 21 of the Official Code of Georgia, enacted "reasonable, even-handed legislation" that ensures that our elections are carried out "in a fair and orderly manner." However, the certainty of the electoral process that these laws have long brought to Georgia's voters has begun to unravel as key participants in the State's election management system have increasingly sought to impose their own rules and approaches that are either inconsistent with or flatly contrary to the letter of these laws. This case involves one of those instances.

Election superintendents play a central role in election management. The importance of their position is matched by the scope of their statutory authority. Among other things, superintendents:

- Decide the sufficiency of would-be candidates' nomination petitions
- Prepare and publish notices and advertisements for upcoming elections
- Select the polling places for their jurisdiction
- Equip the polling places for their jurisdiction
- Appoint all poll workers in their jurisdiction
- Train those poll workers on rules that both the superintendents and the State Election Board may periodically issue on the conduct of elections
- Review and certify the election results in their jurisdiction

O.C.G.A. § 21-2-70. In other words, superintendents (and the staff to whom they may delegate some of these responsibilities) are rule-writers, personnel trainers and managers, logisticians, marketers, and accountants. Much of what they do is left to their broad, reasoned discretion.[9] But not everything -- some things an election superintendent *must* do, either in a certain way or by a certain time, with no discretion to do otherwise.

[9] As but one of many examples, O.C.G.A. § 21-2-293 empowers superintendents who "discover[] that a mistake or omission has occurred in the printing of official ballots or in the programming of the display of

Certification is one of those things. After the close of the polls on the day of an election, the superintendent "*shall*… publicly commence the computation and canvassing of the returns." O.C.G.A. § 21-2-493(a) (emphasis added). The superintendent has the discretion to do this canvassing where she wishes and largely how she wishes (with staff, divided by precinct, etc.) but do it she must[10] -- and when she is done she "*shall* tabulate the figures for the entire county or municipality and sign, announce, and attest the same." *Id.* (emphasis added).

In performing this computation, the superintendent must ("shall") compare the returns with the number of electors (voters) in the precinct and the number of votes cast. O.C.G.A. § 21-2-493(b). This is not an optional task: the superintendent has a statutory obligation to engage in this cross-checking. And, if there is a non-sensical result -- *e.g.*, more votes than voters -- the superintendent must investigate the discrepancy (a/k/a "palpable error"); she is not free to ignore it.[11] *Id.* The superintendent must also "see that the votes shown by each absentee ballot are added to the return received from the

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the official ballot on [electronic] voting equipment" to "correct such mistake or omission if the superintendent determines that such correction is feasible and practicable under the circumstances." That is about as discretionary as it can get: *if* the superintendent wishes to make a correction, she *may* do so after she decides *for herself* if the change makes sense.

[10] As only lawyers (and judges) can, we have muddied and mangled the meaning of the word "shall" in our business. To users of common parlance, "shall" connotes instruction or command: You shall not pass! And, generally, even lawyers, legislators, and judges, construe "shall" as "a word of command," *Mead v. Sheffield*, 278 Ga. 268, 269 (2004), or as a "mandatory directive," *Lewis v. State*, 283 Ga. 191, 194 (2008). But… lawyers shall not be limited to a single, simple meaning when they can have more. Courts have debated whether "shall" and even "must" are directory rather than mandatory. *See, e.g., State v. Henderson*, 263 Ga. 508, 510-11 (1993) (debating and then concluding that "must" means "must"); *Charles H. Wesley Educ. Found., Inc. v. State Election Bd.*, 282 Ga. 707, 709 (2007) (finding that "shall" denotes "simple futurity [!!] rather than a command"). In *this* case and in O.C.G.A. § 21-2-493, the "shall's" are all plainly mandatory and serve as words of command, as "a failure of performance will result in … injury or prejudice to the substantial rights of interested persons" *i.e.*, the voters of Georgia. *Clark v. State*, 371 Ga. App. 37, 41 (2024), cert. granted (Sept. 17, 2024) (citation omitted).

[11] To be clear, there are no limits placed on this investigation (other than, of course, the immovable deadline for certification, discussed below). Thus, within a mandatory ministerial task -- thou shalt certify! -- there are discretionary subtasks. The freedom allowed with the subtasks does not convert the overarching fixed obligation into a discretionary role.

precinct" for that absentee elector. O.C.G.A. § 21-2-493(j). The superintendent is not free to ignore the absentee ballots although she may count them any way she wishes -- again, discretion within a ministerial task. And if in the course of her canvassing, counting, and investigating, a superintendent should discover what appears to her to be fraud or systemic error, she still must count all votes -- despite the perceived fraud -- and report her concerns about fraud or error "to the appropriate district attorney." O.C.G.A. § 21-2-493(i).[12]

Finally, no matter how many poll workers she appointed, what polling places she designated, what advertisements she posted, what training she provided her workers, what color ink she used to complete her worksheets -- all of which are discretionary acts of the superintendent -- that same superintendent "shall" certify her jurisdiction's election returns "not later than 5:00 P.M. on the Monday following the date on which such election was held." O.C.G.A. § 21-2-493(k). There is nothing in Chapter Two of Title 21 of the Official Code of Georgia (or elsewhere in the Code) nor in any case from any appellate court of this State that suggests, hints, indicates, or directs that the plain statutory language in subsection (k) means anything other than precisely what it says: the

[12] In arguing that certification is a discretionary task with no statutorily fixed outcome, Plaintiff's counsel clung to the word "justly" in O.C.G.A. § 21-2-493(i) ("If any error or fraud is discovered, the superintendent shall compute and certify the votes *justly*, regardless of any fraudulent or erroneous returns presented to him or her…" (emphasis added)). Under Plaintiff's view, superintendents are empowered by the "justly" in subsection (i) -- which, according to Plaintiff, calls upon superintendents to "do justice" -- to ignore or omit from certification those precincts or other collections of votes tainted by whatever error or fraud a superintendent may conclude has occurred. The Court disagrees. Nothing in O.C.G.A. § 21-2-493 imbues superintendents with the authority to declare fraud (or, more importantly, determine the consequences for it, if it in fact occurs). And the only errors superintendents can correct are basic tabulation errors set forth in subsections (b) and (c). The GBI, the Secretary of State, the many District Attorneys, and the Attorney General are all better equipped and clearly authorized to undertake the work of verifying election fraud and seeking consequences for it. Superintendents are not. Thus, while the wording of subsection (i) is not a model of legislative clarity, a more reasonable interpretation -- and one that gives meaning to every word in the subsection while maintaining harmony with its sister subsections -- is that superintendents must, in conformity with the other rules set forth in O.C.G.A § 21-2-493 (*i.e.*, justly), certify *all* election results, as corrected per subsections (b) and (c). A superintendent's concerns about fraud or systemic error are to be noted and shared with the appropriate authorities but they are *not* a basis for a superintendent to decline to certify.

superintendent *must* certify and *must* do so by a time certain. There are no exceptions. While the superintendent must investigate concerns about miscounts and must report those concerns to a prosecutor if they persist after she investigates, the existence of those concerns, those doubts, and those worries is not cause to delay or decline certification. That is simply not an option for this particular ministerial function in the superintendent's broader portfolio of functions.

This conclusion is not profound. A discretionary act is "one that requires the examination of facts and the exercise of considered judgment before deciding on a course of action, whereas a ministerial act is one that is a mandatory fixed obligation for which mandamus will lie to compel performance." *Common Cause/Georgia v. City of Atlanta*, 279 Ga. 480, 482 (2005) (citation omitted). Election superintendents in Georgia have a mandatory fixed obligation to certify election results. What may confuse the issue for some superintendents is that so much of their role is indeed discretionary. But the existence of discretion in some roles does not guarantee its existence in all roles. Indeed, "the determination of whether the action at issue is discretionary or ministerial is made on a case-by-case basis, and the dispositive issue is the character of the specific actions complained of, not the general nature of the job." *Barnett v. Caldwell*, 302 Ga. 845, 848 (2018) (citation omitted). The action at issue here, in this case, is certification -- not the general nature of a superintendent's job. And that action -- certification -- is, as has been stated (but which clearly merits repeating), a mandatory fixed obligation.[13, 14]

[13] This statutory obligation to certify applies to every person fulfilling the role of superintendent -- even in counties with multi-member boards of election and registration, such as Fulton County. Each member of such boards swears out the same oath and is vested with the same authority and charged with the same responsibilities as a superintendent in a county with no board. Most decisions in board-based counties are made by the vote of several rather than by the fiat of one, but all the many "shall's" of Chapter Two of Title 21 apply with equal force to every member of these boards, to include the "shall's" in O.C.G.A. § 21-2-493(k).

DECLARATION

Plaintiff has good reason to seek out this clarity in her role as a member of the FCBRE and thus as a superintendent of elections. As mentioned, she was threatened with legal proceedings when, in a previous election, she declined to fulfill her mandatory duty to certify. But the risk goes deeper: superintendents who fail to perform their duties can be suspended from office (O.C.G.A. § 21-2-33.2) or even prosecuted as a misdemeanant (O.C.G.A. § 21-2-596). Plus Plaintiff has taken that oath, which not only is a pledge to prevent fraud but also a commitment to perform her duties "in accordance with Georgia laws." O.C.G.A. § 21-2-70(15)(B). Any uncertainty about what the laws of Georgia say is thus of paramount importance to election superintendents around the State.

The Court thus finds that the issuance of a declaratory judgment is necessary to afford Plaintiff "relief from uncertainty and insecurity with respect to [her] rights, status, and other legal relations." O.C.G.A. § 9-4-1. This declaratory relief will "control or direct [Plaintiff's] future action, under circumstances where that action [or inaction] might

[14] In truth, the debate is not so much about ministerial versus discretionary as it is about mandatory versus optional. Plaintiff propounded several reasonable arguments that the process of certifying, though mandatory, is nonetheless a discretionary duty, like a police officer's obligation to secure livestock "found to be running at large or straying" (not a common problem here in Fulton County but apparently a recurring issue elsewhere in Georgia). *See* O.C.G.A. § 4-3-4(a); *Williams v. Pauley*, 331 Ga. App. 129, 133-34 (2015). While the Court has determined that the role of certifying election results is a ministerial one, that conclusion, even if found by a higher court to have been mistaken, does not alter the more critical and fundamental fact: *certification is mandatory*. Call certification ministerial or call it discretionary -- a superintendent still must do it and do it by a time certain. *See Thompson v. Talmadge*, 201 Ga. 867, 876 (1947) (holding that canvassing/certification is "simple mathematical process" of counting votes and announcing results); *Bacon v. Black*, 162 Ga. 222 (1926) (certification is ministerial duty; superintendents have no discretion to adjudicate alleged fraud); *Tanner v. Deen*, 108 Ga. 95 (1899) (certification is mandatory; refusal to do so is subject to mandamus). While Plaintiff is dismissive of these seminal cases, claiming that the Election Code and its definition of the role and authority of election superintendents has changed enough over the decades to make them irrelevant, the pertinent function of superintendents at issue in this case -- certification -- has remained largely static: the manner in which we vote is more sophisticated (think touch screens rather than #2 pencils) and the number of votes to count has grown exponentially, but the basic role assigned to election superintendents to "count and announce" is not all that different -- making these cases highly persuasive if not outright controlling.

jeopardize or affect [Plaintiff's] rights, liabilities, or interests." *City of Atlanta v. S. States Police Benev. Ass'n of Georgia*, 276 Ga. App. 446, 451 (2005).

Accordingly, the Court DECLARES the following:

(1) An election superintendent's role in certifying election results pursuant to O.C.G.A. § 21-2-493 is ministerial, even though many other aspects of her position are discretionary.

(2) Regardless of the characterization of the election superintendent's role in certifying election results, that certification pursuant to O.C.G.A. § 21-2-493 is mandatory.

(3) Consequently, no election superintendent (or member of a board of elections and registration) may refuse to certify or abstain from certifying election results under any circumstance.[15]

(4) If, in performing her responsibility set forth in O.C.G.A. § 21-2-70(8) "to inspect systematically and thoroughly the conduct of primaries and elections in the several precincts of his or her county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted," an election superintendent (or member of a board of elections and registration) determines a need for election information from the staff of the superintendent's office (or of the board), that information, if not protected from disclosure by law, regulation, or rule, should be promptly provided. *See* Ga. Comp. R. & Regs. Rule 183-1-12-.12(f)(6). However, any delay in receiving such information is not a basis for refusing to certify the election results or abstaining from doing so. *See* Declaration (3) above.

[15] This does not leave the superintendent (or board member) without recourse or the means to voice substantive concerns about an election outcome. The Election Code has a tested mechanism for addressing alleged fraud and abuse: election contests. *See* O.C.G.A. § 21-2-522. Election contests arise *after* the ministerial act of certification. O.C.G.A. § 21-2-524(a). They may be brought by a losing candidate or by any aggrieved elector (voter) -- which includes a superintendent (assuming she voted). O.C.G.A. § 21-2-521. Importantly, election contests occur in open court, under the watchful eye of a judge and the public. The claims of fraud from one side are tested by the opposing side in that open court -- rather than being silently "adjudicated" by a superintendent outside the public space, resulting in votes being excluded from the final count without due process being afforded those electors.

* * *

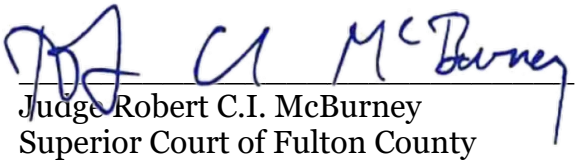
In 1946, the voters of Georgia elected Eugene Talmadge as their Governor. Tragically, he died on 21 December 1946, before he could take office. Three men vied for the now-open position: Ellis Arnall, the outgoing governor; Melvin Thompson, the lieutenant governor-elect; and Herman Talmadge, Talmadge's son. The General Assembly, in fulfilling its role as certifier of gubernatorial election results, decided that no "person" had received a majority of votes cast because Eugene Talmadge was dead and thus did not qualify as a "person." The General Assembly then conducted a "contingent election" through its own membership, choosing Herman Talmadge as Georgia's next governor -- even though not one Georgian had cast a vote for him as Governor during the general election. Both Arnall and Thompson brought suit; their intertwined claims unsurprisingly ended up before the Supreme Court. *Thompson v. Talmadge*, 201 Ga. 867 (1947). In its ruling that reversed the General Assembly's action and installed Thompson as governor,[16] the Supreme Court made clear that election certification is a purely ministerial task that gives its performer no discretion to exclude some votes while counting others. *Id.* at 876-78. To hold otherwise

> would mean that had Mr. Eugene Talmadge been living, and despite the knowledge of everyone of his overwhelming election, the canvassers of those election returns could with immunity and finality assert that some other person was elected, and the people's right, together with the right of Eugene Talmadge to have his election recognized, could be thus destroyed, leaving them without any recourse whatever. This hypothetical case may never arise, and indeed we are all hopeful that it will never arise, but it is within the realm of future possibility and cannot be ignored or overlooked when a construction of the Constitution is being made by a court.

[16] The Supreme Court's full holding was that Arnall should remain Governor because his successor, Eugene Talmadge, had not been "chosen and qualified" due to his untimely death. However, by the time the Court ruled, Arnall had resigned, leaving his office open to the lieutenant governor, Thompson. Thompson, 201 Ga. at 889-90.

Id. at 889. That "hypothetical case" the *Thompson* Court feared has now arrived: if election superintendents were, as Plaintiff urges, free to play investigator, prosecutor, jury, and judge and so -- because of a unilateral determination of error or fraud -- refuse to certify election results, Georgia voters would be silenced. Our Constitution and our Election Code do not allow for that to happen.

SO ORDERED this 14th day of October 2024.



Judge Robert C.I. McBurney
Superior Court of Fulton County
Atlanta Judicial Circuit

Filed and served electronically via eFileGA