

GEORGIA DEMOCRACY TASK FORCE

August 5, 2024

VIA ELECTRONIC MAIL

Chairman John Fervier
Georgia State Election Board
2 Martin Luther King Jr. Drive
Suite 802, Floyd West Tower
Atlanta, GA 30334
sebpubliccomments@sos.ga.gov

Re: Proposed Amendments to SEB Rules 183-1-2-.02 and 183-1-14-.02

Dear Chairman Fervier and State Election Board Members:

The Georgia Democracy Task Force is a group of mostly lawyers that aims to support the rule of law in the context of elections, bolster voter confidence by safeguarding the integrity and non-partisan administration of elections, and to support election workers and officials. We write to express our opposition and concern to the proposed amendments to SEB Rule 183-1-2-.02 and SEB Rule 183-1-14-.02. If enacted, especially so close to the November general election, both proposed amendments would introduce significant confusion into the election process, make administering the election more difficult for election officials, almost certainly lead to litigation, increase voter confusion, and decrease voter confidence in whatever the result of the November election turns out to be. In short, neither of these proposed amendments help ensure the integrity of elections in Georgia, and they should be rejected or at the very least tabled until after the November election.

I. Proposed Amendment to SEB Rule 183-1-12-.02 re. Definition of Certification

The proposed amendment to SEB Rule 183-1-12-.02 seeks to add a definition of certification that, while it may sound innocuous, represents a fundamental misunderstanding of what certification of election results actually is. The proposed amendment contradicts settled law and the plain words of the statutorily imposed, mandatory duty in Georgia law to certify election results. It also ignores the extensive verification measures that currently exist. The importance of timely, consistent, and lawful certification of election results by county election boards across Georgia cannot be overstated, and we fear that this proposed rule amendment will lead to county election boards not completing their mandatory legal duty to certify election results.

County boards of elections have numerous substantive duties in administering Georgia's elections. *See* O.C.G.A. § 21-2-40 (stating that the General Assembly may create county boards of elections and empower them with duties of election superintendents) and O.C.G.A. § 21-2-70 (setting forth the numerous duties of election superintendents). A county election board does not simply appear

at the time of election certification; they have numerous important duties throughout the election process. Like most government officials, a county elections board has both discretionary and mandatory duties. Georgia law is clear that certification of election results is a mandatory duty, and the proposed definition is contrary to that statutory requirement. O.C.G.A. § 21-2-493(k) states:

Such returns *shall be certified* by the superintendent not later than 5:00 P.M. on the Monday following the date on which such election was held and such returns shall be immediately transmitted to the Secretary of State.

(emphasis added). That same code section tells county boards what to do if they are concerned about the accuracy of their results even after all the post-election verifications are complete. In that instance, Georgia law tells the election board that if they do discover any fraud or error in the extensive post-election verification procedures they are required to undertake, “they shall compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented, and shall report the facts to the appropriate district attorney for action.” O.C.G.A. § 21-2-493(i). The General Assembly has spoken clearly on this—election boards are required to certify *even if* fraud or error is discovered.

The fact that certification of elections is a mandatory duty in Georgia law is further supported by Georgia law regarding election contests. *See* O.C.G.A. § 21-2-520 *et seq.* Election contests are the vehicle to correct an election result if in fact there was any misconduct, fraud, or irregularity that puts the outcome of the election in question. *See* O.C.G.A. § 21-2-522. For an election contest to occur, election boards have to complete their mandatory duty of certifying the election first. *See* O.C.G.A. § 21-2-524 (petition to contest the election shall be filed within five days after certification). Paradoxically, refusal of an election board to complete their mandatory duty of certifying election results actually makes it more difficult to correct an election result if such a remedy is appropriate. Election contests are the legally established process for adjudicating elections where facts put the result in question. The judicial process offers distinct advantages in resolving election disputes over county election boards trying to step into this role. Courts have the authority and procedural mechanisms to thoroughly examine evidence, subpoena relevant documents, compel witness testimony under oath, and apply rigorous legal standards in evaluating claims of irregularities or fraud. Judges, as impartial arbiters, can weigh competing claims and evidence in an adversarial setting, ensuring a fair and thorough examination of any election challenges. This process provides a level of scrutiny and due process that cannot be replicated in the certification phase by local election officials, and in any case, county election boards have to complete their mandatory duty of certifying results to allow that process to begin.

This proposed redefinition of certification goes beyond the authority of the State Election Board as it seeks to alter the statutorily-imposed structure of elections in Georgia. The amendment threatens to fragment the uniform application of election laws across Georgia, potentially leading to a patchwork of inconsistent practices that could erode public trust and invite legal challenges.

Georgia’s certification process already marks the culmination of a rigorous computation and canvassing process designed to prevent fraud and ensure fair, legal, and orderly elections. The role

of certification, accordingly, is not to re-verify the vote count but to acknowledge the completion of the comprehensive process that has taken place.

In conclusion, the proposed amendments defy existing state statutes, inject unnecessary delay and individual subjectivity into the election process, attempt to usurp the role of courts in adjudicating election contests, and will almost certainly invite litigation.

II. Proposed Amendments to Rule 183-1-14-.02 re. Return of Absentee Ballots and Drop Box Surveillance

The proposed amendments to Rule 183-1-14-.02 are similarly flawed. Both likely exceed the authority of the State Election Board, will create voter confusion, and will likely not survive judicial scrutiny.

A. Proposed Additional Requirements re. the Return of Absentee Ballots

Georgia law provides for no-excuse absentee voting and allows voters multiple ways to return their ballots, including by mail using USPS or other common carriers,¹ personal return, or by allowing an authorized relative or caregiver to personally return. *See* O.C.G.A. § 21-2-385(a). The proposed amendment requires the creation and use of an “absentee ballot form” that collects the name of the absentee voter, the name of the person delivering the ballot, the relation to the voter, the signature of the person delivering the ballot, and the type of ID of the person delivering the ballot. Failure to abide by the requirement by the person receiving the ballot at the county or by the person delivering the ballot automatically turns the voter’s ballot into a provisional ballot that will not be counted unless it is cured.

Creating a new form for counties and voters to fill out so close to an election does not account for the difficulty of actually designing a clear, accurate form. That is a process that takes time and multiple iterations, especially when failure (even failure by a county official) to properly complete such a form could lead to voter’s ballot not being counted.

Enacting the proposed amendment so close to the election does not allow the Secretary of State or counties to adequately train counties and then for counties to adequately train every person who may receive an absentee ballot at the county.

The proposed amendments place an additional requirement on voters who choose to let an authorized relative or caregiver return their ballot for them. While Georgia law strictly limits who can return an absentee ballot for another voter, it does not place additional requirements on voters who exercise that choice. Attempting to do so via State Election Board rule exceeds the authority of the SEB.

¹ By only exempting United States Postal Service from the absentee ballot form requirement, the rule as drafted would require other common carriers such as UPS and FedEx to complete the proposed absentee form or risk their ballot not being counted. That requirement is clearly ridiculous and should be fixed.

B. Surveillance of Drop Boxes

Placing a new requirement on counties to put in place extensive video recording devices so close to an election will lead to scrambling by county election officials who already have plenty on their plate. Further, Georgia's Election Integrity Act of 2021 expressly moved away from video surveillance of drop boxes to a requirement of direct human surveillance. *See* O.C.G.A. § 21-2-382(c).

CONCLUSION

In conclusion, none of the proposed amendments are necessary to ensure the integrity of Georgia's upcoming elections. In fact, all are seriously flawed and would simply be inviting legal challenges. The SEB should reject the proposed amendments or at the very least table them until after November's election for further refining.

Thank you for consideration.

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