

GEORGIA DEMOCRACY TASK FORCE

September 18, 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
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Re: Proposed Amendments to SEB Rules [for Public Comment on September 20, 2024]

Dear Chairman Fervier and State Election Board Members:

The Georgia Democracy Task Force (“Task Force”) has carefully reviewed the proposed rules that will be considered on September 20, 2024. As stated in our written comments prior to previous State Election Board meetings, we are a coalition of legal professionals and concerned citizens dedicated to upholding the rule of law in elections, enhancing voter confidence through safeguarding the integrity and non-partisan administration of elections, and providing support to election workers and officials. Our mission aligns closely with the State Election Board’s objective of ensuring fair, legal, and orderly election administration. We have full confidence that our election officials in Georgia will conduct the upcoming general election with the utmost professionalism and integrity.

In light of this shared commitment to electoral integrity, we write to express our recommendations and reservations regarding the following new proposals for amendments to State Election Board rules:

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| • 183-1-12-.01 | Conduct of Elections - Ballot Types, Absentee and Provisional/Emergency |
| • 183-1-12-.12(a)(1) | Tabulating Results - Ballot Count from Tabulation Tape to Recap Form |
| • 183-1-12-.12 | Tabulating Results - Hand Counting of Ballots |
| • 183-1-12-.12(e) | Tabulating Results - Daily Reconciliation Reports Published by Counties |
| • 183-1-12-.13 | Storage of Returns - Expanded Retention of Data and Memory Cards |
| • 183-1-12-.19 | Preparation of Electors List and Use of Electronic Poll Book - Voter Lists |
| • 183-1-12-.21 | County Participation and Totals Reporting - Daily Reports by Counties |
| • 183-1-13-.05 | Poll Watchers for Tabulating Center - Expanded Access for Poll Watchers |
| • 183-1-14-.02 (15) | Advance Voting - New Reconciliation Procedures |
| • 183-1-14-.11 | Mailing and Issuance of Ballots - Absentee Ballots by Tracked Mail |
| • 183-1-14-.02 (8) | Conduct of Elections - Hand Counting of Ballots During Advance Voting |

Each of these proposed rules ostensibly seeks to improve election integrity in Georgia. We wholeheartedly agree that ensuring election integrity is of paramount importance, and we strongly support efforts to maintain the highest possible standards for free, fair, transparent, and non-partisan election administration. However, we firmly believe that introducing significant new election rules in late September 2024, mere weeks before a major election, poses a substantial risk to the very integrity these proposed rules seek to protect.

The timing of rule changes in election administration is critically important, as recognized by the U.S. Supreme Court in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). While *Purcell* primarily addresses court interventions in election procedures, its underlying logic extends to administrative rule changes as well. The Court's reasoning in *Purcell* emphasized that last-minute changes to election rules can lead to voter confusion and place undue burdens on election officials (hereinafter “*Purcell* principle”). This principle has been consistently applied and expanded in subsequent cases, reinforcing the importance of maintaining stability in election procedures as Election Day approaches.

In light of the *Purcell* principle and its subsequent applications, we strongly urge the State Election Board to defer consideration of most of these proposed rules until after the November 5, 2024, general election. Implementing a suite of new rules at this late stage in the election process could seriously jeopardize the fair, legal, and orderly administration of elections that we all seek to ensure.

There are several compelling reasons to exercise caution:

1. Operational Challenges: These new requirements would be imposed on election workers at a critical juncture in their preparation process, potentially leading to unintended confusion and errors.
2. Recent Success: Georgia’s election process has demonstrated effectiveness through successful primaries in 2024 and a successful election cycle in 2022. Given these positive outcomes under the current system and the robust checks and balances that are already in place, we respectfully question the urgency of passing significant new election administration rules at this time.
3. Timing Constraints: If the proposed new rules were to pass on September 20, 2024, the earliest they could take effect would be October 13, assuming immediate publication following final approval. By this date, the training of election workers in Georgia will already be well underway - if not completed - with many election processes and procedures firmly established. Notably, absentee ballots will begin to be mailed on October 7, and in person early voting commences on October 15, as stipulated by O.C.G.A. § 21-2-385(d).
4. Potential for Confusion: Introducing new or redundant requirements for election administration on the eve of a general election could compromise the carefully crafted measures that the General Assembly has already put in place for Georgia’s 159 counties.
5. Legal Considerations: As legal professionals committed to the rule of law, we recognize that Georgia’s election integrity laws are among the most robust in the United States, including SB 202, SB 189, and HB 1207. The *Purcell* principle offers a valuable caution against late interventions in election procedures and has influenced numerous related cases.

At this critical and late juncture, we oppose any rule changes, as they would likely undermine the very election integrity they purport to protect. A more prudent approach would be to refrain from seeking such significant rule changes until after the November 2024 general election, allowing for a thorough evaluation of their potential impact and implementation challenges.

I. Proposed Amendment to SEB Rule 183-1-12-.01

#1 RULE 183-1-12-.01

Conduct of Elections - Ballot Types, Absentee and Provisional/Emergency
Requires separate printing of emergency/provisional and absentee ballots.

This rule would require counties to order more than one type of ballot. Emergency or provisional ballots would be printed separately and marked distinctly from absentee by mail ballots. The specific requirement in the rule is that provisional ballots “shall be marked in the top margin separately and distinctly from Absentee by Mail ballots.”

Under O.C.G.A. § 21-2-419, clear procedures already exist for handling provisional ballots that distinguish them from absentee ballots.

Notably, the statutory authority relied upon to support the proposed rule (O.C.G.A. § 21-2-283) does not provide clear support. This code section simply states the required format for Absentee Ballots. It does not give a statutory basis for this additional printing requirement, nor does it indicate any clear need to take additional steps to differentiate Absentee Ballots from Provisional Ballots. As it stands, this proposed rule appears to create an extra, costly requirement that is not needed.

Additionally, OCGA § 21-2-50 gives exclusive authority for determining the form of ballot to the Secretary of State. But even if the State Election Board did have the statutory authority to enact this rule, the timing of its potential enactment would be problematic, because ballots will already be in the process of being built, printed, and mailed; therefore, the proposed rule would not come into effect in time for proper implementation. It would be impossible for election officials to comply with this rule prior to the election, and the State Election Board should not pass it.

II. Proposed Amendment to SEB Rule 183-1-12-.12(a)(1)

#2 RULE: 183-1-12-.12(a)(1)

Tabulating Results - Ballot Count from Tabulation Tape Recorded on Recap Form

Requires poll manager and two witnesses to record count of ballots from tabulation tape on recap form.

This proposed rule change is not needed, because what it requires is already being done. Poll managers already record the count from the printed tabulation tape on the recap form, which is used in 159 counties by all poll managers at the end of the evening on election day. The recap form provided by the Secretary of State’s office already requires poll managers to record the number of ballots cast based on what each scanner reports. And – to be clear - the count from the tape is the same as the counter total on the scanner. Poll workers already follow secure procedures for tabulating results.

This proposal would not increase the security of elections or catch potential errors any more than existing procedures, because it is no different from current operating procedures. Again, poll workers already review the printed tape and are required to record or reconcile any discrepancies on the recap form. *See* O.C.G.A. § 21-2-484 and § 21-2-485.

Finally, the cited statutes provide questionable bases for this proposed rule. Specifically, O.C.G.A. § 21-2-368 and O.C.G.A. § 21-2-379.24 provide guidelines for approval by the Secretary of State for vendors proposing to sell or manufacture voting equipment, and do not address the evening shutdown procedures at polling places.

III. Proposed Amendment to SEB Rule 183-1-12-.12

#3 RULE 183-1-12.12

Tabulating Results - Hand Counting of Ballots

Requires manual hand count of ballots at each precinct after polls close.

The Task Force submitted written comment opposing the previous version of this rule when it was considered during the August 19, 2024, State Election Board meeting. We remain opposed to the revised version of this rule for the same basic reasons: chain of custody risks, delayed results, burdens on election workers, and the need for additional time and training to incorporate new processes.

The amended language in the current version attempts to mitigate the burden on poll workers and election officials caused by the proposed rule. In its current form, however, the proposed rule would still require manual hand counting of all paper ballots after they are removed from scanner bins at each precinct. The rule would still include sorting all ballots into stacks of 50 ballots for hand counting by three separate poll workers. After spreading, sorting, and counting the ballots, each poll worker would need to arrive at the same count, and to ensure the same results are reached by the hand counts and by the scanner totals; any discrepancies or corrective measures would be reported.

The new amendment in the current version offers poll managers the option of completing the hand count the next business day to address staffing concerns and fatigue of poll workers after a full day at the polling place. Board Member Janelle King stated that her amendment has made the proposed rule “more legal” and that she was “making sure we have the legal aspect of this rule in place.” Yet it is unclear how this amendment achieves that objective in practice.

Chain of custody is stronger when ballots are immediately and observably transferred to a secure container instead of being spread, sorted, and counted manually by multiple people on election night (or the following morning). Additionally, O.C.G.A. § 21-2-436 already provides strict procedures and avenues for acknowledging and reporting any discrepancies to poll managers. One statute given as authority for the proposed rule is O.C.G.A. § 21-2-420(a), which emphasizes the importance of quick results – which this proposed rule would certainly jeopardize, if not inhibit or prevent. Unnecessary delays risk undermining voter confidence in election results.

IV. Proposed Amendment to SEB Rule 183-1-12-.12(e)

#4 RULE 183-1-12-.12(e)

Tabulating Results - Reconciliation Reports Published by Counties

Requires counties to publish reconciliation reports after submitting them to Secretary of State.

The proposed amendment to Rule 183-1-12-.12(e) requires counties to publish their reconciliation reports on their websites or make them available at their elections offices after submitting them to the Secretary of State. Currently, election superintendents are only required to submit such reports to the Secretary of State within 30 days of certifying election results, reconciling the total number of ballots cast with the total number of voters credited for voting, and explaining any discrepancies.

Although the amendment arguably makes one step of the election process more accessible to the public at the county level, it provides little value overall, and the urgency of implementing this proposed rule is not apparent. Introducing new processes will require training and extra work to conduct properly. For the same reasons stated at the outset of this comment, we believe that consideration and implementation of this proposed rule should be postponed until after the general election.

V. Proposed Amendment to SEB Rule 183-1-12-.13

#5 RULE 183-1-12-.13

Storage of Returns - Expanded Retention of Data and Memory Cards

Requires the retention of memory cards for 24 months and requires election superintendents to sign and date the sealed storage of electronic files containing ballot data.

This proposed rule amendment presents several issues. It creates an unfunded mandate, requiring counties to purchase additional memory cards for scanners amounting to roughly \$2 million statewide (at the current cost of \$42 per memory card). Such a cost is entirely unnecessary when the data on the memory cards is already maintained and available in other formats. The fact that this rule was proposed by Garland Favorito, a longtime voting machine skeptic of both Georgia's former and current voting system, indicates that this proposal is simply part of his overall efforts to sow doubt and distrust in a voting system that he does not like. We oppose this proposed rule.

VI. Proposed Amendment to SEB Rule 183-1-12-.19

#6 RULE 183-1-12-.19

Preparation of Electors List and Use of Electronic Poll Book - Voter Lists

Requires voter lists to be published before advance voting begins.

This rule ignores the fact that voter lists are already made available, and are widely used by campaigns and political parties, through purchase from the Secretary of State's office. Therefore, this proposed rule is completely unnecessary. It is likely proposed by individuals who seek to challenge voters and are not familiar or are not happy with existing processes and costs to obtain voter lists. But their lack of familiarity and distaste for the costs of production does not necessitate a new rule.

Second, the proposed rule requires each county to produce a certified, time-stamped list of electors in addition to a supplemental list of electors before the start of advance voting and to post them for free on the county website for ten years. It would require the Secretary of State to do the same at the state level before advance voting begins on October 15. This creates additional time, work, labor costs, digital storage, and website costs for counties and the Secretary of State when they should be focusing their time, labor, and resources on preparing for the upcoming election. In addition, publishing this information on a public, freely available website invites its harvesting by bad actors around the globe with little effort, transparency, or tracking, potentially jeopardizing the security and privacy of Georgia voters' information.

VII. Proposed Amendment to SEB Rule 183-1-12-.21

#7 RULE 183-1-12-.21

County Participation and Totals Reporting - Daily Reports by Counties

Requires county registrars to report and publish the total number of voters and their participation method on a daily basis and to provide detailed reports following primaries and general elections.

This rule is redundant with current processes and would also invite inadvertent errors. Like the previous rule, it seems to be completely ignorant of existing processes where this data is already made publicly available, for free, via the Secretary of State's website. This existing data is widely used by campaigns and political parties. The fact that the people seeking this rule change are unfamiliar with the widely used process is not a reason to promulgate a new rule.

VIII. Proposed Amendment to SEB Rule 183-1-13-.05

#8 RULE 183-1-13-.05

Poll Watchers for Tabulating Center - Expanded Access for Poll Watchers at Tabulating Centers

Designates additional areas/processes within tabulating centers in which poll watchers are permitted to view tabulation and reconciliation processes.

In the name of transparency, this rule seeks to expand access by poll watchers within tabulating centers. The Task Force has reservations about this rule because it appears to invite the possibility of disruption by poll watchers to routine election processes. Poll watchers already have access to "enclosed spaces" in polling places and tabulation centers. The proposed rule calls for expanded access to observing the provisional ballot adjudication process, the closing of advanced voting equipment, the verification and processing of mail-in ballots, the transfer of memory cards, the regional or satellite check-in centers, and any election reconciliation processes.

We note here that the General Assembly already expanded and clarified legal parameters for poll watchers with HB1207, which took effect on July 1, 2024, and already allows poll watchers to "sit or stand as close as is practicable" to what they are observing. We are concerned that this proposed rule could inadvertently spur partisan poll watchers to make demands on election workers during the normal course of their work and to create the opportunity for friction to escalate unnecessarily. If the General Assembly had intended to designate additional areas for access by poll watchers, then that would have been done when HB 1207 was passed during the most recent legislative session a few months ago.

IX. Proposed Amendment to SEB Rule 183-1-14-.02(15)

#9 RULE 183-1-14-.02 (15)

Advance Voting - New Reconciliation Procedures

Requires superintendents or tabulators to reconcile the ballot count from scanner tabulation tapes, the election counters on the ballot scanners, the list of absentee electors, and the absentee ballot recap form.

This proposed rule purports to promote accuracy in the reconciliation procedures for advance voting. It adds new requirements to what the election superintendent or tabulating center personnel must do to further ensure that ballot counts match and that any discrepancies are detected and addressed. This proposed rule imposes new reconciliation procedures that are not yet part of standard operating procedures. The rule would not take effect until one day before the start of early voting. This timing is problematic on the eve of the general election.

X. Proposed Amendment to SEB Rule 183-1-14-.11

#10 RULE 183-1-14-.11

Mailing and Issuance of Ballots - Absentee Ballots by Tracked Mail

Requires registrars or absentee ballot clerk to send absentee-by-mail ballots [or provisional absentee ballots] via tracked mail (e.g. USPS) and to keep a log with tracking numbers available for public inspection.

This rule requires the board of registrars or the absentee ballot clerk to mail absentee ballots by United States Postal Service or other delivery services offering tracking. The aim is to track each absentee ballot and ensure that each ballot reaches its intended recipient/destination or was undeliverable and returned to sender. Additionally, the proposed rule requires that the board of registrars or absentee ballot clerk keep tracking records for each ballot mailed to electors and maintain such logs for public inspection pursuant to O.C.G.A § 50-17-70.

The orderly tracking of absentee ballots is a worthy goal. Existing tools and procedures, including BallotTrax and My Voter Page, are currently used to achieve this goal and are effective. While such measures can and should be improved upon whenever feasible, there is currently no demonstrated deficiency in current absentee ballot delivery processes that needs to be urgently addressed.

In addition, under current procedures, returned absentee ballots are not counted until they are reviewed and confirmed to have been completed correctly, with verification of authenticity and the voter's identity.

Given the lack of an urgent, demonstrated need to change current ballot tracking procedures, timing is of great concern here. Counties begin mailing absentee ballots on October 7, yet this proposed rule could take effect no earlier than the second week of October. The proposed rule would require new procedures and forms to be rapidly implemented, create an unfunded mandate on counties, and require county election officials across the state to be newly and consistently

trained. County election officials' workload would be increased with the addition of these new duties to their existing ballot tracking procedures.

Of additional concern is the significant increase in costs this proposed rule requires – from tracked mail services to additional forms and labor hours.

In order to maintain the orderly tracking of absentee ballots in the upcoming election, we recommend postponing consideration of this proposal until after November.

XI. Proposed Amendment to SEB Rule 183-1-14-.02

#11 RULE 183-1-14-.02

Conduct of Elections - Hand Counting of Ballots During Advance Voting

Requires hand counting by three poll officers of total ballots in the scanner [if a ballot box contains more than 1500 ballots] at each voting location and at the end of each day of advance voting. Any discrepancies between the hand count and electronic records must be resolved and documented.

The stated purpose of this rule is to enhance accuracy and to ensure that electronic system totals match hand counted totals. However, we have serious reservations about hand counting ballots at the precinct level for the same reasons that we continue to oppose a similar proposed rule regarding the hand counting of ballots on election day. *See supra* part III.183-1-12.12 Tabulating Results - Hand Counting of Ballots. We are similarly concerned here with chain of custody risks, delayed results, unnecessary requirements for election workers, and the need for additional time and training to incorporate new processes.

CONCLUSION

In conclusion, while election integrity is of crucial importance, many of these proposed rule changes would undermine that goal. They would introduce unnecessary requirements, invite confusion into the process, and create potential avenues for subverting and undermining trust in our elections.

We urge the Georgia State Election Board to reject these proposed rule changes at this time and maintain the current, well-established procedures for election administration as we quickly approach the general election in November.

Thank you for your consideration.

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