

August 18, 2024

Chairman John Fervier
Georgia State Election Board
2 Martin Luther King Jr. Drive, S.E.
8th Floor West Tower Suite 802
Atlanta, GA 30334

Re: Proposed Rulemaking to Revise SEB Rule 183-1-12-.12

Dear Chairman Fervier and Georgia State Election Board Members:

On behalf of the Brennan Center for Justice at New York University School of Law, we write to provide comment on the Proposed Rulemaking to Revise Rule 183-1-12-.12.¹ The State Election Board has listed this proposal as a procedure matter at its August 19, 2024 meeting.²

We urge the Board to reject the proposed rule, which adds several new steps for county boards of elections to complete before election results are certified. One provided purpose of the changes is to ensure county superintendents and boards can “lawfully fulfill their duties.”³ However, at least one of the proposed changes would frustrate a statutory mandate in the post-election process. And all of the proposed changes, adopted together at this late juncture, will undermine and potentially delay the certification process, burden county boards with time-consuming investigatory demands, and sow distrust in election results.

The proposed changes would encumber county boards with several significant pre-certification demands. First, they would require county boards to meet no later than 3:00 p.m. the Friday after Election Day to review precinct returns. During this review, county boards would have to

¹ The Brennan Center is a nonpartisan law and policy institute that works to reform, revitalize – and when necessary – defend our country’s systems of democracy and justice. This comment does not reflect views, if any, of the NYU School of Law.

² Georgia State Election Board, “Agenda August 19, 2024,” accessed August 15, 2024, <https://sos.ga.gov/page/state-election-board-meetings-events>.

³ Georgia State Election Board, “Notice of Proposed Rulemaking, Revisions to 183-1-12-.12,” accessed August 16, 2024, https://sos.ga.gov/sites/default/files/2024-07/notice_of_proposed_rulemaking_183_1_12_12_1_v2.pdf.

compile a list of all voters at each precinct and separate them by voting type (Election Day, advance voting, absentee, and provisionally) to examine for duplicates. They would further be required to compare each precinct's number of voted ballots with the number of unique voter IDs. In the event there are more ballots than voter IDs, county boards would then have to investigate any perceived discrepancy and *could not count votes from the entire precinct* until the investigation's results are revealed and a means of counting the ballots "justly" is agreed upon. When reviewing a precinct's returns, board members would be permitted to examine "all election related documentation."

The proposed requirement for county boards to meet soon after Election Day will disrupt well-established counting laws. To ensure that all valid provisional ballots are counted, Georgia law expressly provides up to three full days after Election Day for voters to submit necessary information and for county registrars to verify such information.⁴ For the general election, this means registrars have until 5:00 p.m. on Friday, November 8 to determine the validity of provisional ballots.⁵ But the requirement for county boards to meet *no later than 3:00 p.m.* that day impermissibly truncates the state's mandatory timeline. Should the Board adopt this rule, registrars could still be identifying which provisional ballots must be counted as board members begin their own review, meaning that they could be reviewing incomplete returns. Indeed, reviewing provisional ballots is a time-intensive process that requires registrars to conduct a "good faith" investigation, including a review of all available voter registration documentation, to determine whether the individual casting a provisional ballot was entitled to vote.⁶

Despite this thorough validation process for provisional ballots, and the existing multi-step reconciliation process for all ballots provided under Georgia law,⁷ the proposed amendments would permit board members to demand and sift through an unbounded list of documents in the immediate days after Election Day. This potentially never-ending search of documents (including those entirely unrelated to election results themselves) paves the way for significant interference with or delays in the certification process – precisely what the General Assembly and the Georgia Supreme Court have sought to avoid.⁸ For instance, a county board member may request scores of documents under the guise of investigating any perceived discrepancies. Or a county board member may outright refuse to certify results until the county fulfills troves of election data

⁴ Ga. Code Ann. § 21-2-419(c)(1)-(3).

⁵ Ga. Sec'y of State, "2024 Election Calendar and Highlights," accessed August 16, 2024, https://sos.ga.gov/sites/default/files/2024-01/29.1.2024%20Comp-Cal_State.01.12.24.Rev_...pdf (noting the November 8, 2024 5:00 p.m. deadline for November general provisional voter documentation).

⁶ Ga. Code Ann. § 21-2-419(b) (providing that the "available voter registration documentation" shall include registration information by electors and documentation of modifications or alterations of registration data, as well as information from the Department of Driver Services, Department of Family and Children Services, Department of Natural Resources, public libraries, and county election and registration offices).

⁷ Ga. Code Ann. § 21-2-493.

⁸ See Ga. Sec'y of State, "Raffensperger Defends Georgia's Election Integrity Act from Last Minute Changes Delaying Election Results," August 15, 2024, <https://sos.ga.gov/news/raffensperger-defends-georgias-election-integrity-act-last-minute-changes-delaying-election> ("The General Assembly knew that quick reporting of results and certification is paramount to voter confidence[.]"); *Tanner v. Deen*, 33 S.E. 832, 833-36 (Ga. 1899) (noting that local election officials "were not selected for their knowledge of the law" and therefore had no authority to make legal determinations concerning the validity of election returns).

requests.⁹ Each refusal to certify and delay tactic not only impacts a county’s ability to meet the mandatory deadline for certification,¹⁰ but also impedes other post-election processes, such as post-election contests and recounts (which carry their own interdependent timelines and demands for resources).¹¹

Such interference in the reconciliation process also invites confusion and opportunities to cast doubt on election results across the state. The proposed amendments especially heighten this risk, as board members can question precinct returns (with some being incomplete, as noted above), demand any and all election material (even if not readily available), and even reject votes from certain precincts (particularly after ballots have been cast and tabulated). This setting can quickly lead to chaos and damage confidence in election returns just days before certification.

The 2024 election is rapidly approaching, and Georgia voters deserve to have confidence in its results. But the proposed amendments would do the opposite: sowing distrust in returns across the state, all while encouraging rogue county officials to manipulate election outcomes. The Board should accordingly reject them without delay.

Sincerely,

BRENNAN CENTER FOR JUSTICE
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⁹ In May, Fulton County Board of Elections member Julie Adams filed a lawsuit against the board, arguing that she could refuse to certify the primary election results until the county fulfilled her election data requests in support of her investigation. *See* “Court Case Tracker: *Adams v. Fulton County Board of Elections and Registration*,” Brennan Center for Justice, published July 29, 2024, <https://www.brennancenter.org/our-work/court-cases/adams-v-fulton-county-board-elections-and-registration>; *see also* Lauren Miller & Will Wilder, *Certification and Non-Discretion: A Guide to Protecting the 2024 Election*, 35 Stan. L. & Pol’y Rev. 1, 14-23 (2024), <https://law.stanford.edu/wp-content/uploads/2024/02/MILLER-WILDER-FINAL-1.pdf> (detailing cases of local certifying officials across the country who have voted to delay the certification process while investigating unsupported allegations of fraud).

¹⁰ Ga. Code Ann. § 21-2-493(k) (requiring the county election superintendent to certify returns and transmit them to the Secretary of State by 5PM on the Monday after the election).

¹¹ Ga. Code Ann. §§ 21-2-522, 21-2-495(c)(1).