



January 13, 2020

Jasmine Shannon
Elections Division
Office of the Secretary of State
2 Martin Luther King Jr. Drive, S.E.
8th Floor West Tower
Atlanta, GA 30334

Re: Proposed Amendments to SEB Rules 183-1-12, 183-1-13, and 183-1-14.

Dear Ms. Shannon:

On behalf of the Brennan Center for Justice at NYU School of Law and Common Cause on behalf of Common Cause Georgia, we write to provide comment on proposed Rules 183-1-12, 183-1-13, and 183-1-14, made available by the State Election Board on December 19, 2019.¹

As the Secretary’s Chief Operating Officer recently noted, in addressing incidents with new voting equipment piloted on November 5, “When you have an election with millions of people voting at one time, things are going to happen.”² Without proper preparation, it is inevitable that equipment malfunctions, registration database errors, electronic pollbook errors and failures, and other incidents will “diminish[] and burden[]” the “First and Fourteenth Amendment rights 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.

Common Cause is a nonpartisan, grassroots organization dedicated to upholding the core values of American democracy. We work to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process.

Common Cause Georgia is a non-profit, non-partisan advocacy organization that works to strengthen public participation in our democracy and ensure that public officials and public institutions are accountable and responsive to citizens.

This comment does not reflect the views, if any, of the NYU School of Law.

² Stephen Fowler, Elections Officials Look To Smooth Out Wrinkles Ahead of Statewide Voting Machine Rollout, Georgia Public Broadcasting, Nov. 15, 2019, <https://www.gpbnews.org/post/elections-officials-look-smooth-out-wrinkles-ahead-statewide-voting-machine-rollout>.

cast a vote that is properly counted.”³ In the current environment, the threat to voters’ rights under federal and state law is even more tangible, as foreign adversaries actively seek to disrupt our elections.⁴ Georgia must make more robust resiliency plans for these incidents and ensure they are consistently followed, so that voters are not subject to long lines, delays, and disenfranchisement if and when systems fail.

Recently proposed rules are a start to that process but require significant changes in order to comply with the State’s obligations under federal and state law and achieve the goal of ensuring that, *under any circumstances, eligible voters can vote for the candidate of their choice and have their vote counted.*

In fact, we recommend that the proposed Rule 183.1.12 include that goal statement, to be used as a guide in interpretation. We also recommend that standard poll worker manuals contain the same goal statement and interpretive guidance. Manuals should repeat that goal in strategic spots, for instance, when describing what to do when machines malfunction, or situations calling for the exercise of discretion and judgment.

When voters are unable to vote and have their vote counted, their fundamental rights are violated. Beyond that, “[a] wound or reasonably threatened wound to the integrity of a state’s election system carries grave consequences beyond the results in any specific election, as it pierces citizens’ confidence in the electoral system and the value of voting.”⁵ The recommendations that follow in this document seek to avoid these democratic harms, advance voters’ rights, and bolster the public’s confidence in free and fair elections.

The attached appendix contains detailed edits to further the goals below.

Our Key Recommendations

- **Nobody should be prevented from voting a regular ballot due to machine failures:** Require polling places to have enough emergency paper ballots on hand for use during 2–3 hours of peak voting, and provide clear and uniform guidance on when an emergency situation exists, so that voters can continue casting ballots until malfunctioning voting machines are repaired or replaced.
- **Be ready to use provisional ballots as the ultimate failsafe:** Require polling places to have enough provisional ballot materials for 2–3 hours of peak voting, and clarify provisional voting guidance. This will ensure that provisional voting can serve as an effective failsafe in case of issues with electronic pollbooks or registration databases, but that voters will be given regular ballots when they are entitled to receive them.

³ Curling v. Raffensperger, 397 F.Supp.3d 1334, 1338 (N.D. Ga 2019).

⁴ Joint Statement from DOJ, DOD, DHS, DNI, FBI, NSA, and CISA on Ensuring Security of 2020 Elections (Nov. 5, 2019), <https://www.dhs.gov/news/2019/11/05/joint-statement-doj-dod-dhs-dni-fbi-nsa-and-cisa-ensuring-security-2020-elections>.

⁵ Curling v. Kemp, 334 F. Supp.3d 1303, 1328 (N.D. Ga 2018).

- Keep all election infrastructure secure: Prohibit electronic pollbooks from being connected to the public internet in order to safeguard this equipment from the spread of malware or unauthorized access, and require paper pollbook backups in case of malfunction.
- Test for potential problems in advance, so voters and pollworkers can focus on the election: Expand pre-election testing of voting system components to require more comprehensive testing of different contest selections, in every ballot style and language. This will allow election officials to catch a broader range of programming errors.
- Ensure the paper record lines up with voters' choices: Instruct poll officers to remind voters to check the accuracy of their ballots after it is printed, but before the ballot is scanned. Experts have warned that voters are not good at checking printed ballots for errors.⁶ This raises security concerns. Research has shown that a verbal direction to check the paper ballot before scanning makes voters more likely to verify their ballots. While such a verbal instruction will not eliminate the security risk, it will provide officials with a greater chance of discovering malware or other errors in ballot marking devices.
- Avoid long lines by supplying enough voting machines: Clarify that precincts must have at least one voting booth or enclosure for every 250 electors *on election day*. The current proposed language could lead to substantial confusion for election officials and violation of governing law.

I. Ensure that polling places have an adequate supply of paper ballots in case of voting machine failure, and that poll workers are prepared to use them when needed.

Emergency paper ballots that can be hand-marked by voters are a necessary measure to protect voters' rights in the event that machines malfunction. We recommend that the proposed language in Rule 183-1-12-.01 and 183-1-12-.11 be amended to clarify what constitutes a "sufficient" number of emergency paper ballots and to clarify when these emergency paper ballots should be used.

During the 2018 elections in Georgia, some voters reported waiting in line to vote for 2–3 hours or more due to inoperable voting machines or an insufficient number of voting machines, combined with historic turnout.⁷ As a result, many of these voters left without casting a ballot.⁸ While Georgia will replace all voting machines statewide before the 2020 elections, it is

⁶ Matthew Bernard et al., "Can Voters Detect Malicious Manipulation of Ballot Marking Devices?," University of Michigan (2020), <https://jhalderm.com/pub/papers/bmd-verifiability-sp20.pdf>; Sarah P. Everett, "The Usability of Electronic Voting Machines and How Votes Can Be Changed Without Detection," PhD Candidacy Thesis, Rice University (2007) (finding low rates of verification on review screens), <http://chil.rice.edu/research/pdf/EverettDissertation.pdf>.

⁷ Coalition Plaintiffs' Notice of Filing Evidence at 324–87, *Curling v. Raffensperger*, 397 F.Supp.3d 1334 (N.D. Ga. 2019) (No. 1:17-cv-2989-AT).

⁸ *Curling v. Raffensperger*, 397 F.Supp.3d 1334, 1383 ("Some DREs were taken out of service due to malfunction or irregularities, resulting in long lines at polling places, with many voters appearing to leave the polls without casting a vote."); Coalition Plaintiffs' Notice of Filing Evidence at 324–87 (collecting affidavits of voters who had to leave without casting a ballot as well as poll monitors who witnessed voters having to leave and not returning);

inevitable that some of these machines will malfunction at some point. Indeed, during the pilot of these new machines on November 5, 2019, voters in 5 out of 6 counties were unable to use the ballot marking devices when polls first opened on election day due to issues with electronic pollbooks. The problem was only resolved around 8:20am, or 80 minutes after it arose when the polls opened.⁹ Notes of a poll worker incident report from Paulding County stated, “Pollpads not working at Diane Wright - unable to scan unable to look up manually, *they have a line and people are leaving . . .*”¹⁰ (emphasis added).

The proposed regulations require every polling place and advance voting location to have a sufficient number of paper ballots that can be hand-marked by voters when ballot marking devices cannot be used, making it clear that it is inexcusable to prevent voters from casting ballots until machines are repaired or replaced. However, the proposed rules do not define “sufficient.” To comply with the State’s legal obligations, the regulations must go further to ensure that polling places are prepared for these inevitable scenarios. To manage lines in 2020, regulations should require polling places to have, at a minimum, enough emergency paper ballots to allow voters to continue casting votes during 2–3 hours of peak voting.

The Secretary must also issue specific guidance requiring polling places to have enough emergency paper ballots for at least 35% of all registered voters for the 2020 general election, given broadly shared expectations and expert predictions of extremely high turnout. Studies show that in 2016, nearly 39% of all voters who showed up to vote in person on election day in Georgia arrived during the busiest three hours of the day.¹¹ In 2018, Georgia saw a historic turnout level of 74% in a midterm election, a total which nearly matched the itself historic turnout of 76.53% during the 2016 presidential election.¹² Given these numbers, polling places should have at least enough emergency paper ballots for 35% of all registered voters in the 2020 general election.

In addition to defining “sufficient,” we recommend supplying greater clarity on when these emergency paper ballots must be used. The proposed regulations give broad discretion to election superintendents to determine when a situation constitutes a severe enough emergency to allow poll officers to issue hand-marked paper ballots to voters. This could lead to varying standards used across the state, or delays in determining when the switch to paper ballots should be made. While the proposed regulations do suggest some events that could be considered emergencies—such as when wait times exceed 30 minutes—these events could be difficult for poll officers to measure in the moment while potentially dealing with machine complications and frustrated voters.

In Pennsylvania, where similar emergency paper ballot procedures are used, a state directive requires paper ballots to be issued to voters whenever 50% of electronic voting machines in a

⁹ Executive Summary Initial Findings: Pilot Counties Municipal Elections 2019 New Georgia Statewide Voting System at 4-5.

¹⁰ Id. (Emphasis added).

¹¹ Charles Stewart III, 2016 Survey of the Performance of American Elections, <http://www.legendvote.org/wp-content/uploads/MIT-Charles-Stewart-Voter-Turnout-Study-2016.pdf>.

¹² *Georgia Breaks All-Time Voting Record*, Georgia Secretary of State, https://sos.ga.gov/index.php/elections/georgia_breaks_all-time_voting_record.

precinct are inoperable.¹³ The language in this directive was ordered by a federal court in 2009, in response to litigation arguing that previous state procedure—which did not require the use of hand-marked paper ballots until 100% of machines were not functioning—violated the right to vote.¹⁴ We recommend that Georgia adopt a similar policy and amend the regulations to state that a presumptive emergency exists whenever 25% or more of ballot marking devices in a polling place are inoperable or found to be misprinting ballots, or voters are waiting 30 minutes or more.

This more aggressive measure is necessary given the large size of many of Georgia’s precincts. At the time of the Pennsylvania litigation, “the vast majority of precincts” in that state “ha[d] no more than two or, at most, three machines.”¹⁵ This meant that if one or two machines malfunctioned, the 50% trigger would be met and the emergency paper ballots would be provided to voters. In contrast, the average precinct in Georgia has approximately 2,500 voters.¹⁶ Under state law, precincts of this size need at least 10 voting machines.¹⁷ Suppose that in a five-machine precinct serving 1,250 voters, 600 voters turned out on election day. This assumes high usage of advance and mail-in voting, so minimal stress on the election day precinct. If even 1 machine—or 20% of the 5 allotted—were to fail, lines could expand to *over 75 minutes* at their peak. If 2 machines out of the 5—or 40%—were to fail, the lines could be *over 30 minutes* for virtually the entire day, and *over 2 hours* for most of it.¹⁸ This potential for long lines as a result of voting machine failures necessitates a clear, uniform, and aggressive standard for implementing emergency paper ballots.

Finally, we strongly support the proposed language in Rule 183-1-12-.11(2)(c), which clearly states that “[e]mergency paper ballots shall not be treated as provisional ballots, but instead shall be placed into the scanner in the same manner that printed ballots in the polling place are scanned.” It is critical that poll workers adjusting to a new voting system understand this rule, so we recommend the development of training materials for poll workers that clearly express these procedures and ensure that voting equipment failures will never prevent an eligible voter from casting a regular ballot and having their vote counted.

¹³ *Directive Concerning the Use, Implementation and Operation of Electronic Voting Systems by the County Board of Elections*, Pennsylvania Department of State (2011), <https://www.dos.pa.gov/VotingElections/Documents/Elections%20Division/Administration/directive%20concerning%20the%20use.pdf>.

¹⁴ NAACP v. Cortes, No. 08–5048 (E.D. Pa Jan. 28, 2009).

¹⁵ Complaint, NAACP v. Cortes, No. 09-5048 (E.D. Pa Jan. 28, 2009), at 2, <https://moritzlaw.osu.edu/electionlaw/litigation/documents/NAACP-SCP-Complaint-10-23-08.pdf>

¹⁶ Mark Niese, et al., Voting Precincts Closed Across Georgia After Oversight Lifted, Atlanta Journal-Constitution (Aug. 31, 2018), <https://www.ajc.com/news/state--regional-govt--politics/voting-precincts-closed-across-georgia-since-election-oversight-lifted/bBkHxptlim0Gp9pKu7dfrN/>.

¹⁷ O.C.G.A. 21-2-367(b) (requiring one voting station for every 250 voters).

¹⁸ The Line Optimization Tool available from the Voting Technology Project of MIT and Caltech can be used to estimate the effect of machine failure on lines. If one estimates 600 voters and 5 machines, with a vote time of 5 minutes per voter, no negligible check-in time, and polls open from 7am to 7pm, the tool predicts an average line of no more than 30 minutes at its peak. But when the number of machines drops to 4, or only 20% failure, the line balloons to over 75 minutes at its peak. At 3 machines, or 40% failure, the line balloons to over 30 minutes for nearly the entire day, and over 2 hours for much of the day. <http://web.mit.edu/vtp/calc3.htm>.

The attached appendix contains detailed edits to these referenced provisions. *See* Appendix at i, iv–v.

II. Ensure that polling places have an adequate supply of provisional ballot materials, and that these materials can serve as an effective failsafe for all eligible voters.

In Georgia, voters are permitted to cast provisional ballots when their eligibility to vote in the polling place is in question—if for instance, they are registered to vote, but their name does not appear on the list of registered voters in the precinct. Provisional ballots, unlike regular ballots, are placed in a sealed envelope and counted after election day once the county registrar verifies that the voter was properly registered to vote in that election.

Provisional voting can act as a failsafe when voter registration database or electronic pollbook data is unreliable due to a malicious attack or other technical failure. A 2018 indictment released by Special Counsel Robert Mueller revealed that Russian operatives visited election websites in certain counties across the county, including Georgia.¹⁹ And the intelligence community has warned that malicious foreign actors will seek to interfere in the voting process once again in 2020.

A strong provisional voting process is especially critical given Georgia’s history of security issues. Georgia relied on vulnerable voter information systems in 2018 and agreed to improve this situation by enacting changes that enhance voter information security. Nevertheless, recent events have shown that these systems are still at risk. In September 2019, laptops meant for use to check in voters were stolen from a heavily African-American precinct before polls opened for a local election.²⁰ These laptops reportedly contained the personal information of every voter in the state and could serve as an invaluable resource for a malicious actor seeking to disrupt an election. Then, during the November 2019 pilot of the state’s new voting equipment, the Secretary of State responded to widespread electronic pollbook problems that were disrupting the normal voting process by directing the private vendors that support this equipment to “do a universal fix quickly by loading [a] dataset through a WiFi connection.”²¹ This response was ordered despite this type of transmission being “one of the largest sources of vulnerabilities, and thus most common methods of attack” against systems.²²

Given these continued incidents involving security risks to voter registration databases and electronic pollbooks, as well as the current threat environment, it is important to bolster the state’s provisional voting procedures to ensure that voters can cast a ballot under all circumstances.

¹⁹ Indictment at 26, *U.S. v. Netyksho* (D.D.C. July 13, 2018) (No. 1:18-cr-00215-ABJ), <https://www.justice.gov/file/1080281/download>.

²⁰ Mark Niesse & Arielle Kass, *Check-in Computers Stolen in Atlanta Hold Statewide Voter Data*, Atlanta Journal-Constitution (Sept. 17, 2019), <https://www.ajc.com/news/state--regional-govt--politics/check-computers-stolen-atlanta-hold-statewide-voter-data/0W40RoNQQ3maPRUt3KPYnL/>.

²¹ Executive Summary Initial Findings: Pilot Counties Municipal Elections 2019 New Georgia Statewide Voting System at 4.

²² Center for Internet Security, *A Handbook for Elections Infrastructure Security*.

The following amendments to the proposed regulations would help clarify the responsibility to keep an adequate supply of all necessary provisional ballot materials—beyond just ballots—for use in case of issues with e-pollbooks or registration databases, and ensure that eligible voters are never disenfranchised by malicious attacks on or errors in election systems:

First, we recommend amending 183-1-12-.18(3) to require election superintendents to provide each polling place with an adequate supply of *provisional ballot materials*, and to be prepared to resupply polling places with *provisional ballot materials* in a timely manner so that polling places do not run out. “Provisional ballot materials” should then be defined in this section to include hand-marked paper ballots, inner and outer envelopes, and all other materials needed for voters to cast a provisional ballot. In addition, this section should permit voters to use ballot marking devices to mark provisional ballots that are then placed in inner envelopes, but specify that the ballot of a voter who is entitled to vote a regular ballot should never be placed in a provisional ballot envelope.

As with emergency paper ballots, “adequate supply” in 183-1-12-.18(3) should be defined to require enough provisional ballot materials to accommodate 2–3 hours of peak voting. The Secretary must also issue specific guidance that polling places have enough provisional ballot materials for at least 35% of all registered voters for the 2020 general election, given the turnout expectations described above.

Second, to facilitate procedural improvements in future elections, we recommend adding to the rule a requirement that election superintendents submit a report to the Secretary of State’s office within 45 days of the election in the event that any polling location runs out of emergency paper ballots *or* provisional ballot materials.

Third, we recommend amending 183-1-12-.18(4) to clarify that this subsection applies to voters whose names do not appear on the electors list *or who otherwise appear ineligible to vote a regular ballot at that polling place, based on the pollbook information*. This latter scenario may occur if the electronic pollbook erroneously indicates that a voter has already cast a ballot or has requested an absentee ballot. Durham County, North Carolina experienced this exact issue in 2016, and the errors resulted in serious disruptions to the voting process.²³ Regulations must ensure that provisional voting can serve as an effective failsafe in these scenarios, and training materials should be developed to clearly communicate these procedures to poll workers.

Finally, we recommend that language be added to the regulations on provisional ballots that would prohibit election superintendents from not counting provisional ballots for reasons solely related to poll officer error, such as failure to fill out portions of the envelope. This requirement will further ensure that provisional ballots can operate as an effective failsafe that prevents any eligible voter from being disenfranchised.

See Appendix at vi–viii.

²³ Pam Fessler, *Federal Government to Inspect North Carolina Election Equipment Over Hacking Fears*, NPR (June 5, 2019), <https://www.npr.org/2019/06/05/729920147/federal-government-to-inspect-north-carolina-election-equipment-over-hacking-fea>.

III. Expand and clarify security protocols for operating electronic pollbooks.

We recommend that the proposed regulations be amended in three ways to improve security protocols for electronic pollbooks.

First, we recommend amending Rule 183-1-12-.05(2) to include electronic pollbooks on the list of equipment that shall not be connected to the internet. While electronic pollbooks need to be networked to each other during operation, connecting these devices to the public internet, rather than using an encrypted private network, leaves them vulnerable to the spread of malware and unauthorized access.

Second, we recommend amending Rule 183-1-12-.11(11)(a) to specify that if any voting system component malfunctions during the day of a primary, election, or runoff, the poll manager shall immediately notify the election superintendent and shall not allow any voter *or poll officer* to use the unit until and unless the malfunction is corrected. The addition of “poll officer” will clarify that this section covers malfunctioning electronic pollbooks as well as voting machines.

Third, a court order currently requires that precinct locations be provided with a paper backup in case of electronic pollbook failure. This resiliency measure should apply to advance voting as well, and be incorporated into the other security measures proposed in Rule 183-1-12. If it is infeasible to keep a paper pollbook backup at some advance voting locations that serve counties with large populations, we recommend amending Rule 183-1-12.01 to require a non-networked device containing the backup list as an alternative.

See Appendix at i, ii, v.

IV. Provide for thorough logic and accuracy testing.

The proposed rules call for pre-election testing to confirm the accuracy of printed ballots, touchscreen ballot displays, and audio ballots, as well as pre-election logic and accuracy testing of voting system components. However, standard practice, as well as Georgia’s own experiences in the November 2019 pilot, demonstrate that much more comprehensive testing is required.

Standard practice requires that during logic and accuracy testing, at least one vote for each available response or candidate choice in a contest is tested as well as overvotes and undervotes in each contest, an entirely blank ballot, and any jurisdiction-specific options available to voters such as straight-party voting or write-in voting.²⁴ Failure to test all possible selections and varying combinations of selections is a missed opportunity to catch programming errors, as was seen recently in Northampton County, PA, where new machines were being deployed on November 5, 2019. An “auto-test” feature on the Northampton machines and employed by the county failed to check whether votes for “cross-filed” candidates—candidates affiliated with more than one party—were counted accurately. This led to a “nightmare” on Election Day in which certain judicial candidates were shown as having received zero votes out of large numbers

²⁴ Interview with Edgardo Cortès, former Virginia Commissioner of Elections.

of ballots. Fortunately, the nightmare meant that the error was caught. But poll workers had to work through the night to tabulate votes on properly programmed machines, and the county and vendor had to reassure voters that the outcome of the election was correctly determined. At the same time, state and national headlines appeared about the incident and described how “everything went wrong.”²⁵

The proposed rule requires logic and accuracy testing, but it could be interpreted by a county to require the testing of no more than one ballot and one contest selection of one candidate. For e-pollbooks, it could require the testing of no more than one example voter. This is despite the fact that during Georgia’s own November 2019 pilot, some e-pollbooks reportedly failed when voters from the same household attempted to vote, particularly during advance voting.²⁶ Two voters from the household would be marked as checked in even though only one voter had actually checked in.

The proposed rule also specifies that re-testing between advance voting and election day is not required unless programming or the database changes. But during the November 2019 pilot of Georgia’s new voting systems, e-pollbooks appear to have functioned without serious reported incident during advance voting, yet widespread failures were experienced on Election Day.²⁷

Georgia should respond to these experiences as well as that of other jurisdictions and require more comprehensive pre-election testing of equipment. First, the regulations should require that electronic pollbooks be tested for proper functioning with voters of the same surname at different and the same addresses checking in, and that they be re-tested prior to Election Day. Second, the regulations should require more comprehensive testing of machine functioning for different contest selections. Finally, the regulations should not only require testing that one ballot display and one audio ballot is accurate, but also that displays and audio are accurate for every ballot style and language. This is required to ensure equality of access: checking proper functioning of machines for some groups of voters but not others is unwise and unfair to those groups—whether particular precincts or language minorities—for whom there is no testing.

See Appendix at ii–iii.

V. Improve voter verification and investigate suspected misprinting.

To ensure that the paper record created by ballot marking devices is an accurate representation of voters’ choices, voters must actually verify their ballots before casting them. But research shows that voters fail to do this as a matter of course, even when reminded with signage or at the start of the voting process.²⁸ However, reminders provided after printing but before scanning appear

²⁵ E.g., Nick Corasaniti, *A Pennsylvania County’s Election Day Nightmare Underscores Voting Machine Concerns: How ‘Everything Went Wrong’ in Northampton County*, NY Times (Nov. 30, 2019).

²⁶ Sara Henderson, a signatory to this comment, received these reports from voters and poll monitors during the early voting period.

²⁷ Executive Summary Initial Findings: Pilot Counties Municipal Elections 2019 New Georgia Statewide Voting System at 4.

²⁸ Matthew Bernard et al., “Can Voters Detect Malicious Manipulation of Ballot Marking Devices?,” University of Michigan (2020), <https://jhalderm.com/pub/papers/bmd-verifiability-sp20.pdf>; Sarah P. Everett, “The Usability of

to have a valuable positive effect. Moreover, when voters do check their ballots and alert poll workers to errors, failure to investigate and respond could leave compromised machines in service, disenfranchising many voters who are unlikely to confirm the accuracy of their printed ballots, as well as potentially destroying the value of the paper record. While these steps might not fully address the security concerns raised by recent studies, they are critical nonetheless. Georgia should require the following practices to increase the rate of voter verification and to alert election officials to potential malware or software errors in ballot marking devices.

The proposed rule should direct poll workers to remind voters to check their printouts for accuracy, and should call for a reminder *at the moment they need to check*, as this is most likely to be remembered by voters.²⁹ A poll worker manual instruction should require that voters be told—after printing out their ballot—to check accuracy before scanning, with specific language such as, “The printed ballot is the official record of your vote; don’t forget to check it. If you see something wrong, you can get a replacement.”

The proposed rule must also direct poll workers to track and report spoilage of ballots due to suspected misprinting of ballot selections, whether the result of malicious hacking or accidental misprogramming of machines. Suspected cases of misprinting should be investigated promptly, and voters should not be asked to use potentially compromised machines. But the current proposed rule appears to direct voters who experience misprinting to mark their ballots using the *same machine* that the voter may believe has printed a ballot not matching his or her selections. For those voters using a potentially compromised machine, the principles underlying Judge Totenberg’s order that Georgia replace its paperless machines are violated: Voters have the right to vote using a system that is reasonably assured to accurately reflect their choices.³⁰

The risk of errors that go undetected by voters can be partially mitigated through further detail in the rule on how and when poll workers should instruct voters to verify their printouts, as well as through invocation of the “voting system component malfunction” portion of the rule, when voters complain about misprinting or spoil too many ballots.

See Appendix at iii–v, ix–x.

VI. Require a sufficient supply of voting machines.

Georgia law, at O.C.G.A. 21-2-367(b), requires that “[i]n each precinct in which optical scanning voting systems are used, the county or municipal governing authority, as appropriate, shall provide at least one voting booth or enclosure for each 250 electors therein, or fraction thereof.” All precincts will soon be using such systems pursuant to their recent adoption statewide.

Electronic Voting Machines and How Votes Can Be Changed Without Detection,” PhD Candidacy Thesis, Rice University (2007) (finding low rates of verification on review screens), <http://chil.rice.edu/research/pdf/EverettDissertation.pdf>. DeMillo, Kadel, & Marks, “What Voters are Asked to Verify Affects Ballot Verification: A Quantitative Analysis of Voters’ Memories of their Ballots,” April 11, 2019 (draft) (finding low rates of verification of paper ballot printouts).

²⁹ Bernard et al., *supra* note 28, at 6–7.

³⁰ Curling v. Raffensperger, 397 F.Supp.3d 1334, 1402 (N.D. Ga 2019).

However, the proposed rule, 183-1-13-.01, states that “[w]hen calculating the number of voting booths or enclosures required to be available to electors of a precinct pursuant to O.C.G.A. 21-2-367(b), the calculation shall take into account the number of voting booths or enclosures available for electors of a precinct on Election Day and on the last day of advance voting. Polling places with assigned voters from more than one precinct shall use the total numbers of voters assigned to the polling place when calculating the minimum number of voting booths.”

It is unclear from the proposed language how the number of booths available at a precinct “on the last day of advance voting” is meant to be “take[n] into account” by election administrators when allocating voting machines for Election Day. And the lack of clarity in the meaning of the rule is exacerbated by the fact that voters are permitted to use any advance voting site in their county. This rule risks confusion on the part of county officials seeking to follow the guidance provided. For instance, some county officials might interpret this rule to require the same minimum number of voting booths on the last day of advance voting as on Election Day—one booth per 250 voters or portion thereof. Alternatively, other county officials might interpret the rule to permit *reducing* the minimum number of voting booths on Election Day by the number used on the last day of advance voting.

Either of these interpretations would lead to difficult questions in determining how to “take into account” booths from advance voting. In the case a county reduces booths on Election Day, if the county has one advance voting site with 15 booths, and has 20 Election Day polling places, is the county permitted to reduce the number of booths at *each* polling place by 15? By 15 divided by 20, or .60 voting booths? What if there are two advance voting sites? How are county officials to determine how many voters are “assigned” to each of the two sites? Is it half the voters in the county, regardless of the transportation time between various precincts in the county and the two sites?

Nothing in the governing statute appears to authorize reducing the number of booths available on Election Day based on early voting.³¹ Thus, the proposed rule risks violations of the governing statute. Furthermore, the proposed rule heightens the possibility that particular counties and precincts will receive insufficient electoral resources on Election Day, in potential violation of federal and State law. Different counties may also receive differing levels of resources, and even within counties, certain precincts may receive fewer voting booths throughout the election period, as advance voting sites are likely to be more accessible to some areas of a county than others. Insufficient electoral resources may lead to longer voter wait times at the polls, and disenfranchisement.

If the intent of the proposed rule is to reduce the number of booths required on Election Day, we strongly recommend against its adoption in any form, as it would likely violate governing law.³² It is further unwise to permit any reductions in resources available to voters on Election Day in what all agree will be an extremely high turnout election year. Not all voters can avail themselves of an advance voting resource at all, much less with equal ability. This is why the governing statute does not mention the provision of advance voting sites as a reason to provide fewer resources on Election Day.

³¹ O.C.G.A. 21-2-367.

³² *Id.*

If the intent is to require a minimum number of voting booths on the last day of advance voting, then we would recommend the following rule instead:

When calculating the number of voting booths or enclosures required to be available to electors of a precinct pursuant to O.C.G.A. 21-2-367(b), the calculation shall be effective on both Election Day and on the last day of advance voting. Polling places with assigned voters from more than one precinct shall use the total numbers of voters assigned to the polling place when calculating the minimum number of voting booths. When calculating the minimum number of voting booths at advance voting sites, voters should be assigned to the advance voting site requiring the least transit time from his or her residence.

See Appendix at ix.

* * *

We encourage the State Election Board to adopt these recommendations, which will help election officials prevent and recover from technology failures and cyberattacks. The right to vote and have your vote accurately counted is fundamental to our constitutional democracy. Georgia must do all it can to ensure that this right is protected.

Sincerely,

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
Lawrence Norden
Gowri Ramachandran
Derek Tisler
Daniel I. Weiner
120 Broadway, Suite 1750
New York, NY 10271

COMMON CAUSE
Susannah Goodman
805 15th Street NW, 8th Floor
Washington, DC 20005

COMMON CAUSE GEORGIA
Sara Henderson
250 Georgia Ave SE, #202
Atlanta, GA 30312