BRENNAN CENTER FOR JUSTICE

August 31, 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: SEB Rule 183-1-15

Dear Ms. Shannon:

We write to provide comment on proposed Rule 183-1-15, made available by the State Election Board on August 11, 2020.[1]

We recommend amending proposed Rule183-1-15-.02(2)(k) to require the use of red-oval ballots rather than black-oval ballots, as well as to change the lower threshold for flagging ballots for adjudication to 5%, and to change the upper threshold to 25%. We also recommend permitting counties to set more sensitive thresholds than that recommended by the State, if testing demonstrates that these more sensitive settings are warranted. This change will lead to fewer legitimate votes being rejected without an opportunity to determine whether the voter clearly indicated their selection.

Many Georgia voters are unfamiliar with hand-marked paper ballots. For the past two decades, Georgia voters have primarily used touchscreen voting machines to make their selection. While Georgia has long allowed all voters to cast an absentee ballot without excuse, few voters used this option – in 2018 just 6% of voters cast their ballot by mail.[2] And even with significantly higher shares of absentee voting during the primary elections this year, the relatively low turnout combined with the expected high number of first-time voters means that most Georgia voters will still be marking their selections on paper this November for the first time in decades, or ever. Election officials should prepare for this unfamiliarity and take all necessary steps to avoid discarding ballots where voters clearly made a choice.

[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 the views, if any, of the NYU School of Law.
[2] https://www.eac.gov/sites/default/files/eac_assets/1/6/EAVS_2018_Data_Brief_GA.pdf.

Because the scanners in use in Georgia can be set not to detect red ink, red-oval ballots will allow scanners to distinguish between the oval printed on the ballot and the marks made on the ballot by the voter, in blue or black ink. In contrast, the outlines of black ovals on ballots are picked up by these scanners, and therefore cannot be separated from marks made by voters. It is difficult to precisely determine, across the different elections and jurisdictions within a State, what percent of a target area is detected by scanners, particularly when a blank, black-oval ballot is scanned. This is because that value could change depending on ballot design, ink used for printing, the paper that ballots are printed on, and even the temperature of the rooms in which ballot printing is occurring.[3] Using red-oval ballots helps reduce these problems.

A range of 5-25% for flagging ballots is the range being successfully used with red-oval ballots in jurisdictions such as Colorado,[4] which uses the same scanners as Georgia will be using this November.[5] It is also the default setting for the scanners that Georgia will be using this November, if red-oval ballots are used.[6] Using these tested settings will accomplish the goal of counting every vote—no more and no less—by flagging more ballots with common alternatives to filling in the bubble – such as check marks, the letter x, a line through the bubble, or writing a word such as "yes" across the bubble – even if the marks are faint. Likewise, raising the threshold for automatically counting a mark as a vote to 25% will avoid stray marks from being counted as votes in contests where a voter intended to make no selection at all.

Importantly, lowering the bottom threshold to 5% and raising the upper threshold to 25% will not mean that more false positives are counted as votes. Ballots where 5–25% of the oval is filled in will still be adjudicated by a vote review panel as set forth in O.C.G.A. 21-2-483(g). But this change *will* mean that fewer false negatives are automatically rejected, and fewer false positives are automatically counted, without the opportunity for human review.

It is unclear why the board has proposed a threshold range of 10-20%, particularly when the typical setting for the upper threshold using even red-oval ballots is 25%; the thresholds for black-oval ballots should be *higher*, not lower. If this board cannot require red-oval ballots in the upcoming November election, we recommend choosing an evidence-based range by following the practice in other jurisdictions, such as Boulder County, CO, that use black-oval

[3] For instance, in Boulder, Colorado, in 2008, problems in vote counting arose when logic and accuracy testing prior to the election used unfolded test ballots, but "folds in the real ballots dislodged toner flecks" and some of these flecks were counted as votes. Laura Snider, "Boulder County Tests Voting Equipment," Boulder County Camera, Sept. 24, 2009, https://www.dailycamera.com/2009/09/24/boulder-county-tests-voting-equipment/.

[4] Conditions of Use for Dominion Voting System's Democracy Suite® 5.11-CO Voting System, https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/DominionDS511ConditionsOfUse.pdf

[5] Verified Voting, The Verifier, https://verifiedvoting.org/verifier/#mode/navigate/map/ppEquip/mapType/normal/year/2020.

[6] Conditions of Use for Dominion Voting System's Democracy Suite® 5.11-CO Voting System, 5, https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/DominionDS511ConditionsOfUse.pdf.

ballots and have engaged in extensive calibration testing across multiple elections.[7] For example, the regulation could call for black-oval ballots and set a range of 9-35%, but permit lower thresholds below 9%, and upper thresholds above 35%, if counties determine these more sensitive settings are appropriate after conducting testing before each election.

In any case, regardless of whether red-oval or black-oval ballots are used, counties should be permitted to set more sensitive thresholds, if testing using ballots marked in a variety of ways indicates that more sensitive thresholds are needed to reliably detect all marks that clearly indicate a voter selection, while not counting stray marks as votes. This calibration testing can be performed alongside required logic and accuracy testing.[8]

Sincerely,

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
Gowri Ramachandran
Derek Tisler
120 Broadway, Suite 1750
New York, NY 10271

[7] *E.g.*, Mircalla Wozniak, "Boulder County to test ballots and equipment for upcoming Primary Election", May 22, 2020, https://www.bouldercounty.org/news/boulder-county-to-test-ballots-and-equipment-for-upcoming-primary-election-4/; "Ballot Logic and Accuracy Test to Take Place on January 30," Jan. 17, 2018, https://www.longmontcolorado.gov/Home/Components/News/News/4307/3?selcat=3; Laura Snider, "Boulder County Tests Voting Equipment," Boulder County Camera, Sept. 24, 2009, https://www.dailycamera.com/2009/09/24/boulder-county-tests-voting-equipment/.

[8] *See, e.g.*, Logic and Accuracy Test Information Packet, 2020 Primary Election, Boulder County Clerk & Recorder Elections Division, https://assets.bouldercounty.org/wp-content/uploads/2020/06/2020PE-LAT-Documents-Combined.pdf.