

September 16, 2024

By Email

John Fervier, Chairman
Sara Tindall Ghazal, Member
Janice W. Johnston, Member
Rick Jeffares, Member
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Re: Comment on Proposed Rulemaking to Amend Rules 183-1-12-.01, 183-1-12-.12(a)(1), 183-1-12-.12(a)(5), 183-1-12-.12(e), 183-1-12-.13, 183-1-13-.05, 183-1-14-.02(15), 183-1-14-.11, 183-1-14-.02 and Adopt New Rules 183-1-12-.19(6)(a), 183-1-12-.21

Dear Chairman Fervier and State Election Board Members:

The American Civil Liberties Union of Georgia, Citizens for Responsibility and Ethics in Washington, and Public Rights Project respectfully submit this comment in opposition to the 11 proposed new rules or amendments released by the State Election Board (“SEB” or “Board”) on August 21, 2024. The proposed rules would introduce major, last-minute changes to election procedures in Georgia, disrupting election operations and undermining voter confidence.¹

Other commenters have raised legitimate objections to the substance of each of the 11 Proposed Rules. This comment focuses on the rules’ belated timing. If the Board adopts the rules at its September 20 meeting and immediately files them with the Secretary of State, the earliest they could take effect is October 10.² By this time, election administrators will already have begun to send out military and overseas ballots.³ “Advance voting” for the general election will start just five days later, on October 15.⁴ Adopting rules that would become effective merely five days before voting begins and 21 days before Election Day—on top of the three other rules the

¹ See *State Election Board Proposed Rules and Rule Amendments*, Elections Div. of the Ga. Sec’y of State’s Off. [hereinafter 11 Proposed Rules], <https://sos.ga.gov/page/proposed-state-election-board-rules-and-rule-amendments> (last visited Aug. 29, 2024).

² See O.C.G.A. § 50-13-6(a) (“Each rule adopted after July 1, 1965, shall not become effective until the expiration of 20 days after the rule is filed in the office of the Secretary of State.”).

³ See *Georgia counties urge state elections board to stop changing rules ahead of November*, Associated Press (Aug. 21, 2024), <https://apnews.com/article/georgia-state-election-board-rules-412ad7544d9002fb2a548c62f4210158>.

⁴ *2024 Election Calendar*, Off. of the Sec’y of State: Elections Div., https://sos.ga.gov/sites/default/files/2024-01/2024%20Comp-Cal_State.01.02.24.Rev_.0.pdf.

Board adopted earlier this year⁵—would impose substantial burdens on election workers and undermine public trust in the electoral process. The Board does not identify any circumstances or reasons for changing the rules so significantly at this late date. Nor has the Board given notice to the public of any “imminent peril to public health, safety, or welfare” that would justify emergency rulemaking.⁶

The Secretary of State and the Georgia Association of Voter Registration and Election Officials (“GAVREO”) have echoed these concerns.⁷ Members of GAVREO—election officials who serve the people of Georgia—will bear the brunt of the 11 Proposed Rules. As they recently stated, these last-minute changes would “disrupt the preparation and training processes already in motion for poll workers, absentee voting, advance voting and Election Day preparation.” GAVREO also expressed concern that “introducing new rules at this stage would create unnecessary confusion among both the public and . . . dedicated poll workers and election officials” and “could ultimately lead to errors or delays in voting, which is the last thing anyone wants.”⁸

Some members of this Board have been quick to dismiss the concerns of election professionals and experts about the serious disruptions its rules will cause.⁹ But the Board cannot bury its head in the sand—it has a legal duty to meaningfully consider public comments about the real-world effects of its actions. Georgia law explicitly requires this Board to “[a]fford to all interested persons reasonable opportunity to submit data, views, or arguments” on proposed rules, and instructs that the “agency *shall consider fully all written and oral submissions respecting the proposed rule.*”¹⁰ The notice-and-comment process is not an empty formality. It is a vital democratic check on arbitrary and unreasoned rulemaking by the unelected Board members.¹¹

The new rules include complex requirements that will be difficult—if not impossible—for election officials to implement for the upcoming election, including the proposed revisions to

⁵ See adopted proposals regarding SEB Rule 183-1-12-.12, Rule 183-1-12-.02, and Rule 183-1-14-.02.

⁶ See O.C.G.A. § 21-2-35(a).

⁷ See Press Release, *Raffensperger Defends Georgia’s Election Integrity Act from Last Minute Changes Delaying Election Results*, Ga. Sec’y of State (Aug. 15, 2024), <https://sos.ga.gov/news/raffensperger-defends-georgias-election-integrity-act-last-minute-changes-delaying-election>; @srl, X (Aug. 21, 2024, 5:09 PM), <https://x.com/srl/status/1826003655247757464> (“GAVREO Calls on State Election Board to Pause Future Rule Changes Ahead of Presidential Elections”).

⁸ @srl, *supra* note 7.

⁹ See, e.g., Mark Niese, *Harris-backed lawsuit challenges Georgia election certification rules*, Atlanta J.-Const. (Aug. 26, 2024), <https://www.ajc.com/politics/lawsuit-supported-by-harris-campaign-targets-new-georgia-certification-rules/PS7PRCBLYZB4XEP2ZF5YW6VH6E/>.

¹⁰ See O.C.G.A. § 50-13-4(a)(2) (emphasis added).

¹¹ See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978) (requiring “openness, explanation, and participatory democracy” in the rulemaking process assures the legitimacy of administrative norms).

Rule 183-1-12-.12(a)(5) *Tabulating Results*,¹² Rule 183-1-14-.02 (8), (13) *Advance Voting*,¹³ and Rule 183-1-13-.05 *Poll Watchers for Tabulating Center*.¹⁴ The first two of these rules contain complicated new instructions about having three sworn precinct poll officers hand count each scanner ballot box on Election Day and during the advance voting period. In both cases, three poll officers have to “independently count the total number of ballots removed from the scanner, sorting into stacks of 50 ballots, continuing until all of the ballots have been counted separately by each of the three poll officers,” among other steps not previously prescribed. Poll managers will have to decide on Election Day when to start the hand count, and poll officers might have to come in the next day to continue the hand count process. Imposing these burdensome new requirements increases the risk of delaying certification in violation of state and federal law. Meanwhile, the final rule mandates a drastic increase in the number of designated places for which the parties may appoint poll watchers, potentially increasing the number of poll watchers and thus the security required. These are not clerical amendments but substantial changes to the administration of Georgia elections at the eleventh hour.

Some rules will have to be implemented mere *days* after they become effective, assuming the Board votes to adopt them during its September 20, 2024 meeting. Proposed revisions to Rule 183-1-14-.02 (8), (13) *Advance Voting*,¹⁵ applies “on any day during the advance voting period,” which begins five days after the earliest effective date of these rules. Similarly, proposed new rules 183-1-12-.19(6)(a) *Preparation of the Electors List and Use of Electronic Poll Book*¹⁶ and 183-1-12-.21 *County Participation and Totals Reporting*,¹⁷ as well as proposed revisions to Rule 183-1-14-.11 *Mailing and Issuance of Ballots*,¹⁸ change the administration of

¹² *Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.12 Tabulating Results*, Ga. State Election Bd. (Aug. 21, 2024), https://sos.ga.gov/sites/default/files/2024-08/seb-notice_of_proposed_rulemaking_183_1_12_.12a5_hand_count.pdf.

¹³ *Notice of Proposed Rulemaking, Revisions to Subject 183-1-14-.02 Advance Voting*, Ga. State Election Bd. (Aug. 21, 2024), https://sos.ga.gov/sites/default/files/2024-08/Notice_of_Proposed_Rulemaking_183_1_14_.02_8_13_AB_hand_counting.pdf.

¹⁴ *Notice of Proposed Rulemaking, Revisions to Subject 183-1-13-.05 Poll Watchers for Tabulating Center*, Ga. State Election Bd. (Aug. 21, 2024), https://sos.ga.gov/sites/default/files/2024-08/seb-notice_of_proposed_rulemaking_183_1_13_.05_poll_watchers_in_tab_center.pdf.

¹⁵ See *Revisions to 183-1-14-.02*, *supra* note 13.

¹⁶ *Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.19 Preparation of the Electors List and Use of Electronic Poll Book*, Ga. State Election Bd. (Aug. 21, 2024), https://sos.ga.gov/sites/default/files/2024-08/seb-notice_of_proposed_rulemaking_183_1_12_.19_voter_list.pdf.

¹⁷ *Notice of Proposed Rulemaking, Promulgation of Subject 183-1-12-.21 County Participation and Totals Reporting*, Ga. State Election Bd. (Aug. 21, 2024), https://sos.ga.gov/sites/default/files/2024-08/seb-notice_of_proposed_rulemaking_183_1_12_.21_daily_reporting.pdf.

¹⁸ *Notice of Proposed Rulemaking, Revisions to Subject 183-1-14-.11 Mailing and Issuance of Ballots*, Ga. State Election Bd. (Aug. 21, 2024),

advance voting and absentee ballots. If these rules go into effect on the earliest possible date of October 10, each county and the Secretary of State will have less than five days to comply with the requirement that they “post a freely accessible link to the certified time-stamped list of Electors before advance voting begins” when the voter registration list is still in flux.¹⁹ “Each registrar” must then implement specific daily reporting requirements “no later than the beginning of the advance voting period,”²⁰ and during early voting the board of registrars or absentee ballot clerks must navigate the additional requirement that additional absentee ballots must be mailed “by United States Postal Service or other delivery service which offers tracking,” with no explanation of what satisfies the tracking requirement.²¹ The haste of these new mandates will bring chaos and confusion to Georgia elections.

* * *

We respectfully urge the Board not to adopt the 11 Proposed Rules. Pursuant to O.C.G.A. § 50-13-4(a)(2), we request that the Board include this comment in the rulemaking record and, if the Board ultimately adopts the proposed rules, we request that it “issue a concise statement of the principal reasons for and against [their] adoption and incorporate therein its reason for overruling the consideration urged against [their] adoption.”

Sincerely,

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https://sos.ga.gov/sites/default/files/2024-08/seb-notice_of_proposed_rulemaking_183-1_14_11_ab_chain_of_custody.pdf.

¹⁹ See *Revisions to 183-1-12-.19*, *supra* note 16. O.C.G.A. § 21-2-224(a), (c) provides that the deadline for registration to vote is October 7, 2024, but that “[m]ail voter registration applications shall be deemed to have been made as of the date of the postmark affixed to such application,” which means valid registration applications might continue to come in up until Election Day.

²⁰ See *Promulgation of 183-1-12-.21*, *supra* note 17.

²¹ See *Revisions to 183-1-14-.11*, *supra* note 18.