

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

OCT 09, 2024 01:40 PM

STATE OF GEORGIA


 Danielle F. Forté, Clerk
 Muscogee County, Georgia

MUSCOGEE COUNTY BOARD OF ELECTIONS AND REGISTRATION,)	
)	
)	
Petitioner,)	Civil Action No. _____
)	
)	
v.)	
)	
STATE ELECTION BOARD,)	
)	
)	
Respondent.)	
)	
)	

VERIFIED PETITION

1. In the 2024 election cycle, Georgia’s county boards of elections face national scrutiny as they work tirelessly to facilitate fair, legal, and orderly elections in every county. Muscogee County is no exception.

2. The Georgia General Assembly created the State Election Board (the “SEB”) to support county boards of elections in their work. Georgia law dictates that the SEB adopt rules that promote fair, legal, and orderly elections and that conform with the laws enacted by the legislature.

3. At the eleventh hour before a Presidential election, the SEB strayed from its charter. Well after county boards of elections have finalized budgets, hired and trained staff, and printed and begun to mail ballots, the SEB has adopted new rules that dramatically change election operations and impose onerous and new obligations on election administrators throughout Georgia.

4. At the SEB's September 20, 2024 public meeting, dozens of public commenters objected to the passage of the rules, for a myriad of reasons, and stressed that one rule in particular, requiring hand-counting of all ballots, would make the election less secure by needlessly introducing human error and disrupting the chain of custody of the ballots. Nonetheless, the SEB adopted the rule.

5. Voting in the minority, SEB Chairman John Fervier said: "We will be going against the advice of our legal counsel by voting in the affirmative."¹ Among other concerns, Chairman Fervier was referring to the fact that the Georgia State Attorney General's Office had itself offered comments in opposition to the proposed rules.

6. County boards of elections have been left scrambling to figure out how to comply, with limited staff already hired and trained and polling location hours already established.

7. The amendments to Rule 183-1-12-.12(a)(5) (the "Hand Counting Rule") are the subject of this litigation. The Hand Counting Rule will cause confusion on Election Day, delay the reporting of election results, and undermine faith in the election system.

8. Petitioner, the Muscogee County Board of Elections and Registration (the "Muscogee Board"), has nearly finalized preparations for the 2024 election and has begun to administer the election. The Muscogee Board brings this lawsuit to obtain a declaration that the Hand Counting Rule violates Georgia law and an injunction to prevent implementation during the current election.

PARTIES

9. Petitioner Muscogee County Board of Elections and Registration is the superintendent of elections for Muscogee County. It was created pursuant to O.C.G.A § 21-2-40.

¹ Georgia State Election Board, *Georgia State Election Board Meeting: September 20, 2024*, https://www.youtube.com/watch?v=c68IJ_gO1c8 at 3:29:25-3:29:35 (last accessed Oct. 8, 2024).

The Board has five members, with three appointed by city council, one by the Democratic Party, and one by the Republican Party. The Muscogee Board is based at City Services Center, 2nd Floor, 3111 Citizens Way, Columbus, Georgia 31907.

10. Respondent State Election Board (“SEB”) is a Georgia state board and division of the Secretary of State’s Office. The SEB’s principal office is located at 2 Martin Luther King, Jr. Drive, Suite 802, Floyd West Tower, Atlanta, Georgia 30334.

JURISDICTION & VENUE

11. This Court has jurisdiction pursuant to the Georgia Constitution of 1983, Article VI, § 4, ¶ I and O.C.G.A. §§ 9-4-2, 9-4-3, and 50-13-10(b).

12. Venue is proper in Muscogee County because the Muscogee Board has its principal places of business within the county. *See* O.C.G.A. § 50-13-10(b).

WAIVER OF SOVEREIGN IMMUNITY

13. The SEB has waived sovereign immunity for the purposes of this declaratory judgment action. *See* O.C.G.A. § 50-13-10(b). Petitioner is not proceeding under the Georgia Constitution’s Art. I, § II, ¶ V waiver of sovereign immunity.

STANDING

14. The Muscogee Board has standing because it bears responsibility for implementing the SEB’s rules.

15. The Muscogee Board oversees the election budget, sets early voting schedules, approves polling location changes, and hires election polling place captains and workers throughout the county. The Muscogee Board reviews policies and procedures and provides guidance to the Board’s election director regarding compliance with the SEB rules and state and federal law.

16. The Muscogee Board is also responsible for certifying election results.
17. The Muscogee Board has long finalized the 2024 election budget, early voting schedules, and poll locations. Muscogee County's election director has already hired and trained more than 55 poll workers for early voting and 350 precinct or Election Day poll workers. As of the filing of this Petition, all of the early voting poll workers have completed their training and about half of the Election Day poll workers have completed their training.
18. There are approximately 150,000 registered voters in Muscogee County.
19. The County projects that approximately 85,000 people will vote in the 2024 election, with 35% voting in-person on Election Day.
20. Muscogee County has 25 precinct managers overseeing the same number of polling places. The larger polling places will likely process over 3,000 ballots on Election Day.
21. The Hand Counting Rule imposes administrative burdens, requires expenditure of resources, and creates confusion relating to the thousands of ballots to be processed on Election Day in Muscogee County.
22. As a direct result of the Hand Counting Rule and the new requirements that it imposes, the Muscogee Board must seek additional funding to pay for additional training of poll workers and additional work from poll workers.
23. The Muscogee Board must divert resources away from existing obligations to determine how best to comply with the Hand Counting Rule.
24. Even with these additional expenses, the diversion of resources, and advance planning, the Muscogee Board cannot comply with the Hand Counting Rule and all of Georgia election law.

25. Compliance with the Hand Counting Rule runs contrary to O.C.G.A. § 21-2-420, which requires that after completing the required accounting and related documentation for a precinct, “the poll manager and at least one assistant manager shall . . . immediately deliver all required documentation and election materials to the election superintendent.”

26. The Muscogee Board has a strong interest in, and a legal obligation to, facilitate a fair and lawful election in which the citizens of its county have their votes promptly and accurately counted.

27. The Hand Counting Rule will delay election results, which increases voter distrust in the results. Hand-counting also introduces more possibilities for human error, which creates opportunities for misinformation about the certainty of the election results. The Muscogee Board may need to expend resources to counter such misinformation during this election cycle or into the future.

28. The Muscogee Board also has standing because Georgia law gives the SEB power to penalize county boards which violate its rules or election law. *See* O.C.G.A. § 21-2-33.2.

APPROPRIATENESS OF DECLARATORY RELIEF

29. The SEB’s actions leave Petitioner in a state of legal uncertainty on the eve of an election.

30. The SEB’s most recent rules conflict with Georgia election code. Thus, the Muscogee Board cannot comply with both the SEB’s rules and the Georgia election code. The Muscogee Board would thus have to choose between violating Georgia statutory law or SEB regulations.

31. The Muscogee Board requires immediate guidance as to their legal obligations, and the relief sought would redress Petitioner’s concerns.

32. Petitioner is presently prepared to facilitate a smooth and fair election in compliance with state law. Declaring the Hand Counting Rule unlawful will allow Petitioner to administer the 2024 general election in compliance with all applicable rules and laws.

FACTUAL ALLEGATIONS

33. The SEB is an administrative agency created by the Georgia legislature.

34. Georgia law imparts the following powers and duties regarding rulemaking onto the SEB:

- a. “To promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections;
- b. To formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections; and, upon the adoption of each rule and regulation, the board shall promptly file certified copies thereof with the Secretary of State and each superintendent; [...] and
- c. To promulgate rules and regulations to define uniform and nondiscriminatory standards concerning what constitutes a vote and what will be counted as a vote for each category of voting system used in this state[.]” O.C.G.A. § 21-2-31(1).

35. On September 20, 2024, less than fifty days before the election, the SEB held a public meeting at which it voted on eleven proposed rule changes. It adopted six of the eleven

rules, including major revisions to Rule 183-1-12-.12(a)(5) to require the hand-counting of all ballots cast on Election Day statewide.

36. In public comment at the meeting, dozens of citizens, voting experts, and election administrators urged the SEB to reject the Hand Counting Rule.

37. Among other notable comments, the Georgia Association of Voter Registration and Election Officials (“GAVREO”) objected to the rule in written and verbal comment, citing the Hand Counting Rule’s “potential to delay results; set fatigued employees up for failure; and undermine the very confidence the rule’s author claims to seek.” Attached as Exhibit A.

38. The Attorney General’s Office commented to the SEB that: “There are thus no provisions in the statutes cited in support of these proposed rules that permit counting the number of ballots by hand at the precinct level prior to delivery to the election superintendent for tabulation.” Attached as Exhibit B.

39. The Muscogee Board participated in opposing the Hand Counting Rule as well. In addition to signing onto the GAVREO comment, the Muscogee Board unanimously passed a resolution on August 20, 2024 requesting that the SEB establish a 90-day quiet period for changes to election-related policy or rules before a federal election except in exigent circumstances. Attached as Exhibit C. Muscogee was the first of several boards throughout Georgia to pass such a resolution.

40. At the hearing on September 20, the SEB adopted the Hand Counting Rule by a vote of 3-2.

Hand Counting of Ballots Is Not Supported by the Elections Code

41. O.C.G.A. § 21-2-420(a) provides a general directive for poll officers in each precinct to “complete the required accounting and related documentation for the precinct” and to

“advise the election superintendent of the total number of ballots cast at such precinct and the total number of provisional ballots cast.” O.C.G.A. § 21-2-420(a). It likewise calls for the public posting of those totals. *Id.* at § 21-2-420(b).

42. The “required accounting” depends on the type of voting system used in the precinct. O.G.C.A. §§ 21-2-436; 21-2-454; 21-2-485.

43. None of these provisions provides a basis to allow for hand counting as required by the Hand Counting Rule.

44. In Muscogee County, all precincts utilize optical scanning equipment and conduct a central count. As a result, O.G.C.A. § 21-2-485(1) applies. Under this statute, Muscogee poll officers must “seal the ballot box and deliver the ballot box to the tabulating center, as designated by the superintendent.” O.C.G.A. § 21-2-485(1)(A). This must be done “*as soon as the polls are closed and the last elector has voted...*” *Id.* (emphasis added).

45. In direct contrast with the statute, the Hand Counting Rule requires that three sworn poll officers open the ballot boxes and “independently count the total number of ballots [...] continuing until all of the ballots have been counted separately by each of the three poll officers.” Rule 183-1-12-.12(a)(5), attached as Exhibit D.

46. The process, as contemplated by the Hand Counting Rule, could take hours to complete or continue on the next day.

47. Elections officials were already required by law to reconcile the number of ballots with the number of voters by comparing the count on the poll pads to the number of ballots cast on the tabulator. *See* O.C.G.A. § 21-2-484. If the numbers do not reconcile, the poll manager must explain why. Ballot counts are generally and accurately conducted by the ballot scanner in each precinct. The ballot scanners contain two separate memory cards for redundancy.

48. The Election Supervisor tests the accuracy of the ballot scanners prior to each election. This is known as Logic and Accuracy testing.

49. There is a much greater probability of human error from hand-counting than error from a frequently-tested machine designed to count ballots, and hand-counting ballots slows down the process and makes ballots more vulnerable to interference.

Ambiguities Plague the Hand Counting Rule

50. Because the SEB finalized the Hand Counting Rule less than one month prior to the general election, there is insufficient time to gain the clarity needed and its implementation will be inconsistent.

51. Among other things, the Hand Counting Rule has some ambiguities that affect its implementation. The Rule requires that poll workers count the ballots “independently” and “separately,” which suggests that each of the three sworn poll officers must count all of the ballots in stacks of 50 before the next person begins. The Hand Counting Rule could also be read to allow a poll officer to count one stack of 50, pass that stack to the next person, and continue counting.

52. The method by which hand counting occurs will affect how long it takes to complete. In Cobb County, for example, local elections officials ran a test during the public comment period for the Hand Counting Rule. When poll officers counted the entire stack of ballots before the next person began, they completed the full hand count at a rate of 12.56 ballots per minute. When they counted one stack of 50, then passed that stack to the next person, they completed the count at a rate of 35.75 ballots per minute. The Cobb County Board of Elections submitted these results to the SEB during the comment period. Attached as Exhibit E.

53. It is not clear from the vague text of the rule whether a polling location with fewer than 750 ballots per scanner must *begin* the hand-count on Election Day or *complete* it that day. In either event, this provision violates O.C.G.A. § 21-2-421, which requires election officials to report precinct results by no later than 11:59 p.m. on Election Day.

The Decision to Extend the Hand Count

54. While the SEB made certain changes to the Hand Counting Rule to address concerns that hand-counting of ballots might extend beyond Election Day, these supposed safeguards created additional problems.

55. According to the Hand Counting Rule, the poll manager or assistant poll manager can decide whether to complete the hand counting process on or after Election Day: “This decision can be made at the end of Election Day, or if a scanner possesses more than 750 ballots on Election Day, the Poll Manager can choose to start the next day and finish during the week designated for county certification.” Rule 183-1-12-.12(a)(5), attached as Exhibit D.

56. But Georgia law gives the election superintendent authority over the ballot-counting process: “In primaries and elections in which optical scanners are used, the ballots shall be counted at the precinct or tabulating center under the direction of the superintendent[.]” O.C.G.A. § 21-2-483.

Financial and Logistical Impacts of the Hand Count Rule

57. Not only does the Hand Counting Rule contradict O.C.G.A. § 21-2-421, it also has a direct impact on Muscogee County’s logistical, financial, and security plans.

58. Poll workers have already been hired and trained under the laws and rules prior to these rules being adopted by the SEB.

59. In localities where the hand count extends beyond Election Day, county boards of elections will be required to seek additional funding to pay poll workers for additional days of work.

60. Muscogee election officials secured their polling locations in January 2024. Polling locations usually serve other purposes after Election Day, and thus are unlikely to be available for hand-counts that extend past Election Day or last for multiple days.

61. The Hand Counting Rule anticipates this problem by creating a new one: by requiring the count to be conducted at the County election office if not at the polling location. Rule 183-1-12-.12(a)(5)(b), Attached as Exhibit D.

62. The Muscogee County election office cannot accommodate a hand-count operation.

63. In addition, moving the ballots introduces chain-of-custody concerns and opportunities for interference.

64. The Hand Counting Rule also requires the hand-counting procedure to be conducted “publicly” and provide notice to “*all candidates on the ballot and the county chair of both major political parties* no later than 10:00 pm on Election Day,” Rule 183-1-12-.12(a)(5) (emphasis added), attached as Exhibit D, which will be a diversion of attention and resources in the end of a busy day.

65. In order to move the ballots, the Muscogee Board will also have to obtain proper security to guard the ballots overnight. This is another expense not covered by the existing budget.

Last-Minute Rulemaking Plagues Election Directors

66. The last-minute nature of the Hand Counting Rule, in combination with several other late rule changes by the SEB, creates an unreasonable burden on the Board and other local election officials.

67. The 2024 election is well underway. Counties were required to mail military ballots by September 21. Counties began mailing absentee ballots on October 7. Early voting starts on October 15. Absentee ballots have already been printed. The Rule is scheduled to take effect on October 22, only 15 days before Election Day.

68. In August, GAVREO publicly called on the SEB to halt adoption or implementation of new rules that would take effect prior to Election Day, citing to an extensive list of both practical and legal problems with the introduction of such rules.

69. Despite these repeated requests, the SEB has made several significant and subsequent changes to election administration, including the Hand Counting Rule.

70. On August 6, the SEB adopted new rules impacting the administration of the 2024 general election which have already taken effect. The August Rules include Rule 183-1-12.12, which requires county boards to make available to any individual board member “all election related documentation created during the conduct of elections prior to certification results,” and Rule 183-1-12.02(c.2), which defines certification of election results as “to attest, after reasonable inquiry that the tabulation and canvassing of the election are complete and accurate and that the results are a true and accurate accounting of all votes cast in that election.” Both of these rules are already the subject of litigation.

71. On September 20, the SEB adopted the Hand Counting Rule and five additional new administrative rules. The other new rules change the established procedure as to poll

watchers (Rule 183-1-13-.05), public posting of reconciliation reports (Rule 183-1-12-.12(e)), daily reporting of absentee and early ballots cast (Rule 183-1-12-.21), and recording and reconciliation of ballot counts (Rule 183-1-12-.12(a)(1) and Rule 183-1-14-.02(15)).

72. Taken together, the new rules place an enormous burden on election officials. The new rules change the existing procedure at nearly every step of the election process, including early voting, drop boxes, absentee ballots, poll watchers, tabulation, reconciliation, and certification of results. Many of the new rules are written as modifications to existing rules, forcing election officials to parse through discrete rules, one at a time, to try to figure out how their obligations have changed.

73. The rules offer no additional funding or added resources with which to implement them. Election officials have already trained staff on the pre-existing procedure for all of these new rules, and must now comprehend the changes, distill them into accurate training materials, and re-train hundreds of poll staff.

CAUSES OF ACTION

COUNT I: DECLARATORY JUDGMENT THAT THE AMENDMENTS TO RULE 183-1-12-.12(a)(5) ARE INVALID BECAUSE THEY ARE NOT AUTHORIZED BY LAW

74. Petitioner realleges and incorporates herein by reference paragraphs 1 through 73.

75. This Court has the authority “to declare rights and other legal relations of any interested party petitioning for such declaration.” O.C.G.A. § 9-4-2(a). The Court also may issue a declaratory judgment “in any civil case in which it appears to the court that the ends of justice require that the declaration should be made.” O.C.G.A. § 9-4-2(b).

76. In addition, the Georgia Administrative Procedure Act (“APA”), O.C.G.A. § 50-13-10(a), states “[t]he validity of any rule, waiver, or variance may be determined in an action for

declaratory judgment when it is alleged that the rule, waiver, or variance or its threatened application interferes with or impairs the legal rights of the petitioner.”

77. “The test of the validity of an administrative rule is twofold: whether it is authorized by statute and whether it is reasonable.” *Black v. Bland Farms, LLC*, 332 Ga. App. 653, 662 (2015). A rule is invalid if it “exceed[s] the scope of or [is] inconsistent with the authority of the statute upon which it is predicated.” *Id.* at 663.

78. As alleged in this Petition, the SEB has no statutory or constitutional authority to revise the Hand Counting Rule (Rule 183-1-12-.12(a)(5)) as approved on September 20, 2024.

79. The Hand Counting Rule is inconsistent with the duties of poll officers laid out in O.G.C.A. §§ 21-2-436, 21-2-454, 21-2-485.

80. The Hand Counting Rule is not authorized by the statutory provisions invoked by the SEB as the source of its authority, O.G.C.A. §§ 21-2-483(a), 21-2-436, 21-2-420(a), or any other provision of Georgia state law.

81. Petitioner is in a state of legal uncertainty concerning the changes to Rule 183-1-12-.12(a)(5). The Hand Counting Rule and its potential applications interfere with and impair the legal rights of Petitioner.

82. Accordingly, Petitioner seeks a declaration that the amendments to Rule 183-1-12-.12(a)(5) are invalid and outside the authority of the SEB.

83. Petitioner seeks further plenary relief that the enforcement of the amendments to Rule 183-1-12-.12(a)(5) be enjoined.

**COUNT II: DECLARATORY JUDGMENT THAT
THE AMENDMENTS TO RULE 183-1-12-.12(a)(5) ARE INVALID
BECAUSE THE SEB FAILED TO COMPLY WITH PROCEDURAL REQUIREMENTS
OF THE GEORGIA ADMINISTRATIVE PROCEDURE ACT**

84. Petitioner realleges and incorporates herein by reference paragraphs 1 through 83.

85. In revising the Hand Counting Rule, the SEB also failed to comply with the procedural requirements of the Georgia APA, including its requirements to fully consider all written and oral submissions regarding proposed rules. O.C.G.A. § 50-13-4(a)(2).

86. The Georgia APA requires agencies, including the SEB, to accept public comment on proposed rules during a 30-day notice period. O.C.G.A. § 50-13-4(a)(1-2). The agency must “consider fully all written and oral submissions respecting the proposed rule.” O.C.G.A. § 50-13-4(a)(2). Upon request, the agency must also “issue a concise statement of the principal reasons for and against its adoption and incorporate therein its reason for overruling the consideration urged against its adoption.” *Id.*

87. “No rule adopted after April 3, 1978, shall be valid unless adopted in exact compliance” with the foregoing requirements. O.C.G.A. § 50-13-4(d).

88. The SEB has violated the APA by failing to provide an explanation to the dozens of individuals who offered specific objections to the Hand Counting Rule. Commenters explained that this Rule will introduce confusion, delay, and distrust into the election, and they explained that since they have already hired and trained election staff and set the budgets for paying them, they are not practically able to put this rule, which requires many hours of additional labor, into effect for this election cycle.

89. Petitioner is in a state of legal uncertainty concerning the changes to Rule 183-1-12-.12(a)(5). The Rule and its potential applications interfere with and impair the legal rights of Petitioner.

90. Accordingly, Petitioner seeks a declaration that the amendments to Rule 183-1-12-.12(a)(5) are invalid because the SEB failed to comply with the requirements of the Georgia APA in amending the rule.

91. Petitioner seeks further plenary relief that the enforcement of the amendments to Rule 183-1-12-.12(a)(5) be enjoined.

**COUNT III: DECLARATORY JUDGMENT THAT
THE AMENDMENTS TO RULE 183-1-12.12(a)(5) ARE INVALID
BECAUSE THEY ARE UNREASONABLE**

92. Petitioner realleges and incorporates herein by reference paragraphs 1 through 91.

93. The amendments to Rule 183-1-12-.12(a)(5) do not comply with the Georgia APA because they are unreasonable.

94. The Hand Counting Rule creates unnecessary administrative burden, delay in processing election results, extra expense to Petitioner and other county election boards, and will not produce a more accurate count.

95. The Hand Counting Rule does not promote the SEB's goals of a fair and orderly election.

96. Petitioner is in a state of legal uncertainty concerning the changes to Rule 183-1-12-.12(a)(5). The Rule and its potential applications interfere with and impair the legal rights of Petitioner.

97. Accordingly, Petitioner seeks a declaration that the amendments to Rule 183-1-12-.12(a)(5) are invalid because the SEB's action is unreasonable.

98. Petitioner seeks further plenary relief that the enforcement of the amendments to Rule 183-1-12-.12(a)(5) be enjoined.

PRAYER FOR RELIEF

Wherefore, Petitioner respectfully requests that the Court:

- (a) Declare the SEB's amendments to Rule 183-1-12-.12(a)(5) invalid;
- (b) Enter a temporary restraining order and/or interlocutory injunction and then a permanent injunction against the enforcement of each of the SEB's amendments to Rule 183-1-12-.12(a)(5) that the Court determines to be invalid, unreasonable, procedurally deficient, or unauthorized by Georgia statute; and
- (c) Grant any other relief the Court deems necessary and proper.

Respectfully submitted on this 9th day of October, 2024

PAGE, SCRANTOM, SPROUSE,
TUCKER & FORD, P.C.

By: /s/ Thomas F. Gristina

James C. Clark, Jr.
Ga. Bar No.: 127145
jclark@pagescrantom.com
Thomas F. Gristina
Ga. Bar No.: 452454
tgristina@pagescrantom.com

1111 Bay Avenue, Third Floor
P.O. Box 1199
Columbus, Georgia 31902
(706) 324-0251

Jonathan B. Miller*
Public Rights Project
490 43rd Street, Unit #115
Oakland, CA 94609
T: (510) 738-6788
jon@publicrightsproject.org

*Application for admission *pro hac vice* forthcoming

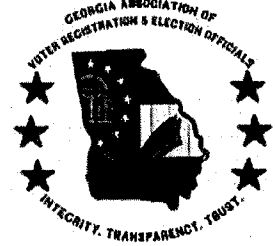
Counsel for Petitioner

EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

GEORGIA ASSOCIATION OF VOTER REGISTRATION AND ELECTION OFFICIALS

September 17, 2024



Dear Members of the State Election Board,

The Georgia Association of Voter Registration and Election Officials (GAVREO) offers the following feedback on the eleven rules that have been posted for rulemaking to be voted on at your September 20th meeting.

We hope you understand that our role is to administer elections in a nonpartisan manner. To that end, any feedback that we provide during the rulemaking process is not only nonpartisan but is rooted in decades of practical election administration experience. We do not oppose rules because we are lazy or because a political operative or organization wants us to. We oppose rules because they are poorly written, inefficient, would not accomplish their stated goals, or go directly against state law. The proposed rules under consideration are not simply “common sense” rules that no reasonable person could disagree with.

The 2024 General Election is less than 50 days away and by-mail voting starts today for some counties and no later than this Saturday for all counties. Ballots have been designed, procured, and are presently being issued to military and overseas voters. Election officials are training thousands of poll workers daily across the state and are already working to educate the public on what to expect throughout the voting process and beyond. We respectfully ask that these proposed rules, and any other petitions for rulemaking, be tabled until 2025.

1. 183-1-12-.01 (Absentee Ballot Distinction)

GAVREO opposes this rule because it goes against state law, will waste taxpayer money, and cannot be implemented prior to the upcoming election.

As we have previously stated, distinguishing between different types of hand marked paper ballots will do nothing to increase the chain of custody of those ballots. However, we would be remiss if we did not inform the board that the opportunity to adopt this rule prior to the 2024 General Election has already passed.

It takes a significant amount of time to design, proof, and order hand-marked paper ballots before the first ballot is ever issued to a voter. That process is routinely completed between 60-70 days prior to any major statewide election so registrars can meet deadlines enumerated in both state and federal law. For the upcoming election we are required to

mail absentee-by-mail ballots to military and overseas voters beginning as early as Tuesday, September 17th and no later than Saturday, September 21. Ballots will be mailed to all other requestors on Monday, October 7th. Considering that rules are not in place until a minimum of 20 days after the Board votes to adopt them, the earliest day that this rule could be in place is October 10th – weeks after ballots have been delivered to counties and three days after we will send ballots to most absentee-by-mail voters.

The stated purpose of this proposed rule is to improve the security and chain of custody of hand-marked paper ballots by ensuring that absentee-by-mail ballots are visually distinct from emergency and provisional ballots. However, knowing the reason that any ballot was cast does almost nothing to address the chain of custody of that ballot but will potentially violate the secrecy of ballots cast in small batches (such as provisional ballots). Rather, we track the chain of custody of hand-marked paper ballots using printed text both on the ballot and the attached stub that is specific to each ballot.

2. 183-1-12-.12 (Reconciliation)

GAVREO is neutral on this rule, but believes that this rule is unnecessary.

Poll workers are already required to record the number of ballots cast from the screen of each in-person scanner on the appropriate paperwork. That number is already printed on the results tape for redundancy (and it's worth noting that the number of ballots cast on the results tape is a printed version of what is already on the screen). This rule is redundant and simply could provide the poll managers with an opportunity to make a clerical error on official paperwork.

3. 183-1-12-.12 and 183-1-14-.02 (Hand Counting)

While GAVREO appreciates the Board's efforts to amend the proposed rule to address our concerns, we continue to oppose the rules for the reasons we have previously stated including: the rule's potential to delay results; set fatigued employees up for failure; and undermine the very confidence the rule's author claims to seek. Please see our previous comments for more detail about our concerns with this rule.

4. 183-1-12-.12 (Reconciliation Reports)

GAVREO does not object to this rule as it will provide more transparency to the election process, but we have identified what we believe is an inconsistency with the rule. If the goal of the rule is to require counties to post the reconciliation report referenced by the rule to their respective county websites, and to allow counties without a county website to post it at their office instead, it appears that the rule provides a county with the choice to report on the website or at the office at its discretion.

While GAVREO does not object to this particular rule, we do object to passing rules within 90 days of the election.

5. 183-1-12-.13 (Storage of Returns)

GAVREO does not object to this rule on the condition that the State Election Board provides any additional memory cards that our members may need for future elections.

We acknowledge the importance of retaining election data contained on certain memory cards for a sufficient period of time. However, procuring a new set of memory cards for every election will be expensive even if we procure them through the most economical source possible rather than the current recommended supplier.

Also, we want to be clear that we are not saying that the data described in the rule should not be retained. We simply think that there are more efficient ways to accomplish that goal. For example, each in-person scanner contains two identical memory cards for redundancy. Only retaining one memory card would cut costs in half.

6. 183-1-12-.19 (Voter Lists)

GAVREO opposes this rule as it seems to assume that there is a static list of eligible electors that cannot be changed during the voting process. That is simply not the case. Registrars are often required to update the list during active elections for a variety of reasons.

For example, O.C.G.A. § 21-2-224 describes the deadline for anyone to apply to register to vote in an election. That does not imply that they must be registered by that date – only that the application has to be submitted by that date. Furthermore, we are required to accept any application that is received through the mail as long as the application is postmarked on or before the deadline. In fact, that same code section requires election officials to accept any mailed application that does not have a postmark but was received by the Secretary of State's Office no later than 25 days prior to the election.

Another example is O.C.G.A. § 21-2-220(d) that requires registrars to provide applicants 30 days to provide any missing information, and to only finish processing those applications when that information is received (which can occur on Election Day). One last example is that O.C.G.A. § 21-2-407 expressly authorizes registrars to correct the list of electors during every primary and election as we discover errors or omissions.

It is worth noting that Electors Lists are not used during Advance Voting and are only used at Election Day Polling Places. Advance voting is a form of absentee voting, and O.C.G.A. § 21-2-381(b)(1) requires that each application is verified against the information on file at the registrar's office rather than against the electors list.

The Board should also know that the Supplemental List is a document that is often filled out by hand by the poll workers at the direction of a registrar while voting is taking place. It cannot be posted online for public review weeks before Election Day, and the Secretary of State has no way to gather that information statewide as the rule describes.

7. 183-1-12-.21 (Daily Reporting)

GAVREO is neutral on this rule as it seems to attempt to make the voting process more transparent by including the number of ballots cast in related daily reporting requirements. However, we are concerned that it contains different reporting requirements for Primary and General Elections. Paragraph (1)(a) requires that registrars include the number of ballots cast in their daily reports for primary election, paragraph (1)(b) does not require those numbers to be reported for General Elections, and special elections are never mentioned. We would prefer if there was one standard report for all three types of elections.

8. 183-1-13-.05 (Poll Watchers at Tabulation Center)

GAVREO is neutral on this rule.

9. 183-1-14-.02 (Reconciliation)

GAVREO regretfully opposes this rule because it creates a situation where a county may miss a reporting deadline that is required by law.

Our members routinely reconcile the number of absentee ballots cast to the number of voters who were issued ballots throughout the absentee voting period. However, mistakes happen and as a result discrepancies occur that must be investigated prior to certification.

However, under this rule we only have an hour to investigate any discrepancy to the satisfaction of the Election Superintendent before any absentee results can be reported. But, for the majority of our counties the superintendent is the full board and cannot be expected to meet during one of the busiest times on Election Day. Per the rule as written, this rule would effectively contradict the law adopted by the legislature passed this year that expressly requires us to report absentee results within an hour of the polls closing.

While we wholeheartedly agree that the numbers described in this rule should be reconciled and any discrepancies explained prior to certification, the timeline described in the rule is unreasonable.

10. 183-1-14-.11 (Chain of Custody)

GAVREO opposes this rule because it fails to increase chain of custody, enhance security, or improve transparency. Furthermore, it cites a law that does not exist.

The main feature of the proposed rule states that it requires absentee-by-mail ballots to be tracked to ensure chain of custody. However, the rule never actually requires us to track absentee-by-mail ballots. The changes in the rule are:

- a. That the registrars use a common carrier that offers tracking to send ballots, and
- b. That the registrars maintain any USPS tracking records generated by this process in accordance with O.C.G.A. § 50-17-70.

The rule never requires registrars to track absentee-by-mail ballots. It requires registrars to retain records that are not generated by the USPS. Furthermore, O.C.G.A. § 50-17-70 does not exist.

Also, even if the rule was not fundamentally flawed, it is too late to pass the rule for the upcoming election. (See the response to 183-1-12-.01 for the applicable timeframes.)

Sincerely,

GAVREO Executive Board

RETRIEVED FROM DEMOCRACYDOCKET.COM

EXHIBIT B

RETRIEVED FROM DEMOCRACYDOCKET.COM



GEORGIA DEPARTMENT OF LAW

40 Capitol Square SW
Atlanta, Georgia 30334-1300

CHRISTOPHER M. CARR
ATTORNEY GENERAL

www.law.ga.gov
(404) 656-3300

ATTORNEY-CLIENT PRIVILEGED INFORMATION

September 19, 2024

MEMORANDUM:

TO: John Fervier
Chairman
State Election Board

FROM: Elizabeth Young
Senior Assistant Attorney General

RE: Request for Comments on Proposed Rules in Advance of September 20,
2024 State Election Board Meeting

This memorandum is in response to the Board's request for comments from our office regarding the proposed rules to be considered by the Board at its September 20, 2024 meeting.

As an initial matter, this office does not typically engage in a broad review of an agency's proposed rules to ensure that the agency's proposed rules are consistent with law. As an administrative board with rulemaking authority, it is the Board's obligation to formulate its proposed rules to be consistent with law and conducive to the fair, legal and orderly conduct of primaries and elections. O.C.G.A. § 21-2-31(2). The Board should evaluate the legality of any proposed rule prior to publication and voting. Should the Board desire specific legal advice concerning any proposed rule or action, the Board should seek such advice in writing addressed to this office. This office cannot search through email correspondence to which it is simply copied to determine whether or not the Board has made a passing comment to seek legal advice on any particular topic. In addition, seeking unspecified comment on any proposed rule is unhelpful. In its request for legal advice, the Board should specify the matter upon which it seeks legal advice and ask a specific question to be answered through the Chair. This is the best manner in which to seek advice and allows this office to answer those questions on which the Board needs advice and avoids any misinterpretation of the Board's request and allows for an efficient and deliberate response.

In the instant matter, in an effort to assist the Board, we make this limited exception to our usual practice to offer the following expedited comments upon the rules proposed for

consideration at the September 20 meeting based on the Board's request. We make this exception here because a review of the proposed rules reveals several issues including that several of the proposed rules, if passed, very likely exceed the Board's statutory authority and in some instances appear to conflict with the statutes governing the conduct of elections. Where such is the case, and as outlined below, the Board risks passing rules that may easily be challenged and determined to be invalid.

Please note the following:

As a general matter, the passage of any rules concerning the conduct of elections are disfavored when implemented as close to an election as the rules on the September 20 agenda. The United States Supreme Court in *Purcell v. Gonzalez* recognized that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” 549 U.S. 1, 4-5 (2006). Federal courts have thus generally refrained from enjoining state election laws in the months prior to an election. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring); *see also League of Women Voters of Florida, Inc. v. Fla. Sec’y of State*, 32 F.4th 1363 (11th Cir. 2022) (*Purcell* applies when voting was set to begin in less than four months). The Board itself has utilized the *Purcell* principle in defense of certain Senate Bill 202 provisions. *See In re Ga. Senate Bill 202*, 622 F.Supp.3d 1312, 1343-44 (N.D. Ga. 2022) (“[State Defendants, which include the members of the State Election Board] argue that the Court should withhold relief under the *Purcell* doctrine and the Eleventh Circuit’s application of that doctrine in *League* because in-person early voting for the general election will begin in mid-October, and a late change to the law will pose a significant risk of voter confusion and harm to the electoral process.”). Thus, the Board should also consider how the passage of any rules well-within the period where courts have agreed that *Purcell* applies may affect the application of the principle in the future.

I. The Board’s general rule-making power is limited to rules that do not exceed or conflict with the Georgia Election Code.

“[T]he General Assembly is empowered to enact laws of general application and then delegate to administrative officers or agencies the authority to make rules and regulations necessary to effectuate such laws.” *Jackson v. Composite State Bd. of Med. Examiners of Ga.*, 256 Ga. 264, 265 (1986). The test of validity of an administrative rule is twofold: (1) is it authorized by statute, and (2) is it reasonable? *Georgia Real Estate Comm. v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975).

The Board’s power to adopt rules is solely derived from statutes passed by the General Assembly. The General Assembly has granted the Board authority to promulgate rules and regulations as will be conducive to the fair, legal, and orderly conduct of primaries and elections, *see* O.C.G.A. § 21-2-31(2); and further to promulgate rules and regulations to obtain uniformity in the practices and proceedings of superintendents, registrars,

deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections. O.C.G.A. § 21-2-31(1).

However, a broad grant of statutory authority to promulgate rules is not an unlimited grant of authority. See *Ga. Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 32-33 (1975) (administrative rules must be both authorized by statute and reasonable) (discussing *Eason v. Morrison*, 181 Ga. 322 (1935)). Only the General Assembly has the constitutional authority to legislate. See *HCA Health Services of Ga., Inc. v. Roach*, 265 Ga. 501, 502 (1995). Although the General Assembly may grant “administrative authority to promulgate rules for the enforcement of the General Assembly’s enactments” to agencies like the Board, the agency’s authority can only extend to “adopt rules and regulations to carry into effect a law already passed” or otherwise “administer and effectuate an existing enactment of the General Assembly.” *Id.* Thus, a regulation that adds extra requirements or procedure where the statute speaks plainly on a matter is inconsistent with the statute and may likely be subject to a legal challenge. See *Dep’t of Hum. Res. v. Anderson*, 218 Ga. App. 528, 529 (1995) (agency regulation that added a requirement before a modification order of child support took effect was inconsistent with the clear authority of the statute).

Operating where there is *no* statute is also similarly impermissible: while agencies have implied powers “as a reasonably necessary to execute the express powers conferred,” *Bentley v. State Bd. of Med. Examiners of Ga.*, 152 Ga. 836, 836 (1922), the Supreme Court of Georgia has recently warned that “for a government entity whose authority on the relevant point is purely a creature of statute, the absence of statutory authority is the absence of legal authority to act.” *Camp v. Williams*, 314 Ga. 699, 709 (2022) (Bethel, J., concurring). See also *Gebrekidan v. City of Clarkston*, 298 Ga. 651, 654 (2016) (“[T]he General Assembly speaks through its silence as well as its words; the broad scope and reticulated nature of the statutory scheme indicate that the legislature meant not only to preclude local regulation of the various particular matters to which the general law directly speaks, but also to leave unregulated ... the matters left unregulated in the interstices of the general law.”).

Thus, the Board’s authority to promulgate rules and regulations is limited to the administration or effectuation of the statutes in the Georgia Election Code. The Board should therefore take all precaution to ensure that any rule adopted and promulgated by the Board neither conflicts with nor expands any statute; otherwise, the Board runs substantial risk of intruding upon the General Assembly’s constitutional right to legislate. When such intrusion occurs, the Board rule is highly likely to be ruled invalid should it be challenged.

Finally, to the extent that a proposed rule merely mirrors the language of a statute without more, it does not accomplish anything. To the extent that a rule mirrors a statute but adds or alters the statute’s requirements, the rule will likely be subject to an easy legal challenge.

II. Proposed Rules

There are several proposed rules before the Board that appear to either impermissibly conflict with or otherwise expand the scope of Georgia statutes.

1. Proposed Rules 183-1-12-.01 and 183-1-12-.19

These rules seek to change the form of the ballots and require that the Secretary of State and the counties post “freely accessible link[s]” to a list of electors prior to advance voting and maintain such data files for free download for a minimum of ten consecutive years, respectively. Thus, the proposed rules seek to direct actions that are, by statute, within the purview of the Secretary of State. *See* O.C.G.A. § 21-2-50(a)(1), (15); O.C.G.A. § 21-2-225(c). As such, the proposed rules do not fall within the Board’s regulatory power under O.C.G.A. § 21-2-31 thus very likely exceeds the Board’s scope of authority to promulgate.

2. Proposed Rule 183-1-13-.05

This rule seeks to expand the enumerated locations where poll watchers may be designated beyond those places identified in the statute. O.C.G.A. § 21-2-408(c), which the original rule, Ga. Comp. R. & Regs. 183-1-13-.05, tracks almost exactly, specifically provides that poll watchers may be designated by the superintendent to serve in “the check-in area, the computer room, the duplication area, and such other areas as the superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center.” Under the canon of statutory construction “expression *unius est exclusio alterius*” (“the mention of one thing implies the exclusion of another”), a list of items in a statute is presumed to exclude items not specifically listed, and the omission of additional locations from the statute is regarded by the courts as deliberate. *See, e.g. Barnes v. State Farm Fire & Cas. Co.*, 2024 Ga.App. LEXIS (Aug. 26, 2024).

The proposed rule goes beyond the statutorily-designated list of places a superintendent may decide to place poll watchers and instead supplants the superintendent’s discretion with the Board’s own. This too does not carry into effect a law already passed by the General Assembly but rather expands upon the statute; the rule, if adopted, would then very likely be subject to legal challenge as invalid.

3. Proposed Rule 183-1-14-.11

This rule goes beyond merely administering or effectuating an existing statute by adding additional requirements that would make it inconsistent with the statute. The proposed rule purports to require that absentee ballots be mailed “by United States Postal Service or other delivery service which offers tracking[.]” However, the General Assembly did not specify the use of tracking for the mailing of absentee ballots. *See* O.C.G.A. § 21-2-

384(a)(2) (“[T]he board of registrars or absentee ballot clerk shall *mail or issue* official absentee ballots to all eligible applicants....”) (emphasis added).

The proposed rule further requires that county boards of registrars maintain as public record the tracking records for each ballot mailed to the electors. However, the Board has no authority to promulgate rules regarding the classification or retention of documents. *See* O.C.G.A. § 21-2-31 (promulgate rules for the fair, legal, and orderly conduct of elections). Thus, promulgation of the rule would very likely go beyond the scope of the Board’s authority and be subject to challenge as invalid

4. Proposed Rule 183-1-12-21

This rule seeks to expand on the reporting requirements set forth in O.C.G.A. § 21-2-385(e). The statute already provides a fairly detailed process by which county boards of registrars or absentee ballot clerks must report information regarding the ballots issued, received, or rejected during the advance voting period. *See* O.C.G.A. § 21-2-385(e). The proposed rule seeks to go beyond the statute to require, among other expansions, additional information regarding the substance of the ballots (i.e., the number of political party or nonpartisan ballots cast). However, the General Assembly did not include that information as information that must be reported pursuant to O.C.G.A. § 21-2-385(e). Accordingly, the rule, if promulgated, would similarly likely go beyond the scope of the statute and the Board’s authority.

5. Proposed Rules 183-1-12-12(a)(5) and 183-1-14-02(8), (13)

These rules refer to the process of hand-counting ballots on Election Day and during the advance voting period, respectively, to produce a vote total to compare to the ballot count produced by the ballot scanners. Crucially, these Proposed Rules purport to amend provisions to allow for hand-counting ballots at the precinct-level, which would appear to occur prior to submission to the election superintendent and consolidation and tabulation of the votes. *Compare* Ga. Comp. R. & Regs. 183-1-12-.12(a) (“After the Polls Close”) with Ga. Comp. R. & Regs. 183-1-12-.12(b) (“Consolidation of Results”); Ga. Comp. R. & Regs. 183-1-14-.02(8) (“At the close of voting on any day *during the advance voting period...*”); Ga. Comp. R. & Regs. 183-1-14-.02(13) (“The ballot scanner and ballot containers shall then be secured *until time for the tabulation of votes.*”).

However, the statutes upon which these rules rely do not reflect any provision enacted by the General Assembly for the hand-counting of ballots prior to tabulation.

For example, O.C.G.A. § 21-2-483 details procedures *at* the tabulation center: in primaries and elections in which optical scanners are used, after the seal on each container of ballots is inspected and verified as not having been broken, the container with the ballots is opened, the ballots are removed, “and the ballots shall be prepared for processing by the *tabulating machines.*” O.C.G.A. § 21-2-483(c) (emphasis added).

Then, “[u]pon completion of the tabulation of the votes, the superintendent shall cause to be completed and signed a ballot recap form[.]” O.C.G.A. § 21-2-483(d). O.C.G.A. § 21-2-436 is similarly inapplicable; that statute contemplates the duties of the poll officers after the close of polls in precincts in which *paper ballots* are used, not ballot scanners or voting machines.

O.C.G.A. § 21-2-420(a) does provide that “the poll officials in each precinct shall complete the required accounting and related documentation for the precinct and shall advise the election superintendent of the total number of ballots cast at such precinct and the total number of provisional ballots cast.” However, neither the statutes that prescribe the duties of poll officers after the close of the polls for precincts using voting machines, *see* O.C.G.A. § 21-2-454, nor the precincts using optical scanners, *see* O.C.G.A. § 21-2-485, suggest that the General Assembly contemplated that a hand-count of the ballots would be part of the “required accounting.”

There are thus no provisions in the statutes cited in support of these proposed rules that permit counting the number of ballots by hand at the precinct level prior to delivery to the election superintendent for tabulation. Accordingly, these proposed rules are not tethered to any statute—and are, therefore, likely the precise type of impermissible legislation that agencies cannot do. *See HCA Health Services of Ga., Inc., supra.*

We hope that this expedited informal analysis is helpful to the Board. Should there be further questions directed to this office as described herein, we will endeavor to assist the Board further.

cc: Mrs. Sara Tindall Ghaza! (via email correspondence)
Dr. Janice W. Johnston (via email correspondence)
Mr. Rick Jeffares (via email correspondence)
Mrs. Janelle King (via email correspondence)
Mr. Michael Coan (via email correspondence)

EXHIBIT C

RETRIEVED FROM DEMOCRACYDOCS.BT.COM

Proposed Resolution – 8/20/2024

Muscogee County Board of Elections and Registration Meeting

Proposed by: Linda Parker – Vice Chair (Democrat Appointee)

Seconded by: UD Roberts – Chair (Republican Appointee)

Linda Parker: I propose the following resolution for the Muscogee County Board of Elections and Registration regarding the implementation of new proposed state election board rules.

The proposed resolution for the Muscogee County Board of Elections and Registration asks for a 90-day quiet period for implementation of certain election-related changes/activities to policy before a federal election except in exigent circumstances.

Justification: OCGA 21-2-300(a)(1) provides for equipment to be used for casting and counting votes to provide consistency in county, state, and federal elections unless a change is authorized by law not by rule.

The Muscogee Election Board may review after the impending federal election.

RETRIEVED FROM DEMOCRATICBUCKET.COM

EXHIBIT D

RETRIEVED FROM DEMOCRACYDOCKET.COM



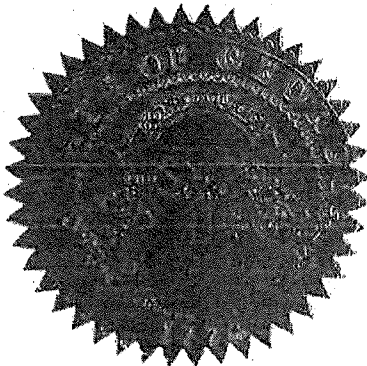
The Office of Secretary of State

Brad Raffensperger
SECRETARY OF STATE

I, Brad Raffensperger, Secretary of State of the State of Georgia, do hereby certify that the attached eight (8) pages represent a true copy of Rule 183-1-12-.12, entitled "Tabulating Results," Rules of the State Election Board, Chapter 183-1, "Georgia Election Code," Subject 183-1-12, "Preparation for and Conduct of Primaries and Elections," as amended by filing on October 2, 2024; to become effective October 22, 2024, as filed in the Office of Secretary of State, Administrative Procedure Division.

Brad Raffensperger

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Official Seal of the State of Georgia this 4th day of October, 2024.



Ga. Comp. R. & Regs. r. 183-1-12-.12 [Effective 10/22/2024] Tabulating Results
Georgia Administrative Code
Department 183. RULES OF STATE ELECTION BOARD
Chapter 183-1. GEORGIA ELECTION CODE
Subject 183-1-12. PREPARATION FOR AND CONDUCT OF PRIMARIES AND ELECTIONS

Rule 183-1-12-.12. [Effective 10/22/2024] Tabulating Results

(a) After the Polls Close.

1. Immediately after the polls close and the last voter has voted, the poll manager and two witnesses who have been previously sworn as poll officers as provided in O.C.G.A. §§ 21-2-94 and 21-2-95 shall begin the closing procedure on each ballot scanner so that no further votes are cast and record the number of scanned ballots from every ballot scanner used in the polling place. The poll manager and the two witnesses shall record the number of scanned ballots from each scanner on a recap form to be developed by the Secretary of State. The poll manager and the two witnesses shall cause each ballot scanner to print three tapes of the tabulated results and shall sign each tape indicating that it is a true and correct copy of the tape produced by the ballot scanner. The poll manager and two witnesses shall record the count of ballots from the tabulation tape on the recap form. If the poll manager or the witnesses have reason to believe that printed tapes are not a true and correct tabulation of the ballots scanned by that ballot scanner, the poll manager or witness shall document the reasons and evidence for that belief and inform the election superintendent, who shall take appropriate action, in his or her discretion, so that the ballots in the ballot box associated with the ballot scanner are accurately tabulated.
2. The poll manager shall cause the number of printed ballots from each ballot marking device to be recorded on the recap form. The poll manager shall further cause the number of spoiled ballots and ballots placed in the emergency bin of the scanner that were unable to be scanned to be recorded on the recap form. The poll manager shall cause the total number of voter check ins from the electronic poll book and/or paper voter list to be recorded on the recap form. If the numbers recorded on the recap form do not reconcile with each other, the poll manager shall immediately determine the reason for the inconsistency; correct the inconsistency, if possible; and fully document the inconsistency or problem along with any corrective measures taken.
3. As soon as possible after the polls close and the last elector votes, the poll manager shall advise the election superintendent of the total number of ballots scanned into the ballot scanner, the total number of provisional ballots issued at the precinct, and the total number of any cast but unscanned ballots in a scanner emergency bin in the manner prescribed by the Secretary of State.

4. One of the three tapes of the tabulated results printed from the ballot scanner shall be affixed to the door of the polling place for the information of the public along with a copy of the provisional ballot recap form for the polling place. One tape shall be placed into an envelope (or reusable document storage container suitable for the same purposes) provided by the election superintendent, along with the "poll officer" memory card from the ballot scanner. The envelope shall be sealed by the poll manager and the same two witnesses who signed the tape such that the envelope cannot be opened without breaking such seal. The poll manager and the two witnesses shall initial the envelope indicating that it contains the correct tape and memory card from the indicated ballot scanner. The envelope shall be labelled with the name of the polling place, the serial number of the ballot scanner, and the number assigned to the ballot scanner for that election. The third tape shall be placed into another envelope with the polling place recap form.
5. The poll manager and two witnesses who have been sworn as poll officers as provided in O.C.G.A. § 21-2-94 and 21-2-95 shall unseal and open each scanner ballot box, remove the paper ballots from each ballot box, record the date and time that the ballot box was emptied and present to three sworn precinct poll officers 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. When all three poll officers arrive at the same total ballot count independently, they shall each sign a control document containing the polling place, ballot scanner serial number, election name, printed name with signature and date and time of the ballot hand count. If the numbers recorded on the precinct poll pads, ballot marking devices [BMDs] and scanner recap forms do not reconcile with the hand count ballot totals, the poll manager shall immediately determine the reason for the inconsistency; correct the inconsistency, if possible; and fully document the inconsistency or problem along with any corrective measures taken. A separate container shall be used for the hand counted paper ballots from each ballot box and the container shall be labelled with the polling place, ballot scanner serial number, the number assigned to the ballot scanner for that election, the scanner counts of the ballots from the tabulation tape, and the hand count ballot total as certified by the three poll officials. The container shall be sealed and signed by the poll manager and two of the three hand count poll officers such that it cannot be opened without breaking the seal. The poll manager and two witnesses shall sign a label affixed to the container indicating that it contains all the hand counted ballots from the indicated scanner box and no additional ballots.
 - a. The decision about when to start the process described in this rule is up to the Poll Manager or Assistant Poll Manager. This decision can be made at the end of Election Day, or if a scanner possesses more than 750 ballots on Election Day, the Poll Manager can choose to start the next day and finish during the week designated for county certification. This decision should

take into account factors such as staffing requirements, fatigue, and concerns about efficiency and accuracy.

- b. If the ballot counting is to take place after Election Day, the relevant ballots, tabulation tapes, enumerated voter lists, and polling information shall be sealed in a tamper-proof container and the number of the seal noted. The counting shall occur in the County election office on the next business day following Election Day and must conclude prior to any scheduled or announced post-election audits. The process must be completed within the designated county certification period.
 - c. Counting will take place as mentioned in this rule. The process of opening, counting, and resealing ballots must be conducted in the presence of the relevant poll manager or assistant poll manager. These procedures must be conducted publicly to ensure transparency.
 - d. If the counting of ballots takes place at any time or place other than the polling location, the supervisor of elections must immediately communicate the date, time, and place of such action with all candidates on the ballot and the county chair of both major political parties no later than 10:00 pm on Election Day. The poll manager shall post such information on the outside windows of the polling location together with all other information required to be so posted.
6. The poll manager and the same two witnesses who emptied the ballot box shall complete and sign a form indicating that the ballot box was properly emptied and the ballots were properly stored and secured. Such form shall be delivered to the election superintendent with the completed polling place recap form. The ballot box shall be resealed and the new seal numbers shall be documented.
 7. The envelopes containing the tabulation tape and the memory card, the containers containing the paper ballots, the completed polling place recap forms, voter access cards, supervisor's cards, electors lists, numbered lists of voters, electronic poll books, and other such paperwork shall be delivered to the election superintendent by the poll manager and at least one other sworn poll officer or law enforcement official. The election superintendent or his or her designee shall receive the materials and shall issue a receipt to the poll manager for the materials. The poll manager and any poll officers who travelled with the materials shall sign a form indicating that no sealed documents were unsealed enroute and that the materials have not been tampered with. The election superintendent, in his or her discretion, may allow a designee of the poll manager to deliver the envelopes or containers containing the ballot scanner tabulation tapes and memory cards to be used for unofficial reporting of results prior to the delivery of the other polling place materials provided that the same procedures for transit and delivery set forth herein are followed.

8. Before leaving the polling place, the poll manager shall power off, secure, and seal all electronic ballot markers, ballot boxes, and ballot scanners. The polling place shall be locked to prohibit unauthorized entry.
9. Accredited poll watchers shall be allowed to observe the process described in this rule; however, they must do so in a manner that does not interfere with poll officials.

(b) Consolidation of Results.

1. All persons involved with the tabulation and consolidation of the election results and who will operate the computer programs or handle the memory cards shall be sworn in the same manner that custodians are sworn before entering into their duties.
2. Only persons who are permanent employees of the election superintendent or have been duly sworn as poll officers or custodians shall touch or be in contact with any ballot, container, returns, tapes, device, memory card, or any other such election materials. Only persons who are employed by the election superintendent or have been duly sworn shall be in the immediate area of the tabulating center designated by the superintendent for the officers to conduct the tabulation and consolidation of the election results.
3. The tabulation and consolidation shall be performed in public. However, the election superintendent may make reasonable rules and regulations for conduct at the tabulating center for the security of the results and the returns and to avoid interference with the tabulating center personnel.
4. The election superintendent shall ensure all properly cast ballots that are received by the deadline to receive ballots are processed, verified, and tabulated as soon as possible and shall not cease such count and tabulation until all such ballots are counted and tabulated. However, counting may cease prior to tabulating provisional ballots that are cured by the prescribed deadline and validated pursuant to O.C.G.A. § 21-2-419, so long as those ballots are processed, verified, and tabulated as soon as possible. Counting may also cease prior to tabulating ballots from qualified electors who are entitled to vote by absentee ballot under the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. Section 20301, et seq. ("UOCAVA"), that are received after the deadline to receive non-UOCAVA ballots but before the deadline for UOCAVA ballots set forth in O.C.G.A. § 21-2-386(a)(1)(G) so long as those ballots are processed, verified, and tabulated as soon as possible following their timely receipt.
 - a. For the purposes of this rule, "shall not cease" allows for reasonable or limited breaks so long as the processing, counting, and tabulating of ballots resumes as soon as possible. If the election superintendent, in its reasonable discretion, determines that due to mechanical or technological

failures, emergency circumstances, or other circumstances that do not allow the processing, counting, and tabulating of ballots to continue reliably and accurately, the election superintendent shall report as soon as possible in writing to the Secretary of State in the manner prescribed by the Secretary of State the reason the processing, counting, and tabulating of ballots cannot continue reliably and accurately and the estimated time that the processing, counting, and tabulating ballots will resume.

5. Upon the delivery of any election materials from a polling place, the election superintendent or his or her designee shall provide a receipt that clearly states what election materials have been delivered.
6. Upon receiving the paper ballots and the memory cards, the election superintendent shall verify the signatures on the sealed envelopes and containers, verify that the seals are intact, that the envelopes or containers have not been opened, and that there is no evidence of tampering with the envelopes, containers, or their contents.
7. In the case of elections for county, state, and federal office, after verifying that the envelopes and containers are properly sealed and have not been opened or tampered with, the election superintendent shall break the seal and open each envelope and remove the memory card and results tape. The election superintendent or his or her designee shall then insert the memory card into the election management system computer and transfer the vote totals from the memory card into the election management system for official tabulation and consolidation.
8. After transferring all of the vote totals from the memory cards to the election management system and consolidating such totals with the totals from the absentee ballot system and such votes from any provisional ballots which have been found by the registrars to be authorized pursuant to O.C.G.A. § 21-2-419, the election superintendent shall prepare the official consolidated returns for the primary, election, or runoff.
9. The election superintendent shall not list and certify in the official consolidated returns for an election any results for write in candidates who were not properly qualified under O.C.G.A. § 21-2-133.
10. In the case of primaries, elections, and runoffs for county, state, and federal office, the county election superintendent shall transmit to the Secretary of State the election returns by precinct for the county in electronic format or by electronic means, as may be specified by the Secretary of State, within fourteen days following a primary, election, or runoff.

(c) Publicly Posting Total Number of Ballots Cast After Close of Polls.

1. For the purposes of publicly posting the number of ballots cast, including the total number of ballots scanned into the ballot scanner, the total number of provisional ballots issued at the precinct, and the total number of any cast but unscanned ballots in a scanner emergency bin, as soon as possible after the close of polls and the number of absentee ballots received as soon as possible following the deadline to receive such absentee ballots as required by O.C.G.A. § 21-2-421(a), posting information in a prominent public place means:
 - a. If the county or municipality maintains a publicly accessible website, publishing information on the homepage of the county's publicly accessible website associated with elections and/or registrations.
 - b. If the county or municipality does not maintain a publicly accessible website, affixing information on the door of the county or municipality's election office such that the information is viewable to the public.
 - c. At the same time that such information is publicly posted, it shall be transmitted to the Secretary of State in a manner determined by the Secretary of State.

(d) Election Night Reporting. The election superintendent shall transmit to the Secretary of State unofficial election results for all races for state offices in any primary, election, or runoff as soon as possible after the closing of the polls for such primary, election, or runoff. Such results shall be transmitted in a format prescribed by the Secretary of State. At a minimum, the results shall be transmitted upon one third of the precincts reporting results, upon two thirds of the precincts reporting results, and upon all precincts reporting results, including absentee ballots within all precincts. Except upon prior notice to and consultation with the Secretary of State, no election superintendent shall conclude the tabulation of votes on election night in any primary, election, or runoff in which there are contested races for federal and state offices until and unless all such unofficial results, including absentee ballots, have been transmitted to the Secretary of State.

(e) Reconciliation Report.

1. As soon as possible but no later than 30 days following the certification of election results, the election superintendent shall transmit to the Secretary of State a reconciliation report that reconciles the aggregate total of all ballots cast in each precinct as reported in the precinct-level election results to the aggregate number of voters who received credit for voting in each precinct on the form made available by the Secretary of State. Any discrepancies in the aggregate total of ballots cast in each precinct compares to the aggregate number of voters who received credit for voting in a precinct shall be fully investigated by the election superintendent or designee. The explanation for any discrepancy shall be included in the Reconciliation Report.

2. Upon submission of the completed Reconciliation Report to the Secretary of State, each county shall publish the report on their county election results website or post it in their elections office.

(f) Preparing for County Certification.

1. After each election but not later than 3:00 P.M. on the Friday following the date on which the election was held, the Board shall meet to conduct a review of precinct returns.
2. After all absentee ballots received by the close of the polls, including those cast by advance voting, and all ballots cast in person on Election Day and all provisional ballots (that have been validated) have been tabulated, the total number of ballots cast by each vote method shall be reported for each precinct.
3. A list of all voters who voted in the election shall be compiled including by category the number of voters who voted Election Day In Person, Advance Voting, Absentee and Provisionally. The list shall be examined for duplicates. The list shall then be sorted by precinct. The total number of unique voter IDs from each precinct shall be counted. The total number of unique voters who voted by each vote method shall be reported for each precinct.
4. For each precinct, the board members shall compare the total number of ballots cast to the total number of unique voter ID numbers. In any precinct in which the number of ballots exceeds the number of unique voters, the Board shall determine the method of voting in which the discrepancy exists. The Board shall investigate the discrepancy and no votes shall be counted from that precinct until the results of the investigation are presented to the Board as required in GA Code § 21-2-493(b).
5. If any error is discovered that cannot be properly corrected, the Board shall determine a method to compute the votes justly as required in GA Code § 21-2-493(i). If fraud is discovered, the Board shall determine a method to compute the votes justly and report the facts to the district attorney for action as required in GA Code § 21-2-493(i).
6. Board members shall be permitted to examine all election related documentation created during the conduct of elections prior to certification of results.

(g) Certification Meeting.

1. After all precinct discrepancies have been investigated and resolved as required by GA Code § 21-2-493, the correct or corrected returns shall be recorded until all the returns from each precinct which are entitled to be counted are recorded; then they shall be added together, announced, and verified as accurate.

2. The consolidated returns shall then be certified by the superintendent not later than 5:00 P.M. on the Monday following the date on which such election was held and such returns shall be immediately transmitted to the Secretary of State.

Authority: O.C.G.A. §§ 21-2-31, 21-2-70(15), 21-2-94, 21-2-95, 21-2-368, 21-2-379.24, 21-2-420, 21-2-421, 21-2-436, 21-2-493(a), 21-2-493(b), 21-2-493(i), 21-2-493(k).

History. Original Rule entitled "Tabulating Results" adopted. F. Jan. 23, 2020; eff. Feb. 12, 2020.

Amended: F. Mar. 2, 2020; eff. Mar. 22, 2020.

Amended: F. Sept. 22, 2021; eff. Oct. 12, 2021.

Amended: F. Nov. 1, 2021; eff. Nov. 21, 2021.

Amended: F. Aug. 27, 2024; eff. Sept. 16, 2024.

Amended: (i.e., subparagraphs (a) 1., (a) 5., paragraph (e), as specified by the Board) F. Oct. 2, 2024; eff. Oct. 22, 2024.

RETRIEVED FROM DEMOCRACYDOCKET.COM

EXHIBIT E

RETRIEVED FROM DEMOCRACYDOCKET.COM

Tabulating Results Simulation

Cobb County

Simulation Audit in reference to:

STATE ELECTION BOARD, NOTICE OF PROPOSED RULEMAKING revisions to Subject 183-1-12-.12. Tabulating Results

SIMULATION INFORMATION

DATE/TIME Friday, August 9, 2024
LOCATION Cobb County Elections Main Office – Advance Voting Room
OF AUDITORS 3

BATCH NUMBERS USED

AIP Northwest Satellite Scanner 1 2073 Ballots
Dec 6, 2022 Runoff Scanner 2 1859 Ballots

PROCEDURE FOR SCANNER 1:

Each auditor independently counted the entire batch to completion, by stacks of 50, before handing the batch to the next auditor.

All auditors reported 2073 ballots.

START TIME 10:30am
END TIME 1:15pm
TOTAL TIME 2 hours 45 minutes

PROCEDURE FOR SCANNER 2:

Auditor counted ballots in a stack of 50, recorded number, then passed the stack to the next auditor to independently count the stack and record the number. This process was continuously repeated with all three auditors until the batch was complete.

All auditors reported 1859 ballots.

START TIME 1:18pm
END TIME 2:10pm
TOTAL TIME 52 minutes

COMMENTS/OBSERVATIONS:

- Audit was done in the morning. Auditors were alert and energetic. The conditions were optimal
- Based on how counting "independently" needs to be conducted, and the number of ballots involved, this proposal could add several hours to the 12+ hour workday poll managers and officials are already working
- There is a high likelihood for human error at the end of a long day
- The number of voter check ins on the poll pads need to match the number of cast ballots on the scanners. Manual count of the ballots is a redundant process
- For Advance Voting – The auditor could get a sense of how results are leaning at their location for a particular contest
- This proposal mandates three additional people handling ballots prior to ballots being secured at the elections office
- Ballots returning and being secured at the main office would be delayed
- Delay poll place facility staff from closing/locking up locations for those sites that do not allow election staff to lock up the building
- Additional paperwork to complete and pulls poll manager away from other duties
- Budget - requires more staff and/or overtime
- The auditors felt tired after this simulation, and they started alert and energetic

Please see attached Time Lapse video showing the entire procedure.

RETRIEVED FROM DEMOCRACYPOCKET.COM

**IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA**

MUSCOGEE COUNTY BOARD OF
ELECTIONS AND REGISTRATION,

Petitioner,

v.

STATE ELECTION BOARD,

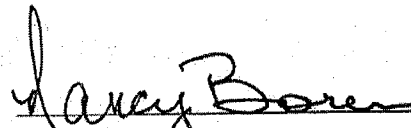
Respondent.

Civil Action No. _____

VERIFICATION OF PETITION FOR DECLARATORY RELIEF

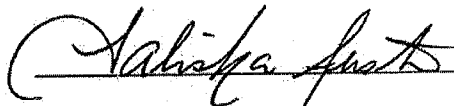
I, Nancy Boren, personally appeared before the undersigned Notary Public, and said under oath that I am the Elections Director for the Muscogee County Board of Elections and Registration and that the facts stated in the Petition for Declaratory Relief are true and correct.

This the 9th day of October, 2024.


Nancy Boren

Elections Director
Muscogee County Board of
Elections and Registration

Sworn to and subscribed before me, this 9 day of October, 2024.



NOTARY PUBLIC

My Commission Expires:

September 20, 2025

