

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

**MICHAEL THURMOND, Individually;
DEKALB COUNTY BOARD OF
REGISTRATION AND ELECTIONS;
and DEKALB COUNTY, GEORGIA,**

Petitioners,

v.

STATE ELECTION BOARD,

Respondent.

CIVIL ACTION

FILE NO. 24CV9085

VERIFIED PETITION

COME NOW, Petitioners Michael Thurmond, Individually; DeKalb County Board of Registration and Elections; and DeKalb County, Georgia (collectively, “Petitioners”), by and through their attorney of record, and file a petition for Declaratory Judgment pursuant to O.C.G.A. § 9-4-1 et seq. as follows:

INTRODUCTION

In less than two weeks, voters in Georgia will step into polling places and begin to cast their ballots and exercise their fundamental right to vote in a Presidential election year. Counties have hired and trained their poll workers on the ins and outs of their obligations and duties under state law, and are well into the

detailed choreography of administering the election. And yet on September 20, 2024 three members of Georgia’s State Election Board (SEB) - over the objection of the Secretary of State and the Georgia Department of Law – decided that this was a good time to change the rules that govern elections in our state.

The rules in question mandate the hand counting of ballots in precincts, require additional reporting about ballots, and change the areas where poll watchers are allowed. If permitted to stand, the rules will require new training and hiring by county election officials and divert the attention and time of election board employees and officials away from other pressing matters in the run-up to November 5th. Moreover, one rule in particular – the “Hand Counting” rule – threatens to serve as a “poison pill,” delaying the county’s statutorily mandated certification process by forcing a time-consuming and costly hand count of ballots at the precinct level that will likely stretch into the days following Election Day itself, eating into the one-week certification period.

These serious practical concerns alone warrant a close look by the courts. But the rules are also plainly unlawful – as other state officials have agreed.

On September 19, the day before the SEB’s vote on the rules, the Department of Law warned the SEB in a Memorandum that the (then proposed) rules would likely be challenged and invalidated because they exceeded the Board’s authority and conflict with statutes governing elections. The Department of Law advised SEB

that last-minute changes to election rules are disfavored because they sow confusion and harm the electoral process. And the Secretary of State blasted the SEB’s rulemaking, noting that “[a]ctivists seeking to impose last-minute changes in election procedures outside of the legislative process undermine voter confidence and burden election workers.” Georgia Secretary of State Press Release: *Raffensperger Defends Georgia’s Election Integrity Act from Last Minute Changes Delaying Election Results* (Aug. 15, 2024) (available at <https://sos.ga.gov/news/raffensperger-defends-georgias-election-integrity-act-last-minute-changes-delaying-election>).

This chaos is precisely what Petitioners hope to avoid. DeKalb County and its Board of Registration and Elections face the overwhelming tasks of trying to reconcile SEB rules and statutory law as best they can, rewriting their internal procedures and retraining their poll workers, all while preparing for an imminent election. Petitioners therefore bring this action to prevent these 11th hour unlawful rule changes from taking effect.

PARTIES

1.

Petitioner DeKalb County Board of Registration and Elections (“the Board”) is charged with organizing, conducting, and validating free and fair elections that occur within DeKalb County, Georgia. The Board is a “superintendent” pursuant to

O.C.G.A. §§ 21-2-70(9) and 21-2-493(k) and is therefore subject to election rules governing “superintendents.”

2.

Petitioner DeKalb County, Georgia (“the County”) is the fourth-most populated county in Georgia and home to roughly 477,000 active, registered voters¹. The County is administered by its governing authority, which consists of an elected Chief Executive Officer and an elected Board of Commissioners.

3.

Petitioner Michael Thurmond was first elected CEO of DeKalb County, Georgia in 2016, assuming office on January 1, 2017. Mr. Thurmond’s platform emphasized the importance of residents’ trust in county government. Mr. Thurmond is the current CEO of DeKalb County, Georgia.

4.

Defendant State Election Board (“SEB”) is a Georgia state board and division of the Secretary of State’s Office. SEB regularly conducts business in DeKalb County as part of its duties. SEB’s principal office is located at 2 Martin Luther King, Jr. Drive, Suite 802, Floyd West Tower, Atlanta, Georgia 30334.

¹ Georgia Secretary of State’s most recent data on registered voters for DeKalb County, Georgia may be found at: <https://sos.ga.gov/election-data-hub>.

JURISDICTION AND VENUE

5.

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).

6.

Venue is proper because Petitioners DeKalb County Board of Registration and Elections; DeKalb County, Georgia; and Michael Thurmond reside within DeKalb County, Georgia or have their principal places of business within such county. *See* O.C.G.A. § 50-13-10(b) (providing for jurisdiction in the county of residence of the petitioner).

7.

The SEB has waived sovereign immunity for the purposes of this declaratory judgment action. O.C.G.A. § 50-13-10(b); *Black v. Bland Farms, LLC*, 332 Ga. App. 653, 669-70 (2015); *see also* Georgia Constitution, Art. 1, § II, ¶ IX. Petitioners are *not* proceeding under the Georgia Constitution's Art. I, § II, ¶ V waiver of sovereign immunity.

THE STATE ELECTION BOARD'S NEW RULES

8.

The State Election Board is a board of the State of Georgia created by the General Assembly. O.C.G.A. § 21-2-30(a). The Board's duties including

promulgating rules and regulations that are “consistent with law” and “conducive to the *fair, legal, and orderly* conduct of primaries and elections.” O.C.G.A. § 21-2-31(2) (emphasis added). Because SEB must only issues rules that are consistent with Georgia law, it cannot validly enact rules that conflict with such law. Nor can it create functionally *new* law unless authorized to do so by statute. Thus, SEB rules that create new requirements or procedures when a statute already speaks plainly as to an issue are invalid. *See Dep’t of Human Resources v. Anderson*, 218 Ga. App. 528, 529 (1995).

9.

Finally, all such administrative rules must be reasonable. *Black v. Bland Farms, LLC*, 332 Ga. App. 653 (2015).

10.

In the weeks and months leading up to the 2024 presidential election, the State Election Board has repeatedly breached the bounds of its statutory authority, seeking to muddy the process for organizing, conducting, and certifying Georgia counties’ elections. This is far from the first lawsuit to challenge the legality of the SEB’s recent actions. *See, e.g., Abhiraman et al. v. State Election Board*, Case No. 24CV010786 (Fulton County Superior Court) (alleging, *inter alia*, that recent SEB rule changes to the certification process violate Georgia law); *Eternal Vigilance Action et al. v. State of Georgia*, Case No. 24CV01158 (Fulton County Superior

Court) (alleging, *inter alia*, that recent SEB rule changes are unconstitutional and inconsistent with SEB’s statutory authority).

11.

On September 20, 2024, SEB voted to adopt a set of rules imposing new and significant burdens on counties and county election officials, none of which comport with Georgia law. These rules become effective 20 days after they are filed with the Secretary of State’s office. Petitioners understand that these rules were filed with the Secretary of State’s office on or about September 20, 2024, and so would become effective on October 11, 2024. Advance voting in DeKalb County begins on October 15, 2024.

12.

Three of those rules are at issue here. For each rule discussed below, the State Election Board failed to provide a “concise statement of the principal reasons for and against” the adoption of the rules and did not fully consider “all written and oral submissions respecting the proposed rule. O.C.G.A. § 50-13-4(a)(2). The rules are therefore invalid under Georgia’s Administrative Procedures Act. O.C.G.A. § 50-13-4(d).

13.

Revisions to Rule 183-1-12-.12(a)(5): *Hand Counting*

The revision to Rule 183-1-12-.12(a)(5) (the “Hand Counting Rules”) introduces hand counting of ballots at the precinct level on election day. This hand counting would purportedly occur prior to tabulation and be compared to the ballot count produced by the ballot scanners at the precinct. A copy of the revision to this Rule is attached hereto as Exhibit A.

14.

The Hand Counting Rule, if upheld or permitted to take effect, would upend the County and the Board’s current procedures, require new training close to Election Day, impose serious delays in the counting and tabulation of ballots and votes, impose new costs on the County and the Board, and put the County and Board at risk of violating other laws that conflict with the rule.

15.

The SEB cites O.C.G.A. §§ 21-2-483(a), 21-2-436, and 21-2-420(a) as its authority for this rulemaking. But none of those statutes authorize what is in truth new legislation – but by an agency, not the General Assembly.

16.

For example, O.C.G.A. § 21-2-483(a) provides that “ballots shall be counted” at the precinct or tabulating center under “the direction of the superintendent.” Such counting does in fact take place at the precinct level in the County – but it is conducted by one election worker, not three, is voluntary and not mandatory (and thus does not subject Petitioners to potential action by the SEB) and is not subject to the new procedures required by the Rule. And O.C.G.A. § 21-2-483(a) simply requires the ballots be “counted” at the “precinct or tabulating center” - it does *not* require hand counting. The decision to require or not require hand counting is plainly a matter of policy reserved to the General Assembly – not the unelected SEB. And the General Assembly has not seen fit to impose such a requirement upon Georgia elections.

17.

O.C.G.A. § 21-2-436 only concerns precincts using paper ballots – not those using optical scanners or other machines.

18.

Finally, O.C.G.A. § 21-2-420(a) simply sets forth some of the duties of poll officials at the precinct level. But other more specific statutes concerning the duties of poll officers make no mention of hand counting as part of any required accounting

of the total number of ballots cast. *See, e.g.*, O.C.G.A. § 21-2-485 (for precincts using optical scanners); O.C.G.A. § 21-2-454 (for precincts using voting machines).

19.

Rule 183-1-12-.21: County Participation and Totals Reporting

This rule (the “Reporting Rule”) seeks to enlarge the reporting requirements set forth in O.C.G.A. § 21-2-385(e). The statute already provides a detailed process for boards of registrars or absentee ballot clerks to report information regarding absentee ballots issued, received, or rejected during the advance voting period. See O.C.G.A. § 21-2-385(e). A copy of this Rule is attached as Exhibit B.

20.

The rule specifically seeks to require additional information regarding the substance of the ballots – specifically, “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). The Rule therefore exceeds the statutory authority granted to the SEB. The Rule also burdens the County and the Board. By requiring the reporting of this information, the Board will need to train or retain additional personnel to ensure it can comply with this reporting obligation.

21.

Revisions to Rule 183-1-13-.05: Poll Watchers for Tabulating Center:

The SEB also proposed and promulgated Rule 183-1-13-.05 (the “Poll Watchers Rule”), which expands the locations where poll watchers may be designated. The Proposed Rule reads (with changes bolded and underlined):

In counties and municipalities using central count optical scanning vote tabulation equipment, the election superintendent shall allow each political party to appoint two poll watchers for each primary or election, each political body to appoint two poll watchers for each election, and each independent candidate and each nonpartisan candidate to appoint one poll watcher for each election, to serve in each of the locations designated by the election superintendent within the tabulating center. Such designated places shall include the check-in area, the computer room, the duplication area, and such other areas **that tabulation processes are taking place including but not limited to provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing of mail in ballots, memory card transferring, regional or satellite check in centers and any election reconciliation processes** as the election superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center. Poll watchers designated for the tabulating center shall be appointed and serve in the same manner as other poll watchers.

A complete copy of this Rule is attached as Exhibit C.

22.

However, Georgia law already sets forth the locations where poll watchers may be designated.

23.

Specifically, O.C.G.A. § 21-2-408(c) provides a list of places where poll watchers may serve. Under that statute, “[s]uch designated locations shall include 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.”

24.

The Rule adds several additional locations not contemplated by the statutory scheme. The statute designates a handful of specific locations and then provides a limited amount of discretion to county election superintendents – not the SEB. O.C.G.A. § 21-2-408(c). This Rule will require the Board to allow poll watchers into locations where they had previously not been required due to space limitations and will interfere with election workers due to such space constraints.

**THE GEORGIA DEPARTMENT OF LAW WARNED THE BOARD THAT
THE PROPOSED RULE CHANGES WERE UNLAWFUL**

25.

On September 19, 2024, the Georgia Department of Law issued a memorandum to the State Election Board informing the Board 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 before, the Board risks passing rules that may be easily challenged and determined to be invalid.” Memorandum from Georgia Department of Law to John Fervier, Chairman, State Election Board

(Sep. 19, 2024), attached hereto as Exhibit D (“Memorandum”). A copy of the Memorandum was obtained by local news media, who published it.

26.

The Memorandum observed: “a broad grant of statutory authority to promulgate rules is not an unlimited grant of authority.” Memorandum at 3. Instead, “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.” *Id.* Thus, “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.” *Id.* The Department further observed that “the absence of statutory authority is the absence of legal authority to act.” *Id.* (citing *Camp v. Williams*, 314 Ga. 699, 709 (2022) (Bethel, J., concurring)).

27.

The Memorandum then dove into the substance of the rules, noting at the outset that “[t]here are several proposed rules before the Board that appear to either impermissibly conflict with or otherwise expand the scope of Georgia statutes.” Memorandum at 4.

28.

For example, the Department addressed Rule 183-1-13-.05. It observed the Rule “seeks to expand the enumerated locations where poll watchers may be designated beyond those places identified in the statute,” and noted that this rule does not “carry into effect a law already passed by the General Assembly but rather expands upon the statute,” making it “very likely to be subject to legal challenge as invalid.” Memorandum at 4.

29.

The Department of Law also agreed that Rule 183-1-12-.21 - the “Reporting Rule” - “seeks to go beyond the statute to require . . . additional information” that “the General Assembly did not include . . . as information that must be reported pursuant to O.C.G.A. 21-2-385(e).” Thus, the Department concluded the Reporting Rule likely goes “beyond the scope of the statute and the Board’s authority.” Memorandum at 5.

30.

Finally, the Department of Law agreed the “Hand Counting Rule” is unlawful, because “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 tabulations.” Memorandum at 5. Thus, “these proposed rules are not tethered to any statute – and

are, therefore, likely the precise type of impermissible legislation that agencies cannot do.” (citation omitted).

THE GEORGIA SECRETARY OF STATE DECRIED “LAST-MINUTE CHANGES” ENACTED BY SEB WHICH WOULD “UNDERMINE VOTER CONFIDENCE AND BURDEN ELECTION WORKERS”

31.

Georgia Secretary of State Brad Raffensperger attacked the proposed rules in an August 15, 2024 press release.

32.

Specifically, Secretary of Raffensperger stated that “Activists seeking to impose last-minute changes in election procedures outside of the legislative process undermine voter confidence and burden election workers.” He continued, “misguided attempts by the State Election Board will delay election results and undermine chain of custody safeguards. Georgia voters reject this 11th hour chaos, and so should the unelected members of the State Election Board.” Georgia Secretary of State, Press Release: Raffensperger Defends Georgia’s Election Integrity Act from Last Minute Changes Delaying Election Results, (Aug. 15, 2024) (“SOS Press Release”), available at <https://sos.ga.gov/news/raffensperger-defends-georgias-election-integrity-act-last-minute-changes-delaying-election> (last access September 27, 2024), attached hereto as Exhibit E.

33.

As the Secretary’s press release explained, “[m]isguided efforts to impose new procedures like hand counting ballots at polling locations make it likely that Georgians will not know the results on Election Night. Additionally, having poll workers handle ballots at polling locations after they have been voted introduces a new and significant risk to chain of custody procedures. Georgia law already has secure chain of custody protocols for handling ballots, and efforts to change these laws by unelected bureaucrats on the eve of the election introduces the opportunity for error, lost or stolen ballots, and fraud.” *Id.*

34.

The Secretary concluded, “These misguided, last-minute changes from unelected bureaucrats who have never run an election and seem to reject the advice of anyone who ever has could cause serious problems in an election that otherwise will be secure and accurate.” *Id.*

LAST-MINUTE CHANGES TO ELECTION RULES ARE DISFAVORED

35.

Last minute changes to election rules are disfavored. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Typically this principle applies to courts and militates against granting injunctive relief close to elections. *E.g., Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (“This Court has repeatedly emphasized

that lower federal courts should ordinarily not alter the election rules on the eve of an election.”).

36.

However, this case is not typical. Here, it is not a court decision that seeks to change the election rules on the eve of an election; it is the unelected State Election Board, over the objection of other (elected) constitutional officers of the State of Georgia.

37.

What Petitioners seek to preserve is the status quo. The Rules are not yet effective as of the filing of this Petition. They were enacted perilously close to the election date. And complying with the prior versions of the Rules is far easier and less costly than complying with the amended or new Rules. Thus, the principles behind *Purcell* and its progeny – that last minute election rule changes are disfavored – support Petitioners’ claims.

THE BURDEN ON THE PETITIONERS

38.

The SEB’s actions impose serious burdens upon Petitioners. As noted by the Secretary of State, the Rules will delay election results and undermine chain of custody safeguards. *See* SOS Press Release, *supra*, Ex. E.

39.

In addition, the Rules will force the County and the Board to incur costs and expenses in order to comply. The Board has already completed the vast majority of training for its poll workers prior to election day, including *all* of its training for advance voting. The Board will have all of its training for election day completed by the end of this week. The Board will also have to revise training materials and handouts to comply with the new rules. The Board has already printed out its training-related handouts, pamphlets, and manuals for the 2024 election.

40.

The County and the Board will have to train their employees on the new rules just weeks before election day – during what is already one of the busiest times of the year for both entities. County and Board employees will then have to train volunteers on the new rules. The Rules impose other burdens upon the County and Board, including forcing busy precincts to hand count ballots well into the morning (or into the next few days), and will require the completion of additional paperwork concerning the hand count. And the Rules will delay election results and undermine voter confidence, as the Secretary of State has already said.

41.

The Board will have to divert time and resources to educating its members, employees, and the public, which will take time away from working on essential Board functions close to election day.

42.

The Board and County will also likely have to hire new election workers, consultants for voter education, and security personnel. The Hand Count Rule will triple the number of election workers the County dedicates to hand counting ballots at the end of election day, from one per precinct to three. Moreover, because the Hand Count Rule requires election workers to reconcile discrepancies between the three separate counts, it is likely that some precincts will have to conduct multiple counts, detracting from other duties (including closing down precincts at the end of the day).

43.

Both the Hand Count Rule and the Poll Watchers Rule will likely require the County and Board to incur security-related costs. These include purchasing additional security cameras for sensitive locations where hand counts are being conducted and hiring additional security personnel (to observe and guard the new areas where hand counting is conducted, during tabulation, and the new locations poll watchers must now be permitted to be stationed).

44.

The SEB's actions also leave Petitioners in a state of legal uncertainty. The Board and the County must comply with both the SEB's rules and the Georgia election code. But as shown above, the SEB's most recent rules conflict with Georgia election code. The County and the Board will thus have to choose between violating Georgia statutory law or SEB regulations. They thus require immediate guidance as to their legal obligations.

45.

The SEB also has investigative authority. Given the SEB's recent partisan bent, the County and the Board risk an unwarranted investigation – and the attendant costs and attention such action would bring – even as they follow Georgia statutory law to the letter.

46.

The SEB also has the authority to take over a county elections board if it determines that such board violated three election laws or rules during the last two election cycles or there is clear and convincing evidence of nonfeasance, malfeasance, or gross negligence. O.C.G.A. § 21-2-33.2.

47.

The Hand Counting Rule may delay the County's ability to certify the election results, because its new obligations will likely require significant outlays of time and resources to hand count cast ballots at the precinct level.

48.

Petitioner Thurmond has standing because, as a voting citizen, he cannot know if his ballot in the November 2024 election will be counted or if his fundamental right to vote will be denied as a result of the upheaval threatened by these Rules. Indeed, the Secretary of State has noted that the Rules threaten to undermine voter confidence in exactly this manner. See SOS Press Release, *supra*, Ex. E.

49.

As a taxpayer and a voter, Mr. Thurmond has an interest in ensuring the SEB follows Georgia law, and that the election in his home county is conducted appropriately and in accordance with Georgia law.

50.

Finally, the County has an associational interest in protecting the voting rights of its citizens. The Rules threaten such rights by introducing unlawful, unnecessary, and harmful new requirements, as set forth by the Department of Law in its legal opinion and the Secretary of State in his Press Release.

COUNT I: DECLARATORY JUDGMENT
AS TO THE HAND COUNTING RULE

51.

Petitioners incorporate by reference paragraphs 1-50 of this Petition.

52.

The provisions of the Georgia Administrative Procedure Act apply to SEB rulemaking. O.C.G.A. § 50-13-1 *et seq.* 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.”

53.

As alleged in this Petition, the SEB has no constitutional or statutory authority to revise Rule 183-1-12-.12(a)(5) in the manner that it did. In addition, the SEB failed to comply with the procedural requirements of the Georgia Administrative Procedures Act, including its requirements to fully consider all written and oral submissions regarding proposed rules. O.C.G.A. § 50-13-4(a)(2).

54.

Petitioners are in a state of legal uncertainty concerning Rule 183-1-12-.12(a)(5). The Rule and its potential applications interfere with and impair the legal rights of Petitioners, as detailed in this Petition.

55.

The Court should therefore find that the SEB lacks the statutory authority to revise the rule in the manner that it did and declare the SEB's September 20, 2024 amendments to Rule 183-1-12-.12(a)(5) to be invalid.

COUNT II: DECLARATORY JUDGMENT
AS TO THE ABSENTEE BALLOT REPORTING RULE

56.

Petitioners incorporate by reference paragraphs 1-55 of this Petition.

57.

The provisions of the Georgia Administrative Procedure Act apply to SEB rulemaking. O.C.G.A. § 50-13-1 *et seq.* 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.”

58.

As alleged in this Petition, the SEB has no constitutional or statutory authority to revise Rule 183-1-12-.21 in the manner that it did. In addition, the SEB failed to comply with the procedural requirements of the Georgia Administrative Procedures Act, including its requirements to fully consider all written and oral submissions regarding proposed rules. O.C.G.A. § 50-13-4(a)(2).

59.

Petitioners are in a state of legal uncertainty concerning Rule 183-1-12-.21. The Rule and its potential applications interfere with and impair the legal rights of Petitioners, as detailed in this Petition.

60.

The Court should therefore find that the SEB lacks the statutory authority to revise the rule in the manner that it did and declare Rule 183-1-12-.21 as amended by the SEB on September 20, 2024 to be invalid.

**COUNT III: DECLARATORY JUDGMENT AS TO THE POLL
WATCHERS RULE**

61.

Petitioners incorporate by reference paragraphs 1-60 of this Petition.

62.

The provisions of the Georgia Administrative Procedure Act apply to SEB rulemaking. O.C.G.A. § 50-13-1 *et seq.* 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.”

63.

As alleged in this Petition, the SEB has no constitutional or statutory authority to revise Rule 183-1-13-.05 in the manner that it did. In addition, the SEB failed to

comply with the procedural requirements of the Georgia Administrative Procedures Act, including its requirements to fully consider all written and oral submissions regarding proposed rules. O.C.G.A. § 50-13-4(a)(2).

64.

Petitioners are in a state of legal uncertainty concerning Rule 183-1-13-.05. The Rule and its potential applications interfere with and impair the legal rights of Petitioners, as detailed in this Petition.

65.

The Court should therefore find that the SEB lacks the statutory authority to revise the rule in the manner that it did and declare Rule 183-1-13-.05 as amended by the SEB on September 20, 2024 to be invalid.

COUNT IV: DECLARATORY JUDGMENT
AS TO ALL THREE RULES

66.

Petitioners incorporate by reference paragraphs 1-65 of this Petition.

67.

The SEB enacted the rules on September 20, 2024, just weeks ahead of Election Day. They will not be effective until early October, less than one month before Election Day and just a few days before early voting begins in DeKalb County. These last-minute rule changes violate the principle behind *Purcell v.*

Gonzalez, 549 U.S. 1 (2006), that last minute changes to election rules are disfavored because they tend to confuse voters.

68.

Petitioners are in a state of legal uncertainty regarding the Rules identified in this Petition. The Rules and their potential applications interfere with and impair the legal rights of Petitioners. The last-minute nature of these changes compounds this uncertainty and creates a serious risk of voter and election worker confusion.

69.

The Court should therefore find that the SEB violated the Georgia Administrative Procedures Act. The Court should further find that the Rules should be enjoined for the purposes of the upcoming election so as to avoid voter and election worker confusion.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that the Court:

- (a) Declare SEB's amendments to Rule 183-1-12-.12(a)(5) invalid;
- (b) Declare SEB's Rule 183-1-12-.21 invalid;
- (c) Declare SEB's amendments to Rule 183-1-13-.05 invalid;
- (d) Declare that SEB's Rules identified herein and proposed amendments to said rules must be consistent with Georgia statutory law, and to the extent they are inconsistent, Georgia statutory law controls;

- (e) Declare that the specific SEB rules identified herein are inconsistent with (or were adopted in a manner inconsistent with) the Georgia Administrative Procedures Act and are therefore invalid;
- (f) Declare that SEB's rules upset the status quo on the eve of an election and are therefore enjoined to avoid voter and election worker confusion and maintain the status quo ante under the principles outlined in *Purcell v. Gonzalez*, 549 U.S. 1 (2006);
- (g) Enter a temporary restraining order and/or interlocutory injunction and then a permanent injunction against the enforcement of each of the aforementioned rules or amendments to rules that the Court determines to be invalid, unreasonable, procedurally deficient, or unauthorized by Georgia statute; and
- (h) Grant any other relief the Court deems necessary or proper.

This 2nd day of October, 2024.

THE BARNES LAW GROUP, LLC

/s/ Roy E. Barnes

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EXHIBIT A

STATE ELECTION BOARD

NOTICE OF PROPOSED RULEMAKING

Revisions to Subject 183-1-12-.12 *Tabulating Results*

TO ALL INTERESTED PERSON AND PARTIES:

Notice is hereby given that pursuant to the authority set forth below, the Georgia State Election Board, (hereinafter “SEB”) proposes the attached amendments to Subject 183-1-12-.12 (Tabulating Results).

This notice, together with an exact copy of the proposed new rules and a synopsis of the proposed rules, is being distributed to all persons who have requested, in writing, that they be placed on a distribution list. A copy of this notice, an exact copy of the proposed rule amendments, and a synopsis of the proposed rule amendments may be reviewed during normal business hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, except official state holidays, at the Office of the Secretary of State, Elections Division, 2 Martin Luther King Jr. Drive, S.E., 8th Floor West Tower, Atlanta, Georgia 30334. These documents will also be available for review on the State Election Board’s web page at: <https://sos.ga.gov/page/proposed-state-election-board-rules-and-rule-amendments> . Copies may also be requested by contacting the State Election Board at: ahardin@sos.ga.gov .

To provide the public an opportunity to comment upon and provide input into the proposed rule amendments, a public hearing will be held on Friday, September 20, 2024 at 9:00 A.M. The meeting will take place at the Georgia State Capitol, Room 341.

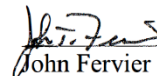
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- Electronically by emailing SEBPublicComments@sos.ga.gov
- By mailing comments to:
State Election Board
C/O Alexandra Hardin
2 Martin Luther King Jr. Drive, S.E.
8th Floor West Tower Suite 802
Atlanta, Georgia 30334

This notice is given in compliance with O.C.G.A. §50-13-4.

This 21st day of August 2024.



John Fervier
Chair, State Election Board

Posted: August 21, 2024

**SYNOPSIS OF THE PROPOSED RULE
OF THE STATE ELECTION BOARD
RULE 183-1-12-.12 *Tabulating Results***

Purpose: The purpose of the rule is to ensure the secure, transparent, and accurate counting of ballots by requiring a systematic process where ballots are independently hand-counted by three sworn poll officers. The rule mandates detailed documentation, sealing, and certification of ballot counts, with provisions for resolving inconsistencies and communicating any counting that occurs outside the polling location to relevant parties.

Main Features: The main features of the amendments to this rule are that requires the poll manager and two sworn poll officers to unseal ballot boxes, remove and record the ballots, and have three poll officers independently count them. Once all three counts match, they sign a control document. If discrepancies arise between the hand count and recorded totals, the poll manager must resolve and document the inconsistency. The counted ballots are sealed in labeled containers, signed to ensure integrity.

**DIFFERENCES BETWEEN THE EXISTING RULE AND THE PROPOSED
AMENDMENTS OF THE STATE ELECTION BOARD,
RULE 183-1-12-.12 *Tabulating Results***

NOTE: Underlined text is proposed to be added.

Rule 183-1-12-.12(a)(5)

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.

Authority: O.C.G.A. §§ 21-2-483(a), 21-2-436, 21-2-420(a)

COPY OF THE PROPOSED NEW RULE

Rule 183-1-12-.12(a)(5)

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

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- 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.
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- 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.

Authority: O.C.G.A. §§ 21-2-483(a), 21-2-436, 21-2-420(a)

EXHIBIT B

STATE ELECTION BOARD
NOTICE OF PROPOSED RULEMAKING

Promulgation of Subject 183-1-12-.21 *County Participation and Totals Reporting*

TO ALL INTERESTED PERSON AND PARTIES:

Notice is hereby given that pursuant to the authority set forth below, the Georgia State Election Board, (hereinafter “SEB”) proposes the attached promulgation of Subject 183-1-12-.21 (County Participation and Totals Reporting).

This notice, together with an exact copy of the proposed new rules and a synopsis of the proposed rules, is being distributed to all persons who have requested, in writing, that they be placed on a distribution list. A copy of this notice, an exact copy of the proposed rule amendments, and a synopsis of the proposed rule amendments may be reviewed during normal business hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, except official state holidays, at the Office of the Secretary of State, Elections Division, 2 Martin Luther King Jr. Drive, S.E., 8th Floor West Tower, Atlanta, Georgia 30334. These documents will also be available for review on the State Election Board’s web page at: <https://sos.ga.gov/page/proposed-state-election-board-rules-and-rule-amendments> Copies may also be requested by contacting the State Election Board at: ahardin@sos.ga.gov .

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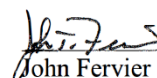
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State Election Board
C/O Alexandra Hardin
2 Martin Luther King Jr. Drive, S.E.
8th Floor West Tower Suite 802
Atlanta, Georgia 30334

This notice is given in compliance with O.C.G.A. §50-13-4.

This 21st day of August 2024.



John Fervier
Chair, State Election Board

Posted: August 21, 2024

**SYNOPSIS OF THE PROPOSED RULE
OF THE STATE ELECTION BOARD
RULE 183-1-12-.21 *County Participation and Totals Reporting***

Purpose: The purpose of the rule is to ensure ongoing transparency in elections during the advance and absentee voting period, and on Election Day. Further, it serves to continuously keep the public informed on the voting process and election information.

Main Features: This rule requires that, for each primary, general, and runoff election in Georgia, registrars must establish a daily reporting system to publicly share the total number of voters who have participated, beginning from the start of advance voting. The reports must include details on how voters participated (either through advance voting or absentee by mail), and for primary elections, they must also specify the number of party or nonpartisan ballots cast. After the canvass and computation of votes, excluding certain ballots like provisional or UOCAVA ballots, election superintendents must create and post precinct-level vote totals for all contests. Both the daily voter participation reports and the final vote totals must be posted on the registrar's or county election superintendent's website, or in a public place if no website is available. This ensures continuous transparency and public access to election information.

COPY OF THE PROPOSED NEW RULE

Rule 183-1-12-.21 *County Participation and Totals Reporting*

(1) For each primary election and general election and any associated runoffs, no later than the beginning of the advance voting period set by OCGA 21-2-385(d), each registrar shall establish a method of daily reporting to the public the total number of voters who have participated in the election or runoff.

(a) For each primary election and associated runoff, the registrar shall report (1) the total number of voters who have participated, (2) the method by which those voters participated (advance voting or absentee by mail), (3) the number of political party or nonpartisan ballots cast, and (4) the date on which the information was provided.

(b) For each general election and associated runoff, the registrar shall report (1) the total number of voters who have participated, (2) the method by which those voters participated (advance voting or absentee by mail), and (3) the date on which the information was provided.

(2) For each primary election and general election and any associated runoffs, at the conclusion of the canvass and computation of votes cast provided for in OCGA 21-2-493(a), with the exception of the processing of UOCAVA ballots, provisional ballots, and ballots requiring adjudication, the election superintendent shall create a report indicating the vote totals for all contests on the ballot by precinct.

(3) The registrar must post the daily reporting information required by paragraph (1) on the

internet website operated by the registrar or county election superintendent.

(4) The election superintendent must post the information required by paragraph (2) on the internet website operated by the county election superintendent.

(5) If a registrar and/or county election superintendent does not operate an internet website, the registrar must post the daily reporting information required by paragraph (1) and the report required by paragraph (2) in a public place in its office, accessible 24 hours a day to the public.

(6) The daily reporting information required by paragraph (1) must be updated each day on which advance voting occurs in the county prior to any primary election, general election, and/or associated runoffs.

Authority: O.C.G.A. § 21-2-385(d), O.C.G.A. § 21-2-493(a)

EXHIBIT C

STATE ELECTION BOARD
NOTICE OF PROPOSED RULEMAKING

Revisions to Subject 183-1-13-.05 Poll Watchers for Tabulating Center

TO ALL INTERESTED PERSON AND PARTIES:

Notice is hereby given that pursuant to the authority set forth below, the Georgia State Election Board, (hereinafter "SEB") proposes the attached amendments to Subject 183-1-13-.05 (Poll Watchers for Tabulating Center).

This notice, together with an exact copy of the proposed new rules and a synopsis of the proposed rules, is being distributed to all persons who have requested, in writing, that they be placed on a distribution list. A copy of this notice, an exact copy of the proposed rule amendments, and a synopsis of the proposed rule amendments may be reviewed during normal business hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, except official state holidays, at the Office of the Secretary of State, Elections Division, 2 Martin Luther King Jr. Drive, S.E., 8th Floor West Tower, Atlanta, Georgia 30334. These documents will also be available for review on the State Election Board's web page at: <https://sos.ga.gov/page/proposed-state-election-board-rules-and-rule-amendments> Copies may also be requested by contacting the State Election Board at: ahardin@sos.ga.gov .

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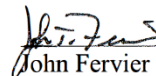
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Atlanta, Georgia 30334

This notice is given in compliance with O.C.G.A. §50-13-4.

This 21st day of August 2024.


John Fervier

Chair, State Election Board

Posted: August 21, 2024

**SYNOPSIS OF THE PROPOSED RULE
OF THE STATE ELECTION BOARD
RULE 183-1-13-.05 *Poll Watchers for Tabulating Center***

Purpose: The purpose of the rule is to clarify the existing election code and to ensure poll watchers may fairly observe all processes of the tabulation center.

Main Features: The main feature of the amendment is that designates additional areas within the tabulating centers in which poll watchers are permitted to view tabulation and reconciliation processes.

**DIFFERENCES BETWEEN THE EXISTING RULE AND THE PROPOSED
AMENDMENTS OF THE STATE ELECTION BOARD,
RULE 183-1-13-.05 *Poll Watchers for Tabulating Center***

NOTE: Underlined text is proposed to be added.

Rule 183-1-13-.05 *Poll Watchers for Tabulating Center*

In counties and municipalities using central count optical scanning vote tabulation equipment, the election superintendent shall allow each political party to appoint two poll watchers for each primary or election, each political body to appoint two poll watchers for each election, and each independent candidate and each nonpartisan candidate to appoint one poll watcher for each election, to serve in each of the locations designated by the election superintendent within the tabulating center. Such designated places shall include the check-in area, the computer room, the duplication area, and such other areas that tabulation processes are taking place including but not limited to provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing of mail in ballots, memory card transferring, regional or satellite check in centers and any election reconciliation processes as the election superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center. Poll watchers designated for the tabulating center shall be appointed and serve in the same manner as other poll watchers.

Authority: O.C.G.A. § 21-2-408 (c)

Rule 183-1-13-.05 *Poll Watchers for Tabulating Center*

In counties and municipalities using central count optical scanning vote tabulation equipment, the election superintendent shall allow each political party to appoint two poll watchers for each primary or election, each political body to appoint two poll watchers for each election, and each independent candidate and each nonpartisan candidate to appoint one poll watcher for each election, to serve in each of the locations designated by the election superintendent within the tabulating center. Such designated places shall include the check-in area, the computer room, the duplication area, and such other areas that tabulation processes are taking place including but not limited to provisional ballot adjudication of ballots, closing of advanced voting equipment, verification and processing of mail in ballots, memory card transferring, regional or satellite check in centers and any election reconciliation processes as the election superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center. Poll watchers designated for the tabulating center shall be appointed and serve in the same manner as other poll watchers.

Authority: O.C.G.A. § 21-2-408 (c)

EXHIBIT D



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 Ghazal (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 E



Georgia
Secretary of State
Brad Raffensperger



[Home](#) > [News & Announcements](#) > Raffensperger Defends Georgia's Election Integrity Act from Last Minute Changes Delaying Election Results

August 15th, 2024

Atlanta, GA – Today Secretary Raffensperger defended Georgia's election integrity laws, denouncing the 11th-hour effort to impose new activist rulemaking that would undermine key provisions of Georgia's Election Integrity Act (S.B. 202) and other reforms like S.B. 189. Since taking office, Secretary Raffensperger has supported reforms that foster voter confidence in elections. The Secretary was proud to work with the General Assembly to require Photo ID for absentee ballots, expedite reporting and certification of election results, strengthen chain of custody procedures, and implement rigorous citizenship verification to ensure that only U.S. citizens can vote in our elections. Because of these efforts, Georgia has been identified by the Heritage Foundation as having some of the best election integrity measures in the country.

"Activists seeking to impose last-minute changes in election procedures outside of the legislative process undermine voter confidence and burden election workers," said Secretary of State Brad Raffensperger. "The General Assembly knew that quick reporting of results and certification is paramount to voter confidence and passed S.B. 202, but misguided attempts by the State Election Board will delay election results and undermine chain of custody safeguards. Georgia voters reject this 11th hour chaos, and so should the unelected members of the State Election Board."

One of the main election integrity measures that the General Assembly put in place in both S.B. 202 and S.B. 189 are procedures to ensure the quick and





Georgia
Secretary of State
Brad Raffensperger



Georgia voters deserve confidence that election results will be timely reported on Election Night as required by S.B. 202 and S.B. 189. Misguided efforts to impose new procedures like hand counting ballots at polling locations make it likely that Georgians will not know the results on Election Night. Additionally, having poll workers handle ballots at polling locations after they have been voted introduces a new and significant risk to chain of custody procedures. Georgia law already has secure chain of custody protocols for handling ballots, and efforts to change these laws by unelected bureaucrats on the eve of the election introduces the opportunity for error, lost or stolen ballots, and fraud.

Throughout this year, the Secretary of State's office has been traveling across the state working with county election officials to conduct audits and site inspections that ensure the state's voting equipment is secure and in working order. Each of Georgia's 159 counties have passed the test. Georgia's voter rolls are the cleanest in the nation, and Secretary Raffensperger is the first Secretary of State to conduct a citizenship audit to ensure only U.S. citizens can vote in Georgia elections. The Secretary's office has also coordinated tabletop exercises between county election workers, law enforcement and cybersecurity partners to reinforce the security of our election processes. These misguided, last-minute changes from unelected bureaucrats who have never run an election and seem to reject the advice of anyone who ever has could cause serious problems in an election that otherwise will be secure and accurate.

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Georgia is recognized as a national leader in elections. It was the first state in the country to implement the trifecta of automatic voter registration, at least 17 days of early voting (which has been called the "gold standard"), and no-excuse



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2022 achieved the largest single day of in-person early voting turnout in Georgia midterm history utilizing Georgia's secure, paper ballot voting system. Most recently, Georgia ranked #1 for Election Integrity by the Heritage Foundation, a top ranking for Voter Accessibility by the Center for Election Innovation & Research and tied for number one in Election Administration by the Bipartisan Policy Center.

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