

August 13, 2024

***By Email***

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***Re: Comment on Proposed Amendment to Rule 183-1-12-.12. Tabulating Results***

Dear Chairman Fervier and State Election Board Members:

The American Civil Liberties Union of Georgia, Citizens for Responsibility and Ethics in Washington, and Public Rights Project respectfully submit this comment on the above-referenced proposed rule released by the State Election Board (“SEB” or “Board”) on July 18, 2024.<sup>1</sup> We object to the provision in the Proposed Rule stating that county “[b]oard members shall be permitted to examine all election related documentation created during the conduct of elections prior to certification of results.” That provision plainly exceeds statutory authority, would invite unscrupulous abuse, and could impose unreasonable burdens on election workers in the hectic six-day period between election day and certification. Because the Proposed Rule would not withstand judicial review, the Board should not adopt it.

Pursuant to O.C.G.A. § 50-13-4(a)(2), we request that the Board include this comment in the rulemaking record and, if the Board ultimately adopts the Proposed Rule, we request that it “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.*

**I. The Proposed Rule Exceeds Statutory Authority**

The Legislature has empowered the Board “[t]o 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.”<sup>2</sup> The Georgia Supreme Court has made clear that an “agency rule” that is “unauthorized by statute” is not consistent with law and thus “[can]not

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<sup>1</sup> See State Election Board, Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.12. *Tabulating Results* (July 18, 2024) [hereinafter Proposed Rule], [https://sos.ga.gov/sites/default/files/2024-07/notice\\_of\\_proposed\\_rulemaking\\_183\\_1\\_12\\_12\\_1\\_v2.pdf](https://sos.ga.gov/sites/default/files/2024-07/notice_of_proposed_rulemaking_183_1_12_12_1_v2.pdf).

<sup>2</sup> O.C.G.A. § 21-2-31(2) (emphasis added).

stand.”<sup>3</sup> That is because the “promulgation of rules not authorized by statute constitutes an unconstitutional usurpation of legislative power.”<sup>4</sup> Moreover, in the context of election canvassing and certification, Georgia has long followed the “general, if not indeed the universal, rule of law” that “election canvassers . . . are given no discretionary power except to determine if the returns are in proper form and executed by the proper officials and to pronounce the mathematical result, unless additional authority is expressed.”<sup>5</sup> In other words, county election superintendents have “no discretionary power” absent “express[]” statutory authorization by the Legislature.

While some sections of the Proposed Rule mirror Georgia statutes, one provision improperly seeks to write new law. Specifically, section 183-1-12-.12(.1)(6) provides that individual county “[b]oard *members* shall be permitted to examine *all election related documentation* created during the conduct of elections *prior to certification of results*.”<sup>6</sup> This provision is unauthorized by statute for two independent reasons.

**First**, Georgia law does not vest power in *individual members* of county election boards. Rather, the Election Code confers “powers” and “duties” on each county’s “election superintendent.”<sup>7</sup> In counties that have county boards, the “election superintendent” is the *majority* of the board’s voting members, not the board’s individual members.<sup>8</sup> The Election Code and this Board’s rules make that point clear by defining the “superintendent” to mean “the county board of elections” or “county board of elections and registrations . . . if a county has such.”<sup>9</sup> County board bylaws similarly provide that “[a]ll actions of the Board shall require a vote of the majority of the members present and voting at any meeting.”<sup>10</sup>

None of the statutes cited as “Authority” in the Proposed Rule provide otherwise.<sup>11</sup> The

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<sup>3</sup> *Ga. Real Estate Comm’n v. Accelerated Courses in Real Estate, Inc.*, 214 S.E.2d 495, 498 (Ga. 1975).

<sup>4</sup> *Id.* at 499.

<sup>5</sup> *Thompson v. Talmadge*, 41 S.E.2d 883, 893 (Ga. 1947); *see also Tanner v. Deen*, 33 S.E. 832, 835-36 (Ga. 1899) (county superintendents’ duties are “regulated by statute, and not left to the discretion of the party performing” them).

<sup>6</sup> Proposed Rule at 3 (emphasis added).

<sup>7</sup> O.C.G.A. § 21-2-70.

<sup>8</sup> *See* O.C.G.A. § 21-2-40(b) (providing that the “board[s] of elections and registration” have “the powers and duties of the election superintendent relating to the conduct of primaries and elections”).

<sup>9</sup> O.C.G.A. § 21-2-2(35)(A); SEB Rule 183-1-12-.02(1)(g).

<sup>10</sup> *E.g.*, Fulton County Board of Registration and Elections Bylaws, Art. III, § 6, <https://fultoncountyga.gov/-/media/Departments/Registration-and-Elections/Board-of-Registration-and-Elections/Monthly-Operations-Reports/BRE-BYLAWS42021.pdf>.

<sup>11</sup> *See* Proposed Rule at 3 (citing O.C.G.A. § 21-2-193(a) (irrelevant statute concerning the listing of names of candidates on presidential preference primary ballots), § 21-2-493(b) (referring to the “superintendent,” not individual board members), § 21-2-493(i) (same), § 21-2-493(k) (same), § 21-2-70(15) (oath of office requirement for board members)). The Proposed Rule’s reference to “§ 21-2-

only cited statute that even mentions individual county board members is the oath requirement of O.C.G.A. § 21-2-70(15)(B). But that provision does not confer any *power* on individual board members; to the contrary, it requires board members to affirm they will “truly, impartially, and faithfully perform [their] duties *in accordance with Georgia laws.*”<sup>12</sup> The oath requirement does not give individual board members any authority beyond that expressly provided by Georgia law, duly enacted by the Legislature, let alone any unfettered right to “examine all election related documentation created during the conduct of elections prior to certification of results.”

**Second**, no Georgia statute grants even *election superintendents* an unconditional right of access to “all election related documentation created during the conduct of elections prior to certification of results.” Rather, Georgia law enumerates specific circumstances in which the election superintendent may request such documentation. The Election Code provides that only “if, upon consideration by the superintendent of the returns and certificates before him or her from any precinct, it shall appear that the total vote returned” from a precinct “exceeds the number of electors in such precinct or exceeds the total number of persons who voted in such precinct or the total number of ballots cast therein, . . . [s]uch excess shall authorize the summoning of the poll officers to appear immediately with any primary or election papers in their possession.”<sup>13</sup> Thus, the superintendent (*i.e.*, the voting majority of a county board) must first identify a numerical “excess” before the superintendent has any “authori[ty]” to “summon[] . . . the poll officers . . . with any primary or election papers in their possession.” The Proposed Rule improperly omits this statutory condition. It instead purports to grant individual board members an unconditional and unfettered right of access to all “election documentation” any time prior to certification for any reason, regardless of whether the superintendent has identified the requisite numerical “excess.” For sound reasons, no Georgia statute confers such authority—either on election superintendents or individual board members.<sup>14</sup>

For both reasons, the Proposed Rule is plainly unauthorized by statute and would not withstand judicial review.

## **II. The Proposed Rule Would Invite Disruption and Abuse of County Canvassing and Certification**

There are many compelling reasons why Georgia law does not contemplate the kind of access granted by the Proposed Rule. Beyond its legal flaws, the Proposed Rule would invite

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<sup>1</sup>193(a)” appears to be a typographical error. Insofar as the Board intended to refer to § 21-2-493(a), that statute likewise refers to the “superintendent,” not individual board members.

<sup>12</sup> O.C.G.A. § 21-2-70(15)(B) (emphasis added).

<sup>13</sup> O.C.G.A. § 21-2-493(b).

<sup>14</sup> While O.C.G.A. § 21-2-72 provides that “primary and election records . . . shall be open to public inspection,” that provision only applies when the records “are not necessarily being used by the custodian or his or her employees” and “such public inspection shall only be in the presence of the custodian or his or her employee and shall be subject to proper regulation for the safekeeping of such documents and subject to the further provisions of this chapter.” This provision plainly does not confer an unconditional right on the public or individual county board members “to examine all election related documentation created during the conduct of elections prior to certification of results.” Proposed Rule at 3.

disruptions to county canvassing and certification. It would empower individual county board members to make unreasonable and vexatious demands for any election-related documents—even ones that have no bearing on certification—without providing any basis for their requests. It provides no safeguards against requests unscrupulously designed to delay or obstruct the lawful certification process, nor does it limit access to documents containing sensitive personal identifying information. And because the Proposed Rule does not specify the election-related documents that must be provided to county board members (instead referring indiscriminately to “all election related documentation created during the conduct of elections”), elections staff have no way of knowing which documents board members may demand before certification. Responding to such unpredictable document demands could be incredibly burdensome for county elections staff in the hectic six-day period between election day and certification.<sup>15</sup>

This concern is not hypothetical. Julie Adams, a current member of the Fulton County Board of Registration and Elections, has burdened elections staff with unreasonable demands for documents that are not readily available and that the board itself (which is the “election superintendent” for Fulton County, not Ms. Adams) has deemed unnecessary for certification.<sup>16</sup> And Ms. Adams abstained from certifying even after elections staff provided her with extensive election-related documentation, including the Poll Pad ePulse Report for Election Day; Poll Pad ePulse Report for Advance Voting; Election Night Summary Report; Results Tape for Advance Voting; Results Tape for Election Day; Batch Load Report; Statement of Votes Cast; Scanner List for Absentee by Mail; Scanner list for Election Day; Memory Card Chain of Custody report; Ballot Recap Sheets; Numbered List of Provisional Voters; and Provisional Summary Report.<sup>17</sup> Ms. Adams provided no credible explanation as to why the provided materials were insufficient, raising questions about whether her document demands were pretextual. The Proposed Rule places no limits on even pretextual demands for document production.

If the Board adopts the Proposed Rule, such vexatious document demands could become the reality in every Georgia county with an election board. This would threaten the orderly administration of Georgia elections and could lead to chaos.

### **III. Technical Errors in the Proposed Rule**

The Proposed Rule repeatedly refers to “the Board”<sup>18</sup>—presumably in reference to county boards of election or county boards of registration and election. But the term “board” is imprecise and disregards that the election superintendent in some counties is a probate judge, not

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<sup>15</sup> See O.C.G.A. § 21-2-493(k) (mandating that consolidated election “returns shall be certified by the superintendent not later than 5:00 P.M. on the Monday following the date on which [the] election was held”).

<sup>16</sup> See Video of Fulton County Board of Registration & Elections Special Meeting (May 28, 2024), <https://www.youtube.com/live/Rp5uVVslzhg?t=23397s>; George Chidi & Sam Levine, *Republican who refused to certify Georgia primary a member of election denialist group*, The Guardian (June 4, 2024), <https://www.theguardian.com/us-news/article/2024/jun/04/republican-julie-adams-georgia-election-integrity-network>.

<sup>17</sup> See *id.*

<sup>18</sup> See Proposed Rule at 2.

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a “board.”<sup>19</sup> That is why the Election Code and this Board’s rules consistently refer to the “election superintendent” or the “superintendent,” not “the board.”

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We respectfully urge the Board not to adopt the Proposed Rule.

Sincerely,

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<sup>19</sup> O.C.G.A. § 21-2-2(35)(A); SEB Rule 183-1-12-.02(1)(g).