



*Sent via email*

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Dear Governor Kemp, Secretary of State Raffensperger, and Chairman Fervier:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”), Black Voters Matter Fund, Georgia Muslim Voter Project, National Asian Pacific American Women’s Forum (“NAPAWF”), Georgia Association of Latino Elected Officials (“GALEO”), Barred Business, Rep Georgia Institute Inc. (Rep. GA), Georgia STAND-UP, Women Watch Afrika, Inc., Georgia Equality, Protect the Vote GA, and Migrant Equity Southeast write to state our strongest concerns regarding the recent adoption by the State Election Board (“SEB”) of amendments to Rules 183-

1-12-.02 and 183-1-12-.12 (the “Rule Amendments”). We convey three specific concerns: (1) the SEB exceeded its statutory authority by enacting Rule Amendments that are inconsistent with Georgia law; (2) the broad discretion and unfettered authority to seek documents that the Rule Amendments confer to local election superintendents can lead to delays or denials of election certification; and (3) these delays or denials can be employed in a racially discriminatory fashion, in particular in counties with significant Black populations.

Accordingly, we ask you, as Georgia’s top election officials, to request the Attorney General to issue an official opinion, pursuant to O.C.G.A. § 45-15-3(1),<sup>1</sup> about the illegality of the Rule Amendments and their potential to cause disruptions to the certification process.

## **I. The Rule Amendments Are Inconsistent with Georgia Law.**

Georgia law provides that the duties of the SEB include “[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 SEB exceeded its statutory authority by adopting the Rule Amendments, which purport to transform the statutorily mandated, ministerial task of election certification into a process that permits county election officials to use discretion and an unfettered right to examine documents to determine whether or not to certify an election. The Rule Amendments’ distortion of the election certification process is plainly inconsistent with and has no basis in Georgia law, which leaves no room for discretion or unconstrained investigation prior to certification.

### **a. Amendment to Rule 183-1-12-.02: “Reasonable Inquiry” Provision is Inconsistent with Non-Discretionary Duty of Certification**

During the August 6, 2024, meeting, the SEB amended Rule 183-1-12-.02 to define the phrase “[c]ertify the results of a primary, election, or runoff,” to mean “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.”<sup>3</sup> The Rule Amendment does not define “reasonable inquiry.” As a result, different election officials can have different

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<sup>1</sup> Although Ga. Code Ann. § 45-15-3(1) provides that the Attorney General must issue an opinion when requested by the Governor, the Secretary of State and the Chairman of the SEB also have the authority to request an official opinion from the Attorney General. The Attorney General states on the office’s website that, “to avoid having the Governor endorse all requests for opinions originating within the departments of the state, the Attorney General receives requests for opinions directly from the heads of the executive departments.” *Opinions*, Office of the Attorney General, (Aug. 19, 2024) <https://law.georgia.gov/opinions>. Indeed, on August 19, 2024, the Attorney General issued an official opinion to the Chairman of the SEB. *See* 2024 Ga. Op. Att’y. Gen. 01 <https://law.georgia.gov/opinions/2024-1>.

<sup>2</sup> Ga. Code Ann. § 21-2-31(2) (emphasis added).

<sup>3</sup> Petition to Amend Rule 183-1-2-.02, presented by Michael Heekin, at 3 (Mar. 26, 2024)(emphasis added), available at [https://sos.ga.gov/sites/default/files/forms/Rule%20Petition%20-%20Heekin\\_redacted.pdf](https://sos.ga.gov/sites/default/files/forms/Rule%20Petition%20-%20Heekin_redacted.pdf).

interpretations of what constitutes the “reasonable inquiry” required to certify an election, inserting an election official’s discretion into the certification process.

This discretion is inconsistent with Georgia law, which mandates that election certification is a mandatory, ministerial task. The Legislature used the mandatory “shall” throughout the Georgia Code to describe the election superintendent’s duty to certify an election. For example, the Code provides that election results “*shall* be certified by the superintendent not later than 5:00 P.M. on the Monday following the date on which such election was held.”<sup>4</sup> Importantly, even “[i]f any error or fraud is discovered, the superintendent *shall* compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented to him or her and shall report the facts to the appropriate district.”<sup>5</sup> In other words, Georgia law requires election officials to certify the election even if there are discrepancies and provides for alternative means after certification to resolve those discrepancies.

Longstanding precedent of the Georgia Supreme Court confirms the mandatory, ministerial nature of the certification function. In 1926, the Court described the duties of the managers and superintendents of election, who are required by law to assemble and count votes (*i.e.*, certify an election) as “purely ministerial.”<sup>6</sup> Years later, the Court reiterated its position that this process is ministerial:

To our minds there is no escape from the conclusion that in publishing the returns and declaring the results[, officials] were performing a strict and precise duty. . . . They were not, while performing that duty, exercising or authorized to exercise any *discretion*, but were simply performing the *ministerial* act of disclosing to the public the official election returns that had been prepared by the election managers.<sup>7</sup>

Finally, by issuing an opinion recognizing the illegality of the SEB’s Rule Amendments, the Georgia Attorney General would be extending the Office’s long-held view that the Election Code imposes “mandatory dut[ies]” on “superintendent[s] of elections.” 1978 Ga. Op. Att’y Gen. 246.

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<sup>4</sup> Ga. Code Ann. § 21-2-493(k) (emphasis added); *see also id.* § 21-2-70(9) (the election superintendent “shall perform all the duties imposed upon him or her by this chapter,” including “to certify the results [of elections] to such authorities as may be prescribed by law”); *id.* § 21-2-493(a) (“Upon the completion of . . . computation and canvassing, the superintendent shall tabulate the figures for the entire county or municipality and sign, announce, and attest the same, as required by this Code section.”).

<sup>5</sup> Ga. Code Ann § 21-2-493(i) (emphasis added).

<sup>6</sup> *See Bacon v. Black*, 133 S.E. 251, 253 (Ga. 1926).

<sup>7</sup> *See Thompson v. Talmadge*, 41 S.E.2d 883, 892-93 (Ga. 1947) (emphasis added).

**b. Amendment to Rule 183-1-12-.12: Unfettered Right of County Board Members to “Examine All Election Related Documentation” Is Inconsistent with Statutorily Prescribed Circumstances in Which Superintendents May Request Documents**

The SEB’s amendment to Rule 183-1-12-.12, adopted on August 19, also runs afoul of state law by mandating that individual county election board members be permitted “to examine all election related documentation created during the conduct of elections prior to certification of results.”<sup>8</sup>

This unfettered right to examine all election related documentation circumvents the specific circumstances in which Georgia law permits an election superintendent to request documentation from poll officers for a particular precinct. The Georgia Code provides that election superintendents may request “election papers in the[] possession [of a precinct poll officer]” only when “the total vote returned” from that 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.”<sup>9</sup> The documents must “relat[e] to such precinct” and must be examined “in the presence of representatives of each party, body, and interested candidate.”<sup>10</sup> The SEB’s Rule Amendment impermissibly broadens the authority of county board members by allowing them to request and examine “*all*” documentation, regardless of whether or not they have identified an excess at a particular precinct, the documents are in the poll officer’s possession, the documents relate to the precinct at which there is an excess, or the relevant representatives are present during the examination.

Moreover, the Rule Amendment purports to provide the right of examination to individual county board members, but Georgia law confers authority upon the county election superintendent, which is the majority of the voting members of the county board of elections in those counties that have boards.<sup>11</sup> The Rule Amendment’s conferral of authority to examine documents to individual

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<sup>8</sup> See State Election Board, Notice of Proposed Rulemaking, Revisions to Subject 183-1-12-.12. Tabulating Results (July 18, 2024) at 3, [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>9</sup> Ga. Code Ann. § 21-2-493(b).

<sup>10</sup> *Id.*

<sup>11</sup> See Ga. Code Ann. § 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”).

board members is therefore at odds with the delegation of authority under Georgia law to county boards.<sup>12</sup>

## **II. The Rule Amendments, on Their Own and When Taken Together, Create the Opportunity for Delays or Refusals of Certification.**

The Rule Amendments create the potential for chaos in the election certification process. Individual county election board members will be able to use their own definitions of “reasonable inquiry” to determine whether or not they have met the requirement established by the Rule Amendments to certify the election. This creates the opportunity for election officials, or third parties attempting to pressure election officials, to abuse the process and create delays to certification that are premised on unsubstantiated claims of fraud or other irregularities.<sup>13</sup> Unfettered discretion to withhold certification in order to inquire into the conduct of an election opens the door for conspiracy theories and harmful misinformation to cast doubt on the election administration process. As the SEB Chair John Fervier noted, the “reasonable inquiry” provision does “not appear to have guardrails around the process.”<sup>14</sup>

Similarly, the Rule Amendment permitting examination of “all election related documentation” will enable individual county election board members to withhold certifying an election until an individual board member can examine an undefined number of documents that may or may not relate to any identified discrepancies. The Rule Amendment will create unnecessary delays and encourage wanton conduct at the expense of poll workers and voters. During the SEB’s August 19 meeting, Chair Fervier opposed the Rule Amendment, citing his concern that county election board members could use it as a justification to vote against certifying elections.<sup>15</sup> In that meeting, Chair Fervier noted that “this rule would lead to an unlimited search of documents that could create board members saying. . . . I’m not going to certify this election.”<sup>16</sup>

These concerns are not theoretical. At least 19 election board members have refused to certify elections since 2020.<sup>17</sup> Earlier this year, a member of the Fulton County Election Board sued to stop certification in the May 2024 primary, seeking a ruling that her duty to certify elections was discretionary rather than mandatory.<sup>18</sup> Local board members in Cobb, DeKalb, and Spalding

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<sup>12</sup> Ga. Code Ann. § 21-2-70.

<sup>13</sup> See Amy Gardner, *et al.*, *Trump Allies Test a New Strategy For Blocking Election Results*, The Washington Post, (June 26, 2004) <https://www.washingtonpost.com/politics/2024/06/26/certification-2024-election-results/>.

<sup>14</sup> *Id.*; See also Letter from NAACP Legal Defense and Educational Fund to Georgia State Election Board (Aug. 5, 2024) <https://acrobat.adobe.com/id/urn:aaid:sc:va6c2:c4976ce0-c929-4b3a-b6ae-c0286bb08f8b>.

<sup>15</sup> See Mark Niese, *Georgia Election Board Votes to Add Requirements Before Certification*, Atlanta Journal-Constitution, (Aug. 19, 2024) <https://www.ajc.com/politics/georgia-election-board-votes-to-add-more-requirements-before-vote-certification/HWWL2ELWIJDZJF6OUWFTXIQLQ/>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Rosie Manins, *Republican Member of Fulton Elections Board Won’t Certify Primary Results*, Atlanta Journal-Constitution, (May 28, 2024) <https://www.ajc.com/news/atlanta-news/republican-member-of-fulton-elections-board-wont-certify-primary-results/IDYT7CZVMZAJXHDAADS7G6JNT4/>.

Counties refused to certify results during the 2023 municipal election cycle.<sup>19</sup> The Rule Amendments facilitate these types of actions and make it more likely they will occur in the upcoming November election.

Georgia's 159 counties are required to certify elections. Without standards, these counties may withhold certification based on subjective criteria that differ from county to county in what promises to be a contentious general election. This lack of clarity opens the door to potential misuse and arbitrary decision-making, creating the risk of significant delays and uncertainty in the certification of election results. This is particularly troubling given the proximity to the upcoming November elections, a critical period for our state and nation. Georgia voters should not be subject to an arbitrary process with no justiciable standards.

To be sure, the Georgia Code prescribes specific procedures and actions for local election officials to take to investigate and rectify discrepancies prior to certification.<sup>20</sup> For example, local election officials must conduct risk-limiting audits of certain races,<sup>21</sup> and they may perform an optional recount or recanvass of returns prior to certification.<sup>22</sup> After certification, alleged discrepancies or fraud can be addressed through an election contest or prosecutorial action.<sup>23</sup> Sufficient safeguards therefore exist to preclude the need for the Rule Amendments.

### **III. The Rule Amendments Could Be Employed in a Racially Discriminatory Fashion.**

Given the discretion permitted by the Rule Amendments, it creates the risk that delays or denials of certification could be used in racially discriminatory ways, particularly in counties that include significant numbers of Black voters. The Rule Amendments enable the personal views and priorities of election officials to distort the democratic process and invite inconsistent interpretation and application across counties. Vague and open-ended standards like those in the Rule Amendments can create opportunities for bias and discrimination to influence decision-making, either unconsciously or invidiously.

This is particularly true in the voting context. For example, subjective and discretionary literacy test requirements notoriously gave rise to disenfranchisement and discrimination against Black voters before the passage of the Voting Rights Act—still-recent history that Black Georgians remember all too well, some from personal experience. We are gravely concerned that the Rule

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<sup>19</sup> See Mark Niese, *Several Republican Officials Vote Against Certifying Georgia Elections*, Atlanta Journal-Constitution, (Nov. 22, 2023), <https://www.ajc.com/politics/several-republican-officials-vote-against-certifying-georgia-elections/XRALMPAOZFHABLVH7756GILWD4/>.

<sup>20</sup> See Ga. Code Ann. § 21-2-493.

<sup>21</sup> See Ga. Code Ann. § 21-2-498(b).

<sup>22</sup> See Ga. Code Ann. § 21-2-495.

<sup>23</sup> See Ga. Code Ann. § 21-2-522; § 21-2-493(i).



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