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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

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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)