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August 31, 2020

Jasmine Shannon
Office of the Secretary of State
Elections Division
2 Martin Luther King Drive, S.E., 8th Floor West Tower
Atlanta, Georgia 30334
jshannon@sos.ga.gov

Re: Proposed Amendments to SEB Rules 183-1-14

Dear Ms. Shannon:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”), we write to provide comments on proposed amendments to the Rules of the State Election Board (“SEB”), Chapter 183-1-14, Absentee Voting, which were made available by the SEB on August 11, 2020 (the “Proposed Rule”).

The stated purpose of the Proposed Rule is to “clarify and define the required language to be included in the directions on absentee ballots.”¹ We agree that the instructions provided to voters who seek to cast absentee ballots require clarification, and we commend the SEB for taking this important step. We urge the SEB to modify the Proposed Rule in several ways. *First*, the SEB should enact specific requirements for separate instructions that are provided to voters along with their ballot (the “Uniform Instructions”). *Second*, the Uniform Instructions should inform voters who request an absentee ballot how they can vote in person. *Third*, the Uniform Instructions should inform voters how to use the two envelopes provided with their absentee ballot and what to do if they do not have both envelopes. *Fourth*, the SEB should clarify the Proposed Rule to prevent unnecessary disputes and litigation during recounts. *Finally*, the SEB should clarify and simplify the directions that appear on the absentee ballot itself (the “Absentee Ballot Directions”). To aid consideration of our proposed changes, please see Appendix A, which incorporates the revisions discussed herein.

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce

¹ State Election Board, *Notice Of Intent To Post A Rule Of The State Elections Board, SEB Rule 183-1-14-.06(3)* (Aug. 11, 2020), available at [https://sos.ga.gov/admin/files/SEB%20Rule%20183-1-14-.06\(3\)%20-%20To%20Post%20For%20Public%20Comment.pdf](https://sos.ga.gov/admin/files/SEB%20Rule%20183-1-14-.06(3)%20-%20To%20Post%20For%20Public%20Comment.pdf).

and promote laws and policies that protect the right to vote,² prohibit voter intimidation and suppression, and increase access to the electoral process.³

The Proposed Rule Should Clarify Both the Uniform Instructions for Absentee Ballots and the Directions That Appear on the Absentee Ballots

Georgia law requires that voters must be provided with “uniform instructions for the manner of preparing and returning the [absentee] ballot, in form and substance as provided by the Secretary of State,” pursuant to O.C.G.A. § 21-2-384(b). Current SEB rules only govern the Absentee Ballot directions (which appear on the ballot itself),⁴ and do not provide any requirements for the Uniform Instructions.

We urge the SEB to enact rules clarifying *both* the Absentee Ballot Directions and the Uniform Instructions. The Absentee Ballot Directions should be limited to information relating to how to mark the ballot. In contrast, the Uniform Instructions prepared by the Secretary of State should address all questions that are likely to arise for voters concerning the absentee ballot process. We do not believe the SEB should codify rigid language for the Uniform Instructions, but should instead adopt basic requirements for the Uniform Instructions to ensure that they fully educate voters about the absentee ballot process. The requirements that we propose for this purpose (reflected in Appendix A) would be easy to implement, because the absentee ballot instructions currently being used already satisfy most of these requirements.⁵

The Uniform Instructions Should Fully Inform Voters Who Request an Absentee Ballot How to Vote in Person

The Proposed Rule, if adopted, will modify the Absentee Ballot Directions to clarify that voters who request an absentee ballot but choose to vote in person may “surrender the ballot to the poll manager” and will then be “permitted to vote a regular ballot.” We urge the SEB to broaden this instruction to address the process for voters who request an absentee ballot but do not receive it by the election. In addition, we believe it is preferable for these instructions to be included in the Uniform Instructions rather than the Absentee Ballot Directions.

Under state law, voters who request an absentee ballot but seek to vote in person at their precinct have two options: *First*, voters may bring their absentee ballot with them to their precinct, surrender the absentee ballot to the poll manager, and are then permitted to cast a regular ballot. *See* O.C.G.A. § 21-2-

² *See Northwest Austin Municipal Utility District No. 1 v. Holder*, 556 U.S. 193 (2009) (ensuring that minority voters would still have the safeguards provided by Section 5 preclearance process prescribed by the Voting Rights Act of 1965).

³ *See Smith v. Allwright*, 321 U.S. 649 (1944) (holding policy that prohibited Black people from voting in primary elections violated Fourteenth and Fifteenth Amendments).

⁴ *See* Rule 183-1-14-.06(3). The Absentee Ballot Directions are limited in scope, as they should be: They only pertain only to marking the ballot, spoiled ballots, and the procedure for surrendering a ballot.

⁵ *See* Georgia Secretary of State, *Instructions for Preparing and Returning Official Absentee Ballots in Primaries and Elections*, available at <https://sos.ga.gov/admin/files/ballotrtn.pdf>. These instructions would already satisfy most of the requirements set forth in the proposed Rule 183-1-14-.14 in Appendix A, except for Sections 2(c), 2(f), and 2(g).

388(1). *Second*, voters who do not bring their absentee ballot (including any voters who requested but did not receive an absentee ballot) may vote in person at their precinct without surrendering their absentee ballot so long as the poll manager has “satisfied themselves as to the identity of such elector and confirming that the elector’s absentee ballot has not yet been received by the board of registrars,” which is generally handled with a phone call to the registrar or absentee ballot clerk. *See* O.C.G.A. § 21-2-388(2).⁶

It is expected that a very large number of voters will seek to cast an absentee ballot in the 2020 general election due to the COVID-19 pandemic.⁷ Given the expected significant increase in absentee voting, there is a significant risk of USPS delays in mail delivery⁸ and risk that a substantial number of voters will not receive their absentee ballots in time to vote, as occurred during the June 9, 2020 primary.⁹ For this reason, it is especially important that the Uniform Instructions clearly set forth all options available to voters who request absentee ballots but do not receive them in advance of Election Day.¹⁰

It is also important to simplify and streamline the verbiage on the absentee ballot itself, which can be accomplished by including this information in the Uniform Instructions rather than the Absentee Ballot Directions.

The Uniform Instructions Should Inform Voters How to Use the Two Envelopes Provided and What to Do If They Do Not Have Both Envelopes

Georgia requires that absentee voters be provided with an inner and an outer envelope in order to ensure confidentiality of the absentee ballot.¹¹ Notwithstanding the clear requirement for *two* envelopes

⁶ Only if the poll manager is unable to verify the identity of a voter and confirm the ballot has not been received should the voter be cast a provisional ballot. *See* Help America Vote Act, 52 U.S.C. § 21082; *see also* *White v. Blackwell*, 409 F. Supp. 2d 919 (N.D. Ohio 2006) (holding that a state cannot prohibit provisional ballot access to voters who applied for an absentee ballot). Such provisional votes must be counted so long as the registrar determines that the person casting the provisional ballot “timely registered to vote and was eligible to vote.” *See* O.C.G.A. § 21-2-419(c)(1).

⁷ *See* Juliette Love, Matt Stevens, and Larazo Gamio, *A Record 76% of Americans Can Vote by Mail in 2020*, New York Times (August 14, 2020), available at <https://www.nytimes.com/interactive/2020/08/11/us/politics/vote-by-mail-us-states.html>.

⁸ *See* Nicole Carr and Matt Johnson, *Postal service funding, delays lead to mail-in voting concerns in Georgia*, WSB-TV Atlanta (August 14, 2020), available at <https://www.wsbtv.com/news/local/atlanta/postal-service-funding-delays-lead-mail-in-voting-concerns-georgia/M3T2T2B2MBCIFAC2IZ67UKWIM4/>.

⁹ *See* Mark Niese, *Election workers struggle to finish counting Georgia absentee ballots*, The Atlanta Journal-Constitution (June 17, 2020), available at <https://www.ajc.com/news/state--regional-govt--politics/election-workers-struggle-finish-counting-georgia-absentee-ballots/ra6euGvP4I5ikiami0SmBP/>.

¹⁰ It is also critical to take steps to ensure that each poll site is equipped with additional provisional ballots, especially because certain poll sites ran out of provisional ballots during the June 9, 2020 primary. *See* Richard Fausset, Reid J. Epstein and Rick Rojas, *I Refuse Not to Be Heard’: Georgia in Uproar Over Voting Meltdown*, New York Times (June 9, 2020), available at <https://www.nytimes.com/2020/06/09/us/politics/atlanta-voting-georgia-primary.html>.

¹¹ *See* O.C.G.A. § 21-2-384(b) (“two envelopes for each official absentee ballot . . . in order to permit the placing of one within the other.”). The “Absentee Voting” guide issued by the Georgia Secretary of State Elections Division explains that the inner envelope is utilized to “ensure confidentiality of the ballot.” Georgia Secretary of State, Elections

for absentee ballots, during the June 9, 2020 primary election, absentee voters were provided only *one* envelope (the outer envelope).¹² Instead of an inner envelope, absentee voters were given a sheet of paper to ensure privacy of their ballot, which was described by the Secretary of State’s office as a “privacy sleeve.”¹³ The instructions provided to absentee voters for the June 9, 2020 primary, however, continued to direct voters to use two envelopes.¹⁴ The fact that voters were provided with incorrect instructions directing them to use two envelopes (even though only one envelope was provided) caused significant voter confusion, including voter concerns over whether their absentee votes would count and whether their selections would remain confidential.¹⁵

It is important that the Uniform Instructions explain clearly how voters should use the two envelopes and explain that if an inner envelope has not been provided, voters should use another envelope, a folded sheet of paper, or place the ballot directly into the outer envelope, and the confidentiality of their vote will still be protected.¹⁶

The Proposed Rule Should be Clarified to Prevent Unnecessary Disputes and Litigation During Recounts

The Proposed Rule, if adopted, will modify the Absentee Ballot Directions to state that voters must “not use ‘check’ marks or an ‘X’” to mark their ballot. Although we believe this language can be improved, we support the goal of this modification because it will reduce the number of votes that must be referred to a review panel for adjudication pursuant to O.C.G.A. § 21-2-483(g).

Some voters may inadvertently, however, indicate their selections with an “X” or other mark, rather than completely filling in the bubble. Such votes are less likely to be detected by the central tabulator and are more likely to be referred to a review panel for adjudication. As long as the voter

Division, *Absentee Voting: A Guide for Registered Voters (v.1 2014)*, p. 5, available at https://sos.ga.gov/admin/uploads/Absentee_Voting_Guide_20142.pdf.

¹² See Mark Niese, *Georgia absentee ballots changed to remove inner envelope*, Atlanta Journal-Constitution (April 30, 2020), available at <https://www.ajc.com/news/state--regional-govt--politics/georgia-absentee-ballots-changed-remove-inner-envelope/5VCLguuvNOR2qb4zTctOLK/>.

¹³ *See id.*

¹⁴ *See id.*; see also Georgia Secretary of State, *Instructions for Preparing and Returning Official Absentee Ballots in Primaries and Elections*, available at <https://sos.ga.gov/admin/files/ballotrtn.pdf> (directing voters to “enclose and securely seal the ballot into a plain envelope and seal” and to place “the sealed envelope into a large envelope and seal.”).

¹⁵ See Jenna Eason, *The instructions on some Georgia absentee ballots are wrong. Here’s what you need to know*, The Telegraph (May 1, 2020), available at <https://www.macon.com/news/politics-government/election/article242431106.html>.

¹⁶ Moreover, as the SEB has previously confirmed, absentee votes must be counted regardless of whether an inner envelope and/or privacy sleeve is utilized. See Jenna Eason, *The instructions on some Georgia absentee ballots are wrong. Here’s what you need to know*, The Telegraph (May 1, 2020), available at <https://www.macon.com/news/politics-government/election/article242431106.html>.

provides a clear indication of intent, Georgia law provides that such votes are valid and must be counted.¹⁷ In order to reduce the risk of unnecessary disputes during adjudication proceedings, as well as unnecessary and costly litigation at taxpayer expense, it is important for the Proposed Rule to state clearly that a failure to follow these directions is not a basis to invalidate an elector’s ballot, if the voter’s intent is clear.

The Absentee Ballot Directions Can Be Improved to Minimize the Risk of Voter Confusion

It is important that the Absentee Ballot Directions use “clear, simple language” that is as concise as possible.¹⁸ The proposed Absentee Ballot Directions contain errors and vague language that will lead to voter confusion and likely result in some voters filling out their absentee ballot improperly. These errors may also lead to some voters questioning whether the absentee ballot is a legitimate government communication or a scam.¹⁹

We respectfully request that the SEB revise the Proposed Rule as reflected in Appendix A to this letter. These changes will benefit all Georgia voters, but are particularly important for older voters, low income voters, and voters of color who have borne the most severe impacts of the pandemic and current economic crisis. These more vulnerable voters are less likely to have access to the healthcare, social networks, and transportation needed to feel safe voting in-person under these extraordinary conditions. Given the importance of the right to vote, which the U.S. Supreme Court has described as “a fundamental political right, because [it is] preservative of all rights,”²⁰ we believe it is critical to take these common-sense steps to provide voters with clear information about how to cast their ballot so that it will count.

If you have questions or would like to discuss these issues in the meantime, please contact Michael Pernick by email at mpernick@naacpldf.org or telephone at (917) 790-3597.

Sincerely,

/s Catherine Meza
Catherine Meza, Senior Counsel
Michael Pernick, Attorney
NAACP Legal Defense
& Educational Fund, Inc.

¹⁷ *Henderson v. Cty. Bd. of Registration & Elections*, 126 Ga. App. 280, 282 (Ga. 1972) (noting that assessment of a ballot is based on voter intent); *Du Pre v. Cotton*, 134 Ga. 316 (Ga. 1910) (same).

¹⁸ See generally, Center for Civic Design, *Designing usable ballots*, available at <https://civicdesign.org/fieldguides/designing-usable-ballots/>.

¹⁹ Grammatical issues and typos—especially in documents that request personal information—are widely understood to signal that a communication may be fraudulent. See, e.g., Chancellor Winn, *Beware: Text that appears to be from FedEx is likely a scam*, NBC12 (Jan. 25, 2020), available at <https://www.nbc12.com/2020/01/23/beware-text-that-appears-be-fedex-is-likely-scam/>; Becca Pizmoht, *New scams circulating*, Daily Progress (May 21, 2020), available at https://dailyprogress.com/madisonnews/news/new-scams-circulating/article_db0c6088-c20d-11ea-a10d-cbb322eeca86.html.

²⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

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MODIFICATIONS TO PROPOSED RULE

Replace Rule 183-1-14-.06(3) with the following:

(3) The directions that explain how to cast a vote and how to obtain a new ballot after one is spoiled shall appear immediately at the top of the ballot in substantially the following form as appropriate for that particular primary or election:

To vote, use a black or blue ink pen to completely fill-in the oval to the left of the candidate name or choice.

To vote for a write-in candidate, completely fill in the oval to the left of the write-in selection, then print the name of the write-in candidate in the space provided.

Read the instructions for each contest. Do not mark more choices than allowed.

Help us count your ballot accurately:

- Do not use red ink or a felt tip pen to mark the ballot.
- Do not use marks or an “X” to mark your choices.
- Do not sign, cut, tear, or damage the ballot.

If you change your mind or make a mistake, do not attempt to correct the ballot. Write “Spoiled” across the face of the ballot and across the return envelope. Mail or return the spoiled ballot and envelope to your county board of registrars, and a new official absentee ballot will be mailed to you.

“I understand that the offer or acceptance of money or another object of value to vote for any particular candidate, list of candidates, issue, or list of issues included in this election constitutes an act of voter fraud and is a felony under Georgia law.” See O.C.G.A. §§ 21-2-284(e), 21-2-285(h), and 21-2-383(a).

Add Rule 183-1-14-.06(4) as follows:

(4) An elector’s failure to follow any of the directions set forth in this rule may not be a basis to invalidate an elector’s ballot if the elector’s intent is otherwise clear.

Add Rule 183-1-14-.14 as follows:

Rule 183-1-14-.14 Uniform Instructions for Absentee Ballots

- (1) The Secretary of State shall prepare Uniform Instructions for absentee ballots as provided in O.C.G.A. § 21-2-384(b).
- (2) The Uniform Instructions shall, at a minimum, include instructions on the following topics:

- (a) Deadlines for submitting an absentee ballot.
 - (b) Instructions for marking an absentee ballot consistent with the provisions of Rule 183-1-14-.06(3).
 - (c) Instructions concerning the effect of overvoting or voting for more candidates than one is authorized to vote for a particular office, as required by O.C.G.A. § 21-2-384(b).
 - (d) Instructions concerning how the elector may correct errors in voting the ballot before it is cast, including information on how to obtain a replacement ballot if the elector is unable to change the ballot or correct the error, as required by O.C.G.A. § 21-2-384(b).
 - (e) Instructions for sealing, signing, and submitting an absentee ballot, and the fact that there is no witness requirement.
 - (f) Instructions concerning the two options available to electors who request an absentee ballot but seek to instead vote a regular ballot: (i) surrender the absentee ballot to the poll manager of an early voting site or precinct, pursuant to O.C.G.A. § 21-2-388(1); or (ii) appear in person before the poll manager of an early voting site or assigned precinct and ask to cancel the absentee ballot, pursuant to O.C.G.A. § 21-2-388(2).
 - (g) Instructions concerning the proper use of the two envelopes provided to absentee voters, as provided in O.C.G.A. § 21-2-384(b), and additional clarification that if an inner envelope is not provided, electors may (i) place a completed absentee ballot in another envelope; (ii) place a completed absentee ballot in a folded sheet paper; or (iii) place a completed absentee ballot directly into the outer envelope, and the elector's vote will be kept confidential regardless.
 - (h) Instructions concerning assistance for electors, pursuant to O.C.G.A. § 21-2-385(b).
- (3) The Uniform Instructions shall be provided in printed form to all electors along with their absentee ballot and shall be made available in a downloadable electronic form on the Secretary of State's website.