

October 24, 2022

Dear County Board of Elections & Registration,

Georgia has seen a spate of mass voter challenges this year, mostly based on residency. County boards have properly rejected most challenges as deficient. But if similar mass challenges continue to be filed in the run-up to the election, they will disrupt election day operations and disenfranchise voters. To address these risks, we write to highlight the legal obligations protecting challenged voters and to propose steps to take in advance to minimize disruptions at the polls.

I. Georgia Law Requires an Immediate Probable Cause Determination

No challenged voter should be denied a ballot absent the full hearing required by Georgia Code Section 21-2-230(i). In many instances, this merits hearing will not be necessary because “[u]pon the filing” of a voter challenge, the board of registrars must “immediately . . . determine whether probable cause exists to sustain such challenge.” Ga. Code § 21-2-230(b). If the board determines probable cause does not exist or is unable to make a determination before the voter votes, the voter must receive a regular ballot. Only if this probable cause threshold is cleared does the board hold the full hearing on that voter. If it is not practical to hold the full hearing before the close of polls, the voter should be offered a residency affirmation form. Only absent a residency affirmation form should the voter receive a provisional challenged ballot. *Id.* § 21-2-230(b)-(i). The State Election Director’s October 13, 2022, guidance reinforces this procedure.

To find probable cause under Georgia law, the board of registrars must have “a reasonable belief” based on the information the challenger provided that the voter is not entitled to vote. *Adams v. Carlisle*, 278 Ga. App. 777, 782 (2006). “Rumor, suspicion, speculation or conjecture” are not sufficient grounds. *Zimmerman v. State*, 131 Ga. App. 793, 794 (1974).

Recent mass challenges in Georgia have not met the probable cause threshold. Address matching—to the National Change of Address (NCOA) database, tax records, social media, or another source—is unreliable as evidence that a voter has permanently moved. A voter may be temporarily attending school, serving in the military, or spending time with family while remaining eligible to vote in Georgia. Lists that identify individuals only by name are likely to yield false positives among residents with the same names. Door-to-door survey results also cannot sustain probable cause as they are only hearsay from unknown sources. The person who opens the door may be a child, a temporary lessee, or simply scared to provide personal details to unknown canvassers.

Federal law governing voter list maintenance confirms this understanding of probable cause. Under the National Voter Registration Act of 1993 (NVRA), state and local

officials already compare rolls to sources such as the NCOA database. 52 U.S.C. § 20507. Due to the limitations of those sources, the NVRA requires a specific notice and waiting procedure before removing voters based on NCOA data and prohibits “systematic removals” in the 90 days before a federal election. *Id.* § 20507(c)(2)(A). To provide probable cause for denying someone the right to vote, then, a challenge must offer more than reference to public databases. In most instances, the challenger must have personal knowledge of facts establishing a voter’s ineligibility. A mass challenge to dozens of voters or more is unlikely to “specify distinctly” reliable grounds regarding any particular voter and therefore is unlikely to meet the probable cause threshold. October 13, 2022, Guidance from State Elections Director.

II. How to Handle Challenges Submitted Just Before Election Day

The Board may wish to reserve time for a virtual meeting the day before Election Day to resolve any last-minute challenges. It will be too late to count on flagging challenged voters in the PollPads for Election Day. Changing procedures this late in the game would risk human error of the sort that has [led to long lines and provisional voting supply shortages](#) in other jurisdictions.

Moreover, any challenges to large numbers of voters based on unreliable methods like data matching and door-to-door stranger visits can be dismissed rapidly for lack of probable cause, as described above. This will resolve any question about whether your administrators must be burdened with the impossible: matching these lists to the voter file, distributing hard copies to all the precincts, and creating new and last-minute poll worker instructions for checking voters against these lists. Long lines and potential supply shortages caused by the time-consuming provisional challenged ballot process will also be avoided.

If a small number of specific challenges are received at this late stage that meet the probable cause threshold, your administrators may distribute an advisory on your behalf to the poll managers of the individual precincts to which those voters are assigned.

III. Poll Managers Have No Authority to Decide if a Challenge Is Valid

All challenges must be submitted to the board of registrars in writing. Ga. Code § 21-2-230(a); October 13, 2022, Guidance from State Elections Director. This board should advise poll workers that they may not accept or act on any challenges directly. Poll workers may direct challengers to the board of registrars but may not delay someone from voting because they anticipate the filing of a challenge against that person.

IV. How to Handle Challenges Submitted on Election Day

If the board receives a written challenge on Election Day, it must determine whether it meets the “probable cause” threshold before any process to add voters to the challenged

list is carried out. If the challenge does not meet the threshold, it should be dismissed. If it does (assuming there is no time for a hearing), the voter must be offered a residency affirmation form or allowed to vote promptly by provisional challenged ballot. Ga. Code § 21-2-230(b).

If the board expects to receive Election Day challenges that meet the probable cause threshold, we recommend advising precinct managers before Election Day of how they should expect to receive notice from the board, as it will be too late to mark these voters as challenged in the PollPads. We also recommend the board or the elections director with the guidance of the board provide an affidavit form that your administrators can supply to poll managers, as described in the State Election Director’s October 11, 2022, guidance. Such a form negates the finding of probable cause and allows challenged voters to vote a regular ballot if they sign and provide identification confirming their eligibility.

V. How to Deal with Provisional Challenged Ballots

We recommend the board provide guidance to poll managers to instruct them on proper marking and handling of challenged ballots. Challenged ballots are governed by distinct procedures from other provisional ballots. Pursuant to Ga. Code § 21-2-386(e), the poll worker must write “Challenged,” the elector’s name, and the reason for the challenge on the outer envelope and deposit it in a secure, secret box. As with all provisional ballots, voters must be able to ask questions about and receive a sheet describing the provisional voting process, as well as how to ascertain if their ballot is counted. Ga. Comp. R. & Regs. § 183-1-12-.18(2), (7). Challenged ballots must be kept separate from other provisional ballots so that challenged ballots can be counted together later.

The county registrars, upon receiving the challenged ballots, must determine the eligibility of all those ballots by close of business on the third business day following the election. *Id.* § 183-1-12-.18(10), (11). All accepted ballots are counted and those voters added (or reinstated) to the electors list. *Id.* § 183-1-12-.18(11)(d).

Before rejecting a ballot, however, the registrars must provide a hearing for the challenged voter. Ga. Code § 21-2-230(i). At this hearing, the challenger must affirmatively prove the voter’s ineligibility before the registrar may decide not to count the vote.

VI. Ensuring Sufficient Numbers of Provisional Ballots

If the board receives challenges for which it finds there is probable cause, and as a result large numbers of voters are placed on the challenged list, it is critical that poll managers at both early vote sites and election day polling places have the guidance, training, and supplies they need to administer these ballots. Filling out challenge envelopes will be time consuming, as will looking up voters on any late-received challenge lists that

could not be entered into E-net or the PollPads. If poll workers run out of supplies, an already difficult situation could become a nightmare.

Each precinct is required to have emergency paper ballots in the amount of 10% of registered voters. This requirement is designed to cover situations where voters are unable to use ballot marking devices due to technical failures or poll worker error. Ga. Comp. R. & Regs. § 183-1-12-.11(2)(c). It does not account for a scenario involving mass challenges. In that event, both early voting sites and election day polling places will need supplies, including envelopes, that go far beyond the regulatory minimum designed for technical malfunctions. The longer the list of voters treated as challenged with probable cause, the more provisional ballots and envelopes will be needed to ensure that supply shortages do not exacerbate lines and disenfranchise voters.

We are available if you would like to discuss any of our recommendations.

Sincerely,

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