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March 3, 2006

The Honorable Cathy Cox
Chairperson
State Election Board
Suite 1104, West Tower
2 Martin Luther King Jr Dr SE
Atlanta, GA 30334-1530

Re: Petition for Amendment of Administrative Rules

Dear Chairperson Cox:

Pursuant to O.C.G.A. § 50-13-9, I hereby submit this petition for the State Election Board to amend its rule 183-1-6-.03, related to voter registration [hereinafter, the “SEB Rule”], to bring it into compliance with the requirements of the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq* (“NVRA”) and the First and Fourteenth Amendments to the U.S. Constitution, with respect to the rights of private entities to conduct organized voter registration activities in the State of Georgia. This request is being submitted on behalf of the Charles H. Wesley Education Foundation, Inc. **We ask that this rulemaking petition be placed on the agenda for discussion and resolution at the State Election Board’s upcoming meeting on March 8, 2006.** Please direct any communications related to this petition to my attention.¹

Background

As you know, the rights to vote and to participate in the political process are fundamental rights, preservative of all other rights under the United States Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 n.14 (1996). “The Supreme Court has recognized ‘as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.’” *Osburn v. Cox*, 369 F.3d 1283, 1286 n.2 (11th Cir. 2004) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Thus, the right of

¹In submitting this Petition for Rulemaking under the Georgia Administrative Procedure Act, the Wesley Foundation does not waive, and in fact it specifically reserves, any and all other rights and remedies to which it may otherwise be entitled by law to address the violations of federal law noted herein. These rights specifically include, but are not limited to bringing an action for declaratory, injunctive, or other appropriate relief in a court of competent jurisdiction.

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private entities to associate with others, for purposes of encouraging the exercise of voting and voter registration rights, is fundamentally protected activity within the meaning of the First and Fourteenth Amendments to the United States Constitution.

To the extent any state regulation imposes or seeks to impose a severe burden on a fundamental voting or associational right, it must be *narrowly drawn* to serve a *compelling* state interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). As Justice Thurgood Marshall stated, “Statutes affecting constitutional rights must be drawn with precision. . . and must be tailored to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means.” *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

In addition to being protected as a fundamental associational right, the right of private entities to conduct and participate in organized voter registration activity at times and locations of their choosing, without the presence or permission of deputy registrars, and to collect and submit voter registration applications to appropriate election officials, is protected under the NVRA. *Charles H. Wesley Educ. Found. v. Cox*, 324 F. Supp. 2d 1358, 1369 (N.D. Ga. 2004) [*Wesley Foundation I*], *aff’d*, 408 F.3d 1349 (11th Cir. 2005) [*Wesley Foundation II*], *and consent decree and final judgment entered*, No. 1:04-CV-1780-WCO (N.D. Ga. Mar. 1, 2006) (slip op.) [*Wesley Foundation III*].

As described in further detail below, the SEB Rule, in its current form, does not comport with the Constitution or the NVRA because it imposes severe and unnecessary restrictions on the right of private entities to engage in voter registration activity in Georgia. Therefore, an immediate amendment to the SEB Rule is necessary and in the interests of justice.²

**Severe Burdens that SEB Rule Imposes on Private Entities’
Rights to Engage in Organized Voter Registration Activity**

By arguably not being limited in scope to registrars, deputy registrars, and other authorized persons, the SEB Rule impermissibly regulates the right of private entities to engage in voter registration activity in a number of important ways. For example, the SEB Rule seeks to limit the locations where voter registration activities can be conducted by prohibiting door-to-door voter registration, registration sponsored by political parties and political candidates, and registration in places where alcohol is lawfully sold and consumed on the same

²On September 14, 2005, we provided the required written notice to you, as the chief state election official, that the SEB Rule violated the NVRA. We requested immediate remedial action within 90 days. More than 90 days has passed since your receipt of that *ante litem* notice, and no remedial action has been taken by the Secretary of State or the SEB in response to that notice. Accordingly, petitioners are now entitled to institute an enforcement action under the NVRA at any time. We hope that such steps will not be necessary, however, and that appropriate relief can be obtained by way of this rulemaking petition.

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premises (such as sports venues, bars, restaurants, carnivals, or fairs). *See* Ga. Comp. R. & Regs. r. 183-1-6-.03(2)(b) and (2)(c)(1) and 183-1-6-.03(3)(h).³ Similarly, the SEB Rule seeks to limit the times during which voter registration activities can be conducted by providing that voter registration “may be conducted only at such times as are designated by the board of registrars, precleared by the United States Department of Justice, and advertised as required by law.” Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(k)(1).

Recently approved amendments to the SEB Rule prohibit private entities from accepting completed applications from voter registrants unless the applications are sealed; prohibit photocopying of such applications; and require such applications to be submitted to registrars no later than 72 hours after the date of execution of the application by the applicant. *See* Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2) and (3)(o)(3). All of these restrictions constitute impermissible infringements on the manner in which private entities may engage in organized voter registration activity.⁴

The sealing requirement severely interferes with the ability of private entities to assist eligible citizens with properly completing applications (*e.g.*, by verifying that they have filled in all required information, checked all required boxes, and written the information legibly). The ban on photocopying, in turn, severely hampers the ability of private entities and the applicants themselves to ensure that completed voter registration applications are being received and properly processed by election officials, because it eliminates the best verifiable evidence of the date and time that an application was completed, collected, and submitted. The photocopying ban likewise makes it infinitely harder for private entities to conduct their all-important get-out-the-vote activities, to encourage new registrants to cast ballots on election day.

While the photocopying ban and sealing requirement impose extremely onerous burdens on private entities’ associational rights, they fail to serve any compelling governmental interest in privacy, security, or prevention of voter registration fraud. Those requirements are also not sufficiently narrowly tailored to address any of those interests. As an initial matter, all information on a voter registration application is public information under Georgia law, with

³Some of these restrictions relate specifically to deputy registrars, while others do not — thereby arguably making the restrictions applicable to voter registration by anyone. Part of the problem with the current SEB Rule is that it was drafted at a time when election officials were under the erroneous assumption that only registrars and deputy registrars were authorized to conduct voter registration drives. That notion was invalidated as a result of the recent *Wesley Foundation* litigation; accordingly, the SEB Rule needs to be amended so as to clarify that rule is limited in scope and is not to be construed in a manner that would violate another person’s right to engage in voter registration activity allowed by any other law, including the NVRA. The amendments proposed in this Petition do just that.

⁴On or about September 12, 2005, Advancement Project and Project Vote submitted written public comments urging the SEB not to enact these restrictions, on the ground that they were in derogation of the NVRA and the U.S. Constitution. (*See* <http://www.advancementproject.org/vp/GAcom2.pdf>.) Nevertheless, the Board voted to enact those amendments on September 14, 2005. The Wesley Foundation incorporates those public comments into this Petition, as additional supporting reasons.

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the exception of an applicant's social security number. O.C.G.A. § 21-2-225(b). However, the Eleventh Circuit has recently confirmed that Georgia is prohibited by federal law from requiring a social security number on the voter registration application. *Schwier v. Cox*, ____ F.3d ____, No. 05-11428, 2006 U.S. App. LEXIS 3656 (11th Cir. Feb. 16, 2006). Because voter registration applications, by definition, contain no non-public information, the government cannot possibly have a compelling interest in protecting such applications from disclosure.

Similarly, the sealing requirement and photocopying bans would do little, if anything, to prevent voter registration fraud, since those private entities who would be motivated to submit fraudulent applicants could just as easily do so regardless of whether they had to seal the fraudulent application before sending it in. *Cf. Wesley Foundation II*, 408 F.3d at 1355. The more reliable method of preventing voter registration fraud would be to require an applicant who registers by mail for the first time in a jurisdiction to supply appropriate identification the first time he or she votes. The Help America Vote Act and the Georgia Election Code already require this. *See* 42 U.S.C. § 15483(b)(2); O.C.G.A. 21-2-20(c).⁵

Finally, the SEB Rule's requirement that registration applications be turned in within 72 hours of their being completed (regardless of how far off the close of the registration period is) severely burdens private entities in their conduct of organized voter registration activity. It virtually prevents the important quality control and statistical information-gathering functions that are so integral to many larger private voter registration organizations. At the same time, the 72-hour deadline discourages smaller organizations from undertaking any significant voter registration activity because of a concern that they may not be able to comply with the expedited time frames for submission of voter registration applications because of limited staff or infrequent meeting times during any given week.

Everyone would agree that the State has a compelling interest in the timely submission of voter registration applications, as well as in ensuring that election officials are not inundated with a barrage of last-minute submissions of voter registration applications. However, a blanket 72-hour submission rule is not sufficiently narrowly tailored to serve those compelling governmental interests. Outside of the two-week period before the close of a registration period, a 10-day submission deadline should be sufficient to serve the governmental interest in timely and steady submission of applications from third-party sources. Indeed, 10 days is the period of time that the NVRA establishes for the return of voter registration applications collected at designated voter registration agencies such as motor vehicle bureaus and public libraries. *See* 42 U.S.C. § 1973gg-5(d). Within the two-week period preceding the close of a registration period, the State would certainly have more of a compelling interest in imposing a 72-hour submission deadline (or even shorter deadlines), in order to ensure that all applications are submitted and processed in a timely manner.

⁵To the extent the State feels additional safeguards are required to address the issue of voter registration fraud, the NVRA allows states to require first-time voter registrants by mail to vote in person the first time they cast a ballot. *See* 42 U.S.C. § 1973gg-4(c).

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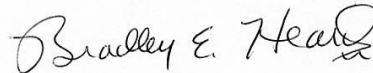
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Conclusion

Attached as Exhibit A to this Petition is a redlined version of our proposed amendments to the SEB Rule. The minor revisions included therein are intended to clarify that the SEB Rule does not seek to prohibit voter registration activity that is allowed by the NVRA, and that any provisions of the rule related to the establishment of additional voter registration places and the maintenance of completed voter registration applications apply only to registrars, deputy registrars, and other authorized persons. We submit that these proposed amendments are required in order to conform Georgia regulatory law to the requirements of the NVRA and the First Amendment. Accordingly, we would ask that a rulemaking notice be issued immediately, so that these amendments can be enacted at the earliest practicable opportunity.

Please feel free to contact me with any questions or issues regarding this submission. We appreciate your consideration of this petition and look forward to your prompt reply.⁶

Very truly yours,



BRADLEY E. HEARD

/bh
Enclosures

cc: **(Via Electronic Mail)**
Tex McIver, Esq. (Vice Chair, SEB)
J. Randolph Evans, Esq. (SEB Member)
David J. Worley, Esq. (SEB Member)
Mr. Jeff Israel (SEB Member)
Ms. Kathy A. Rogers (Director, Elections Division)
Clifford D. Tatum, Esq. (Assistant Director of Legal Affairs)
Dennis R. Dunn, Esq. (Deputy Attorney General)
Stefan E. Ritter, Esq. (Senior Assistant Attorney General)
Hon. M. Gino Brogdon, Sr. (Special Assistant Attorney General)
Derin B. Dickerson, Esq. (Special Assistant Attorney General)

⁶We would also again encourage the Board to commence rulemaking proceedings on the Wesley Foundation's August 26 petition for the promulgation of administrative rules related to participation in organized voter registration activity by non-authorized private entities. The bulk of these recommendations have been placed into a recent piece of legislation in the Georgia Senate, S.B. 590. See http://www.legis.ga.gov/legis/2005_06/search/sb590.htm. In addition to considering the Wesley Foundation's August 26 petition, we would encourage the Board to pass a resolution recommending passage of S.B. 590.

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183-1-6-.03 Rules and Regulations for Voter Registration by Registrars, Deputy Registrars, and Other Authorized Persons.

(1) Intent and Purpose.

(a) These rules are promulgated pursuant to the authority granted the State Election Board by Georgia Laws 1984, p. 1430, (O.C.G.A. Section 21 2 215(f)) and by Georgia Laws 1968, p. 862, (O.C.G.A. Section 21 2 31). It is the intent of the State Election Board to increase the level of participation in the elective process in the State of Georgia by encouraging the registration of voters within the State. It is the intent and purpose of the State Election Board, within the parameters of the law, to make voter registration in Georgia as convenient and as easy as practicable while retaining the necessary controls to prevent abuse of the system and fraud in the elective process. To this end, the State Election Board has promulgated these rules and regulations.

(b) Nothing in this rule shall be construed to prohibit any voter registration activity that is permitted pursuant to the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg et seq., or any other federal or state law or regulation.

(2) Criteria for Appointment of Deputy Registrars. The board of registrars in each county may appoint deputy registrars to aid them in the discharge of their duties. The number of deputy registrars appointed to serve shall be determined by the board of registrars.

(a) Deputy registrars appointed by each county board of registrars shall meet the following qualifications:

1. be a registered voter in the State of Georgia;
2. be able to read, write and speak the English language;
3. have legible handwriting unless the voter registration applications are to be completed by typewriter or electronic means;
4. satisfactorily complete such training as shall be required by the board of registrars;
5. not have been convicted of a felony or of any crime involving fraud or moral turpitude;
6. not be a candidate for nomination or election to any office except as allowed by O.C.G.A. § 21-2-214; and
7. not have been removed as a deputy registrar for improper conduct in the performance of the duties of deputy registrar.

(b) Deputy registrars shall not engage in political activity on behalf of a candidate, political party or body, or question while actually conducting the duties of their office. While conducting the duties of their office, each person serving as a deputy registrar shall wear a badge or display identification which shall state no more than the person's name and the fact that the person is a deputy registrar of the county. There shall be available for

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inspection, upon request to verify the authority of the persons involved, the names of the authorized deputy registrars serving at the site.

(c) The following activities shall subject a deputy registrar to immediate revocation of appointment as a deputy registrar:

1. registering voters at unapproved sites, times, and hours, including door to door registration;
2. intoxication while on duty;
3. falsification of registration records;
4. improper handling of registration applications;
5. engaging in any communication, wearing badges, buttons, or clothing that advocates or criticizes a particular candidate, office holder, political party or body, or ballot question while on duty, such as making verbal statements and distributing campaign literature. However, deputy registrars shall identify themselves as deputy registrars of the county by wearing the badges or displaying the identification described in paragraph (b) above; and
6. failure to appear or remain at the deputy registrar's assigned site at or during the assigned hours without adequate notice to the board of registrars or without a proper replacement.

(3) Criteria for Establishment of Additional Voter Registration Places by Boards of Registrars:

(a) The Board of Registrars, in addition to its main office, may designate other fixed places throughout the county as would be reasonably necessary to receive applications for registration and for the registration of electors.

(b) Such additional registration places shall be located in facilities which are open to and frequented by the general public. No place shall be used as an additional registration place unless the general public is freely admitted without regard to race, color, creed, religion, gender, or national origin.

(c) Churches which are open to all persons and which are, in fact, attended for any purpose by persons who are not members of the church shall be considered to be open to and frequented by the general public.

(d) The offices or facilities of community, civic, service, social, civil rights, patriotic, fraternal, and labor organizations shall be considered to be open to and frequented by the general public if non members of the organization in fact attend various activities sponsored by the organization at its offices and facilities and such offices or facilities are open to all persons. However, offices or facilities of political parties, political bodies or candidates shall not be used as additional voter registration places.

(e) The fact that a facility is used primarily or exclusively by the general public of one race or ethnic group or socioeconomic group shall not, for that reason alone, bar its designation as a registration place.

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(f) When employers or business owners request the use of their place of business as a registration place, registration shall be conducted only in that part of the place of business which is open to the general public. Such part of the place of business shall be considered to be open to and frequented by the general public if it is an area which is maintained for use by the general public and is known to serve the general public for the purpose of conducting business or engaging in other transactions with the business.

(g) Organizations, employers, offices, and businesses that register voters at their facilities shall not limit registration to their members, employees, or customers, but must register any qualified applicant.

(h) ~~R~~No additional voter registration ~~of voters~~place shall be ~~prohibited~~established in places where alcoholic beverages are sold and consumed on the same premises.

(i) No additional voter registration ~~of voters~~place shall ~~take place~~be established where criminal activities are permitted to occur.

(j) Registration places may be established on a temporary or permanent basis. Permanent places are those which operate on a fixed schedule for an indefinite period of time. Temporary places are those which operate on a temporary schedule and, among other things, may be used in voter registration drives.

1. The deputy registrars appointed by the board of registrars who staff registration places may be unpaid volunteers, employees of the board of registrars, or employees of government offices or of private businesses.

(k) Persons acting as individuals or as representatives of organizations and businesses may request the establishment of additional voter registration places. The board of registrars shall consider such requests.

1. If the request is approved, the board of registrars shall make provisions for having a deputy registrar who has been appointed by the board of registrars available at the additional voter registration places at all times which have been designated by the board of registrars and which have been precleared by the United States Department of Justice for the purpose of voter registration. The board of registrars shall inform such persons that registration under the authority of the board of registrars may be conducted only at such times as are designated by the board of registrars, precleared by the United States Department of Justice, and advertised as required by law.

(l) The board of registrars shall retain the ultimate responsibility for ~~the~~any required submissions of additional registration places, dates, and times to the United States Department of Justice for preclearance pursuant to the Voting Rights Act of 1965 and for the advertising of registration places as required by law. The board of registrars shall also retain the ultimate responsibility for the appointment and training of deputy registrars, the proper conduct of voter registration by such deputy registrars, and the security of completed registration applications; ~~but the board of registrars may use~~ held by such deputy registrars ~~to assist them in carrying out these duties~~.

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(m) The board of registrars shall instruct deputy registrars in the law and procedure for registration prior to the administration of the oath of office to the deputy registrars. Such training shall include the duties and obligations of deputy registrars, the proper completion of registration applications, the proper security of registration applications, the protection of the integrity of the registration process, and the taking of oaths of registrants and the procedures for appeal upon rejection of the applications for registration.

(n) The Secretary of State shall provide the board of registrars of each county manuals for the use of deputy registrars which include simple instructions on the rules and procedures for the proper conduct of voter registration. The form and content of these manuals shall be determined by the Secretary of State. The board of registrars shall provide each deputy registrar with a copy of the manual.

(o) In order to ensure that the same degree of supervision and security provided at the main office of the board of registrars to prevent voter registration irregularities is maintained for the additional voter registration places authorized by this rule, the following rules shall apply:

1. ~~Except as provided in this rule, c~~Completed registration applications ~~may be maintained only~~ by registrars ~~and~~ deputy registrars, or other persons specifically authorized by state law to receive voter registration applications in person and in an official capacity shall be maintained only:

(i) at the additional voter registration place during the hours of operation;

(ii) in transit to the main office of the board of registrars in the possession of a registrar or deputy registrar;

(iii) at the main office of the board of registrars;

(iv) at permanent additional voter registration places overnight but not beyond the end of the next business day; and

(v) at sites mandated as voter registration sites under *O.C.G.A. § 21-2-221* and *21-2-222* but not longer than the time permitted under those Code sections.

~~2. No person may accept a completed registration application from an applicant unless such application has been sealed by the applicant. No copies of completed registration applications shall be made. This paragraph shall not apply to registrars and deputy registrars.~~

~~3~~2. Transit time shall be kept at a minimum. Registration applications shall be mailed or delivered to the registrars as soon as reasonably practicable, but, in any event, not later than ~~72 hours~~10 days after the date of the execution of the application by the applicant.

~~4~~3. Notwithstanding any provision of this rule to the contrary, a valid registration application that is timely received by the Secretary of State ~~or the registrars~~, a registrar, or a deputy registrar shall be accepted and processed.

(p) The board of registrars should identify and establish additional voter registration places where the public congregates for commerce, recreation, worship, education,

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employment, and other such purposes which are most likely to facilitate registration and suit the convenience of the general public throughout the county. These places should be open at hours to suit the convenience of the general public including times other than the regular hours of the main office of the board of registrars.

(q) Wherever practicable, the Board of Registrars should fully utilize federal, state, county, and municipal offices located within the county which are open during regular business hours and other hours for the purpose of taking voter registration applications.

(r) All additional voter registration sites which are staffed by volunteer deputy registrars shall have prominently displayed a sign, placard, or banner which shall state that voter registration at that location is being conducted under the authority of the Board of Registrars of the county or, in counties in which the duties of the Board of Registrars are performed by Boards of Election, the county Board of Elections. If the volunteer deputy registrars are provided by an organization, club, or other group, the sign, placard, or banner may also identify the organization, club, or group providing the volunteer deputy registrars. The language contained on the sign, placard, or banner shall conform substantially to the following: 'Voter registration at this location is being conducted under the authority of the Board of (Registrars or Elections) of _____ County. The volunteer deputy registrars at this location are provided by _____.'