September 20, 2021

State Election Board
214 State Capitol
Atlanta, GA 30334

Dear State Election Board members:

We write to express concerns about recent statements by Secretary of State Raffensperger threatening to seek the removal of all five members of the Fulton County Board of Registration and Elections ("Fulton BRE"), based on their recent appointment of Cathy Woolard to serve as the Chair of that Board.[1]

Any attempt to seek the suspension or removal of the Fulton BRE members based on Ms. Woolard's appointment would be contrary to the law. S.B. 202 has specific procedures and standards that must be followed prior to any election official being suspended or removed, none of which are satisfied by the Secretary's disapproval of Ms. Woolard's previous political affiliations.

As an initial matter, under S.B. 202, for large counties like Fulton, "at least two members of the Georgia House of Representatives and two members of the Georgia Senate who represent the county" may request "that a performance review of a local election official be conducted." O.C.G.A. § 21-2-106(a)(2).[2] Thus, the law plainly does not authorize the Secretary of State to seek a performance review of the Fulton BRE.

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[1] Specifically, on September 14, Secretary Raffensperger wrote on Twitter that he viewed Ms. Woolard to be "a blatantly partisan and conflicted individual" because she "is literally on Stacey Abrams's payroll." Ga Sec of State Brad Raffensperger (@GaSecofState), TWITTER, (Sep. 14, 2021, 7:36 PM), https://twitter.com/GaSecofState/status/1437938240061911044. His statement appears to be based on Ms. Woolard's previous role as a consultant for Fair Fight Action, a 501(c)(4) organization. Secretary Raffensperger further stated that "[i]f the Fulton County Commissioners go through with this partisan and irresponsible selection, *I will seek the removal of Fulton's entire election board through SB202, Georgia's new election law."* (emphasis added). Ga Sec of State Brad Raffensperger (@GaSecofState), TWITTER, (Sep. 14, 2021, 7:36 PM), https://twitter.com/GaSecofState/status/1437938241165041665.

[2] While we analyze the application of these provisions of S.B. 202, we take no position on their legality or enforceability. These provisions have been challenged as violating Fourteenth Amendment Due Process. *See e.g. Coalition for Good Governance et al. v. Raffensperger*, No. 21-cv-02070 (N.D. Ga.), Dkt. No. 1 (Complaint) (filed May 17, 2021).

Second, even if the authorized Georgia legislators were to seek such a performance review, political disagreements with an appointee to the BRE are not a basis for suspension or removal. The plain language of S.B. 202 limits the basis for performance reviews to *election* issues such as those relating to election equipment, administration, and oversight, as well as compliance with state election law. Specifically, the law states that after the authorization of a review, the independent performance review panel must then "make a thorough and complete investigation of the local election official with respect to all actions of the local election official regarding the technical competency in the maintenance and operation of election equipment, proper administration and oversight of registration and elections, and compliance with state law and regulations." O.C.G.A. § 21-2-106(b). Disagreement with Ms. Woolard's previous political affiliations do not fall into any of these categories.

Third, S.B. 202 imposes specific legal standards for the suspension or removal of election officials. After a recommendation by the preliminary review panel, either by petition from the governing authority of a county or municipality, or by its own motion, the State Election Board may pursue suspension or removal of a local election official. O.C.G.A. § 21-2-33.2(a). In so doing, the State Election Board must make a preliminary investigation, followed by a preliminary hearing, after which it may suspend a local election official if it finds that:

> (1) By a preponderance of the evidence, a county or municipal superintendent has committed at least three violations of this title or of State Election Board rules and regulations, in the last two general election cycles; and the county or municipal superintendent has not sufficiently remedied the violations; or
> (2) By clear and convincing evidence, the county or municipal superintendent has, for at least two elections within a two-year period, demonstrated nonfeasance, malfeasance, or gross negligence in the administration of the elections.

O.C.G.A. § 21-2-33.2(c).

Georgia courts have elucidated the relevant and significant burden of proof standards for "preponderance of the evidence" and "clear and convincing evidence."[3] In addition, the terms "nonfeasance," "malfeasance" and "gross negligence" are legal standards that require a finding of serious wrongdoing. Nonfeasance refers to "the total omission or failure of the [official] to enter upon the performance of some distinct duty." *See Sharp-Boylston v. Bostick,* 90 Ga.App. 46, 47-48 (1954). "Malfeasance" means "the wrongful or unjust doing of some official act, which the doer has no right to perform . . . [but] it is essential that an evil intent or motive must accompany the act, or that it must have been done with such gross negligence as to be equivalent to fraud." *See Cargile v. State,* 194 Ga. 20, 22 (1942). "Gross negligence" means "(the) failure to exercise even a slight degree of care, or lack of the diligence that even careless men are accustomed to exercise." *See Johnson v. Omondi,* 294 Ga. 74, 77-78 (2013)

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[3] A finding based on "preponderance of the evidence" requires "that superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other." *See Zwiren v. Thompson*, 276 Ga. 498, 499 (2003). A finding based on "clear and convincing evidence" requires "evidence having a high capability of inducing belief, such that the fact finder's mind is left with an abiding conviction that the evidence is true." *See Clarke v. Cotton*, 263 Ga. 861, 863 (1994) (Jackson, J., concurring).

(quotations and citations omitted).[4] There is no serious allegation that Ms. Woolard's appointment comes close to meeting those standards.

In light of the above, the Secretary's threats to seek the suspension or removal of the Fulton BRE members are wholly unsupported by law.

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Thank you for the opportunity to address the legal standards set forth in S.B. 202. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

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Sara Chimene-Weiss
Counsel, Protect Democracy

Mel Barnes
Staff Counsel, Law Forward

[4] The SEB would also have to conclude that the local elections official was the *proximate cause* of the conduct leading to suspension or removal. *See Duke Galish, LLC v. Manton,* 291 Ga.App. 827, 833 (2008). An intervening act need not be wrongful or negligent to break the chain of causation. *Jordan v. Everson,* 302 Ga. 364, 365–66 (2017).