

## **Ga. Officials Can't Dodge Electronic Voting Row: 11th Circ.**

By **Shayna Posses**

*Law360 (February 8, 2019, 6:13 PM EST)* -- The Eleventh Circuit has ruled that Georgia election officials aren't immune from a dispute challenging the state's allegedly insecure electronic voting system, saying the 11th Amendment doesn't protect the leaders from litigation seeking to end their purported, continuing violations of federal law.

The three-judge panel affirmed Thursday a lower court's decision that state election officials don't have 11th Amendment immunity from litigation led by voting integrity group Coalition for Good Governance, along with a separate group of Georgia voters, seeking to bar the Peach State's use of direct recording electronic, or DRE, voting units.

The amendment generally bars federal courts from exercising jurisdiction over state defendants in private actions that seek money, but there's an exception covering suits that ask for "prospective equitable relief to end continuing violations of federal law," which is the situation here, the panel held in an unpublished decision.

"The test for determining whether a suit fits within *Ex parte Young*'s exception is typically 'straightforward,' asking only whether the 'complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective,'" the panel wrote. "As long as the plaintiff alleges ongoing violations of federal law and seeks injunctive or declaratory relief, or both, against state officials in their official capacity, plaintiffs usually face no hurdles in clearing *Ex parte Young*."

The officials' attempt to invoke legislative immunity is no more availing, the judges concluded. Legislative immunity only applies when a plaintiff challenges an official's legislative act, which isn't the case here, the panel found, noting that the coalition and voters instead oppose the leaders' execution of state law.

The appeal followed U.S. District Judge Amy Totenberg's decision on an August request from the coalition and voters to block officials — including then-Secretary of State Brian Kemp, who has since become Georgia's governor and was replaced as the state's top election official by Brad Raffensperger — from conducting in-person voting during the midterms using the DRE system. The challengers claim the machines are "extremely vulnerable to undetectable attack or system error."

The judge rejected the motion the next month, concluding that there was just too little time to make the switch before the November election without potentially causing chaos. However, she held that the challengers had standing to pursue claims that the current system is problematic and that the officials

weren't immune, warning that the leaders' arguments about making changes on short notice were "compelling" at the time, but "would hold much less sway in the future."

The officials immediately went to the Eleventh Circuit, challenging the portion of the ruling that "subjects them to suit and discovery despite their entitlement to immunity" and urging the court to "review any and all other threshold jurisdictional issues that, in its discretion, the court deems efficient and just."

Judge Totenberg agreed to stay the lower court proceedings during the appeal, saying she wasn't persuaded by the leaders' insistence that they were immune, but felt that the cutting-edge issues involved justified a pause anyway.

"This case presents evolving special circumstances and cyber issues affecting the integrity of the voting process (and results) at this particular moment in history," the judge said in an October decision. "While the court has found that defendants have not provided a sound legal basis to support their Eleventh Amendment and legislative immunity defenses, it is not prepared to declare the defendants' position wholly frivolous in this context."

In the end, the panel agreed that the officials' immunity defenses don't hold water, rejecting their arguments as to why the Ex parte Young exception laid out in a 1908 U.S. Supreme Court decision doesn't apply.

For instance, the leaders contended that the challengers aren't seeking the requisite prospective relief because they want to correct harm from past elections and have failed to allege that the election system is continuously violating federal law, as the possibility of a hack is "nebulous, intermittent and speculative," according to the opinion.

But, the judges held, those arguments "can be disposed of without much ado because they run counter to the complaints' allegations and settled precedent."

David D. Cross, who represents the Georgia voters, told Law360 Friday that the ruling confirms that the appeal was meritless from the start.

"The court's decision finally brings to an end the delay tactics and lets us get our case to a trial on the merits," he said.

Robert A. McGuire III, counsel for the coalition, echoed Cross' sentiments, telling Law360 Friday that they are "pleased to be vindicated" in their straightforward views on 11th Amendment and legislative immunity and are ready to move forward on the merits.

Representatives for the officials didn't immediately return a request for comment Friday.

U.S. Circuit Judges William Pryor and Robin S. Rosenbaum and U.S. District Judge K. Michael Moore sat on the panel for the Eleventh Circuit.

The officials are represented by John F. Salter and Roy E. Barnes of the Barnes Law Group LLC.

The voters are represented by David D. Cross, Joseph R. Palmore, Bryan J. Leitch, and Michael F. Qian of Morrison & Foerster LLP and Halsey G. Knapp Jr. and Adam M. Sparks of Krevolin & Horst LLC.

The coalition plaintiffs is represented by Bruce P. Brown of Bruce P. Brown Law LLC, Robert A. McGuire III of Robert McGuire Law Firm and Cary Ichter of Ichter Davis LLC.

The case is Curling et al. v. Secretary of State of Georgia et al., case number 18-13951, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Allison Grande and Ben Kochman. Editing by Connor Relyea.