

Pandemic Disrupts Georgia Voters' Bid For Paper Ballots

By **Rosie Manins**

Law360 (August 10, 2020, 5:56 PM EDT) -- A group of Georgia voters and election advocates lost their bid to have the state's electronic voting system replaced with paper ballots for a third time Friday, when a federal judge ruled they relied on information rendered obsolete by the coronavirus pandemic.

U.S. District Judge Amy Totenberg said a handful of voters and the Coalition for Good Governance in their request for an injunction raised valid issues with Georgia's new ballot-marking devices in their bid to have them replaced with hand-marked paper ballots ahead of the Nov. 3 presidential election, less than 85 days away.

But the judge also said the case can't keep pace with challenges arising from the pandemic and denied the request as outdated, leaving the door open for the plaintiffs to make a fourth attempt with fresh evidence arising from the new system's use in the state's June 9 primary.

The coalition and voters said they are preparing a new injunction request and continue to allege that Georgia's new system is vulnerable to cybersecurity threats and doesn't allow voters to see if a bar code generated by their vote accurately reflects their choice before that bar code is scanned. In this way, the system fails the constitutional standard of transparent, fair, accurate and verifiable voting, they say.

"As plaintiffs have indicated their intent to significantly supplement the evidence in support of their request for injunctive relief, the court finds that a denial of the present motions and allowing plaintiffs to refile their motions will provide the court with a more streamlined and clean record," Judge Totenberg said in her order. "At the same time, for the sake of clarity, the court notes that a host of election issues may arise in the course of the 2020 election cycle that are not embraced within the ambit of this specific case."

The order came a week after the judge largely rejected the state's bid to toss the voters' and coalition's claims. Judge Totenberg said the court is open to further proceedings based on fresh evidence, including from 2020 elections in Georgia and any auditing developments.

Arguments during a hearing on the motion in March were quickly dated by Georgia Secretary of State Brad Raffensperger's decision a week later to postpone the March 24 state primary due to the pandemic, Judge Totenberg said, which meant the election merged with the state's June 9 presidential primary. That combined election marked the first widespread use of the new voting system and was widely slammed by participants as chaotic, thanks to high numbers of in-person voters and absentee

ballots coupled with fewer polling locations and staff.

Judge Totenberg said it didn't make sense to rule at this point on the merits of arguments made prior to and during March, before the new system was widely tested in the June 9 election.

The case dates back to August 2017 when Georgia's then-Secretary of State Brian Kemp, who is now the governor, was sued over the state's longtime electronic voting system. The court denied the plaintiffs' first injunction request in September 2018 because it would have left the state without a robust voting system for the November 2018 gubernatorial general election.

In April 2019, Georgia legislators passed a bill to implement a new voting system using ballot-marking devices and optical scanners. Given this development, the court denied the plaintiffs' second request in August 2019 for paper ballots to be used in the November 2019 municipal elections, and instead ordered the state to retire its old system and create a backup plan using paper ballots in case the new system failed.

The coalition and voters amended their complaint to include the state's new system, arguing it doesn't remedy the old system's problems and is just as vulnerable to cyberattacks or data breaches. They want hand-marked paper ballots to be used so voters can see that their choices are accurate and the election results can be audited.

David D. Cross of Morrison & Foerster LLP, a pro bono attorney for the plaintiffs, said they'll file a new preliminary injunction motion in the coming weeks to ensure reliable elections this fall, and will support the new motion with fresh evidence obtained through expedited discovery. He said the plaintiffs will also pursue a permanent injunction against the state's new voting system.

Cross said it's not too late to have paper ballots used in Georgia on Nov. 3, but that is ultimately up to the court. He said the delay of Georgia's primary elections gave plaintiffs a short window to collect evidence about the new system's suitability and it is unclear what impact the pandemic will have on the case going forward.

"It's never too late to require elections that comply with the constitution and don't disenfranchise voters or reward interference from the likes of Russia," Cross told Law360 on Monday. "It's also important to keep in mind that this isn't some last-minute effort — we've been seeking this relief since last October."

The Georgia Secretary of State's Office did not immediately respond to a request for comment Monday.

The coalition and voters are represented by David D. Cross, John P. Carlin, Lyle F. Hedgecock, Mary G. Kaiser and Robert W. Manoso of Morrison & Foerster LLP, Halsey G. Knapp Jr. and Adam M. Sparks of Krevolin & Horst LLC, Bruce P. Brown of Bruce P. Brown Law LLC, Robert A. McGuire III of Robert McGuire Law Firm, Cary Ichter of Ichter Davis LLC and John Powers and David Brody of the Lawyers' Committee for Civil Rights Under Law.

The state is represented by Vincent R. Russo, Josh Belinfante, Carey A. Miller, Alexander Denton and Brian E. Lake of Robbins Ross Alloy Belinfante Littlefield LLC and Bryan P. Tyson, Bryan F. Jacoutot, Diane F. LaRoss and Loree A. Paradise of Taylor English Duma LLP.

The case is Donna Curling et al. v. Brad Raffensperger et al., case number 1:17-cv-02989, in the U.S. District Court for the Northern District of Georgia.

--Additional reporting by Adrian Cruz and Allison Grande. Editing by Alanna Weissman.

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