

11th Circ. Vacates Poll Book Ruling In Ga. Election Case

By **Carolina Bolado**

Law360 (October 5, 2022, 7:19 PM EDT) -- The Eleventh Circuit on Wednesday vacated a ruling requiring the state of Georgia to print paper poll book backups after early voting has concluded, finding that the state's current procedures do not "severely burden the right to vote," so they must be left to policymakers, not the court.

In a published opinion, the appeals court said the district court erred when it required the state to provide paper backups of updated voter information upon the close of absentee in-person early voting.

The district court reasoned that the paper backups would allow lists to be printed and used to issue ballots in the event of voting machine failures, which have caused hours-long lines in recent elections. But the Eleventh Circuit said the plaintiffs challenging the state's procedures — several voters and a civic group called the Coalition for Good Governance — failed to show that the long lines were attributable to the fact that the state's paper backup list does not include updated information covering the last several days of early voting.

The appeals court added that it is not obvious that an updated list would solve the problem.

"Perhaps on a blank slate this would be a reasonable idea," the appeals court said. "Or perhaps the state is right that the administrative burdens of the later print date outweigh the benefits. Either way, because the plaintiffs did not show that the state's current print-date policies severely burden the right to vote, deciding which policy to implement is not our call."

The appeals court said Georgia has a process for dealing with voting machine malfunctions, and the court's role is not to consider what the best policy would be but to determine whether the state's policy burdens the right to vote.

The court dismissed the rest of the state's appeal over the district court's decision to side with the plaintiffs who said the state's ballot scanners should be set to recognize, or at least flag for review, even very slight marks on the ballots. The district court agreed with the plaintiffs and asked for proposals from the parties but never issued an injunction, so the Eleventh Circuit said it had nothing to review and dismissed that part of the appeal.

David Cross of Morrison & Foerster LLP, who represents the plaintiffs, told Law360 that he was pleased that the appeals court rejected Georgia's attacks on plaintiffs' standing in the long-running lawsuit.

"We've spent considerable time and expense, as has the district court, dealing with meritless standing

challenges from the state," Cross said. "We can now focus on the merits of our claims in an effort to better secure elections in Georgia."

A spokesperson for Raffensperger called the Eleventh Circuit decision "another victory for Georgia election law and a rebuke of stolen election proponents."

"The Eleventh Circuit correctly found that the lower court had abused its discretion and vacated the injunction, reminding the lower court that 'the Constitution charges states, not federal courts, with designing election rules,'" the spokesperson said.

The plaintiffs have been challenging the state's voting systems and equipment since August 2017, claiming Georgia's election methods and equipment are unreliable and prone to hacking, and pushing for the state to supplement its electronic voting machines with pen and paper.

In September 2020, U.S. District Judge Amy Totenberg said the supporting evidence presented by the plaintiffs — which showed that the previous three statewide elections in Georgia were marred by precinct device failures that forced voters to spend up to six hours trying to cast ballots — was compelling.

Judge Totenberg ordered Georgia Secretary of State Brad Raffensperger to provide each county election office with updated voter information upon the close of absentee in-person early voting so that lists could be printed and used to issue ballots. The order also required the state to encourage and train precinct workers to use at least one paper poll book on Election Day and maintain a sufficient stack of emergency paper ballots.

But the Eleventh Circuit on Wednesday ruled that Judge Totenberg had gone too far.

"If federal courts were to flyspeck every election rule and apply strict scrutiny no matter how limited the burden on voters, our enforcement practices would bar states from carrying out their constitutional responsibility to prescribe election rules," the appeals court said.

U.S. Circuit Judges Britt C. Grant, Robert J. Luck and R. Lanier Anderson III sat for the Eleventh Circuit.

The plaintiffs are represented by Bruce P. Brown of Bruce P. Brown Law LLC, Robert A. McGuire III of Robert McGuire Law Firm, Cary Ichter of Ichter Davis LLC, David D. Cross, Hannah R. Elson, Lyle F. Hedgecock, Mary G. Kaiser, Robert W. Manoso, Tamara R. Wiesebron, Zachary D. Fuchs and Veronica Ascarrunz of Morrison & Foerster LLP, Halsey G. Knapp Jr. and Adam M. Sparks of Krevolin & Horst LLC, William B. Ney of Ney Rhein LLC, Eric R. Havian of Constantine Cannon LLP and Russell T. Abney of Watts Guerra LLP.

The defendants are represented by Alexander F. Denton, Brian E. Lake, Carey A. Miller, Joshua B. Belinfante, Vincent R. Russo Jr., Melanie L. Johnson and Javier Pico-Prats of Robbins Alloy Belinfante Littlefield LLC, Bryan P. Tyson, Bryan F. Jacoutot, Diane F. LaRoss, James A. Balli, Jonathan D. Crumly Sr. and Loree A. Paradise of Taylor English Duma LLP and Cheryl Ringer, David R. Lowman, Kaye W. Burwell and Nancy L. Rowan of the Fulton County Office of the County Attorney.

The case is *Curling et al. v. Raffensperger et al.*, case numbers 20-13730 and 20-14067, in the U.S. Court of Appeals for the Eleventh Circuit.

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