

Ga. Told To Back Up Voting Machines With Paper Ballots

By **Rosie Manins**

Law360 (September 29, 2020, 2:56 PM EDT) -- Georgia must provide paper backups of updated voter information for the Nov. 3 election to reassure electors its malfunction-plagued digital system can be easily bypassed if necessary, an Atlanta federal judge ruled Monday.

The Peach State had opposed as too burdensome the latest attempt by a handful of Georgia voters and election advocates to supplement its electronic voting machines with pen and paper, but U.S. District Judge Amy Totenberg said the supporting evidence was compelling.

She said the last three statewide elections in Georgia, including the June 9 primaries and August runoffs, were marred by precinct device failures that disenfranchised voters who spent up to six hours trying to cast ballots.

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 can be printed and used to issue ballots. The state must encourage and train precinct workers to use on Election Day at least one paper poll book and maintain a sufficient stack of emergency paper ballots.

"Plaintiffs have been seeking this relief for a long time, and their pleas have fallen on the state's deaf ears," Judge Totenberg said in her order. "It is not too late for defendants to take these reasonable concrete measures to mitigate the real potential harms that would otherwise likely transpire at precinct polling locations grappling with the boiling brew created by the combination of new voting equipment issues and old voter data system deficiencies."

The plaintiffs have been challenging the state's voting systems and equipment since August 2017, alleging that new electronic ballot marking devices and other digital machines are just as unreliable and prone to hacking as the state's old system from three years ago, parts of which still haven't been updated.

Judge Totenberg's order followed a dayslong evidentiary hearing via Zoom, interrupted by a hacker, in which cybersecurity experts testified that Georgia's voting system was vulnerable to attacks and couldn't identify faults or rectify them, meaning the state couldn't produce reliable election results.

Judge Totenberg cited in her order a "host of bugs" and other issues, including the failure to read driver's license barcodes to verify voter registration, record voter signatures upon check-in, accurately

report if a voter has voted previously and encode ballot access cards to allow voters to cast ballots. She said the result was that many voters had to use provisional ballots in recent elections, some of which were rejected without explanation from officials.

Judge Totenberg also said the state had jeopardized the security of its voter check-in system by disabling the default password protection of electronic "poll pads" and allowing them to operate on an unreliable and unsecure internet connection. She said Georgia voters faced imminent harm of a "constitutional magnitude" and the plaintiffs were likely to succeed on their claim requiring paper backups.

"The harm suffered by a voter in being turned away from the polls or from being shuffled into a provisional ballot process with no guarantee that their ballot will be counted is permanent," Judge Totenberg said. "Defendants suggest there is no constitutional violation because voters have the option to vote absentee to avoid problems with the poll books. However, the evidence offered in this case and others in this district ... demonstrates that Georgia's absentee voting process also poses other risks of voter disenfranchisement."

David D. Cross of Morrison & Foerster LLP, lead counsel for the plaintiffs, told Law360 on Tuesday that they are thrilled with the court's order, which is "a common-sense solution to a major problem."

"It will make a difference on Nov. 3 by reducing the risk of long lines and helping ensure every voter gets to vote, without needlessly resorting to provisional ballots," he said.

Cross said plaintiffs will closely monitor Georgia's Nov. 3 election, with the court still to consider their request for widespread use of hand-marked paper ballots. He said if the state uses its electronic ballot marking devices as planned, the upcoming election will comprise "even worse chaos" than the June primary.

Counsel for the state deferred comment to Raffensperger's office, which did not immediately respond Tuesday to a request for comment.

The plaintiffs are represented by David D. Cross, John P. Carlin, Lyle F. Hedgecock, Mary G. Kaiser, Robert W. Manoso, Veronica Ascarrunz and Eileen M. Brogan 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.

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

--Editing by Orlando Lorenzo.