

Ga. Shouldn't 'Go Back' On Absentee Voter Rules, Judge Told

By **Chart Riggall**

Law360 (April 16, 2024, 6:33 AM EDT) -- Back in court for its third election-related trial of 2024, the state of Georgia urged a federal judge Monday morning not to strike down increased regulations on the state's absentee ballot application process enacted as part of the state's controversial 2021 election law.

In the first case challenging Senate Bill 202 to reach trial, counsel for the state said the provisions challenged by the Voter Participation Center and the Center for Voter Information — which have alleged that recent restrictions on absentee voting mailers infringe on their First Amendment rights — should be upheld because the mailers aren't protected political speech.

Schaerr Jaffe LLP's Gene Schaerr told U.S. District Judge J.P. Boulee that the mailers, some of which included pre-filled absentee ballot request forms, are "not expressive conduct at all, and even if [they] were, [they're] not core political speech."

Returning to an argument the state has relied upon frequently in past litigation, Schaerr said the new rules — which ban both pre-filled absentee ballot application mailers and sending applications to voters who've already requested or received a ballot — have bolstered voter confidence in elections post-2020.

"Why would we return to old rules?" Schaerr asked, pointing to long lines and confusion caused by such mailers. "We should not go back."

Filed against Secretary of State Brad Raffensperger in April 2021, the lawsuit from sister organizations VPC and CVI came just weeks after the passage and signing into law of SB202, dubbed the Election Integrity Act of 2021 by the Republican lawmakers who led its drafting. Including a raft of new regulations and reforms to Georgia elections — including a controversial statute banning handing out food and water to voters in line at polling places — the bill was condemned by Democrats as a step backward for voting rights.

Republicans, meanwhile, have argued the legislation tightened election security in the aftermath of the 2020 election, rebuking their critics with the oft-repeated mantra that SB 202 made it "easy to vote and hard to cheat" in the Peach State.

VPC and CVI's suit, one of several taking aim at SB 202, raised free speech objections specifically to the absentee ballot voting restrictions. According to a 2020 press release shown in court Monday, the groups sent over 2 million voter registration forms and absentee ballot applications to Georgians during the 2020 election cycle alone.

But under what's now the law of the land, the absentee ballot mailers can no longer be pre-filled with a voter's personal information, which the plaintiffs argue have aided voters and election workers alike in accurately completing their applications.

Valencia Richardson, an attorney with the Campaign Legal Center, told Judge Boulee that the mailers ensure voters "are able to act on plaintiffs' encouragement to vote by mail," especially if the voter doesn't have a computer, printer or car.

More central to Richardson's argument was the contention that the mailers are protected political

speech, and any state-imposed restriction on them needs to be "narrowly tailored," which she argued the Georgia law is clearly not. And the state, she predicted, would be unable to produce a single instance of pre-filled mailers resulting in a duplicate ballot being cast.

"The First Amendment gives the right not only to advocate for a cause but to choose how to do so," she said. "At the end of the day, plaintiffs are just trying to help people vote."

But Schaerr contended SB 202 was passed to respond "directly to complaints and inefficiencies," with numerous voters confused and concerned about the legitimacy of the mailers, sometimes mistaking them for official government documents.

More importantly, he said, the mailers were not prospected speech for an array of reasons, not least of which is that the United States' mail system has never been considered to be a public forum.

Asked by Judge Boulee whether, if the mailers were deemed political speech, the law could stand up to the "narrowly tailored" test, Schaerr said he was confident.

"We think it passes any conceivable level of scrutiny," he said.

The plaintiffs are represented by Danielle Lang, Jonathan Diaz, Alice Huling, Christopher Lapinig, Valencia Richardson, and Rachel Appel of the Campaign Legal Center, Robert B. Remar of Smith Gambrell & Russell LLP, and Katherine L. D'Ambrosio of Councill Gunnemann and Chally LLC.

Raffensperger and Georgia are represented by Gene C. Schaerr, Erik S. Jaffe, H. Christopher Bartolomucci, Brian J. Field, Edward H. Trent, Justin A. Miller, and Miranda Cherkas Sherrill of Schaerr Jaffe LLP, Bryan P. Tyson, Bryan Francis Jacoutot, and Diane Festin LaRoss of Taylor English Duma LLP, and Bryan K. Webb and Russell D. Willard of the Georgia Department of Law.

The case is Voter Participation Center et al. v. Raffensperger et al., case number 1:21-cv-01390, in the U.S. District Court for the Northern District of Georgia.

--Editing by Sarah Golin.