

Extending the Deadline to Receive Absentee Ballots for Multiple Reasons

Democratic Party of Georgia v. Burkes (W. Louis Sands, M.D. Ga. 1:18-cv-212) and Democratic Party of Georgia v. Crittenden (Amy Totenberg, N.D. Ga. 1:18-cv-5443)

Following a morning proceeding three days after an election, a federal judge signed a consent agreement extending the deadline for election officials to receive cast absentee ballots. Ballots were mailed late to voters because of a state-court injunction and a hurricane. In another district in the same state, a consent order similarly extended the deadline for absentee ballots statewide in a runoff election.

Subject: Absentee and early voting. *Topics:* Absentee ballots; enjoining certification.

A major political party filed a federal complaint in the Middle District of Georgia on November 8, 2018, two days after a general election, seeking a court order requiring election officials in one county to accept absentee ballots postmarked by election day and received within three days after that instead of requiring that they be received by election day.¹ The complaint alleged that an injunction benefiting a prospective candidate delayed transmission of absentee ballots until after the statutory deadline.² Further, Hurricane Michael, arriving just after the government holiday of Columbus Day, closed offices, which performed at diminished capacity even after they opened again because of lingering disruptions to electricity and telephone systems.³ To top it off, the complaint alleged particularly poor mail service in the county.⁴

With its complaint, the political party filed a motion for a preliminary injunction.⁵ Judge W. Louis Sands heard the case on the following morning.⁶ He temporarily enjoined certification of the election and instructed the parties to return at 2:00 p.m. with additional evidence.⁷ They returned with a proposed consent agreement.⁸ Judge Sands granted the political party relief:

At the afternoon hearing, Defendants appeared before the undersigned and did not contest that some voters were, in fact, harmed by the late mailing of the absentee ballots, and accordingly, consent to the relief requested

1. Complaint, *Democratic Party of Ga. v. Burkes*, No. 1:18-cv-212 (M.D. Ga. Nov. 8, 2018), D.E. 1; see Richard Fausset, Patricia Mazzei & Alan Blinder, *With No Clear-Cut Winner, the Bickering Builds*, N.Y. Times, Nov. 9, 2018, at A1.

2. Complaint, *supra* note 1.

3. *See id.*

4. *Id.*

5. Preliminary-Injunction Motion, *Democratic Party of Ga.*, No. 1:18-cv-212 (M.D. Ga. Nov. 8, 2018), D.E. 2.

6. Minutes, *id.* (Nov. 9, 2018), D.E. 6 [hereinafter *Democratic Party of Ga. Minutes*].

7. Temporary Restraining Order, *id.* (Nov. 9, 2018), D.E. 4; *Democratic Party of Ga. Minutes*, *supra* note 6.

8. *Democratic Party of Ga. Minutes*, *supra* note 6.

by the Democratic Party of Georgia, namely that the Board treat all absentee ballots received by Dougherty County that are postmarked by November 6, 2018, and are received within the three-day period following the election, if otherwise proper, as valid ballots, and shall count and include those ballots in the certified election results.⁹

On November 29, the political party filed a federal action in the Northern District alleging that some election officials in the state were late in sending out absentee ballots for a December 4 runoff election for two statewide offices.¹⁰ The party sought “an injunction requiring Secretary of State Crittenden to order the Counties to treat absentee mail-in ballots like those sent by military voters and overseas voters, counting ballots postmarked by Election Day and received by the voter’s county within three days following the election.”¹¹ With its complaint, the party filed a motion for a preliminary injunction.¹²

On the day that the complaint was filed, Judge Amy Totenberg set the case for hearing on the following day with an order that the parties discuss with each other before the hearing the feasibility of relief.¹³ On the day of the hearing, Judge Totenberg signed a consent order granting the requested relief.¹⁴

Northern District of Georgia Judge Steve C. Jones conducted a bench trial from April 11 to June 23, 2022,¹⁵ in a November 27, 2018, action generally challenging Georgia’s oversight of elections, including concerns about absentee ballots.¹⁶ He did not find any flaws in the way that Georgia conducted

9. Consent Order, *Democratic Party of Ga.*, No. 1:18-cv-212 (M.D. Ga. Nov. 9, 2018), D.E. 5; see Mark Niese, *What Happens Next with Vote Count?*, Atlanta J.-Const., Nov. 10, 2018, at 1A; Elise Viebeck, Vanessa Williams & Sharon Dunten, *Trump Says Kemp “Won” in Georgia*, Wash. Post, Nov. 11, 2018, at A7.

10. Complaint, *Democratic Party of Ga. v. Crittenden*, No. 1:18-cv-5443 (N.D. Ga. Nov. 29, 2018), D.E. 1.

11. *Id.* at 4.

12. Preliminary-Injunction Motion, *id.* (Nov. 29, 2018), D.E. 2.

13. Order, *id.* (Nov. 29, 2018), D.E. 3.

14. Consent Order, *id.* (Nov. 30, 2018), D.E. 6; see Greg Bluestein, *Ga. to Count Runoff Votes by Absentees*, Atlanta J.-Const., Dec. 1, 2018, at 1B.

15. Minutes, *Fair Fight Action v. Crittenden*, No. 1:18-cv-5391 (N.D. Ga. June 23, 2022), D.E. 852; Minutes, *id.* (Apr. 11, 2022), D.E. 789; *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1148 (N.D. Ga. 2022) (“[a]fter a delay in the start of trial due to the Omicron variant of COVID-19”); *id.* at 1143 (“what is believed to have been the longest voting rights bench trial in the history of the Northern District of Georgia”).

16. Docket Sheet, *Fair Fight Action*, No. 1:18-cv-5391 (N.D. Ga. Nov. 27, 2018); Second Amended Complaint, *id.* (Dec. 3, 2020), D.E. 582; Amended Complaint, *id.* (Feb. 19, 2019), D.E. 41; Complaint at 39–41, *id.* (Nov. 27, 2018), D.E. 1; see *Fair Fight Action v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019) (denying a motion to dismiss the amended complaint on standing, mootness, and other grounds, but dismissing the state election board from some claims for sovereign immunity); see also Valerie Bauerlein, *Suit Alleges Georgia Curbed Black Voters*, Wall St. J., Nov. 28, 2018, at A4; Richard Fausset, *Supporters of Candidate Who Lost Georgia Race Take the State to Court*, N.Y. Times, Nov. 28, 2018, at A19; Vanessa Williams, *Lawsuit by Abrams’s PAC Alleges Voter Suppression in Georgia*, Wash. Post, Nov. 30, 2018, at A4.

elections requiring a judicial remedy.¹⁷

17. *Fair Fight Action, Inc.*, 634 F. Supp. 3d 1128; see Matthew Brown, *Judge Upholds Ga. Law in Challenge Brought by Abrams After 2018 Loss*, Wash. Post, Oct. 2, 2022, at A8.