

## Voters Say Ga. Voting Machines Are Unreliable As Trial Begins

By Kelcey Caulder

*Law360 (January 9, 2024, 9:06 PM EST)* -- A trial six years in the making kicked off in Georgia federal court on Tuesday, with a group of voters and a nonprofit organization telling the judge that they believe the state's electronic in-person voting systems put their choices on the ballot at risk of being inaccurately counted.

The voting rights activists who sued state election officials over the voting system have long argued that the Dominion Voting Systems touchscreen machines used by in-person voters across the state are unreliable, vulnerable to malware and harder to audit than hand-marked paper ballots used by voters in other parts of the country.

Jeff Schoenberg, one of the voters suing over the system, said Tuesday that the touchscreen machines — commonly called ballot-marking devices or "BMDs" — concern him because the ballot they print to record the choices voters make at the ballot box features a barcode that a scanner then reads to record and tally those choices.

Schoenberg said that because he "can't read a QR code," he can't verify that the ballot printed by the state's voting machines accurately reflects the vote he intended to cast. And while he said it may be possible to verify a vote count using the machines, Schoenberg said he didn't think it was possible to recount a voter's intended choices if the machines "printed out a different choice that the voter didn't intend to make."

Under cross-examination by attorney Josh Belinfante, who represents the state officials, Schoenberg said his preference would be for hand-marked paper ballots that leave an "auditable paper trail."

"My vote should be counted as cast," Schoenberg said. "My particular point of view should be heard."

Attorneys for the state officials pointed out that the ballots printed by the voting machines also feature a summary of voters' selections, but another voter, Jeanne Dufort, said that doesn't fix the problem, because the summary doesn't include the full text of questions asked on the ballot and the options voters had to choose from.

"I can't always memorize or recall a 30 to 40 question ballot when I'm trying to review the BMD print out," Dufort said.

Dufort told U.S. District Judge Amy Totenberg that she also has concerns about privacy and secrecy

when casting her vote on the state's current voting machines because they are "big and bright and visible from quite a distance."

Maintaining the secrecy of her ballot is important to her, Dufort said, because she works as a realtor and someone else having knowledge of how she voted might impact that person's willingness to work with her in the future.

During his opening statement, attorney David Cross, who represents the voters, said state officials have failed to take appropriate action to address issues with the voting machines despite a 96-page report written by University of Michigan computer science professor J. Alex Halderman that revealed vulnerabilities in the state's election system that could allow hackers to change votes or alter elections.

The Cybersecurity and Infrastructure Security Agency released an advisory based on Halderman's findings in June 2022 that urged jurisdictions where the voting machines were in use to implement controls that would mitigate possible exploitation of the vulnerabilities, Cross said, but the state ignored it.

Georgia Secretary of State Brad Raffensperger called Halderman's findings "way off base" in a video Cross played for the court and said that while someone with the kind of access Halderman had to the machines could "do something," that's "not the real world."

Cross pushed back against that claim by playing surveillance video of unauthorized people entering the Coffee County, Georgia, elections office in January 2021. The video showed local election officials granting those individuals access to voting equipment in what Cross said was the election system's "operating environment."

"What we will show in this trial is that the only person who doesn't live in the real world when it comes to election security is the secretary of state," Cross said.

Repeatedly showing a graphic of an empty chair to represent Raffensperger's absence in the courtroom, Cross said that Raffensperger was "choosing" not to answer questions before the court. This comes after the Eleventh Circuit ruled last week that, despite Judge Totenberg previously ordering Raffensperger to appear, he does not have to testify.

Robert McGuire, who represents the nonprofit Coalition for Good Governance, told the judge that the voting machines currently used by the state are "insecure, unreliable and untrustworthy." The state's election system could run "perfectly well" without using them, he said.

McGuire emphasized that the case is about future elections, not the 2020 election or its results.

"If the system isn't fixed, 2024 is a disaster waiting to happen," McGuire said.

Bryan Tyson, who represents the state officials, argued during his opening statement that it is up to the state, not the court, to select the election system it wants to use. The state chose to use its current voting machines because they balance the state's interest in allowing people with disabilities to vote without difficulty, simplifying the jobs of election workers and obtaining accurately recorded ballots, Tyson said.

No evidence has been presented to outweigh those interests, Tyson said.

There is no evidence showing that malware was installed on any Georgia voting machines or used to alter the state's elections, Tyson said, just as there is no evidence that the state's election system resulted in a hack where a voter's vote was changed.

"Georgia's elections work," Tyson said. "Election officials do their work well, regardless of attacks from the right or left."

Tyson also told the judge that while voters have the right to vote, there is "no right to vote in a preferred manner." While voters might not like the state's current voting machines, he said the issue at the heart of this case isn't preference — it's whether the system is constitutional.

"Fears that someone, someday might take advantage of the BMD system isn't enough," Tyson said, noting again that there is no evidence to show that anyone tried to exploit the system to change election results.

The trial, which is expected to last three weeks, will leave Judge Totenberg to decide whether the state's election system and voting machines are so flawed that they infringe on voters' fundamental rights.

In an order in November, Judge Totenberg said that if she does find problems with the system, she lacks the power to order the state to institute a paper ballot voting system or judicially impose one.

However, she said she can identify "constitutional deficiencies" and order remedial policy measures. Those measures, according to the November order, include providing for the use of printed ballots that don't feature barcodes, increasing the number and scope of election audits, and instituting cybersecurity measures recommended by experts.

The state election officials are represented by Vincent R. Russo, Josh Belinfante, Carey A. Miller, Alexander Denton, Edward A. Bedard, Javier Pico-Prats, Anna Edmondson and Melanie Leigh Johnson of Robbins Alloy Belinfante Littlefield LLC, Bryan P. Tyson, Bryan F. Jacoutot and Diane F. LaRoss of Taylor English Duma LLP.

The Coalition for Good Governance is represented by Bruce P. Brown of Bruce P. Brown Law LLC, Robert A. McGuire III of Robert McGuire Law Firm, Russell T. Abney of Watts Guerra LLP, Cary Ichter of Ichter Davis LLC and Eric R. Havian of Constantine Cannon LLP.

Voters are represented by David D. Cross, Mary G. Kaiser, Oluwasegun Joseph, Matthaeus H. Martino-Weinhardt, Aaron Heath Scheinman, Reiley Jo Porter, Lyle F. Hedgecock, Ramsey W. Fisher, Tamara Raquel Wiesebron, Wail Jihadi, Robert W. Manoso, Benjamin E. Campbell and Hannah R. Elson of Morrison Foerster LLP, Halsey G. Knapp Jr., Jessica G. Cino and Adam M. Sparks of Krevolin & Horst LLC, Cary Ichter of Ichter Davis LLC, Christian Gabriel Andreu-von Euw of The Business Litigation Group PC, William Brent Ney of Ney Rhein LLC and Robert A. McGuire III of Robert McGuire Law Firm.

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 Tom Lotshaw. Editing by Dave Trumbore.