

## Record Mismatches on Absentee Ballots

*Martin v. Kemp (1:18-cv-4776) and Georgia Muslim Voter Project v. Kemp (1:18-cv-4789) (Leigh Martin May) and Democratic Party of Georgia v. Crittenden (Steve C. Jones, 1:18-cv-5181) (N.D. Ga.)*

Not quite two weeks before the 2018 general election, a district judge ordered election officials to regard absentee ballots with signatures apparently not matching signatures on file to be regarded as provisional ballots with an opportunity for the voters to resolve discrepancies. Before the election, the judge declined to order immediate relief from the rejection of absentee ballots for clerical errors. After the election, while absentee ballots were being counted, the judge ordered a county to not reject absentee ballots that arrived with a missing or incorrect year of birth, because only eligible voters would have received absentee ballots. In another case with election officials for an additional county as defendants, another judge issued a similar order on the following day.

*Subject:* Absentee and early voting. *Topics:* Absentee ballots; early voting; signature matching; provisional ballots; class action.

Georgia voters filed a federal complaint in the Northern District of Georgia on Monday, October 15, 2018, seeking relief from the possible disfranchisement of mail voters.<sup>1</sup> According to the complaint,

Mail ballots are frequently rejected because of a perceived signature discrepancy—a determination that can be made by election staff without signature analysis training on a subjective and arbitrary basis without oversight of supervisors or of authorized pollwatchers appointed by political parties and candidates.

Another common discrepancy is the unintentional voter error of dating the oath with the current date rather than the required date of birth.<sup>2</sup>

Defendants were election officials for Georgia and Gwinnett County, a county northeast of Atlanta.<sup>3</sup>

Four days later, the plaintiffs filed a motion for a preliminary injunction.<sup>4</sup> Three days after that, the plaintiffs filed an amended complaint adding a voter

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1. Complaint, *Martin v. Kemp*, No. 1:18-cv-4776 (N.D. Ga. Oct. 15, 2018), D.E. 1 [hereinafter *Martin* Complaint]; *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1304 (N.D. Ga. 2018); see Tyler Estep, *Voting, Rights Groups Focus on Absentee Ballots*, Atlanta J.-Const., Oct. 17, 2018, at 1B.

The caption named five plaintiffs, but only four were identified in the complaint. *Martin* Complaint, *supra* note 1, at 1, 8–10.

2. *Martin* Complaint, *supra* note 1, at 3 (paragraph numbers omitted).

3. *Id.* at 10–13.

4. Preliminary Injunction Motion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 19, 2018), D.E. 4; *Martin*, 347 F. Supp. 3d at 1305.

participation coalition as a sixth plaintiff.<sup>5</sup> An amended preliminary injunction motion followed on the next day.<sup>6</sup>

Two other voter participation organizations filed a similar complaint in the Northern District on October 16, alleging, among other things,

A person's signature . . . may vary for a variety of reasons, both intentional and unintentional. Unintentional factors include age, physical and mental condition, disability, medication, stress, accidents, and inherent differences in a person's neuromuscular coordination and stance. Variants are more prevalent in people who are elderly, disabled, or who speak English as a second language.<sup>7</sup>

A day later, the organizations filed a motion for a temporary restraining order.<sup>8</sup>

Judge Leigh Martin May began an October 23 hearing on both cases,<sup>9</sup> with an observation that there were less clear ways to address signature mismatches than other absentee ballot discrepancies and a reflection that she did not herself know what her signature looked like when she first registered to vote at age 18.<sup>10</sup> Judge May ordered that briefing in the first case conclude by October 31.<sup>11</sup>

On Wednesday, October 24, Judge May issued a 31-page injunction opinion.<sup>12</sup>

Because the Electors just filed a motion for preliminary injunction on Friday and an amended motion for preliminary injunction on Tuesday morning (the day of the hearing), the Court will only consider the Electors' arguments as to signature mismatch. All other Elector claims will be addressed by the Court at a later time, after Defendants have had an opportunity to be heard.<sup>13</sup>

The opinion concluded with a proposed injunction, and Judge May gave the parties until noon on the next day for comments as to clarity.<sup>14</sup> The decision required election officials to regard mail ballots with apparently mismatched

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5. First Amended Complaint, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 22, 2018), D.E. 10. All five voter plaintiffs were identified in the amended complaint. *Id.* at 8–10.

6. Amended Preliminary Injunction Motion, *id.* (Oct. 23, 2018), D.E. 19; see *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1329 (N.D. Ga. 2018).

7. Complaint at 3, *Ga. Muslim Voter Project v. Kemp*, No. 1:18-cv-4789 (N.D. Ga. Oct. 16, 2018), D.E. 1; see *Martin*, 347 F. Supp. 3d at 1304–05; see also Estep, *supra* note 1.

8. Temporary Restraining Order Motion, *Ga. Muslim Voter Project*, No. 1:18-cv-4789 (N.D. Ga. Oct. 17, 2018), D.E. 5; see *Martin*, 341 F. Supp. 3d at 1329.

9. Minutes, *Ga. Muslim Voter Project*, No. 1:18-cv-4789 (N.D. Ga. Oct. 23, 2018), D.E. 27; Minutes, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 23, 2018), D.E. 22; see Tyler Estep, *Judge Mulls Action on Ga. Absentee Ballots*, Atlanta J.-Const., Oct. 24, 2018, at 6A.

10. Transcript at 6–7, *id.* (Oct. 23, 2018, filed Oct. 26, 2018), D.E. 28.

11. Order, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 23, 2018), D.E. 21.

12. *Martin*, 341 F. Supp. 3d 1326.

13. *Id.* at 1329; see *Martin*, 347 F. Supp. 3d at 1305.

14. *Martin*, 341 F. Supp. 3d at 1341–42; see Tyler Estep, *U.S. Judge Sides with Absentee Voters*, Atlanta J.-Const., Oct. 25, 2018, at 1B.

signatures as provisional, and it required them to provide voters with opportunities to resolve the discrepancies.<sup>15</sup>

On October 30, Judge May declined the secretary's motion to stay the injunction pending appeal.<sup>16</sup> On November 2, the court of appeals declined to stay the injunction or expedite the appeals from each case, which the court consolidated.<sup>17</sup> One month after the election, the appeals were voluntarily dismissed.<sup>18</sup>

Judge May decided the amended preliminary injunction motion in the first case, which was filed on the day of the hearing, on November 2.<sup>19</sup> Judge May declined to order immediate relief from rejected mail-in ballots for reasons other than signature mismatches.<sup>20</sup> A mismatching signature needs a resolution opportunity, but clerical errors can be avoided by carefully following instructions.<sup>21</sup> "This does not mean that the Court is not troubled by some of the allegations in Plaintiffs' Motion. Instead, it merely holds that there is not enough time to adequately implement the more wide-ranging solutions proposed."<sup>22</sup>

On election day, November 6, "a state judge ordered three precincts in suburban Gwinnett County—a populous swing county in metro Atlanta—to extend their polling hours, one of them as late as 9:25 p.m."<sup>23</sup> At the end of the day on November 7, one day after the election, Brian Kemp had 50.33% of the votes counted for governor, slightly more than the amount necessary to avoid a runoff election.<sup>24</sup>

On Sunday, November 11, the plaintiffs filed an emergency motion for a temporary restraining order preventing Gwinnett County election officials "from rejecting absentee ballots containing immaterial errors or omissions,

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15. *Martin*, 341 F. Supp. 3d at 1341–42; Temporary Restraining Order, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 25, 2018), D.E. 26; see Amy Gardner, *Georgia Must Stop Tossing Absentee Ballots Over Signatures*, Wash. Post, Oct. 25, 2018, at A6; Cameron McWhirter, *Judge Orders Georgia to Ease Ballot Rules*, Wall St. J., Oct. 26, 2018, at A4; Mark Niese, *Your Guide to Georgia Voting Integrity*, Atlanta J.-Const., Nov. 2, 2018, at 6A; Glenn Thrush, Audra D.S. Burch & Frances Robles, *Parsing Signatures, Not Chads, in Florida Vote*, N.Y. Times, Nov. 15, 2018, at A1.

16. Opinion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 30, 2018), D.E. 38.

17. Order, *Ga. Muslim Voter Project v. Kemp*, No. 18-14502 (11th Cir. Nov. 2, 2018).

18. Voluntary Dismissals, *id.* and No. 18-14503 (Dec. 7, 2018).

19. Injunction Denial Opinion at 2, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 2, 2018), D.E. 41.

20. *Id.* at 10–11.

21. *Id.* at 9.

22. *Id.* at 10–11.

23. Bill Barrow & Ben Nadler, *Long Lines and Technical Issues as Georgians Vote for Governor*, Miami Herald, Nov. 7, 2018, at 10A.

24. See Alan Judd, *Abrams Faces Long Odds to Prolong Campaign*, Atlanta J.-Const., Nov. 8, 2018, at 10A; see also Alan Judd & Bill Rankin, *Security Doubts Not Over After Race Ends*, Atlanta J.-Const., Nov. 18, 2018, at 1A ("this year, Georgia experienced its tightest race for governor in 52 years").

including those cast by” three voters<sup>25</sup> whom the plaintiffs would move on the following day to add as additional plaintiffs.<sup>26</sup>

Also on November 11, a candidate for Congress and a voter filed a motion to intervene as plaintiffs.<sup>27</sup> Judge May granted the motion two days later.<sup>28</sup>

In her November 13 decision, Judge May ordered Gwinnett County not to reject absentee ballots solely for an omitted or incorrect year of birth.<sup>29</sup> The Civil Rights Act of 1964 forbids the disqualification of a voter for an omission or error that is not material to the voter’s eligibility.<sup>30</sup> A voter need not show the voter’s age when returning an absentee ballot, because only eligible voters receive absentee ballots.<sup>31</sup>

Unlike Plaintiffs’ arguments with respect to missing or incorrect birth years, Plaintiffs offer only conclusory statements and no supporting authority for their claim that a missing signature, incorrect address, or other clerical errors are immaterial pursuant to the Civil Rights Act. Thus, Plaintiffs have not met their high burden on this point and the requested broader injunction is not granted.<sup>32</sup>

Pending are amended complaints in both cases<sup>33</sup> and an appeal in the first case by Gwinnett County’s election officials.<sup>34</sup>

A third federal case was filed in the Northern District on November 11 by the campaign of a candidate for governor and her nominating party against election officials for Georgia, Gwinnett County, and DeKalb County—a county between Atlanta and Gwinnett County—that sought court-ordered

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25. Amended Temporary Restraining Order Motion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 11, 2018), D.E. 44 (adding reference to three additional proposed plaintiffs); Temporary Restraining Order Motion, *id.* (Nov. 11, 2018), D.E. 42; *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1305 (N.D. Ga. 2018).

26. Complaint Amendment Motion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 12, 2018), D.E. 53.

27. Intervention Motion, *id.* (Nov. 11, 2018), D.E. 45; *Martin*, 347 F. Supp. 3d at 1305; see Tamar Hallerman, Tyler Estep & Amanda C. Coyne, *U.S. House Candidate Seeks Delay of Vote Certification*, Atlanta J.-Const., Nov. 13, 2018, at 1B.

28. *Martin*, 347 F. Supp. 3d at 1306–07; see Intervention Complaint, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 13, 2018), D.E. 56.

29. *Martin*, 347 F. Supp. 3d at 1308–11; see Opinion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 15, 2018), D.E. 59 (denying the intervening plaintiffs’ motion for reconsideration); see also Greg Bluestein & Mark Niese, *Vote Count Plays Out in Counties, Courts*, Atlanta J.-Const., Nov. 14, 2018, at 1A; Allison McCann & Karen Yourish, *In Some Races, Results May Still Be Weeks Away*, N.Y. Times, Nov. 14, 2018, at A18.

30. Pub. L. No. 88-352, § 101(a)(2)(B), 78 Stat. 241, 241 (1964), *as amended*, 28 U.S.C. § 10101(a)(2)(B) (2016); see *Martin*, 347 F. Supp. 3d at 1308; see Judd & Rankin, *supra* note 24.

31. *Martin*, 347 F. Supp. 3d at 1308–09.

32. *Id.* at 1308 n.4; see Tamar Hallerman & Tyler Estep, *Gwinnett’s Result: Woodall Wins by 419*, Atlanta J.-Const., Nov. 16, 2018, at 4A.

33. Second Amended Complaint, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 15, 2018); Amended Complaint, *Ga. Muslim Voter Project v. Kemp*, No. 1:18-cv-4789 (N.D. Ga. Oct. 29, 2018), D.E. 41.

34. Docket Sheet, *Martin v. Day*, No. 18-15148 (11th Cir. Dec. 13, 2018).

counting of valid absentee and provisional ballots.<sup>35</sup> On the following day, the plaintiffs filed a motion for a preliminary injunction.<sup>36</sup> Judge Steve C. Jones heard the case one day after that,<sup>37</sup> and he promised a ruling by noon on the case's fourth day.<sup>38</sup>

The complaint included the words “class action” in its caption, and text stated that the plaintiffs asserted claims against a class of defendants comprised of election officials for Georgia’s 159 counties, but absent a request to certify a class Judge Jones declined to consider relief against a class.<sup>39</sup>

On November 14, Judge Jones extended Judge May’s decision proscribing the rejection of absentee ballots for failure to include the voter’s correct year of birth: “for the sake of statewide uniformity and assurance that all absentee mail-in ballots are equally treated, the Court adopts the rationale set forth in Judge May’s Order and holds that absentee mail-in ballots rejected solely because of an omitted or erroneous birth date must be counted.”<sup>40</sup>

Judge Jones declined to provide the plaintiffs with relief on provisional ballots.<sup>41</sup> “[T]here is a lack of evidentiary support for Plaintiffs’ contention that there has not been enough time to cure the provisional ballots filed in the 2018 General Election.”<sup>42</sup> Respecting provisional ballots cast in the wrong county, “Plaintiffs do not present sufficient evidence to show that the State’s interest in preventing voter fraud is unreasonable, nor do they show that the restriction was applied in a discriminatory manner.”<sup>43</sup>

Democratic nominee Stacey Abrams conceded Kemp’s gubernatorial victory on November 16.<sup>44</sup>

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35. Complaint, *Democratic Party of Ga. v. Crittenden*, No. 1:18-cv-5181 (N.D. Ga. Nov. 11, 2018), D.E. 1 [hereinafter *Democratic Party of Ga. Complaint*]; *Democratic Party of Ga. v. Crittenden*, 347 F. Supp. 3d 1324, 1331 (N.D. Ga. 2018); see *Democrat Abrams Files New Suit in Too-Close-to-Call Ga. Governor’s Race*, Miami Herald, Nov. 12, 2018, at 8A.

36. Preliminary Injunction Motion, *Democratic Party of Ga.*, No. 1:18-cv-5181 (N.D. Ga. Nov. 12, 2018), D.E. 4; *Democratic Party of Ga.*, 347 F. Supp. 3d at 1330.

37. Minutes, *Democratic Party of Ga.*, No. 1:18-cv-5181 (N.D. Ga. Nov. 13, 2018), D.E. 34; *Democratic Party of Ga.*, 347 F. Supp. 3d at 1330.

38. See Bluestein & Niese, *supra* note 29.

39. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1335–36; *Democratic Party of Ga. Complaint*, *supra* note 35, at 1–2, 14–16.

40. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1341; see Hallerman & Estep, *supra* note 32; Judd & Rankin, *supra* note 24.

41. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1341–45; see Greg Bluestein & Tia Mitchell, *Judge: More Ballots Must Be Counted*, Atlanta J.-Const., Nov. 15, 2018, at 1A.

42. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1342.

43. *Id.* at 1344.

The case was dismissed by stipulation on January 11, 2019. Stipulation, *Democratic Party of Ga. v. Crittenden*, No. 1:18-cv-5181 (N.D. Ga. Jan. 11, 2019), D.E. 47.

44. See Alan Blinder & Richard Fausset, *Democrat Ends Bid in Georgia for Governor*, N.Y. Times, Nov. 17, 2018, at A1; Greg Bluestein & Tia Mitchell, *Abrams: Kemp Is Next Governor*, Atlanta J.-Const., Nov. 17, 2018, at 1A.

Pending before Judge Jones is a November 27 complaint filed in the Northern District generally challenging Georgia's oversight of elections.<sup>45</sup>

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45. Docket Sheet, *Fair Fight Action v. Crittenden*, No. 1:18-cv-5391 (N.D. Ga. Nov. 27, 2018); Amended Complaint at 56–58, *id.* (Feb. 19, 2019), D.E. 41 (alleging improper rejection of absentee ballots for errors or omissions in the birth year field); Complaint at 39–41, *id.* (Nov. 27, 2018), D.E. 1 (same); see 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.