

Eleventh Circuit Judges Give Postage Paid Ballots a Hard 'No' and Then a 'Whoa'

A judge not on the panel took exception to an opinion that included this language: “We note that the Plaintiffs’ claims border on the frivolous. At this time, however, we are not imposing sanctions.” More to come.

An unusual one-line order entered into the docket Wednesday put the brakes on a three-judge panel’s rejection of a lawsuit seeking to have the government pay postage for mail in absentee ballots.

The latest order said simply: “A judge of this Court withholds issuance of the mandate in this appeal.” The maneuver means the panel’s opinion will not become final but puts the decision on hold pending further consideration.

Though the judge who took exception with the ruling was not identified, it had to be someone not on the panel that turned down the postage lawsuit Aug. 27 with a unanimous ruling. That panel included Judges Elizabeth Branch, Britt Grant and Ed Carnes. Branch wrote the opinion. She went farther than just rejecting the appeal filed by the Black Voters Matter Fund. She said this: “We note that the Plaintiffs’ claims border on the frivolous. At this time, however, we are not imposing sanctions.”

The comment stood out because sanctions had not been requested. It came in a footnote, No. 10, at the end of a 15-page order. It went with this conclusion: “While voting often involves incidental costs like transportation, parking, child care, taking time off work, and—for those who choose to vote absentee by mail—the cost of a postage stamp, those incidental costs do not mean that Georgia has imposed an unconstitutional poll tax or fee on its voters.”

Mail in ballots were far more widely used than ever last year because of the COVID-19 pandemic. The lawsuit contended that requiring postage puts an unconstitutional burden on those least able to pay.

“This case is about protecting American democracy at a time when we are facing a worldwide pandemic,” the complaint said. “Though the stakes are high, the legal claim is simple. The United States Constitution (through the Twenty-Fourth and Fourteenth Amendments) bans poll taxes. Georgia election officials require voters to use their own postage when submitting mail-in absentee ballots and applications. Postage costs money. Thus, Defendants have imposed a poll tax in violation of the Constitution.”

Sean J. Young, legal director for ACLU of Georgia, argued the case for the plaintiffs. He declined to comment on the footnote or on the latest order. Of the Branch opinion, he said, “We are disappointed in the ruling. The ACLU of Georgia will continue to protect the sacred fundamental right to vote.”

Josh Belinfante of the Robbins Firm argued for Secretary of State Brad Raffensperger. He declined to comment on the ruling or on the latest order, as did Attorney General Chris Carr.

“Due to ongoing litigation,” said a representative for Carr, “we are unable to comment at this time.”

The case is *Black Voters Matter Fund v. Secretary of State for the State of Georgia*, No. No. 20-13414.