

Ga. Judge Allows Perdue To Fix 'Gap' In Election Finance Suit

Law360 (January 31, 2022, 9:01 PM EST) — A Georgia federal judge gave a chance Monday to former U.S. senator and current Peach State gubernatorial hopeful David Perdue to fix what the judge described as a "gap" in the politician's case against a new state law over campaign fundraising.

U.S. District Judge Mark H. Cohen was frank with Perdue's counsel during a hearing in Atlanta federal court Monday afternoon, pointing out that the politician should amend his complaint against Gov. Brian Kemp and state officials in order to have a chance at getting the relief he seeks.

Perdue, who was voted out of his Senate seat in 2020, sued Kemp as well as Georgia Attorney General Christopher Carr and members of the Georgia Government Transparency and Campaign Finance Commission in early January, claiming they are responsible for a new state law that gives incumbent governors an unfair fundraising advantage over challengers.

Judge Cohen pointed out that Perdue and his gubernatorial campaign committee failed to sue the fundraising committee chaired by Kemp — Georgians First Leadership Committee Inc. — which they want barred from further supporting the governor's campaign under the new state law. Kemp is being sued in his official capacity as governor, not as the committee chair.

"How am I going to enter injunctive relief when you haven't named them as a party?" Judge Cohen asked Perdue's lawyers early in the hearing. "I think you've got a problem there, and I think y'all need to consider amending your complaint to add Georgians First. I think that's a gap."

Asked later in the hearing by Judge Cohen whether he wanted to amend the complaint, Stephen J. Obermeier of Wiley Rein LLP, an attorney for Perdue and his campaign committee, said he did. Obermeier said he heard Judge Cohen "loud and clear."

The judge gave Perdue until close of business Tuesday to add Georgians First as a party, and told the state defendants to file their response by the end of Thursday, so Perdue could reply by midday Friday. He said he would decide Perdue's injunctive relief request as soon as possible, following amendment of the complaint.

"I'm trying to move the case along and not get bogged down in that issue," Judge Cohen told the parties. "I'm just trying to cut to the chase here."

Perdue and his campaign committee alleged that Georgia's S.B. 221, which Kemp signed into law in May 2021, wrongfully allows incumbent governors to chair a "leadership committee" for their reelection campaign that isn't held to the usual campaign contribution limits.

The new law provides a workaround to a long-standing Georgia statute barring incumbent state politicians from accepting campaign contributions during the legislative session, which typically runs from January through March. That law, in place for more than 30 years, only applies to those currently in office and not candidates like Perdue in his bid to oust Kemp as governor.

Perdue contends that he and other gubernatorial hopefuls are disadvantaged by S.B. 221 because it allows Kemp access to unlimited contributions while holding rivals and their campaign committees to state fundraising caps.

"By raising the limits for the other side, you're tipping the scales in their favor," Obermeier said.

According to the complaint, the law violates Perdue's First Amendment rights because it denies him the opportunity to raise and spend campaign funds on an equal footing with Kemp.

Perdue also claims his Fourteenth Amendment rights to equal protection are being violated.

Georgians First filed an amicus curiae brief in the case shortly before Monday's hearing, opposing Perdue's request for injunctive relief. The leadership committee argued in support of S.B. 221, pointing out that the law creates committees like it to fundraise for any candidate in any election, not just the governor.

"Despite his soaring rhetoric about violations of constitutional rights, Mr. Perdue's lawsuit is fundamentally an attempt to muzzle the leading candidate's supporters just as Gov. Kemp is prohibited from raising money for himself during the legislative session," Georgians First said in its brief. "This is nothing more than rank, political opportunism."

But Judge Cohen hinted during Monday's hearing that Perdue may have a valid challenge to what the judge said is essentially a mechanism for holding political candidates in the same race to different standards.

"You've got two contenders in the same race that have different contribution levels and no case has supported that," Judge Cohen said. "It creates a mechanism for the governor not to have to comply with the [state] contribution limit. That's why I think they [the plaintiffs] actually do have standing here."

Gene C. Schaerr of Schaerr Jaffe LLP, an attorney for the defendants, said Perdue's "extraordinary" request for relief would give him a huge advantage over Kemp during the campaign period, because Kemp would not be able to accept contributions until the current legislative session ends in March. Schaerr said that is just before early voting starts in the state's primary elections.

"Any injunction that gives Perdue a fundraising advantage is clearly not the right outcome," Schaerr said.

"What's really going on here is an attempt to kneecap the sitting duck. S.B. 221 does not impose any disparity. It simply allows the incumbents to whom it applies to escape a limitation that would otherwise prohibit them and their supporters from being able to speak [through campaigning] during the legislative session."

Judge Cohen said whatever he decides in the case, there's nothing he can do about campaign contributions that have already gone to Kemp through Georgians First under the new law.

"You can't put the toothpaste back in the tube," Judge Cohen said. "The only thing that I could possibly do, if I agree with the plaintiffs, is to say going forward you can no longer spend any funds from Georgians First to

benefit Gov. Kemp."

Counsel for Georgians First did not immediately comment about the hearing on Monday.

Perdue and his campaign committee are represented by Brandis L. Zehr, Jeremy J. Broggi, Krystal B. Swendsboe, Michael E. Toner and Stephen J. Obermeier of Wiley Rein LLP; Douglas A.S. Chalmers Jr. of Chalmers & Adams LLC; and Heather L. Wagner of The Childs Law Firm.

Kemp and the state officials are represented by Annika M. Boone, Brian Field, Erik S. Jaffe, H. Christopher Bartolomucci and Gene C. Schaerr of Schaerr Jaffe LLP and Elizabeth "Beth" M.W. Vaughan of the Georgia Department of Law.

Georgians First is represented by ***Vincent R. Russo, Edward A. Bedard*** and ***Carey A. Miller of Robbins Alloy Belinfante Littlefield LLC***.

The case is Perdue et al. v. Kemp et al., case number 1:22-cv-00053, in the U.S. District Court for the Northern District of Georgia.

-Additional reporting by Morgan Conley. Editing by Andrew Cohen.