No. 20-13414

In the

United States Court of Appeals

for the Eleventh Circuit

BLACK VOTERS MATTER FUND, et al.,
Plaintiffs-Appellants,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia, et al.,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1-20-CV-1489 — Amy Totenberg, *Judge*

BRIEF OF DEFENDANT-APPELLEE BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF GEORGIA

Josh Belinfante
Vincent Russo
Brian Lake
Special Assistant Attorneys General
Robbins Ross Alloy Belinfante Littlefield LLC
500 14th Street NW
Atlanta, GA 30318
Tel: (678) 701-9381
jbelinfante@robbinsfirm.com
vrusso@robbinsfirm.com
blake@robbinsfirm.com

Christopher M. Carr
Attorney General
Andrew Pinson
Solicitor General
Bryan K. Webb
Deputy Attorney General
Russell D. Willard
Senior Asst. Attorney General
Charlene McGowan
Asst. Attorney General
Office of the Georgia Attorney General
40 Capitol Square, S.W.

Atlanta, Georgia 30334
Tel: 404-458-3409
apinson@law.ga.gov

Counsel for Defendant-Appellee Brad Raffensperger

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, counsel for Defendant-Appellee Brad Raffensperger, in his official capacity as Secretary of State of Georgia, ("Appellee") hereby certify that the below is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal.

ACLU of Georgia – Counsel for Plaintiffs-Appellants

Belinfante, Josh – Counsel for Defendant-Appellee

Black Voters Matter Fund – Appellant

Carr, Christopher – Counsel for Defendant-Appellee

DeKalb County Board of Registrations and Elections: additional Defendant-Appellee

DeKalb County Law Department – Counsel for additional Defendant-Appellee DeKalb County Board of Registrations and Elections

Denton, Alexander – Counsel for Defendant-Appellee

Els, Irene Vander – Counsel for additional Defendant-Appellee DeKalb County Board of Registrations and Elections

Georgia Law Department – Counsel for Defendant-Appellee

Gordon, Megan – Appellant

Hamilton, Erica – additional Defendant-Appellee

Ho, Dale – Former Counsel for Plaintiffs-Appellants

Johnson, Melanie – Counsel for Defendant-Appellee

Kim, Andy – Former Appellant

Lake, Brian – Counsel for Defendant-Appellee

Lakin, Sophia Lin – Former Counsel for Appellant

Harper, Andrew – Objector in underlying case.

Lewis, Anthony – additional Defendant-Appellee

McGowan, Charlene – Counsel for Defendant-Appellee

Momo, Shelly Driskell – Counsel for additional Defendant-Appellee DeKalb County Board of Registrations and Elections

Motter, Susan – additional Defendant-Appellee

Pinson, Andrew – Counsel for Defendant-Appellee

Raffensperger, Brad – Defendant-Appellee

Reid, Penelope – Appellant

Robbins Ross Alloy Belinfante Littlefield LLC – Counsel for Defendant-Appellee

Russo, Jr., Vincent – Counsel for Defendant-Appellee

Smith, Dele Lowman – additional Defendant-Appellee

Tillman, Samuel – additional Defendant-Appellee

Totenberg, Honorable Amy – United States District Court Judge, Northern District of Georgia, Atlanta Division, who is the Judge in the underlying case

Vu, Baoky – additional Defendant-Appellee

Webb, Bryan – Counsel for Defendant-Appellee

Willard, Russell – Counsel for Defendant-Appellee

Young, Sean – Counsel for Appellants

CORPORATE DISCLOSURE STATEMENT

Counsel for Appellee certifies that Appellee is an individual. Counsel for Appellee further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

/s/ Josh Belinfante
Josh Belinfante

Counsel for Defendant-Appellee
Brad Raffensperger

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Eleventh Circuit Rule 28-1(c), Appellee states that he does not desire oral argument in this appeal. All matters regarding this case are fully set forth in the briefs filed by the parties and oral argument is unnecessary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Other Authorities **Page(s)**

STATEMENT OF THE ISSUES

Whether the Twenty Fourth Amendment or the Equal Protection Clause of the Fourteenth Amendment require states to pay postage for all voters who choose to vote absentee by mail.

STATEMENT OF THE CASE

This is an appeal of the district court's order dismissing Appellants' poll tax claim under the Twenty-Fourth and Fourteenth Amendments. Prior to taking this appeal, Appellants voluntarily dismissed all other claims in this case.

In summary, Appellants asked the district court to become the first in the nation to strike a common and widespread electoral practice: requiring voters who *choose* to vote by mail to be responsible for their own postage. More specifically, Appellants asked the district court to hold that when a voter chooses to vote by mail and the state does not pay voters' postage, it constitutes a *de facto* and *per se* poll tax. Appellants are incorrect; the State's policy of not paying for an absentee voters' postage is not a tax, as courts have defined that term, let alone a poll tax in violation of the Twenty-Fourth and Fourteenth Amendments.

Acknowledging the complete lack of authority supporting Appellants' theory, the district court's order correctly declined to create new law and require Georgia taxpayers to pay for absentee ballot postage. It was the correct decision and should be affirmed.

A. Statement of facts.

Appellants Reid and Gordon ("Individual Plaintiffs") allege they are Georgia registered voters who possess, but do not wish to use, their own stamps to mail their absentee ballots. (Doc. 143 at ¶ 14-15.) Neither

Individual Plaintiff contends that they are unable to obtain more stamps later. *Id.* Appellant Black Voters Matter Fund ("BVMF") is a political advocacy organization that "works on increasing voter registration and turnout, advocating for policies to expand voting rights and access." *Id.* at ¶ 13. BVMF alleges that it has standing to bring this lawsuit because it "must divert resources away from voter education and away from other efforts to facilitate voting by mail," but does not indicate that it has assisted voters unable to vote due to an inability to obtain postage. *Id.* The Second Amended Complaint contains *no allegations* of any voter that actually cannot vote—either in person, by dropping off an election ballot, or by mail.

Georgia offers multiple options for voters to cast a ballot. Voters may vote in person on Election Day or during three weeks of advanced voting. O.C.G.A. § 21-2-385(d)(1). Voters choosing not to vote in person may vote absentee without excuse. *See* O.C.G.A. §§ 21-2-216(a) (elector's qualifications); 21-2-381 (application for absentee ballot); 21-2-385 (voting by absentee electors). Absentee ballots can be requested up to 180 days before an election, O.C.G.A. § 21-2-381(a)(1)(A), and elderly, disabled, overseas, and military voters can each request an absentee ballot once for every election in an election cycle. O.C.G.A. § 21-2-381(a)(1)(G). The Secretary of State has established an online portal that all Georgia voters may use to facilitate this process. (Georgia

Absentee Ballot Request Online Portal, available at: https://ballotrequest.sos.ga.gov/ (last visited December 21, 2020)).

County governments are responsible for the postage required to mail absentee ballot requests and absentee ballots *to* voters. O.C.G.A. § 21-2-389. Voters are responsible for returning absentee ballots to county election offices, and they may do so by physically returning the absentee ballot to a secure drop box, or returning the absentee ballot to the county election office. O.C.G.A. § 21-2-381; Ga. Comp. R. & Regs. 183-1-14-0.8-.14.

Only if the absentee voter chooses this last option might they face the need to purchase a stamp, but additional options still remain. Third parties are permitted to provide postage to voters free-of-charge if it is not in exchange for a particular vote. Ga. Comp. R. & Regs. 183-1-19-.01. If postage is provided, the proceeds are paid to the United States Postal Service ("USPS") to account for the costs associated with delivering the mail. 39 U.S.C. § 3622(c); *see also* 39 U.S.C. § 101(d) ("Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis."); 39 U.S.C. § 404(b) (authorizing the Postal Service to "establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services"). However, actual postage is not necessary to deliver absentee ballots, even when a voter utilizes the

United States mail. The USPS has an explicit policy to deliver election mail that contains insufficient postage. (Postal Bulletin 22391 2014 Election and Political Mail Update, United States Postal Service (June 12, 2014), available at: https://about.usps.com/postal-bulletin/2014/pb22391/html/front_cvr.htm (last visited February 1, 2021)).[1] Appellants have neither alleged nor identified a single voter whose ballot was not delivered, or rejected by Georgia Elections officials, for insufficient postage.

B. Proceedings below

Despite these options and USPS policy, Appellants brought two facial challenges to this Court. The first alleges that the State's decision not to reimburse or pay postage for voters who choose to return their absentee ballot by mail constitutes a per se poll tax in violation of the Twenty-Fourth Amendment to the United States Constitution. (Appellants' Br. at 25-37.)[2] They also claim that the State's practice violates the Equal Protection Clause of the Fourteenth Amendment by

---

[1] This Court is permitted to consider matters in the public record when reviewing a motion to dismiss. *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986).

[2] Page numbers cited in this brief refer to the ECF numbers and not those paginated at the bottom of the Appellant's Brief.

discriminating between in-person and absentee voters on the basis of "affluence." (Appellants' Br. at 37-41.)[3]

By contrast, Appellants' depiction of the district court's order dismissing their *de facto* poll tax claim addressed in Section (D) is incomplete or contains references unsupported by the record. The district court's conclusion was clear and to the point:

> The fact that any registered voter may vote in Georgia on election day without purchasing a stamp, and without undertaking any "extra steps" besides showing up at the voting precinct and complying with generally applicable election regulations, necessitates a conclusion that stamps are not poll taxes under the Twenty-Fourth Amendment prism. In-person voting theoretically remains an option for voters in Georgia, though potentially a difficult one for many voters, particularly during a pandemic. The Court recognizes that voting in person is materially burdensome for a sizable segment of the population, both due to the COVID-19 pandemic and for the elderly, disabled, or those out-of-town. But these concerns — while completely justifiable and pragmatically solvable — are not the specific evils the Twenty-Fourth Amendment was meant to address.
>
> Instead, Plaintiffs' concerns about the current public health crisis and the potential dangers associated with in-person voting for a large portion of Georgia's population are better addressed in connection with Plaintiffs' claim in Count II under *Anderson–Burdick*. Otherwise, accepting Plaintiffs' argument under *Harman*

---

[3] Sections (A-C) and (E) of Appellants' statement of the procedural history of this case accurately reflects prior proceedings in the court below. Accordingly, Appellee will not repeat such statements here. 11th Cir. R. 28-2.

> and *Harper* would necessitate ruling that the postage requirement on absentee ballots in Georgia is now and has always been a poll tax, even before the pandemic, because voting in person presents a material burden for some segment of the population.

(Doc. 139 at 68-69.) In accordance with the above assessment, the district court dismissed Appellants' poll tax claim.[4]

C. Standard of review

Appeals from the granting of a motion to dismiss are reviewed *de novo*. *See Harris v. Ivax Corp.*, 182 F.3d 799, 802 (11th Cir. 1999). "When considering a motion to dismiss, all facts set forth in the plaintiff's complaint 'are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.'" *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000) (quoting *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510 (11th Cir. 1993)). A complaint is due to be dismissed where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

---

[4] The order from which this appeal is taken denied Appellants' Motion for Preliminary Injunction in addition to granting Defendant-Appellee's Motion to Dismiss. Appellants have indicated that they do not appeal the denial of their Motion. Appellants' Brief at 14. Accordingly, for purposes of this appeal, evidence submitted in conjunction with Appellants' Motion may not be considered. *Land v. Dollar*, 330 U.S. 731, 735 (1947) ("In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered.").

which would entitle him to relief." *Lopez v. First Union Nat. Bank of Fla.*, 129 F.3d 1186, 1189 (11th Cir. 1997) (quotation omitted).

SUMMARY OF ARGUMENT

Appellants contend that Georgia's policy of not paying for absentee voters' postage constitutes an unconstitutional poll tax. No court has adopted the theory the Appellants advance, and with good reason. The fundamental flaw in the Appellants' argument is that it conflates an incidental cost associated with a method of absentee voting with the denial or abridgement of the right to vote itself. This case is not about a prerequisite to voting, or a practice that applies to all exercises of the franchise. Nor is it about the State of Georgia imposing a tax. Indeed, the only revenue raised from the use of stamps (which, here, is no requirement at all) benefits the USPS. Under no reasonable definition of the word "tax" would the State's policy qualify. Similarly, there is no burden on or abridgement of the right to vote. To reach an alternative conclusion would necessarily require the State to compensate all voters for any conceivable incidental cost of voting, including those identified by the Appellants: "find[ing] transportation and tak[ing] time off from work." (Appellant's Br. at 19.) The Constitution requires no such result. Put simply, Appellants' claims fail because they have neither identified a tax, a practice that abridges the right to vote, nor actionable discrimination between different types of voters.

ARGUMENT AND CITATION OF AUTHORITY

The district court correctly ruled that neither the Twenty-Fourth Amendment or Equal Protection Clause compel the State of Georgia to pay the cost of voters' mailing their absentee ballot request forms or absentee ballots.

I. Georgia has not imposed a poll tax.

The Twenty-Fourth Amendment prohibits states from denying or abridging the right to vote "by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. Thus, the prohibition requires the presence of: (1) a tax (2) that denies or abridges (3) the right to vote. Appellants' argument never satisfies even the plain text of the amendment, as the district court recognized.

A. Georgia's policy is not a tax.

It should be axiomatic that a state policy cannot violate the Twenty-Fourth Amendment without imposing a tax on voting. The Appellants' claim fails for this reason alone, and the district court's order should be affirmed because Appellants have not identified an imposed "tax" as that term is understood. First, unlike the recognized concept of taxes, the State does not impose a requirement to pay postage. Second, revenue raised by the purchase of stamps does not flow to Georgia's coffers. Third, postage is a service fee and not a tax.

First, as shown, the State does not compel voters to utilize the mail when voting, much less when voting absentee. Thus, for postage to even be at issue, a voter must (1) choose to use the mail system to deliver his or her ballot; and (2) purchase a stamp despite the USPS's policy of delivering election mail with insufficient postage.[5] The State compels neither decision. This alone can end the inquiry, as even the most basic concept of a tax necessarily includes a "monetary exaction[] imposed by the government." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1038 (11th Cir. 2020) (en banc). Black's Law Dictionary defines a tax as a "monetary charge *imposed* by the government on persons." (17th Ed. 1999) (emphasis added). Georgia's policy does not satisfy this definition of taxation.

Second, the State does not receive the benefit of any postage paid by Georgia voters. *See* 39 U.S.C. §§ 3622(c); 101(d); 404(b). Thus, Georgia's policy cannot be reasonably viewed as compelling a "contribution to provide for the support of the government." *United States v. State Tax Comm'n*, 421 U.S. 599, 606 (1975) (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)); *see also New Jersey v. Anderson*, 203 U.S. 483, 492 (1906) ("[A] tax is a pecuniary burden laid

---

[5] Of course, in the case of the individual Appellants, they need only use one of the stamps they each concede that they have in their possession.

upon individuals or property for the purpose of supporting the government."). As this Court recognized in *Jones*, a tax "exist[s] primarily to raise revenue." 975 F.3d at 1038. No conduct by the State challenged in this appeal raises State revenue from Georgia voters.

Even Appellants agree, which is why they are forced to argue that the State somehow *raises* revenue by *avoiding* spending tax dollars on some voters' postage. (Appellants' Br. at 28.) If this were true, then the Twenty-Fourth Amendment must also preclude the State's decision not to pay for gas to drive to polling locations, ride shares, bus fares, or other methods that allow voters to cast a vote. The Twenty-Fourth Amendment has never been interpreted so broadly, nor should it. Instead, the Twenty-Fourth Amendment grants no positive right to anything; it is "phrased in the negative [meaning] that the right to vote shall not be denied or abridged based on the relevant reason." *Texas Democratic Party v. Abbott*, 978 F.3d 168, 189 (5th Cir. 2020) (addressing Twenty-Sixth Amendment and those "related" to it, like the Twenty-Fourth Amendment).

Other courts have rejected similar attempts to judicially regulate the franchise based on incidental costs associated with voting. Analyzing a photo-identification requirement, Justice Scalia wrote in a concurring opinion that all impositions on voting are not actionable; those that are "merely inconvenient" do not violate the First and

Fourteenth Amendments. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring). Prior to the *Crawford* decision upholding Indiana's photo identification requirement, an Indiana district court concluded the same in a separate case:

> Thus, the imposition of tangential burdens does not transform a regulation into a poll tax. Moreover, the cost of time and transportation cannot plausibly qualify as a prohibited poll tax because those same "costs" also result from voter registration and inperson voting requirements, which one would not reasonably construe as a poll tax. Plaintiffs provide no principled argument in support of this poll tax theory.

Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006). The Northern District of Georgia cited *Rokita* favorably when it also rejected poll tax arguments about Georgia's photo identification requirement. *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1355 (N.D. Ga. 2006). Put simply, no Georgia voter pays anything to the State to exercise the right to vote, and adopting Appellants' theory to the contrary would transform all incidental costs of voting, like transportation, into poll taxes. This is not consistent with the text of the Twenty-Fourth Amendment.[6]

---

[6] For these same reasons, Appellants also lack standing. They have alleged no injury: The USPS's policy is to deliver election mail even

Third, the charges imposed by the USPS are service fees and not taxes. "Under federal law, a tax has certain characteristics which distinguish it from a mere debt or charge." *In re Adams*, 40 B.R. 545, 548 (E.D. Pa. 1984). "The major distinction lies in whether it is an involuntary charge assessed on all or a charge for services rendered in the nature of a contractual or quasi-contractual obligation." *Id.* As the Supreme Court explained long ago in *New Jersey v. Anderson*:

> Taxes are not debts . . . . Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States . . . . an action of debt may be instituted for their recovery. The form of the procedure cannot change their character.

---

without a stamp. (Postal Bulletin 22391 2014 Election and Political Mail Update, United States Postal Service (June 12, 2014).) Any failure to deliver election mail with insufficient postage is, therefore, not traceable to Defendant-Appellee, which deprives Appellants of standing. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253 (11th Cir. 2020) ("To satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'") (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (alterations adopted in original). This eliminates the theory that there is a cost associated with mail-in absentee voting and warrants affirming the district court's order.

203 U.S. at 492.

This fee-for-service model distinguishes USPS's postage requirement from the Affordable Care Act's (ACA) insurance penalty, discussed in *National Federation of Independent Businesses v. Sebelius,* the case cited by Appellants in their brief. 567 U.S. 519 (2012). As the Supreme Court noted in *Sebelius*, the ACA's penalty:

> looks like a tax in many respects. The shared responsibility payment, as the statute entitles it, is paid into the Treasury by taxpayers when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it in the same manner as taxes.

Sebelius, 567 U.S. at 563–64 (citations, quotations, and alterations omitted). None of the above conditions apply here. When distinguishing between a tax and a penalty, this Court in *Jones* held that a tax exists "primarily to raise revenue," and Georgia's coffers do not see a dime from the purchase of stamps. 975 F.3d at 1038.

Finally, postage fees are more akin to the sewage fees found not to be taxes in *In re Lorber Industries of California, Inc.,* 675 F.2d 1062, 1067 (9th Cir. 1982). There, the Ninth Circuit held that sewer use charges were not taxes because they were triggered by an individual's

decision to use the sewage system and the amount of the charge was proportionate to the individual's use:

> In determining if Lorber's use of the system was voluntary, and if it therefore consented to imposition of the fees, we are not free to consider the practical and economic factors which constrained Lorber to make the choices it did. The focus is not upon Lorber's motivation, but on the inherent characteristics of the charges.

Id. at 1066. "Put another way, the fact that Lorber probably had nowhere else to turn for sewerage services did not transform the charges into involuntary pecuniary burdens, and hence taxes." *In re Adams*, 40 B.R. at 458. Like the sewer fees in *Lorber,* postage is a charge for a **chosen** service rendered, rather than an involuntary pecuniary imposition in the nature of a tax.[7] Postal charges are also distinct from taxes because they are consensual rather than involuntary; and they are proportionate to the use of the mail system.

---

[7] As importantly, the government entity that stood to benefit from the sewer charge in *Lorber* was the same government that imposed it. Here, the USPS imposes and collects the charge, and the State coffers see nothing from postage. 39 U.S.C. § 3622(c)(2). *See also* 39 U.S.C. § 101(d) ("Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis."); *id.* at § 404(b) (authorizing the Postal Service to "establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services").

Applied here, voters have several options to exercise the right to vote: they can choose to vote by mail but in no way are compelled to do so. Even then, they are not required to purchase stamps, because third parties may do it for them; drop boxes may be utilized; and ballots can also be delivered to county election offices. O.C.G.A. § 21-2-381; Ga. Comp. R. & Regs. 183-1-14-0.8-.14. There is nothing compulsory in the process. That some voters may have a more difficult time voting—due to COVID-19, age, or any other condition—is not relevant under a poll tax analysis. "[T]he peculiar circumstances of individual voters" are not relevant for purposes of the Plaintiffs' facial constitutional claims. *Crawford*, 553 U.S. at 206 (Scalia, J., concurring).

In short, Appellants ask the Court to ignore well-settled precedent that draws a distinction between taxes and service charges like those imposed by the USPS for postage. The argument is unsupported by legal authority, and this warrants affirming the district court's order.

B. Georgia does not abridge the right to vote.

Even if not paying voters' costs of mail (or their transportation or time off from work) were some form of a tax, the practice neither denies nor abridges the right to vote for a simple reason: there are many other ways to vote in Georgia, including by absentee. Thus, this case is only about one method of voting, and so long as others remain, there is no abridgement or denial of voting and, hence, no cause of action.

Appellants do not contend that Georgia's policy *denies* anyone the right to vote; their claim is that it "abridges" the right to the franchise.[8] (Appellant's Br. at 29-33.) There are several fatal flaws with their theory. First, there is a distinction between the right to vote and the right to vote absentee (and by mail at that). "It is … not the right to vote that is at stake here but a claimed right to receive [and utilize] absentee ballots." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969). This Court held the same in *Jones*, when it described a violation of the Twenty-Fourth Amendment as including "a tax on the franchise itself," but there is no such imposition in this case. 875 F.3d at 1041. Taken together, these cases reveal that a tax that "abridges" the right to vote is unconstitutional; the decision not to pay all costs associated using absentee ballots is something different altogether.

Second, further dashing Appellants' theory, the Fifth Circuit correctly recognized that, at the time the Twenty-Fourth Amendment was ratified, the right to vote "did not include a right to vote by mail." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 188 (5th Cir. 2020)

---

[8] The Fifth Circuit recently addressed the terms "abridge" and "deny" in an election case applying the Twenty-Sixth Amendment to the United States Constitution. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 188 (5th Cir. 2020). It concluded that to "deny" means to prohibit. *Id.*

(considering the 1971 date of the Twenty-Sixth Amendment). Thus, Appellants' claim never makes it out of the gate. When it was ratified, no one understood the Twenty-Fourth Amendment to require payment for the use of absentee ballots, because there was no right to an absentee ballot in the first place. This is what the district court's order meant when it concluded that the purpose of the prohibition on poll taxes was not about postage.

Third, this Court held in *Jones* that to violate the Twenty-Fourth Amendment, there must not only be a denial but for the imposition of the tax, but the denial must also be "motivated by a person's failure to pay a tax." 975 F.3d at 1045. Here, a person can choose to not pay postage and still exercise the right to vote—either by the USPS policy of returning election mail with insufficient postage, or by taking advantage of the numerous other ways State lawmakers have authorized Georgians to exercise the franchise.

The analysis in *Jones* and *Abbott* squares with dictionary definitions as well. Black's Law Dictionary defines "abridge" as to "reduce or diminish." (17th Ed. 1999). The Oxford Dictionary of English defines the word as "curtail." (3rd Ed. 2010). Webster's New Collegiate Dictionary defines "abridge" as to "reduce in scope; diminish." (1977). It is clear that Georgians' right to franchise may still be exercised through (1) in person voting on Election Day; (2) in person

voting during advanced voting; (3) requesting absentee ballots online; (4) returning absentee ballots to the county election office (thereby having no more cost than in-person voting); (5) returning absentee ballots to a county drop box; or (6) accepting stamps from third parties. The right to vote is secure and not diminished, curtailed, or abridged. This ends the inquiry.

Despite this weight of authority, Appellants contend that all that is needed is a "material requirement" upon voting. *See*, *e.g.*, Appellants' Br. at 31. Appellants confuse a material burden with the presence of any burden. As shown, if this Court were to reverse the district court's order and adopt Appellants' theory, every aspect of voting that imposes some cost—driving, riding a bus or train, ride shares, missing work, obtaining temporary childcare—would require reimbursement by the State. There is simply no way to distinguish between postage and these other incidental costs of voting. For this reason, the Appellee requests that this Court simply apply the text of the Twenty-Fourth Amendment and recognize that it prohibits raising funds from the act voting; it does not mandate the expenditure of public funds to address every conceivable cost associated with the franchise.

C. Precedent does not support Appellants' expansive theory.

Appellants rely heavily on *Harman v. Forssenius*, 380 U.S. 528 (1965), and *Jones*. Neither decision supports their claim.

Harman, the only time the Court has struck down a state policy as a poll tax, arose under very different factual circumstances. As the Twenty-Fourth Amendment moved through the ratification process, the Commonwealth of Virginia removed its poll tax as an absolute prerequisite for voting in federal elections. However, it substituted a provision whereby voters could qualify to vote either by paying the customary poll tax or by filing a certificate of residence. *Id.* at 540. The Supreme Court noted that, although the strict poll tax requirement had been removed, the alternative option of obtaining a certificate of residence to qualify to vote was still a "cumbersome procedure" that had to be filed six months before the election. *Id.* at 541-42. Accordingly, the Supreme Court held that, unlike Georgians here, voters there had no real option other than to pay the poll tax. *Id.* at 540.

The context surrounding Virginia's policy mattered to the *Harman* Court. At the time of the decision, only four states maintained some form of a poll tax. 380 U.S. at 543. And, Virginia's policy "was born of a desire to disenfranchise" African-American voters. *Id.*; *see also Jones* 975 F.3d at 1045 (citing *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966)). Neither can be said of Georgia's policy, and

Appellants do not make either argument. Indeed, Appellants name only three states that "cover the postal fees for mail-in voters." (Appellants' Br. at 9 (identifying Kansas, Iowa, and West Virginia).)

Additional distinctions limit *Harman*'s applicability to this appeal. In *Harman*, as well as in the Supreme Court's subsequent and related decision *Harper v. Virginia State Board of Elections*, the challenged practice involved an absolute "condition to obtaining a ballot." *See Harper*, 383 U.S. at 668. Here, voters have numerous other options (not just a "cumbersome" procedure) to exercise the franchise. Contrary to Appellants' contentions, this distinction matters. *See* Appellants' Br. at 21-22. Unlike Virginia, Georgia imposes no prerequisite to voting.

Thus, *Harman* itself is easily distinguishable, and its progeny offers no basis to mandate that Georgia taxpayers pay for every conceivable cost associated with just one method of voting.[9] Indeed, it is

---

[9] Despite Appellants' frequent citation to *Jones*, it is not helpful to their position. *Jones* examined whether a Florida law was a poll tax when it required convicted felons to pay all court costs, fees, and other forms of restitution before having their voting rights restored. 975 F.3d at 1026-28. It ultimately answered the question in the negative, because it considered the requirement to pay the fines and fees neither a tax nor a condition of voting. Florida's law was, instead, an additional qualification of voting. *Id.* at 1045-46. But as Appellants recognize, "*Jones* involved the denial of the right to vote for those who had not completed their felony sentences. It did not have occasion to apply the abridgement standard." (Appellants' Br. at 29 n.6.) Thus, to the extent

not surprising that no court has ever held that postage is a "de facto" poll tax, and Appellants fail to cite a single case that supports their argument. The few courts that have addressed this issue have rejected the claim that postage operates as a poll tax. *See*, *e.g.*, *Bruce v. City of Colorado Springs,* 971 P.2d 679, 685 (Colo. App. 1998) ("requiring voters to affix a stamp to their ballots is a reasonable requirement imposed for the purpose of efficiently conducting a mail ballot election" and does not constitute an unconstitutional poll tax.).

Other courts have held that similar indirect costs associated with voting are not poll taxes, such as in the voter-identification context. *See Veasey v. Abbott*, 796 F.3d 487, 268 (5th Cir. 2015) (holding that "indirect costs on voters" having to obtain the required identification "does not constitute a poll tax" because it does not "impose a material requirement solely upon those who refused to pay a poll tax"); *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012) ("Although obtaining the identification required under [state law] may have a cost, it is neither a poll tax itself (that is, it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax."); *Billups*, 439 F. Supp. 2d at 1335 (denying preliminary injunction

---

that *Jones* addresses a poll tax, it supports a more limited application of the definition of "tax" than Appellants claim.

against Georgia's Voter ID law because the costs associated with obtaining an ID did not constitute an unconstitutional poll tax); *Rokita*, 458 F. Supp. 2d at 827 ("the imposition of tangential burdens does not transform a regulation into a poll tax"); *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014) (upholding Wisconsin's Voter ID law, concluding that "the burdens of time and inconvenience associated with obtaining [the state's] acceptable photo identification are not severe burdens on the right to vote and do not invalidate the law.").

II. Appellants fail to state a violation of equal protection.

Appellants also raise an Equal Protection claim to compel Georgia taxpayers to pay for those voters who choose to vote absentee by mail. They contend that not paying postage amounts to a fee on voting that (1) is not related to a voter's qualifications, and (2) discriminates against persons who do not vote in person. (Appellants' Br. at 37-41.) It is hard to see any basis for purported discrimination when absentee ballots may be returned without postage (either by the voter or the USPS pursuant to its policy). Further, unlike the Supreme Court's decision in *American Party of Texas v. White*, 415 U.S. 767 (1974), a case cited by the Appellants, a voter's ballot will be the same, whether it is cast in person or by absentee. Put simply, there is no discrimination against absentee voters.

Appellants make much of the conclusion in *Jones* that the challenged Florida law survived because the requirement to pay all fines and fees was related to voter qualifications and not voting itself. *See* Appellants' Br. at 40-41. But that reads far too much into this Court's *en banc* decision. When addressing the poll tax theory and *Harper*, it mattered to this Court that "*any* voter who wished to cast a ballot in a state election had to pay the tax." *Jones*, 975 F.3d at 1030 (emphasis added). As shown, *only* voters who *choose* to mail their absentee ballot requests and absentee ballots *may* have to pay postage (or rely on the USPS's policy of delivering the election mail with insufficient postage). This is a material difference that matters and is fatal to Appellants' Equal Protection claim.

To the extent that Appellants are making some kind of wealth-based discrimination claim, *Jones* closed the door on that theory. "[W]ealth is not a suspect classification." *Jones*, 975 F.3d at 1030. Thus, even in cases involving elections, the rational basis test applies. *Id.* Here, paying postage (and potentially other incidental costs of voting) implicate the State's fiscal concerns, which are plainly important enough issues to satisfy a rational basis test. *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 373 (1988) ("protecting the fiscal integrity of Government programs, and of the Government as a whole, 'is a

legitimate concern of the State.'") (citation omitted); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016); *Wilson v. Birnberg*, 667 F.3d 591 (5th Cir. 2012); *see also Armour v. City of Indianapolis, Ind.*, 566 U.S. 673 (2012) (concluding avoiding a potential administrative burden satisfied rational basis test).

In sum, Appellants can show no discrimination against voters who vote absentee and those who vote in person. To the extent they focus solely on those voters who choose to utilize the United States mail, they cannot overcome the State's fiscal concerns, which certainly satisfy the rational basis test.

CONCLUSION

For the reasons above, the Court should affirm the district court's dismissal for failure to state a claim.

Respectfully submitted, this 1st day of February, 2021.

/s/ *Josh Belinfante*
Josh Belinfante
Vincent Russo
Brian Lake
Special Assistant Attorneys General
Robbins Ross Alloy Belinfante Littlefield LLC
500 14th Street NW
Atlanta, GA 30318
Tel: (678) 701-9381
jbelinfante@robbinsfirm.com
vrusso@robbisnfirm.com
blake@robbinsfirm.com

Christopher M. Carr
Attorney General
Bryan K. Webb
Deputy Attorney General
Russell D. Willard
Senior Asst. Attorney General
Andrew Pinson
Solicitor General
Charlene McGowan
Asst. Attorney General
Office of the Georgia Attorney General
40 Capitol Square, S.W.

Atlanta, Georgia 30334
Tel: 404-458-3409
apinson@law.ga.gov

Counsel for Defendant-Appellee Brad Raffensperger

NOTICE REGARDING PAPER FILING

Pursuant to General Order No. 46 of the United States Court of Appeals for the Eleventh Circuit, Counsel for Defendant-Appellee hereby provides notice that he has filed the foregoing brief through the CM/ECF system, but is unable to comply with the requirement to file paper copies with the Court at this time and will do so at a future date to be established by the Court.

/s/ Josh Belinfante

Josh Belinfante

Dated: February 1, 2021.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,689 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

ROBBINS ROSS ALLOY
BELINFANTE LITTLEFIELD
LLC

/s/ Josh Belinfante
Josh Belinfante
Georgia Bar No. 047399
Vincent R. Russo
Georgia Bar No. 242628
500 14th Street NW
Atlanta, GA 30318
Brian Lake
Georgia Bar No. 575966
(678) 701-9381
jbelinfante@robbinsfirm.com
vrusso@robbinsfirm.com
blake@robbinsfirm.com

Counsel for Defendant-Appellee

Dated: February 1, 2021.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, I filed the foregoing Brief for Defendant-Appellee, Secretary of State of Georgia, electronically using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

ROBBINS ROSS ALLOY
BELINFANTE LITTLEFIELD
LLC

/s/ Josh Belinfante
Josh Belinfante
Georgia Bar No. 047399
Vincent R. Russo
Georgia Bar No. 242628
500 14th Street NW
Atlanta, GA 30318
Brian Lake
Georgia Bar No. 575966
(678) 701-9381
jbelinfante@robbinsfirm.com
vrusso@robbinsfirm.com
blake@robbinsfirm.com

Counsel for Defendant-Appellee