No. 20-13414

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BLACK VOTERS MATTER FUND, MEGAN GORDON, and PENELOPE REID

Plaintiffs-Appellants

v.

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

Defendants-Appellees

On Appeal from the U.S. District Court
for the Northern District of Georgia
Civil Action No. 1:20-cv-1489
Hon. Amy Totenberg

REPLY BRIEF OF PLAINTIFFS-APPELLANTS BLACK VOTERS MATTER FUND, MEGAN GORDON, AND PENELOPE REID

Sean J. Young
Georgia Bar No: 790399
Rahul Garabadu
Georgia Bar No: 553777
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 30357
Tel: (678) 981-5295

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Appellants hereby certify that Black Voters Matter Fund, Megan Gordon, and Penelope Reid do not have a parent corporation, and that no publicly held corporation owns ten percent or more of Black Voters Matter Fund, Megan Gordon, and Penelope Reid. Further, the following individuals/entities have an interest in this litigation. To the best of Appellant's knowledge, none of the following individuals/entities is a corporation that issues shares to the public, and no publicly traded company or corporation has an interest in the outcome of this appeal. I hereby certify that the following persons and entities may have an interest in the outcome of this case:

1. American Civil Liberties Union Foundation of Georgia, Inc. (counsel for Appellants)
2. Belinfante, Josh – Counsel for Defendant – Appellee
3. Black Voters Matter Fund – Plaintiff-Appellant
4. Carr, Christopher – Counsel for Defendant-Appellee
5. DeKalb County Board of Registration and Elections – Defendant-Appellee
6. DeKalb County Law Department – Firm of Counsel for Defendant-Appellee (Shelley Momo, Irene Vander Els)

7. Denton, Alexander – Counsel for Defendant-Appellee

8. Els, Irene Vander – Counsel for Defendant-Appellee

9. Garabadu, Rahul – Counsel for Plaintiff-Appellant

10. Georgia Department of Law – Firm of Counsel for Defendant-Appellee (Christopher Carr, Bryan Webb, Russell Willard, Charlene McGowan)

11. Gordon, Megan – Plaintiff-Appellant

12. Hamilton, Erica – Defendant-Appellee

13. Ho, Dale – Former Counsel for Plaintiff-Appellant

14. Johnson, Melanie – Counsel for Defendant-Appellee

15. Kim, Andy – Former Plaintiff-Appellant

16. Lake, Brian – Counsel for Defendant-Appellee

17. Lakin, Sophia Lin – Former Counsel for Plaintiff-Appellant

18. Lewis, Anthony – Defendant-Appellee

19. McGowan, Charlene – Counsel for Defendant-Appellee

20. Momo, Shelley Driskell – Counsel for Defendant-Appellee

21. Motter, Susan – Defendant-Appellee

22. Raffensperger, Brad – Defendant-Appellee

23. Reid, Penelope – Plaintiff-Appellant

24. Robbins Ross Alloy Belinfante Littlefield LLC – Firm of Counsel for Defendant-Appellee (Josh Belinfante, Vincent Russo, Alexander Denton, Brian Lake, Melanie Johnson)

25. Russo, Vincent – Counsel for Defendant-Appellee
26. Smith, Dele Lowman – Defendant-Appellee
27. Tillman, Samuel – Defendant-Appellee
28. Totenberg, Amy, United States District Judge for the Northern District of Georgia.
29. Vu, Baoky – Defendant-Appellee
30. Webb, Bryan – Counsel for Defendant-Appellee
31. Willard, Russell – Counsel for Defendant-Appellee
32. Young, Sean – Counsel for Plaintiff-Appellant

/s/ Sean J. Young
Sean J. Young

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

ARGUMENT

In 1965, the Supreme Court held that it was unconstitutional for Virginia to charge voters $1.50 to cover the administrative costs of running an election, even if voters could avoid that fee by obtaining a "free" certificate of residence. *Harman v. Forssenius*, 380 U.S. 528, 531-532 (1965). This case asks whether, in 2021, Georgia can constitutionally charge mail-in voters up to $1.65 in postal fees to cover the administrative costs of ballot delivery by mail, even if voters can avoid that fee by voting for "free" in-person. The answer is no.

Georgia law grants all registered voters the right to cast a ballot "by mail." O.C.G.A. § 21-2-385(a). But Georgia elections officials charge voters money to use it. Specifically, once a mail-in voter has completed their ballot, the State requires voters to pay for the cost of ballot delivery via mail (i.e., postage stamps), even though elections officials can and do provide prepaid postage envelopes to cover the mailing costs of other voting-related materials submitted by voters. *See, e.g.*, O.C.G.A. § 21-2-233(b); O.C.G.A. § 21-2-234(c).

This is unconstitutional. When a State has established a specific mechanism of voting, such as voting by mail, the Twenty-Fourth Amendment and the Equal Protection Clause forbid elections officials from charging voters to use it—even if voters can still vote in-person for free. *See Harman*, 380 U.S. at 542; *American Party of Texas v. White*, 415 U.S. 767, 795 (1974). Thus, for instance, Georgia

elections officials cannot open a popular early in-person voting location (such as Atlanta's State Farm Arena), then charge voters $1.50 to vote at that location (i.e., to cover the costs of renting that space), even if voters can use other early voting locations for free.

Of course, the Constitution permits elections officials to impose reasonable measures related to verifying a voter's qualifications. *See generally Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020). For instance, the State can require voters to complete their felony sentences. *See id*. The State can require in-person voters to show up in-person and display identification to verify their identity and confirm that they are duly registered voters. O.C.G.A. § 21-2-417(a); *Jones*, 975 F.3d at 1044 (W. Pryor, C.J., plurality opinion).[1] The State can similarly require mail-in voters to verify their identity by signing their name on the ballot envelope. O.C.G.A. § 21-2-385(b).

Any incidental costs a voter incurs to satisfy these voter qualifications must be borne by the voter. *Jones*, 975 F.3d at 1031. The State is not, for example, required to pay off the criminal fines and fees needed to complete a felony sentence. *Id*. at 1036. The State is not required to pay for the time and

[1] In the opening brief, Plaintiffs referred to Part III-B-2 of the *Jones* opinion, which was written by Chief Judge William Pryor and joined by Judge Newsom and Judge Lagoa, as a "concurrence." It should have been referred to as the "plurality opinion."

transportation costs associated with getting in-person voters to the polls, nor pay for the underlying documentation that in-person voters need to obtain photo identification to verify their identity at the polls. *Id*. at 1044 (W. Pryor, C.J., plurality opinion). And the State is not required to pay for the pens that mail-in voters need, or the caregivers certain disabled voters may need, to sign their mail-in ballots for purposes of identity verification.

Postal fees, however, have nothing to do with verifying a voter's qualifications (and Defendant[2] does not argue otherwise). Ballot delivery or other administrative costs—such as the cost of renting trucks to transport in-person ballots from the polling place to the tabulation center—cannot be constitutionally passed onto the voter based on whether the voter accesses that service. Such "user fees" are unconstitutional.

Part I explains why the postal fee requirement violates the Twenty-Fourth Amendment under *Jones* and *Harman*, and it addresses Defendant's counterarguments, most of which rely on inapposite bankruptcy cases. In Part II, Plaintiffs demonstrate that the postal fee requirement violates the Equal Protection Clause under *White* and *Harper v. Virginia State Board of Elections*, 383 U.S. 663

[2] There are multiple Defendants in this case, including the Secretary of State of Georgia and individuals associated with the DeKalb County Board of Registration and Elections (collectively, "elections officials"). However, only the Secretary (hereinafter "Defendant") filed an opposition brief.

(1966), precedent with which Defendant barely engages. For these reasons, the District Court's dismissal of Plaintiffs' complaint should be reversed.[3]

I. CHARGING VOTERS POSTAL FEES TO VOTE BY MAIL VIOLATES THE TWENTY-FOURTH AMENDMENT.

Requiring voters to pay a postal fee of up to $1.65 to exercise their statutory right to vote by mail abridges their right to vote in violation of the Twenty-Fourth Amendment.

---

[3] Attempting to silently torpedo this appeal, Defendant tepidly questions Plaintiffs' standing in a footnote, pointing to a seven-year-old Postal Bulletin which asserts that the U.S. Postal Service ("USPS") allegedly delivers election mail with insufficient postage and charges the receiver. (D.Br. at 12-13, n.6.) But Defendant does not even bother to refute the District Court's nearly 20 pages of factual findings establishing Plaintiffs' standing at this early stage (Doc. 139 at 32-51), nor does Defendant address the District Court's refusal to credit the veracity of the USPS postal bulletin in the face of countervailing evidence. (*Id*. at 67-68.) Defendant's non-responsive argument hardly demonstrates that the District Court's preliminary factual findings are clearly erroneous. *See Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009) ("We review the factfindings underlying a standing determination only for clear error." (citation omitted)).

Defendant's brief contains other scattered references to the bulletin (D.Br. at 5, 10, 18), but courts can only consider the *existence* of public records on a Rule 12(b)(6) posture, not assume the truth of their contents. And here, there is good reason to doubt the bulletin's accuracy. After the District Court's decision, the USPS sent a physical mailer to every household in advance of the 2020 general election explicitly asking that voters "[a]dd postage to the return envelope [of the mail-in ballot] if needed." https://bit.ly/2ZefLbO. The current USPS website also states that "[u]nless your state or local election officials provide you with a prepaid return envelope, you should make sure appropriate postage is affixed to your return ballot envelope." https://about.usps.com/what/government-services/election-mail/. (And if the USPS does deliver election mail without postage by charging the receiver, that raises the troubling question of why elections officials insist on misleading

The Twenty-Fourth Amendment states that the right to vote in federal elections "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. Thus, a state violates the Twenty-Fourth Amendment when: (1) the state requires voters to pay "any poll tax or other tax"; (2) the right to vote is "abridged"; and (3) the right to vote is abridged "by reason of" failure to pay such tax, as opposed to failure to satisfy a voter qualification. All three elements are satisfied here.

A. The Postal Fee Requirement is a "Tax," Not a "Penalty," for Purposes of the Twenty-Fourth Amendment.

First, the postal fee constitutes a "poll tax or other tax" for the purposes of the Twenty-Fourth Amendment. U.S. Const. amend. XXIV. As this Court has explained, "[t]he term 'tax' is a broad one," and covers any "monetary exaction[] imposed by the government" that is not a "penalt[y]." *Jones v. Governor of Florida*, 975 F.3d 1016, 1037 (11th Cir. 2020) (en banc). The distinction between a tax and a "penalty" "define[s] the outer limits of the term 'tax' today." *Id.* at 1038. As the Supreme Court has explained, "the essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 564 (2012). The government

---

voters into covering the government's costs.) In any event, courts do not resolve disputed facts on a Rule 12(b)(6) posture.

exaction becomes a "penalty" when it is a "punishment for an unlawful act or omission." *Id.* at 567. A government exaction can be considered a "tax" for purposes of the Constitution even if that exaction is not considered a "tax" for purposes of a statute or rule. *See, e.g.*, *id*. at 563 (Affordable Care Act's individual mandate was a "tax" under the Constitution's taxing power clause, even though it was not a "tax" under the Anti-Injunction Act).

Here, the postal fee is undisputedly a "monetary exaction" that is "imposed by the government," and it undisputedly "produces at least some revenue for the Government." *See* 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."). And Defendant does not argue that postal fees are a "penalty" intended to punish. Accordingly, the postal fee is a "tax" for purposes of the Twenty-Fourth Amendment.

Resisting this straightforward conclusion, Defendant raises four circuitous arguments to dispute that the postal fee is a "tax." Each of them attempts to tack on novel legal tests found nowhere in binding precedent and should accordingly be rejected.

1. The postal fee requirement is a "tax" even if a voter "chooses" to pay it.

Defendant initially argues that the postal fee requirement is not a "tax" because voters "choose" to pay it. (D.Br. at 10, 14-15.)[4] According to the Defendant's legal fiction, if a person can "choose" to avoid paying a government exaction (e.g., by not voting or by voting in-person), that exaction transforms into something other than a "tax."

Defendant fails to cite any Twenty-Fourth Amendment precedent, which is unsurprising because the proposed "choice" construct is nonsensical in the context of poll tax claims involving "abridgment" of the right to vote. Forcing voters to "choose" between paying a poll tax and overcoming an additional "material requirement" to vote is *exactly* what constitutes unconstitutional "abridgment" in violation of the Twenty-Fourth Amendment under *Harman v. Forssenius*, 380 U.S. 528, 542 (1965). In *Harman*, the Virginia statute at issue mandated that voters in federal elections "choose" to either pay a poll tax of $1.50 or file a free certificate of residence if they wanted to vote. 380 U.S. at 529. But the possibility of "choice" did not matter, because the "free" certificate of residence method imposed an additional "material requirement" on voting. *Id.* at 542. Thus, even if many voters

[4] References to Plaintiffs' opening brief are denoted as "Pl.Br." while references to Defendant's opposition brief are denoted as "D.Br."

"choose" to vote in-person rather than pay $1.65 in postal fees, unconstitutional abridgment has still occurred.

Defendant seeks refuge in bankruptcy law, citing *In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982). (D.Br. at 14-15.) But *Lorber* was attempting to define the term "tax" as used in the Bankruptcy Act, and its "tax" definitional analysis was animated by unique concerns about what creditor priority level Congress intended to give the government vis-à-vis unsecured creditors in various circumstances. (Namely, unpaid involuntary "taxes" give the government higher priority over unsecured creditors, while unpaid voluntary debts relegate the government to unsecured creditor status.) *Compare Lorber*, 675 F.2d at 1066, *with In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1994) (disagreeing with Ninth Circuit's test for what constitutes a "tax" under the Bankruptcy Act because of impact on government priority status).

Lorber is inapplicable because these bankruptcy priority considerations are absent here. As shown above, Defendant's proposed "choice" framework makes no sense in vote "abridgment" cases, where the existence of choice is presumed. Indeed, the Ninth Circuit itself has declined to apply *Lorber*'s "tax" definition to other contexts because bankruptcy concerns are unique. *See Bidart Bros. v. Cal.*

Apple Comm'n, 73 F.3d 925, 929-30 (9th Cir. 1996) (*Lorber* decision[5] "does not provide a universal definition of 'tax' applicable in every legal context" and does not apply to the use of "tax" in Tax Injunction Act); *see also, e.g.*, *Sebelius*, 567 U.S. at 563-64 (individual mandate was "tax" under Constitution but not "tax" under the Anti-Injunction Act). This Court should similarly decline to join Defendant's foray into bankruptcy law when deciding this Twenty-Fourth Amendment case.

2. The postal fee requirement is a "tax" because it is imposed by the government.

Defendant next argues that the postal fee cannot be considered a tax because the payment is imposed by one government entity (the State) but received by another government entity (the U.S. Postal Service). (D.Br. at 10-11.) But Plaintiffs' opening brief addressed this anticipated argument, and Defendant never adequately responds. As Plaintiffs explained, the text of the Twenty-Fourth Amendment is indifferent about which governmental entity a tax goes to; the text prohibits abridgment for failure to pay "*any* poll tax or other tax." (Pl.Br. at 18-19 (quoting U.S. Const. amend. XXIV) (emphasis added).) Defendant does not dispute that "any" means "any."

[5] The Ninth Circuit referred to this as the "*Farmers Frozen Food* test," which was the test that *Lorber* reaffirmed. *Id.* at 929.

Moreover, Defendant's proposed "same entity" test would allow elections officials to launder proceeds of a poll tax to other entities to pass on expenses and evade the prohibitions of the Twenty-Fourth Amendment. For example, suppose that a local YMCA charged an elections board rent to use their venue as an early voting site. Elections officials want voters to pay that cost, but they know that they cannot require voters to pay officials a $1.50 poll tax. Under Defendant's invented "same entity" test, however, officials could simply require voters to *directly* pay the YMCA a $1.50 "user fee" when voting at that location. But such a scheme would still violate the Twenty-Fourth Amendment even though the user fees never technically touch the government's hands.

Defendant shoehorns three citations in an attempt to justify this novel "same entity" test. (D.Br. at 10-11.) But these cases just say that taxes are imposed to "support" the "government," *United States v. State Tax Comm'n*, 421 U.S. 599, 606 (1975); *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906), or that a tax "exist[s] primarily to raise revenue," *Jones*, 975 F.3d at 1038. None of these decisions state that poll taxes are unconstitutional only if the proceeds technically go to the *same* government entity that requires them as a condition to vote. It would be just as unconstitutional for Defendant to require voters to pay off federal income taxes before they can vote. Defendant then scurries back to bankruptcy law (D.Br. at 15 n.7 (citing *Lorber*)), but *Lorber* is inapplicable for reasons already

discussed. Accordingly, this Court should decline to adopt Defendant's "same entity" test.

3. The postal fee requirement is a "tax" because there is no "service fee" exemption to the Twenty-Fourth Amendment.

Defendant next argues that the postal fee is not a "tax" because it is a "service fee" charge incurred for "use of the mail system." (D.Br. at 13, 15.) But Defendant cites no Twenty-Fourth Amendment cases supporting a fictional "service fee" category that is purportedly exempt from the "broad" definition of "tax" as used in the Twenty-Fourth Amendment. When explaining the "tax" versus "penalty" dichotomy in *Jones*, this Court said nothing about a "service fee" carveout.

Once again, Defendant puts all his eggs into the bankruptcy basket, citing bankruptcy cases that grappled with the distinction between a "tax" and a "service fee." (D.Br. at 13-16 (citing *Lorber*; *In re Adams*, 40 B.R. 545 (E.D. Pa. 1984); *New Jersey v. Anderson*, 203 U.S. 483 (1906)).) But artificially engrafting the "service fee" exemption from bankruptcy law to this case also makes no sense. Under Defendant's proposed test, even the poll tax in *Harman*—a $1.50 charge on every person who votes—could be considered a "service fee" for providing voting services. Thus, any financial condition on voting that is used to facilitate the election process could be rebranded as a "service fee," allowing a state to easily evade the Twenty-Fourth Amendment.

Moreover, these bankruptcy cases are inapposite because, again, their analyses were focused on the government's creditor priority level vis-à-vis unsecured creditors (i.e., unpaid "taxes" get higher priority than unpaid "service fees"), concerns that are inapplicable here. And again, the courts have declined to apply these cases outside the bankruptcy context. *See Trading Co. of N. Am. v. Bristol Twp. Auth.*, 47 F. Supp. 2d 563, 575 n.6 (E.D. Pa. 1999) (declining to apply the same district court's *Adams* decision to a different statute "because the interpretation of a 'tax' for purposes of bankruptcy priority does not consider the federalism questions at issue here").

For guidance on how to interpret "tax" as used in the Twenty-Fourth Amendment, it is best to turn to cases that have interpreted "tax" as used in the Twenty-Fourth Amendment. In *Jones*, this Court made clear that the definition of "tax" is "broad," and that the relevant distinction is whether a government monetary exaction is a "tax" or a "penalty." 975 F.3d at 1037-38. And it is this "tax" versus "penalty" distinction—not Defendant's bankruptcy-specific distinction between "taxes" and "service fees"—that defines the "outer limits" of the term "tax" for purposes of the Twenty-Fourth Amendment. *Id.*

4. The postal fee requirement is a "tax" even if it doesn't go directly to the IRS.

Lastly, Defendant says that postal fees are not a tax because they don't share the exact same features of the Affordable Care Act tax, such as the fact that the

latter was collected by the Internal Revenue Service. (D.Br. at 14.) Ultimately, though, as Defendant concedes, "a tax exists 'primarily to raise revenue.'" (*Id*.) Thus, while taxes may come in many different species, ranging from a penalty assessed by the IRS like in *Sebelius* to a surcharge payment administered by the Secretary of Energy, *see New York v. United States*, 505 U.S. 144, 152 (1992), the defining feature of a tax is that it "supports" the "government." (D.Br. at 10-11 (quoting *State Tax Comm'n*, 421 U.S. at 606; *Anderson*, 203 U.S. at 492).) And here, Defendant admits that the revenue generated from the postal fee "benefits the USPS," a government entity. (*Id*. at 8.)

* * *

The postal fee qualifies as a "tax," because it is a government monetary exaction that is not a "penalty." There is no "choice" rule, no "same entity" requirement, no "service fee" exemption, and no "IRS" test. This Court should reject Defendant's attempts to festoon *Jones* and *Harman* with additional tests that do not exist.[6]

[6] Buried in a footnote, Defendant casually argues that because *Jones* did not specifically apply the abridgment standard, "it supports a more limited application of the definition of 'tax.'" (D.Br. at 21-22 n.9.) Defendant cites no textualist principle suggesting that the same word in the exact same sentence ("tax") can simultaneously have two different meanings depending on which verb is operative (i.e., "deny" or "abridge"). "A word or phrase is presumed to bear the same meaning throughout a text," Antonin Scalia & Brian Garner, *Reading Law* § 25, at 170 (2012), and certainly the same meaning in *the exact same text*. If a parent says, "You may not eat or nibble a cookie before dinner," the definition of "cookie" does

B. The Postal Fee Requirement "Abridges" the Right to Vote.

Georgia's postal fee requirement is not only a "tax," it "abridge[s]," U.S. Const. amend. XXIV, i.e. "reduce[s] or diminish[es]," Georgia voters' right to vote. *See Abridge*, Black's Law Dictionary (11th ed. 2019). Under *Harman*, the right to vote is unconstitutionally "abridged" by a poll tax if the alternative "free" methods of voting require satisfying additional "material requirements." *See Harman*, 380 U.S. at 542. A requirement is considered "material" if it is "as onerous as," or "even less onerous than," paying the poll tax. *See also id.* ("the poll tax is abolished absolutely as a prerequisite to voting, *and no equivalent or milder* substitute may be imposed." (emphasis added)). Here, voters can avoid postal fees by voting for "free" in person, but voting in-person requires travel, which defeats the purpose of voting by mail (and for elderly and disabled voters like Plaintiff Penelope Reid, voting in-person is virtually impossible). Defendant does not dispute that travel, when compared to paying $1.65 in postal fees, clears this low bar of materiality.

---

not change depending on whether the child "eats" or "nibbles" it. "Tax" as used in the Twenty-Fourth Amendment means what *Jones* says it means, regardless of whether the case involves a "denial" or an "abridgment" of the right to vote.

Unable to resist this basic application of *Harman*'s "material requirement" test, Defendant tosses out three red herrings to argue that the postal fee does not "abridge" the right to vote. This Court should not take the bait.

1. The postal fee requirement "abridges" the right to vote even if free alternatives exist.

Defendant starts by suggesting that the postal fee requirement does not "abridge" the "right to vote" because "there are many other ways to vote in Georgia, including by absentee," and "so long as other[] [methods] remain, there is no abridgment." (D.Br. at 16.) Defendant's argument does not comport with a textualist understanding of the word "abridge." It is akin to arguing that taking all the Benadryl out of a pharmacy does not "reduce or diminish" the supply of "medication" because Tylenol and Advil are still available. For instance, the Voting Rights Act also prohibits "abridgement of the right . . . to vote." 52 U.S.C. § 10301(a). And yet, "limiting the times and places at which registration can occur" is potentially actionable under that law, *Holder v. Hall*, 512 U.S. 874, 924 (1994) (Thomas, J., concurring), even when multiple avenues for registering to vote remain open. Defendant apparently defines "abridge" as meaning to "eliminate all methods of voting," an absurd definition that would render "deny" superfluous. *See* Antonin Scalia & Brian Garner, *Reading Law* § 26, at 174 (2012) (rule against surplusage).

Moreover, as discussed *supra* Part I-A-1, *Harman* presumes that "abridgment" still leaves other voting options open. Because the other ways to vote impose "material requirements" upon the voter (namely travel) that voting by mail does not involve, unconstitutional abridgment has occurred.[7]

2. The postal fee requirement "abridges" the right to vote regardless of *McDonald*'s Equal Protection holding and legislative history.

Next, Defendant posits that the "right to vote" described in the Twenty-Fourth Amendment does not include mail-in voting, relying on the Equal Protection case of *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969). Defendant also proclaims that in 1964, "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." (D.Br. at 18.) Under Defendant's apparent theory, if a type of voting didn't exist in 1964, the Twenty-Fourth Amendment does not apply.

As a preliminary matter, *McDonald* provides no help to Defendant because its Fourteenth Amendment Equal Protection holding is inapplicable to the other

[7] Defendant cites a Colorado state court decision that cursorily stated that the postal fee was not a poll tax because it was a "reasonable requirement" that was used to "efficiently conduct" an election. (D.Br. at 22 (citing *Bruce v. City of Colorado Springs*, 971 P.2d 679, 675 (Colo. App. 1998).) But the Supreme Court is clear that whether a tax is only a "slight economic obstacle" does not matter, *Harman*, 380 U.S. at 539, and that "constitutional deprivations may not be justified by some remote administrative benefit to the state," *id*. at 542-43.

amendments. *See, e.g., Texas Democratic Party v. Abbott*, 978 F.3d 168, 193 (5th Cir. 2020) ("We are hesitant to hold that *McDonald* applies" to the Twenty-Sixth Amendment context). *McDonald* attempted to clarify which standard of scrutiny applied to Equal Protection cases involving voting, concluding that discrimination against voters in jail was subject only to rational basis review because inmates were not a suspect class and were not "absolutely prohibited from exercising the franchise." *McDonald*, 394 U.S. at 807-09. Nothing in *McDonald* purported to interpret the text of the Twenty-Fourth Amendment, which does not require a showing that voters are "absolutely prohibited" from voting, only "abridgment." Nor did *McDonald* examine abridgment "by reason of" "failure to pay a poll tax or other tax," or examine financial conditions at all.

Defendant's self-serving definition of the "right to vote" mirrors the same flawed argument that Florida made in *Jones*. Just as Defendant contends that the right to vote by mail is not part of the "right to vote" because Georgia is not constitutionally required to allow voting by mail, Florida argued that the right of felons to be reenfranchised is not part of the "right to vote" because Florida is constitutionally allowed to permanently disenfranchise felons.

But as Chief Judge W. Pryor's plurality opinion correctly explained, once a State *does* extend the franchise to persons previously convicted of felonies, the Twenty-Fourth Amendment prohibits the State from then restricting that

reenfranchisement on the basis of the "failure to pay any poll tax or other tax." *Jones*, 975 F.3d at 1040 (W. Pryor, C.J., plurality opinion) (citing U.S. Const. amend. XXIV). This prohibition remains *even if* "reenfranchisement is an 'act of grace' extended to a class that has no cognizable rights." *Id.* Thus, a State could not selectively deny reenfranchisement to felons based on race in violation of the Fifteenth Amendment, or on sex in violation of the Nineteenth Amendment, both of which use the same relevant text as the Twenty-Fourth Amendment ("deny or abridge the right to vote"). *Id.* So too here, elections officials cannot discriminate against certain mail-in voters on the basis of the postal fee payment after extending them the right to vote by mail.[8]

Defendant's argument also fails as it relates to methods of voting that did not exist in 1964. For instance, early in-person voting did not exist in 1964, but Georgia cannot now constitutionally charge every voter $1.50 if they choose to vote early in-person.

Moreover, whether anyone "understood the Twenty-Fourth Amendment to require payment for the use of absentee ballots" in 1964 is irrelevant. (D.Br. at 18.)

[8] Both the Georgia and United States Constitutions expressly contemplate the Georgia legislature having prime responsibility for determining the methods of voting (subject, of course, to other constitutional restrictions). Ga. Const. Art. 2, § 1, ¶ I ("Method of voting" to be "conducted in accordance with procedures provided by law"); U.S. Const. Art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof").

As the *Jones* plurality opinion explains, "we do not" "assume that some recourse to legislative history is appropriate in the interpretation of the Twenty-Fourth Amendment." *Jones*, 975 F.3d at 1046 (W. Pryor, C.J., plurality opinion) (citing Scalia & Garner, *Reading Law* § 66, at 369); *see also Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1737 (2020) (whether in 1964 legislators thought "sex" included sexual orientation or transgender status was irrelevant when interpreting the text of Title VII of the Civil Rights Act of 1964). In any event, Defendant is simply wrong in asserting that voting by mail didn't exist in 1964. While *no-excuse* absentee voting by mail did not exist at the time, absentee voting by mail *did* exist for out of town voters as early as 1917 and for disabled voters as early as 1955. *See McDonald*, 394 U.S. at 804. Even under Defendant's artificial "1964 test," at a minimum those categories of voters should not be required to cover the cost of mail delivery.

Fortunately, this Court need not pore through the dusty annals of legislative history to resolve this case. Georgia has established "the right to vote" as encompassing the right to vote by mail, and that right has been "abridged" because part of it has been conditioned upon the payment of a "tax." The text is the beginning and the end of the matter.[9]

[9] Defendant also asserts that "the context surrounding Virginia's [poll tax] policy" in the 1960's, namely the racism that animated it, "mattered" in determining

3. The abridgment can be cured simply by not requiring postal fees.

Defendant lastly invokes a parade of horribles, suggesting that Plaintiffs are demanding that the government remove all "material requirements" on voting, such as the cost of transportation. (D.Br. at 19.) Defendant is wrong. The Twenty-Fourth Amendment doesn't eliminate all material requirements upon voting, it just eliminates fee-paying requirements upon voting. The "material requirement" test comes into play only in assessing whether a fee requirement amounts to "abridgment." For instance, the Supreme Court in *Harman* found that the poll tax "abridged" the right to vote because obtaining a free certificate of residence was a "material requirement," but the Court did not order Virginia to cover all the transportation costs associated with obtaining a free certificate of residence. All Virginia had to do was remove the fee. Here, the fee requirement on voting by mail amounts to "abridgment" because the "free" way of voting, voting in-person, imposes additional material requirements. So too here, the solution is to eliminate the fee.

For the above reasons, the postal fee requirement "abridges" the right to vote.

Harman's outcome. (D.Br. at 20.) But *Harman* does not require a showing of intentional discrimination.

C. The Postal Fee Requirement Abridges the Right to Vote "By Reason of" the Voter's "Failure to Pay."

Finally, Plaintiffs have demonstrated that the challenged restriction abridges the right to vote "by reason of" failure to pay postal fees, U.S. Const. amend. XXIV, and not because of some other justification, like verifying a voter's qualifications. *See Jones*, 975 F.3d at 1045 (W. Pryor, C.J., plurality opinion). Defendant does not dispute that postal fees are unrelated to a voter's qualifications.

This is another reason why Defendant's worry that there is "no way to distinguish between postage and these other incidental costs of voting" like transportation costs will not come to fruition. (D.Br. at 19.) Courts have been clear about what costs are "incidental" and permissible to pass onto the voter (e.g., the transportation costs Defendant identifies), and what costs violate the Twenty-Fourth Amendment (e.g., the postal fees).

Incidental costs related to voter qualifications. *Jones* teaches that the costs associated with satisfying a voter's qualifications are "incidental" and are not covered by the Twenty-Fourth Amendment. For instance, as Defendant unremarkably points out with a lengthy string cite (D.Br. at 21-22), the costs of obtaining photo identification (i.e., driving to the DMV, etc.) are incidental, because photo identification verifies the voter's identity—a "legitimate voter qualification." *See Jones*, 975 F.3d at 1044 (W. Pryor, C.J., plurality opinion). Similarly, the costs of paying fines and fees imposed by a sentencing court are

incidental, because paying off those fines and fees completes a felony sentence—which is also a "legitimate voter qualification." *Id.* at 1045.

The transportation, work, and childcare costs associated with voting in-person—the costs Defendant frets about having to cover—fall into this category of "incidental" costs. When voting in-person, voters must physically appear at their polling location to verify their identity (using their photo identification, which also incurs incidental costs), which in turn performs the critical function of ensuring that that voter is validly registered. The costs incurred to appear in-person—transportation, taking time off work, finding childcare—are all incidental to verifying identity, a legitimate voter qualification. Only then will the voter be issued a ballot.

In the mail-in voting context, Georgia law currently provides that the identity of mail-in voters is verified by the voter's signature. Thus, incidental costs could include the cost of hiring a caregiver for a disabled voter to help complete and sign the ballot, *see generally* O.C.G.A. § 21-2-385(b), or the cost of a pen, which the voter must use to sign their name. These, too, are incidental to satisfying the identity verification requirement in the mail-in voting context and may be borne by the voter.

Ballot delivery costs are unrelated to voter qualifications. On the other hand, costs required by elections officials that are unrelated to voter qualifications,

such as ballot delivery costs, are prohibited by the Twenty-Fourth Amendment. For instance, the State could not require an in-person voter to defray the cost of renting trucks to deliver their paper ballot to a tabulation center. Similarly, once a mail-in voter has established their legitimate voter qualification by signing their name and verifying their identity, the State cannot ask them to cover the administrative costs of delivering the ballot from their homes to county registrar offices. Instead, the prepaid postage mechanism Defendant uses to pay for the mail delivery of other voter-related mail should cover the mail delivery of completed absentee ballots.

* * *

In sum, Plaintiffs have shown that the postal fee violates the Twenty-Fourth Amendment because: (1) it requires voters to pay "any poll tax or other tax," because postal fees are undisputedly a government "monetary exaction" that is not a "penalty," *Jones*, 975 F.3d at 1037; (2) the right to vote is "abridged," because an additional "material requirement"—namely, travel—is imposed on voters who seek to avoid paying the tax, *Harman*, 380 U.S. at 542; and (3) the right to vote is abridged "by reason of" failure to pay such tax, as opposed to failure to satisfy a legitimate voter qualification, *Jones*, 975 F.3d at 1045 (W. Pryor, C.J., plurality opinion).

II. CHARGING VOTERS POSTAL FEES TO VOTE BY MAIL VIOLATES THE EQUAL PROTECTION CLAUSE.

Plaintiffs have also stated a claim under the Equal Protection Clause.[10] The Equal Protection Clause of the Fourteenth Amendment provides that no "State" shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Section 1. A voting restriction violates the Equal Protection Clause when the right to vote is conditioned on the "payment of any fee" that has nothing to do with a voter's qualifications. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966). Here, while the State has granted voters the right to vote by mail, O.C.G.A. § 21-2-385(a), it conditions that right on the voter's payment of the $1.65 in postal fees. And because postal fees are not "directly related to legitimate voter qualifications," that requirement violates the Equal Protection Clause. *Jones v. Governor of Florida*, 975 F.3d 1016, 1031 (11th Cir. 2020) (en banc); *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008) ("under the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.").

Defendant makes three flawed arguments to respond to Plaintiffs' claims.

[10] What Plaintiffs have called their "poll tax claim" is supported by both the Twenty-Fourth Amendment and the Equal Protection Clause. The Twenty-Fourth Amendment applies only to federal elections, while the Equal Protection Clause applies to all elections. Thus, Plaintiffs can prevail on Equal Protection grounds alone.

A. Georgia's Unconstitutional Discrimination Amongst Mail-In Voters is Not Cured by Equal Treatment of In-Person Voters.

First, Defendant papers over the unconstitutional discrimination amongst mail-in voters who pay the postal fee and those who don't by emphasizing that anyone can vote for free in-person, i.e., that no such discrimination exists for in-person voters. (D.Br. at 24.) But as Plaintiffs noted in their opening brief, the Supreme Court has held that "permitting *absentee voting* by some classes of voters and denying the privilege [of absentee voting] to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause." *American Party of Texas v. White*, 415 U.S. 767, 795 (1974) (emphasis added). This is why the Supreme Court found that the exclusion of the Socialist Workers Party on absentee ballots potentially violated the Equal Protection Clause, *even though* the party was included on in-person ballots. Thus, having an in-person alternative cannot justify discriminating against absentee voters.

Defendant's response to Plaintiffs' reliance on *White* is a non sequitur. Defendant simply states that *White* does not apply because here, "a voter's ballot will be the same, whether it is cast in person or by absentee." (D.Br. at 23.) In other words, Defendant urges this Court to ignore the Equal Protection holding of *White* because Defendant did not commit the exact same constitutional violation at

issue in that case. But Defendant cannot, and does not, dispute the fact that by imposing the postal fee, the State "permit[s] absentee voting by some classes of voters"—those absentee voters who pay the $1.65 in postal fees—while "denying the privilege to other voters in similar circumstances"—absentee voters who do not pay the postal fees. *White*, 415 U.S. at 795. And *Harper* makes clear that drawing a line between voters who do and do not pay money is unconstitutional. *See Harper*, 383 U.S. at 666. Since impermissible line-drawing among absentee voters alone violates the Equal Protection Clause even if such impermissible lines are not drawn for in-person voters, *see White*, 415 U.S. at 795, Plaintiffs have successfully stated a claim under the Equal Protection Clause.

B. Georgia's Unconstitutional Discrimination is Between Mail-In Voters Who Pay the Postal Fee and Mail-In Voters Who Do Not Pay It.

Second, Defendant chases a straw man, chastising Plaintiffs for making a "wealth-based discrimination" claim. (D.Br. at 24.) As Defendant rightly notes, the Equal Protection Clause does not protect against discrimination based on wealth.

However, Plaintiffs are not making a wealth-based discrimination claim. Georgia's postage requirement discriminates between voters who pay postal fees and voters who do not pay postal fees "*regardless* of whether a voter c[an] pay." *Jones*, 975 F.3d at 1031. A voter making an annual income of $50,000 who pays the postal fees cannot be treated more favorably than a voter making an annual

income of $50,000 who does not pay the postal fees. Here, Defendant does not dispute that the postal fee requirement draws a line based on who pays money.

C. Georgia's Unconstitutional Discrimination is Not Saved by *McDonald*.

Third, Defendant's citation to *McDonald v. Board of Comm'rs of Chicago* in the Twenty-Fourth Amendment context also does not save the postal fee in the Equal Protection context. 394 U.S. 802 (1969). While *McDonald* specifically says that discriminating against mail-in voters in jail can be constitutional under the Equal Protection Clause, it does not authorize Defendant to discriminate on *any grounds* relating to voting by mail. Just as *McDonald* obviously does not permit the State to discriminate against mail-in voters based on the voter's race or sex, *McDonald* also does not permit the State to discriminate against mail-in voters on the basis forbidden by *Harper*—whether they pay fees. Thus, discriminating against mail-in voters based on their non-payment of postal fees violates the Equal Protection Clause. Such unconstitutional discrimination cannot be justified on some other legitimate basis, such as verifying a voter's qualifications.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed.

Respectfully submitted this 22nd day of February, 2021.

/s/ Sean J. Young

Sean J. Young
Georgia Bar No: 790399
Rahul Garabadu
Georgia Bar No. 553777
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 30357
Tel: (678) 981-5295
syoung@acluga.org
rgarabadu@acluga.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 32(a) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 11th Circuit Rule 32-4, this document contains 6,488 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

This 22nd day of February, 2021.

/s/ Sean J. Young

Sean J. Young
American Civil Liberties Union
Foundation of Georgia, Inc.

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I, Sean J. Young, do hereby certify that I have filed the foregoing Brief electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on the above mentioned date. I further certify that upon receiving notification from the Court that the electronic version of the Brief has been accepted and docketed, one true and correct paper copy of the Brief will be sent via first-class mail to counsel of record.

Dated: February 22, 2021

/s/ Sean J. Young

Sean J. Young
American Civil Liberties Union
Foundation of Georgia, Inc.

Counsel for Plaintiffs-Appellants