**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; DEKALB COUNTY BOARD OF REGISTRATION & ELECTIONS; ANTHONY LEWIS, SUSAN MOTTER, DELE LOWMAN SMITH, SAMUEL E. TILLMAN, BAOKY N. VU, in their official capacities as Members of the DeKalb County Board of Registration & Elections; and ERICA HAMILTON, in her official capacity as Director of Voter Registration and Elections

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

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

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**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. Belinfante, Josh – Counsel for Defendant – Appellee
2. Black Voters Matter Fund – Plaintiff-Appellant
3. Carr, Christopher – Counsel for Defendant-Appellee
4. DeKalb County Board of Registration and Elections – Defendant-Appellee
5. DeKalb County Law Department – Firm of Counsel for Defendant-Appellee (Shelley Momo, Irene Vander Els)
6. Denton, Alexander – Counsel for Defendant-Appellee
7. Els, Irene Vander – Counsel for Defendant-Appellee
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(Christopher Carr, Bryan Webb, Russell Willard, Charlene McGowan)

9. Gordon, Megan – Plaintiff-Appellant

10. Hamilton, Erica – Defendant-Appellee

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

12. Johnson, Melanie – Counsel for Defendant-Appellee

13. Kim, Andy – Former Plaintiff-Appellant

14. Lake, Brian – Counsel for Defendant-Appellee

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

16. Lewis, Anthony – Defendant-Appellee

17. McGowan, Charlene – Counsel for Defendant-Appellee

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19. Motter, Susan – Defendant-Appellee

20. Raffensperger, Brad – Defendant-Appellee

21. Reid, Penelope – Plaintiff-Appellant

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

23. Russo, Vincent – Counsel for Defendant-Appellee

24. Smith, Dele Lowman – Defendant-Appellee

25. Tillman, Samuel – Defendant-Appellee

26. Vu, Baoky – Defendant-Appellee

27. Webb, Bryan – Counsel for Defendant-Appellee

28. Willard, Russell – Counsel for Defendant-Appellee

29. Young, Sean – Counsel for Plaintiff-Appellant

/s/ Sean J. Young

Sean J. Young

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request oral argument as this case raises novel questions of law regarding the constitutionality of a postal fee requirement for voters under the Twenty-Fourth and Fourteenth Amendments to the U.S. Constitution. Although the Twenty-Fourth Amendment has been in effect for over fifty years, the Supreme Court has decided only one case which has interpreted and applied the amendment. *Harman v. Forssenius*, 380 U.S. 528 (1965). Similarly, this Court has seen relatively few cases that have involved the interpretation and application of the Twenty-Fourth Amendment, with the notable exception of *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020). Although *Jones* applies to the facts of this case, that decision was made in the context of voter qualifications (specifically, the requirement that voters complete any felony sentence), which is not at issue in this case.

Oral argument can help show how the Twenty-Fourth and Fourteenth Amendments, along with the Court's recent decision regarding voter qualifications in *Jones*, apply to the postal requirement at issue in this case.

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## STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is a civil and constitutional rights action arising under 42 U.S.C. § 1983 and the Twenty-Fourth and Fourteenth Amendments to the Constitution of the United States. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court granted Defendants' motion to dismiss the poll tax claim on August 11, 2020 and entered final judgment on August 28, 2020. (Docs. 139, 144.) A notice of appeal was timely filed on September 9, 2020. (Doc. 145.)

## STATEMENT OF THE ISSUES

Georgia law guarantees all registered voters the right to cast a ballot from home by sending an absentee ballot "by mail." O.C.G.A. § 21-2-385(a). The cost of sending mail, i.e., the postal fees, can either be borne by the voter (by buying stamps) or Georgia election officials (by using prepaid postage envelopes). However, Georgia elections officials ("Defendants") require voters to pay the postal fee, even though the fee has nothing to do with a voter's qualifications and Defendants pay postal fees on certain other voting-related materials as required by law. *See* O.C.G.A. § 21-2-233(b); O.C.G.A. § 21-2-234(c). Requiring voters to pay a fee to exercise the right to vote by mail violates the Twenty-Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment. The District Court

improperly dismissed the complaint for failing to state a claim upon which relief can be granted.

Thus, the two issues are as follows:

First, given that Georgia law has granted the right to vote by mail, do Defendants violate the Twenty-Fourth Amendment by conditioning the exercise of that right on the payment of postal fees, which has nothing to do with voter qualifications and "abridge[s]" the right to vote "by reason of failure to pay any poll tax or other tax?" U.S. Const. amend. XXIV; *Harman v. Forssenius*, 380 U.S. 528, 542 (1965).

Second, given that Georgia law has granted the right to vote by mail, do Defendants violate the Equal Protection Clause by limiting that right only to those who pay the postal fee, which has nothing to do with voter qualifications, thus conditioning the right to vote by mail on the "affluence of the voter or payment of any fee?" U.S. Const. amend. XIV; *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

The answer to both questions is yes. Thus, the District Court's dismissal of such claims should be reversed.

## STATEMENT OF THE CASE

Georgia law guarantees all registered voters the right to cast a ballot by sending an absentee ballot "by mail." O.C.G.A. § 21-2-385(a). But when it comes

to mail delivery, either the sender or the receiver must pay for it: the voter can pay for it by buying and affixing stamps, or Georgia elections officials can pay for it by using prepaid postage envelopes as they do with other voting-related mailings. At present, Georgia elections officials ("Defendants") force voters to cover the cost, even though nothing in Georgia's statutes or regulations require them to do so.

But requiring voters to pay such postal fees has nothing to do with the voter's qualifications to vote. By abridging the right to vote based on whether a voter pays these fees and by discriminating against voters who pay the fees and voters who do not, Defendants have violated both the Twenty-Fourth Amendment and the Equal Protection Clause. The District Court erred in concluding otherwise when dismissing Plaintiffs' claims, and Plaintiffs seek reversal of that decision.

## Course of Proceedings and Disposition in the Court Below

### A. Plaintiffs' Complaint and the Poll Tax Claim[1]

Plaintiffs Black Voters Matter Fund ("Black Voters Matter") and Megan Gordon filed their Original Complaint against Defendants Secretary of State and DeKalb County Board of Voter Registration & Elections on April 8, 2020 in the

[1] For the sake of simplicity, Plaintiffs refer to this claim as the "poll tax claim" even though the Twenty-Fourth Amendment bans the abridgment of the right to vote by reason of failure to pay "any poll tax or *other tax*." U.S. Const. amend. XXIV (emphasis added). Plaintiffs assert that requiring voters to pay postal fees qualifies as a "tax," whether it is a "poll tax" or "other tax."

Northern District of Georgia. (Doc. 1.) On May 11, 2020, additional Individual Plaintiffs and Defendants were added to the case in the First Amended Complaint under the same counts asserted in the Original Complaint. (Doc. 88.) On August 28, 2020, a Second Amended Complaint was filed which eliminated Count 2 of the Original and First Amended Complaints. (Doc. 143.)

Plaintiffs sought to certify a class of Georgia registered voters, as well as a subclass of Georgia registered voters for whom voting by mail is the only real option, such as Plaintiff Penelope Reid, who is elderly and disabled and cannot leave her home to vote. Plaintiffs also sought certification of a defendant class of all 159 Georgia county boards of registrars to the extent the District Court deemed it necessary. (Doc. 143 at 15-22.)

Count 1 ("the poll tax claim") alleged that requiring voters to pay for their own postage to submit absentee ballot applications and absentee ballots constituted a poll tax in violation of the Twenty-Fourth and the Fourteenth Amendment (specifically, the Equal Protection Clause) to the United States Constitution. (Doc. 143 at 3.) Plaintiffs alleged that this requirement was unconstitutional as to the entire class of registered voters, and Plaintiffs alleged in the alternative that the requirement is unconstitutional at least as-applied to the subclass of voters who have no choice but to vote by mail and thus pay the fee. Plaintiffs sought a

declaratory judgment and injunctive relief eliminating the requirement that voters pay postal fees to vote by mail. (*Id*. at 5.)

### B. Plaintiffs' Motion for Preliminary Injunction

On the day the lawsuit was filed, Plaintiffs also moved for preliminary injunctive relief prohibiting Defendants from requiring voters to pay postal fees to cast a ballot by mail. The District Court denied Plaintiffs' motion for preliminary injunction on August 11, 2020. (Doc. 139.) Plaintiffs do not appeal the denial of the motion for preliminary injunction.

### C. Defendants' Motion to Dismiss

While Plaintiffs' motion for a preliminary injunction was pending, Defendants each filed a motion to dismiss based on the Original Complaint on April 23, 2020 and April 30, 2020 respectively. (Docs. 67 and 80.) After Plaintiffs filed the First Amended Complaint, Defendants filed motions to dismiss which restated and incorporated by reference their previous motions to dismiss as well as arguments from their briefs in opposition to Plaintiffs' motion for preliminary injunction on May 11, 2020 and May 18, 2020. (Docs. 90 and 104.)

### D. The District Court's Order on the Motion for Preliminary Injunction and the Motion to Dismiss

On August 11, 2020, the District Court granted the Defendant's motion to dismiss the poll tax claim (in the same order that denied Plaintiffs' motion for a preliminary injunction). (Doc. 139.) The District Court granted the Defendants'

motion to dismiss the poll tax claim because: (1) a voter could forgo his or her statutory right to vote by mail by voting in another, less convenient manner; (2) even though voting in person is materially burdensome or impossible for a sizable segment of the population, "both due to the COVID-19 pandemic and for the elderly, disabled, or those out-of-town," these are not the "specific evils the Twenty-Fourth Amendment was meant to address"; and (3) striking down the poll tax as unconstitutional "would necessitate ruling that the postage requirement on absentee ballots in Georgia *is now and always has been* a poll tax." (Doc. 139 at 68-69.) The District Court denied Defendants' motion to dismiss the *Anderson-Burdick* claim and declined to rule on Plaintiffs' pending motions for class certification. (*Id.* at 51, 89-90.)

After this ruling, Plaintiffs eliminated Count 2, their *Anderson-Burdick* claim,[2] pursuant to the procedures set forth in *Perry v. Schumacher Grp. of Louisiana*, 891 F.3d 954, 958 (11th Cir. 2018). Specifically, Plaintiffs filed a Second Amended Complaint that was identical to the First Amended Complaint

[2] Count 2 ("the *Anderson-Burdick* claim") of the Original and First Amended Complaint had alleged that the postal fee requirement imposed an unjustifiably heavy burden on the right to vote in violation of the First and Fourteenth Amendments to the United States Constitution. (Doc. 1 at 18-19; Doc. 88 at 24-25.)

except that Count 2 was eliminated. (Doc. 143.) For simplicity, Plaintiffs reference the Second Amended Complaint.

### E. This Appeal

On September 9, 2020, Plaintiffs filed the instant appeal solely with respect to the dismissal of Count 1, the poll tax claim. Plaintiffs do not challenge the ruling with respect to the motion for preliminary injunction or the *Anderson-Burdick* claim, which has now been eliminated from the complaint. (*See* Doc. 143.)

## Statement of Facts

The following facts are derived from the allegations of Plaintiffs' Second Amended Complaint, which must be accepted as true on this Rule 12(b)(6) motion to dismiss posture.

Plaintiff Penelope Reid is a registered voter. (Doc. 143 at ¶ 15.) She is 80 years old, disabled, and cannot reasonably leave her home to vote. (*Id*. at ¶ 16.) Plaintiff Megan Gordon is also a registered voter. (*Id*. at ¶ 14.) Both Plaintiffs Reid and Gordon ("the Individual Plaintiffs") wish to vote by mail without having to pay postal fees. (*Id*. at ¶¶ 14-15.)

**Georgia Requires Voters to Pay Postal Fees to Vote by Mail.** Georgia law establishes the right to vote "by mail." O.C.G.A. § 21-2-385; *see also* O.C.G.A. § 21-2-380. To vote by mail, a voter must submit an application for a mail-in ballot. *See* O.C.G.A § 21-2-381.

Defendants require voters to pay the postal fees required for the mail delivery of these ballots to Defendants for counting. (Doc. 143 at ¶ 34.) There do not appear to be any statutes or regulations that require the government to pass these postage costs onto the voter. (*Id.* at ¶ 32.)

Once a voter has acquired postage for their mail-in ballot, they must decide how much postage to place on the envelope. (Doc. 143 at ¶ 41.) Depending on the heaviness of the paper and the length of the ballot, one 55-cent stamp may be insufficient to send a mail-in ballot or an application for a mail-in ballot. (*Id.*) Voters who happen to possess a stamp scale may use these specialized instruments to determine how many stamps to place on their envelopes. (*Id.*) Other voters must take their best guess as to how much postage is required on the ballot. (*Id.*) To ensure their ballot is received and counted in an election, voters must err on the side of affixing extra, potentially unnecessary, postage. (*Id.*)

Based on these allegations, it is plausible that voters must potentially affix up to three stamps—up to $1.65 in postage—to cast a single ballot. (Doc. 143 at ¶ 41.)

**Postage in Other Voting-Related Contexts.** Voters are not required to pay postal fees when sending certain other voting-related mail to Georgia elections officials. (Doc. 143 at ¶ 9.) When voters mail in materials updating their voter registration for list maintenance purposes, Defendants pay the postal fees by

providing postage prepaid envelopes. *See, e.g.*, O.C.G.A. § 21-2-233(b) (requiring officials to send certain voters a "postage prepaid, preaddressed return form" to update their address); O.C.G.A. § 21-2-234(c) ("The confirmation notice shall be a postage prepaid, preaddressed return card"). (Doc. 143 at ¶ 35.) Similarly, other states including Kansas, Iowa, and West Virginia, cover the postal fees for mail-in voters. (*Id.*) (citing K.S.A. § 25-433; I.C.A. § 53.8; W. Va. Code § 3-3-5.) When a sender mails in a postage prepaid envelope, the U.S. Postal Service charges the receiver the postal fees upon delivery.

**Impact of Postal Fee Requirement on Plaintiffs.** The Individual Plaintiffs do not want to pay to vote by mail because they believe that no citizen should have to pay money to vote. (Doc. 143 at ¶¶ 14-15.) Despite her objection to the postal fee requirement, Plaintiff Reid has no option but to pay it if she wishes to exercise her right to vote. Because of her age and her physical ailments, Plaintiff Reid cannot reasonably leave her home to vote. (*Id*. at ¶ 16.) This is true for other Georgia voters who are elderly, disabled, or out of town (and, at present, voters at risk for contracting COVID-19). (*Id.* at ¶ 15.)

The postal fee requirement also impacts the activities of non-partisan civic organizations leading efforts to educate voters and remove barriers to voting. (Doc. 143 at ¶ 13.) Plaintiff Black Lives Matter Fund ("Black Voters Matter") is one such organization. (*Id.*) Black Voters Matter focuses on bringing down barriers to

voting with an emphasis on communities of color. (*Id.*) The organization is particularly active in the rural "Black Belt" of Georgia where communities tend to be the most neglected and have higher rates of poverty than other areas in the state. (*Id.*) Black Voters Matter must divert scarce resources away from voter education and registration efforts to ensure that voters are able to comply with the postal fee requirement. (*Id.*)

**In-Person Voting as an Alternative.** For voters such as Plaintiff Reid who are elderly and have physical disabilities, voting in-person is not an option. (Doc. 143 at ¶ 16.) This also holds true for voters who are temporarily out-of-town. (*Id.* at ¶ 17.) Other voters can only avoid postal fees by voting in-person, defeating the purpose of voting by mail. (*Id.* at ¶ 45.) A voter who chooses to vote in-person must potentially find transportation and take time off from work to exercise their right to vote. (*Id.* at ¶ 42.) Voters also may have to find childcare while they vote in-person. (*Id.*) In addition to these logistical requirements, if the voter casts a ballot at their polling place, they must present valid photo identification. O.C.G.A. § 21-2-417. Except in narrow circumstances, casting a ballot by mail does not require enclosing a copy of photo identification, because identity is verified by the voter's signature. 52 U.S.C. § 21083(b)(2)(A)(ii) (2002).

## STANDARD OF REVIEW

The scope of review is *de novo*. The Court takes the facts alleged in the complaint as true and construes them in the light most favorable to the Plaintiffs-Appellants. *McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 722 (11th Cir. 2002).

## SUMMARY OF ARGUMENT

This case is about whether Georgia elections officials ("Defendants") can require voters to pay a postal fee, which are unrelated to any voter qualifications, to exercise their statutorily guaranteed right to vote "by mail." O.C.G.A. § 21-2-385. Under the Twenty-Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment, the answer is no.

1. The postal fee requirement violates the Twenty-Fourth Amendment. *See* Part I. Under the Twenty-Fourth Amendment, a state imposes an unconstitutional poll tax when it: (1) requires voters to pay "**any poll tax or other tax**," defined as a government "monetary exaction" that is not a "penalty," *Jones v. Governor of Florida*, 975 F.3d 1016, 1037 (11th Cir. 2020) (en banc); (2) the right to vote is "**abridged**," in that an additional "material requirement" is imposed on those who avoid the poll tax, *Harman v. Forssenius*, 380 U.S. 528, 542 (1965); 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, *Jones*, 975 F.3d at 1040 (W. Pryor, C.J., concurring).[3]

Plaintiffs have established all three elements. First, postal fees are a government "monetary exaction" because they go to the government, and no one can seriously argue that postal fees are a "penalty." *Jones*, 975 F.3d at 1038.

Second, the postal fee requirement "abridges" the right to vote because voters who wish to avoid paying postal fees by voting in-person must satisfy additional "material requirements." Specifically, voting in-person requires travel, which defeats the purpose of voting by mail and, for elderly and disabled voters like Plaintiff Penelope Reid, is virtually impossible. *See, e.g.*, *Harman*, 380 U.S. at 542 (free alternative method of voting involved extra travel and imposed a "material requirement").

Third, the postal fee requirement explicitly abridges the right to vote "by reason of" "failure to pay" postal fees and not because of a voter's qualifications. Postal fees do not verify identity, complete a felony sentence, or establish age, U.S. citizenship status, residency, or whether a voter has been declared mentally

[3] Part III-B-2 of the majority opinion written by Chief Judge William Pryor, joined by Judge Newsom and Judge Lagoa, was not signed onto by a majority of judges. For the sake of simplicity, Plaintiffs call this portion of the opinion a "concurrence," though Chief Judge William Pryor also penned a separate formal concurrence. *See Jones*, 975 F.3d at 1049-1050.

incompetent by a judge. *Contra*, *Jones*, 975 F.3d at 1040 (paying fees to complete felony sentence satisfies a voter qualification) (W. Pryor, C.J., concurring).

2. The postal fee requirement also violates the Equal Protection Clause of the Fourteenth Amendment. *See* Part II. The Equal Protection Clause provides that no "State" shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A voting restriction violates the Equal Protection Clause when the right to vote is conditioned on the "payment of any fee," and when the voting restriction has nothing to do with a voter's qualifications. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966); *Jones*, 975 F.3d at 1029. Here, the right to vote by mail is conditioned on the payment of a fee to the U.S. Postal Service, and paying postal fees has nothing to do with a voter's qualifications.

3. The District Court improperly dismissed the Plaintiffs' claim that the postal fee requirement is an unconstitutional poll tax. Specifically, the District Court: (1) impermissibly elevated purpose over text when applying the Twenty-Fourth Amendment; (2) failed to apply the "material requirement" test even after acknowledging that the alternative to paying postal fees, voting in-person, imposed an additional material burden; and (3) erroneously concluded that the postal fee requirement was not unconstitutional in part because it had been around for a long period of time. *See* Part III.

Because the Plaintiffs have properly stated claims under the Twenty-Fourth Amendment and the Equal Protection Clause, the District Court's decision to dismiss the Plaintiffs' poll tax claims should be reversed.

## ARGUMENT

Georgia law guarantees all registered voters the right to cast a ballot by sending in an absentee ballot "by mail." O.C.G.A. § 21-2-385. Though all voters have the right to vote by mail, this right is especially important to elderly and/or disabled voters like Plaintiff Penelope Reid, who cannot leave their homes to vote; out-of-town voters for whom in-person voting is impossible; and, at present, voters who are especially vulnerable to COVID-19 for whom in-person voting is potentially deadly.

Georgia law requires elections officials to make mail-in voting available to all voters, regardless of their circumstances. When it comes to mail delivery, either the sender or the receiver must pay the postal fees. The voter (the sender) can pay the postal fees by buying and affixing stamps, or Georgia elections officials (the receiver) can pay the postal fees as they do with other voting-related mailings by using prepaid postage envelopes, whereby the U.S. Postal Service charges postal fees to the receiver after the mail is delivered.

But Georgia elections officials ("Defendants") have decided to force mail-in voters to cover the postal fees—even though nothing in Georgia's statutes or

regulations require Defendants to do so. Meanwhile, Defendants can and do cover the postal fees when voters submit other voting-related materials required by law. *See, e.g.*, O.C.G.A. § 21-2-233(b) (requiring officials to send certain voters a "postage prepaid, preaddressed return form" to update their address); O.C.G.A. § 21-2-234(c) ("The confirmation notice shall be a postage prepaid, preaddressed return card.").

As discussed below, requiring voters to pay money to cast a ballot is unconstitutional when the payment of such fees has nothing to do with a voter's qualifications—even when these fees apply only to one method of voting.

Part I establishes why Georgia's scheme violates the Twenty-Fourth Amendment's ban on "abridg[ing]" the right to vote "by reason of" failing to pay a "tax." U.S. Const. amend. XXIV; *see Harman v. Forssenius*, 380 U.S. 528 (1965). Part II demonstrates how Georgia's scheme violates the Equal Protection Clause by conditioning the right to vote by mail on the "payment of a fee," *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966), when paying postal fees has nothing to do with a voter's qualifications. Part III briefly addresses the District Court's application of these constitutional principles and demonstrates the fundamental flaws in its cursory reasoning.

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

As discussed below, requiring voters to pay up to $1.65 in fees in order to exercise their statutory right to vote by mail has nothing to do with a voter's qualifications and abridges the right to vote in violation of the Twenty-Fourth Amendment.

The Twenty-Fourth Amendment provides:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, 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 it: (1) requires voters to pay "**any poll tax or other tax**," defined as a government "monetary exaction" that is not a "penalty," *Jones v. Governor of Florida*, 975 F.3d 1016, 1037 (11th Cir. 2020) (en banc); (2) the right to vote is "**abridged**," in that an additional "material requirement" is imposed on those who avoid the poll tax, *Harman v. Forssenius*, 380 U.S. 528, 542 (1965); 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, *Jones*, 975 F.3d at 1045 (W. Pryor, C.J., concurring).[4] All three elements are satisfied here.

### A. Postal Fees Are a "Tax," Not a "Penalty," for Purposes of the Twenty-Fourth Amendment

First, in order to demonstrate a Twenty-Fourth Amendment violation, the right to vote must be abridged by reason of failure to pay "**any poll tax or other tax**." The "term 'tax' is a broad one, but it does not cover all monetary exactions imposed by the government." *Jones v. Governor of Florida*, 975 F.3d 1016, 1037 (11th Cir. 2020) (en banc). As the Supreme Court explained, "the essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012). A government-required payment ceases to be a tax and becomes a "penalty" when it is imposed as a "punishment for an unlawful act or omission." *Jones,* 975 F.3d at 1038 (quoting *Sebelius*, 567 U.S. at 567). "In short, if a government exaction is a penalty, it is not a tax." *Id.* The amount of the tax is irrelevant: neither the text of the Twenty-Fourth Amendment nor the Supreme Court's application of the amendment in *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) suggests otherwise.

Here, the payment of up to $1.65 to the U.S. Postal Service easily satisfies the definition of "tax." The payment is a "monetary exaction imposed by the

[4] As noted above, Part III-B-2 of the opinion was not signed onto by a majority of judges, so Plaintiffs refer to this section as a concurrence for the sake of simplicity.

government" on mail transactions, *Jones,* 975 F.3d at 1037, and paying these fees yields "at least some revenue" to the U.S. Postal Service in support of its mail delivery services, *Sebelius*, 567 U.S. at 564. *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 though "'[t]he difference between a tax and a penalty is sometimes difficult to define,'" *Jones*, 975 F.3d at 1038 (quoting *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)), no one would seriously argue that the cost of postage stamps is a "penalty" to punish unlawful behavior.[5]

In briefing below, the Secretary repeatedly floated a red herring, emphasizing that postage stamps are a tax imposed by the U.S. Postal Service, not Georgia, because the money goes to the U.S. Postal Service. (Doc. 51 at 19 n.21 ("the Secretary does not impose any postage fee, the USPS does."); *see also* Doc. 67-1 at 13; Doc. 87 at 2.) This assertion is both irrelevant and misleading. Irrelevant, because the text of the Twenty-Fourth Amendment is indifferent about

[5] In the Secretary's motion to dismiss, the Secretary argued that postage stamps did not meet Black's Law Dictionary's definition of "poll tax," defined as "a fixed tax levied on each person within a jurisdiction." (Doc. 51 at 19 (citing Black's Law Dictionary 1498 (8th ed. 2004).) In response, Plaintiffs correctly pointed out that the Secretary was using the wrong "poll tax" definition. (Doc. 84 at 16-17.) As Plaintiffs explained, "poll tax" as used in Black's Law Dictionary actually refers to something unrelated to voting, namely a "direct tax" or "capitation," and that postage stamps satisfy the broad definition of "tax" in Black's Law Dictionary. (*Id*.) The Secretary's reply brief did not dispute that his opening brief used the wrong "poll tax" definition.

which governmental entity the taxes are going to: the text prohibits abridgment for failure to pay "*any* poll tax or other tax." U.S. Const. amend. XXIV (emphasis added). "Any" means "any": it is unconstitutional regardless of whether Defendants condition the right to vote on the payment of a tax to Defendants, the United States, or some other governmental entity.

The Secretary's assertion is also misleading. Defendants are statutorily required to make voting by mail available to all voters. Thus, the money paid by voters essentially goes to Georgia elections officials, because voters paying the postal fee are defraying the postal fees that Defendants would have paid to the U.S. Postal Service to deliver those ballots. The legal analysis would be the same if, for example, Defendants directly paid the U.S. Postal Service by using postage prepaid envelopes, but then required mail-in voters to reimburse Defendants by paying $1.65 directly to Defendants. Either way, voters' payment of the tax financially benefits Defendants. In these circumstances, constitutional liability cannot possibly turn on whose hands the money technically reaches first.

For these reasons, Georgia's postal fee requirement constitutes a "poll tax or other tax." U.S. Const. amend. XXIV.

### B. Requiring Voters to Pay Postal Fees "Abridges" the Right to Vote Because the Alternative Imposes Additional "Material Requirements"

Next, the right to vote must be "**abridged**," i.e., "reduced or diminished." *Abridge*, Black's Law Dictionary (11th ed. 2019). The Twenty-Fourth Amendment does not solely prohibit total disenfranchisement. As the Supreme Court has explained, the Twenty-Fourth Amendment "does not merely insure that the franchise shall not be 'denied' by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied or abridged' for that reason." *Harman*, 380 U.S. at 540.[6] After all, the Twenty-Fourth Amendment "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed." *Id.* at 540-541 (citation omitted).

A voting requirement can unconstitutionally abridge the right to vote even if the state offers some free voting alternatives. To determine whether the right to vote is "abridged," "it need only be shown that" the additional requirements imposed on voters who exercise the free alternative "imposes a material requirement solely upon those who refuse . . . [to] pay[] a poll tax." *Harman*, 380 U.S. at 541. For example, in *Harman*, Virginia voters could either pay the $1.50

[6] *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 abridgment standard. 975 F.3d 1016.

poll tax or pay nothing and submit a free certificate of residence. To do the latter, voters could "either obtain the certificate from local election officials or prepare personally 'a certificate in form substantially' as set forth in the statute," which "must then be filed 'in person, or otherwise' with the city or county treasurer.'" *Id* at 541. This had to be done six months before the relevant election. *Id.* But because going the certificate of residence route was a "plainly cumbersome procedure," *id.*, the Supreme Court found that the certificate of residence method imposed an additional "material requirement" on voters who did not want to pay the tax. *Id.* at 542. Despite the "free" alternative available, Virginia's scheme "abridged" the right to vote in violation of the Twenty-Fourth Amendment.

The Supreme Court, however, quickly clarified that "cumbersome" is not the standard, and that the standard for what constitutes "material requirement" is low. After finding the Virginia scheme "cumbersome," the Court explained that "[t]he requirement imposed upon those who reject the poll tax method of qualifying would not be saved *even if* it could be said that *it is no more onerous*, *or even somewhat less onerous*, than the poll tax." *Harman*, 380 U.S. at 542 (emphasis added). Moreover, an additional requirement is "material" even if it is "*equivalent or milder*" than paying a $1.50 poll tax. *Id.* (emphasis added). After all, the text of the Twenty-Fourth Amendment simply says "abridge"—it does not say "abridge a lot." Accordingly, "*[a]ny* material requirement imposed upon the federal voter

solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-Fourth Amendment and must fall under its ban." *Id.* (emphasis added).

The low standard for abridgment is satisfied here. In this case, there are two ways to avoid paying the $1.65 fee. Voters can "personally deliver" the sealed absentee ballot by travelling to the office of the "board of registrars or absentee ballot clerk," O.C.G.A. § 21-2-385(a), or they can cast a ballot in-person at a polling place which additionally requires displaying photo identification, O.C.G.A. § 21-2-417. But both alternatives impose additional "material requirements" upon those who wish to avoid paying $1.65. Both options force absentee voters to travel outside the home, defeating the whole purpose of voting by mail.[7] In *Harman*, the free certificate of residence similarly required voters potentially to make an additional trip to "local election officials" to obtain a certificate of residence,

[7] After the lawsuit was filed, the State Election Board passed an emergency rule allowing, but not requiring, counties to create drop boxes where voters can drop off their absentee ballots. State Election Board Rule 183-1-14-0.8-.14 (found at https://sos.ga.gov/index.php/elections/state_election_board). This alternative similarly requires travel.

and/or draft one from home and make an additional trip to deliver it to the "city or county treasurer."[8] 380 U.S. at 541.

If such additional travel was deemed material in *Harman*—even if such travel was undoubtedly easy for some or most voters at the time—similar additional travel is material here. Indeed, the Supreme Court has suggested in the Equal Protection context (discussed in Part II) that in-person voting is not a "comparable alternative means to vote" when compared to absentee voting. *See Amer. Party of Tex. v. White*, 415 U.S. 767, 795 (1974) (excluding Socialist Party from absentee ballot potentially unconstitutional when there is no "comparable alternative means to vote," in a case where voters could still vote for the Socialist Party on in-person ballots).

Moreover, the additional travel requirement is material even if it is as easy, or even easier, than simply paying up to $1.65 in postal fees. *See Harman*, 380 U.S. at 542 (requirement is material if it is "no more onerous, or even somewhat less onerous, than the [$1.50] poll tax."); *id.* (requirement is material even if it is "equivalent or milder" than paying a $1.50 poll tax). Many Georgia voters wish to avoid traveling to the polls due to the significant imposition on their time,

[8] Indeed, the voter in *Harman* could avoid trips altogether by drafting one from home and mailing it to the city or county treasurer—and even that was deemed material.

transportation logistics, or the need to make childcare arrangements (or, at present, avoiding COVID-19). Many of these voters would probably just prefer to pay the unconstitutional postal fee (and for voters like Plaintiff Reid who cannot vote in-person, they have no choice but to pay the fee). But funneling voters into paying these fees, no matter how small, runs headlong into the very problem that the Twenty-Fourth Amendment seeks to prevent. *See, e.g.*, *id.* at 542 (poll tax unconstitutional even if, "[f]or many, it would probably seem far preferable to mail in the poll tax payment"). Under the plain text of the Twenty-Fourth Amendment, any abridgment is too much abridgment.[9]

Because avoiding the payment of up to $1.65 in postal fees by voting in-person involves additional material requirements that voters paying the $1.65 postal fees would not otherwise have to face, Georgia's postal fee requirement "abridges" the right to vote under the Twenty-Fourth Amendment.

[9] The only real distinction between the certificate of residence procedure in *Harman* and the alternative procedure here is the requirement that the certificate be filed six months before the relevant election. But again, "cumbersome" is not the standard, and this mere deadline cannot be the magic line that divides material requirements from immaterial requirements.

### C. Postal Fees Abridge the Right to Vote "By Reason Of" the Voter's "Failure to Pay" Postal Fees, Which Have Nothing to do with Voter Qualifications

Lastly, to establish a Twenty-Fourth Amendment violation, the right to vote must be abridged "**by reason of**" failure to pay such a tax, and not some other reason, like the voter's failure to satisfy a voter qualification. Specifically, the right to vote is denied "by reason of" failing to pay a tax when the failure to pay the tax is itself the core "justification" for the denial, *Jones*, 975 F.3d at 1045 (W. Pryor, C.J., concurring), as opposed to some other justification such as failure to satisfy a voter qualification. *See id.* at 1040 ("A financial obligation that indirectly burdens the right to vote is permissible under the Twenty-Fourth Amendment when the State has a constitutionally legitimate reason for imposing the voter qualification that creates the indirect burden."). When a state enforces a "legitimate voter qualification for constitutionally legitimate reasons, it does not violate the Twenty-Fourth Amendment—even if the qualification sometimes denies the right to vote because a person failed to pay a tax." *Id*. at 1045.[10]

[10] Judge Jordan's dissent interpreted "by reason of" as referring to "but-for causation," *see Jones*, 975 F.3d at 1105 (Jordan, J., dissenting), and out of an abundance of caution, Plaintiffs do not waive the argument that Judge Jordan's dissent was correct. But it ultimately doesn't matter which standard applies in this case since Plaintiffs prevail under Chief Judge William Pryor's narrower standard.

Thus, for example, Florida requires those convicted of a felony to pay the remaining fines and fees of a felony sentence before they can be reenfranchised, but such a requirement does not deny the right to vote "by reason of" failure to pay the fines and fees. Instead, the requirement prevents reenfranchisement "by reason of" failure to satisfy a "legitimate voter qualification"—that is, the requirement that any felony sentence be completed. *Jones*, 975 F.3d at 1045 (W. Pryor, C.J., concurring). Similarly, in *Gonzalez v. Arizona*, Arizona's requirement that voters obtain photo identification to vote did not deny the right to vote "by reason of" failure to buy the documentation needed to obtain photo identification (e.g., birth certificates). 677 F.3d 383, 408 (9th Cir. 2012) (en banc). Instead, the right to vote was limited "by reason of" failure to satisfy a "legitimate voter qualification"—the verification of identity. *Jones*, 975 F.3d at 1044-45 (W. Pryor, C.J., concurring).

Here, Plaintiffs easily demonstrate that the challenged restriction abridges the right to vote "by reason of" failure to pay the postal fees. To state the obvious, the postal fee requirement explicitly requires payment of postal fees. Thus, the sole "justification" for preventing the voter from voting by mail is precisely because the voter is not covering up to $1.65 in postal fees that Defendants would otherwise have to pay in order to make voting by mail available to Georgia voters.

Furthermore, the abridgment in this case does not occur because the voter failed to satisfy some voter qualification. That's because the ability to pay $1.65 in

postal fees has nothing to do with a "legitimate voter qualification." *Jones*, 975 F.3d at 1045 (W. Pryor, C.J., concurring). Paying a $1.65 postal fee does not complete a felony sentence or serve any rehabilitative or criminal justice related purpose. *See, e.g.*, *id*. at 1045-46. Paying a $1.65 postal fee does not prove identity like photo identification. *See, e.g.*, *Gonzalez*, 677 F.3d at 409. Paying a $1.65 postal fee does not prove United States citizenship, whether the person is age 18 or older, whether the voter is a resident of Georgia, or whether the voter has been declared mentally incompetent by a judge. *See* Ga. Const. Art. 2, § 1, ¶¶ II-III (listing voter qualifications).

If there is any requirement associated with voting by mail that has to do with a voter's qualifications, it is the requirement that the absentee voter sign their ballot envelope. The signature is used to verify their identity, O.C.G.A. § 21-2-385, just like photo identification verifies identity for in-person voters, O.C.G.A. § 21-2-417. But once a mail-in voter has verified their identity by signing the absentee ballot envelope, Defendants cannot then condition whether to accept such ballots based on whether the voter covers the subsequent $1.65 postal fee that Defendants themselves would have to pay the U.S. Postal Service to have the ballot delivered if Defendants used postage prepaid envelopes. Defendants thus prevent voters from casting a ballot by mail "by reason of" their failure to pay a "tax." U.S. Const. amend. XXIV.

* * *

In sum, Georgia's postal fee requirement violates the plain text of the Twenty-Fourth Amendment. First, Georgia's postal fee requirement requires voters to pay a "tax" by paying fees to the U.S. Postal Service, which shifts the financial burden of mail delivery onto the voters and saves Defendants money. Second, the requirement "abridges" the right to vote, because voters who want to avoid the tax must satisfy the additional material requirement of in-person travel, defeating the whole purpose of absentee voting. (And for voters like Plaintiff Reid, voting in-person is not just material but impossible.) Third, the right to vote is abridged in this way precisely "by reason of" the voter's "failure to pay" such postal fees, and not for any other reason like a failure to satisfy voter qualifications. Accordingly, Plaintiffs' complaint has stated a Twenty-Fourth Amendment claim.

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

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, § 1. A voting restriction violates the Equal Protection Clause when the right to vote is conditioned on the "payment of any fee," and when the voting restriction has nothing to do with a voter's qualifications. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966). Here, Georgia law guarantees the right to vote "by mail." O.C.G.A. § 21-2-385.

But the exercise of that right is conditioned on the voter shouldering the costs of mail delivery by paying a fee to the U.S. Postal Service so that Defendants don't have to. Paying postal fees has nothing to do with a voter's qualifications. Accordingly, Plaintiffs have stated an Equal Protection claim.

### A. Requiring Mail-In Voters to Pay $1.65 in Postal Fees Conditions the Right to Vote on the "Payment of a Fee"

First, a voting restriction violates the Equal Protection Clause if it conditions the right to vote on the "affluence of the voter or payment of any fee." *Jones v. Governor of Florida*, 975 F.3d 1016, 1031 (11th Cir. 2020) (en banc) (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966)). "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper*, 383 U.S. at 665. Drawing lines based on fee payments is unconstitutional "regardless of whether a voter [can] pay the [fee], . . . whether a voter has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." *Id.* at 668.

Here, Defendants require voters to pay up to $1.65 in postal fees to exercise their statutory right to cast a ballot by mail. This requirement draws a line between voters who pay up to $1.65 in postal fees and voters who do not pay the fee. Thus, the right to vote is unconstitutionally conditioned on the "payment of any fee." *Harper*, 383 U.S. at 666.

Both Defendants and the District Court emphasized the fact that there is an alternative, free—and they imply, easy—way of voting without paying a fee: voting in-person. But just as this option did not cure the Twenty-Fourth Amendment violation, this option also does not cure the Equal Protection violation. Because "[t]he degree of the discrimination is irrelevant," *Harper*, 383 U.S. at 668, discrimination in voting by mail is still unconstitutional even if such discrimination is absent for in-person voting.

Furthermore, the Supreme Court has expressly held that drawing impermissible lines specifically amongst absentee voters can violate the Equal Protection Clause even if no such discrimination exists for in-person voting. In *American Party of Texas v. White*, the Supreme Court held that "permitting absentee voting by some classes of voters and denying the privilege 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." 415 U.S. 767, 795 (1974). Thus, in *White*, the Supreme Court found that the exclusion of the Socialist Party on absentee ballots potentially violated the Equal Protection Clause, even though there the Socialist Party was included on in-person ballots. *See id*. After all, there would be no question of an Equal Protection violation if, for instance, Defendants prohibited African-

American voters from absentee voting, even if voters of all races were permitted to cast a ballot in-person by traveling to the polls.

Here, Defendants restrict mail-in absentee voting solely to those who pay up to $1.65 in postal fees. They permit absentee voting by "some classes of voters," i.e., those who pay up to $1.65 in fees, while "denying the privilege to other classes of otherwise qualified voters," i.e., those who do not pay $1.65 in fees. *White*, 415 U.S. at 795. Under the principle set forth in *White*, such impermissible line drawing violates the Equal Protection Clause, even though such voters can still vote for free in-person (except for voters like Plaintiff Reid and out-of-town voters for whom in-person voting is impossible).

### B. Postal Fees Have Nothing to Do with a Voter's Qualifications

Second, a restriction that is premised on the payment of a fee is unconstitutional if it has nothing to do with a voter's qualifications. *Jones*, 975 F.3d at 1030 (citing *Harper*, 383 U.S. at 668). Furthermore, whether the justifications for such a fee is "rational," e.g., because it saves the government money, plays no role in the Equal Protection analysis when the fee has nothing to do with voter qualifications. *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." (emphasis added)).

As set forth *supra* Part I.C., the ability to pay a $1.65 postal fee has nothing to do with a voter's qualifications. *See Harper*, 383 U.S. at 670 ("wealth or fee paying has, in our view, no relation to voting qualifications"). And even if saving Defendants money were a rational interest, rational government justifications are irrelevant when it comes to fee requirements. Thus, making mail-in voters pay fees simply because Defendants don't want to violates the Equal Protection Clause.

## III. THE DISTRICT COURT'S REASONING WAS FUNDAMENTALLY FLAWED

The District Court's dismissal of Plaintiffs' claims under Rule 12(b)(6) is reviewed *de novo*. *McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 722 (11th Cir. 2002). Nonetheless, it is worth noting three fundamental errors in the District Court's reasoning.

First, the District Court elevated purpose over text, violating a cardinal rule of legal interpretation. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 68, at 396 (2012) ("it is high time that . . . uses of *intent* in questions of legal interpretation be abandoned."). Specifically, the District Court recognized that while "voting in person is materially burdensome," these burdens "are not the specific evils that the Twenty-Fourth Amendment was *meant* to address." (Doc. 139 at 68-69 (emphasis added).) But courts examine text, not divined purpose. If requiring voters to pay up to $1.65 to vote by mail violates the plain text of the Twenty-Fourth Amendment, which it does, it violates the Twenty-

Fourth Amendment, end of story. It doesn't matter whether the 1964 framers of the Twenty-Fourth Amendment subjectively contemplated the possibility that the provision would apply to requiring voters to pay up to $1.65 in postal fees to vote by mail. *See generally Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1737 (2020); *see also Jones v. Governor of Florida*, 975 F.3d 1016, 1046 (11th Cir. 2020) (legislative intent behind Twenty-Fourth Amendment is irrelevant) (W. Pryor, C.J., concurring).[11]

Second, though the District Court acknowledged the "material requirement" test of *Harman*, it did not even apply it. Instead, it dismissed the Twenty-Fourth Amendment claim because a Georgia voter could vote "without undertaking any extra steps besides showing up at the voting precinct and complying with generally applicable election regulations[ ]." (Doc. 139 at 68.) But the whole point of the

[11] To the extent the District Court's language implies that requiring the payment of postal fees must in some way be connected to intentional or historical racial discrimination, such an implication would be wrong. While it is undeniable that the Twenty-Fourth Amendment was adopted in large part to address the evils of racism and Jim Crow laws, the text of the Twenty-Fourth Amendment does not require proof of such discrimination to strike down a poll tax. To be sure, *Harman* acknowledged that the Virginia poll tax, passed in 1902, was "born of a desire to disenfranchise the Negro," 380 U.S. at 543, but it did not suggest this factor must be present. Indeed, when invalidating Virginia's poll tax for state elections one year later in *Harper*, the Supreme Court expressly declined to opine on whether the more recent iteration of the poll tax was motivated by racial discrimination. 383 U.S. at 666 n.3. Thus, the motivations or intent behind a challenged voter restriction should play no role in evaluating its constitutionality.

abridgment analysis is to assess whether the "extra steps" involved in evading the poll tax impose a "material requirement." As demonstrated above, travel imposes a material requirement, even if it is easy for many voters and "less onerous[] than" paying $1.65 in postal fees. *Harman v. Forssenius*, 380 U.S. 528, 542 (1965). Indeed, the District Court even "recognize[d] that voting in person is materially burdensome," (Doc. 139 at 68), and still inexplicably declined to find unconstitutional abridgment, in direct contravention of *Harman*'s "material requirement" standard.

Furthermore, the District Court's casual observation that voters who avoid paying postal fees must "comply[] with generally applicable election regulations" when voting in-person is irrelevant. (Doc. 139 at 68.) In *Harman*, the alternative certificate of residence requirement was also "generally applicable" to all voters and Virginia still violated the Twenty-Fourth Amendment. 380 U.S. at 533. Similarly, in *White*, the fact that all voters could still cast a ballot for the Socialist Party when voting in-person did not excuse the potentially unconstitutional exclusion of the Socialist Party on the absentee ballot. 415 U.S. at 795. Complying with these "generally applicable" election regulations imposes additional material requirements on voters who wish to avoid paying postal fees, and thus the postal fee requirement is unconstitutional.

Third, and perhaps most troubling, the District Court concluded that there was purportedly no constitutional violation because the postal fee requirement has been around for a long time. (Doc. 139 at 69 ("accepting Plaintiffs' argument under *Harman* and *Harper* would necessitate ruling that the postage requirement on absentee ballots in Georgia *is now and always has been* a poll tax, even before the pandemic, because voting in person presents a material burden for some segment of the population.") (emphasis in original).) The Court added that it "is not prepared under these circumstances to make such a ruling under the Twenty-Fourth Amendment framework." (*Id.*)

An unconstitutional practice does not become constitutional over time by adverse possession. Contrary to the District Court's reasoning, when the government's practice is found to be unconstitutional regardless of its longevity of use, courts must in fact be "prepared under these circumstances to make such a ruling" rather than allow the unconstitutional practice to continue. *See, e.g., United States v. Comstock*, 560 U.S. 126, 137 (2010) ("recogniz[ing] that even a longstanding history of related federal action does not demonstrate a statute's constitutionality"); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970) ("no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it"). This Court should not repeat the District Court's errors.

## CONCLUSION

Georgia law guarantees all registered voters the right to cast a ballot from home by sending in a ballot "by mail." O.C.G.A. § 21-2-385(a). State law requires Georgia elections officials to make this voting method available, but Defendants instead require Georgia voters to pay up to $1.65 in postal fees so that Defendants don't have to. But paying $1.65 in postal fees has nothing to do with a voter's qualifications. Thus, and for the above stated reasons, Plaintiffs have stated claims under the Twenty-Fourth Amendment and the Equal Protection Clause. The District Court's decision to grant Defendants' motion to dismiss with respect to such claims should therefore be reversed.

Respectfully submitted this 5th day of November, 2020.

/s/ Sean J. Young

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## 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 8,443 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 5th day of November, 2020.

**/s/ Sean J. Young**

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## 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: November 5, 2020

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