IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BLACK VOTERS MATTER FUND, and MEGAN GORDON, on behalf of herself and all others similarly situated, Plaintiffs, vs. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia; DEKALB COUNTY BOARD OF REGISTRATION & ELECTIONS, and all others similarly situated, Defendants.	Civil Action No. 1:20-cv-1489-AT

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT RAFFENSPERGER'S MOTION TO DISMISS

Defendant Secretary of State's Office ("the Defendant") moves to dismiss this case for two overarching reasons: 1) on the merits, that the complaint purportedly fails to state a claim upon which relief may be granted; 2) that Plaintiffs lack standing. COVID-19 is ravaging the state and voters should not have to choose between risking deadly infection to vote in-person and risking deadly infection to buy stamps at a Post Office. For these reasons and more, Defendant's motion should be denied.

ARGUMENT

I. PLAINTIFFS HAVE STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Defendant argues that Plaintiffs have not stated a claim for which relief can be granted, adopting his arguments from his brief in opposition to plaintiffs' motion for preliminary injunction ("MPI"). Doc. 67-1 at 23. Plaintiffs do the same with respect to their moving brief and reply, as well as arguments raised during the hearing on April 24, 2020. Doc. 75. Plaintiffs will strive not to repeat prior arguments.

Part A addresses Plaintiffs' poll tax claim. Here, Plaintiffs will explain the difference between the (1) facial and (2) as-applied versions of the claim; (3) demonstrate in detail how voter ID cases support Plaintiffs' poll tax claim; and

(4) respond to Defendant's "poll tax definition" argument, Doc. 51 at 22-24. These arguments together demonstrate that Plaintiffs have stated poll tax claims upon which relief can be granted.

Part B will explain how Plaintiffs have stated an *Anderson-Burdick* claim upon which relief can be granted, and also break down the facial and as-applied distinction.

Part C will address Defendant's federalism arguments, which he appears to argue requires the dismissal of both claims. Doc. 67-1 at 22-23.

A. Poll tax claim (Count I)

Right now, this case is about the COVID-19 pandemic, which imperils practically all Georgia voters who cannot vote in-person or buy stamps without exposing themselves to a deadly virus. This case is also about the burdens ordinarily faced by marginalized voters who cannot easily get stamps or vote in-person.

Plaintiffs' facial claim does not depend upon the pandemic or changing circumstances as a strict doctrinal matter. Plaintiffs' as-applied poll tax claim, however, focuses directly on the plight of vulnerable voters, which currently includes nearly all voters during the COVID-19 pandemic. Both claims achieve the same ends.

1. Facial poll tax claim

Plaintiffs' facial poll tax claim is premised on the proposition that the poll tax workarounds—here, voting in person—impose at least a "material requirement" on voters generally.

This facial attack is patterned after *Harman v. Forssenius*, 380 U.S. 528, 542 (1965). While courts were not using the formal "facial" versus "as-applied" framework in 1965, *Harman* was essentially a facial challenge. It was brought on behalf of "a broad class of citizens," *id.* at 537, and it resulted in the poll tax being struck down in all circumstances, *id*. at 533; 554. *Harman* did not examine whether the certificate of residence workaround was "cumbersome" for one voter versus another. Instead, the Court found the certificate of residence workaround to be "cumbersome" generally, and "constitutes an abridgment of [the] right to vote by reason of failure to pay the poll tax." *Id.* at 541-42.

The standard, of course, is "materiality." A requirement is "material" even if it "no more onerous, or even somewhat less onerous," than paying $1.50. *Id.* at 542. This standard is low, because the Twenty-Fourth Amendment is an inexorable command. *Id.* at 542 ("For federal elections, the poll tax is *abolished absolutely* as a prerequisite to voting, and no equivalent or milder substitute may be imposed." (emphasis added)). In addition, poll taxes were considered so odious and racist, *id.*

at 539-40, that they needed to be pulled out, root and branch. That is why the Twenty-Fourth Amendment prohibits the "abridgment"—not just the denial—of the right to vote. *Id.* at 540-41. The amendment says voting "shall not be abridged," it does not say voting "shall not be substantially abridged," as Defendant's arguments imply.

This historical background and the text of the amendment demonstrates why *Harman* used language emphasizing how low the material burden requirement is. *Id.* at 541 (after tracing history of poll tax, noting that "it *need only* be shown that it imposes a material requirement upon those who refuse . . . [to] pay[] a poll tax.") (emphasis added); *id.* at 542 (poll tax "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" (emphases added)). *Any* abridgment on the basis of failure to pay a poll tax is too much abridgment.

For these reasons, efforts to vote in person—which Defendant boils down to "[g]as, time, or bus or rideshare fares", Doc. 51 at 2[1]—are still "material" because

[1] Conflating different legal concepts together, the Secretary also argues that "postage" is not a "material burden," Doc. 51 at 2, but the affordability of the poll tax itself is irrelevant. In addition, the Secretary argues that "allowing the use of mail without pre-paid postage is [not] a material burden on voting." *Id.* at 28. Plaintiffs' will not repeat arguments related to the alleged U.S. Postal Service policy. Doc. 57 at 10-11.

they are "no more onerous, or even somewhat less onerous, than the poll tax" of $0.55 to $1.60. *Harman*, 380 U.S. at 542.

2. As-applied poll tax claim

Plaintiffs' poll tax claim also includes an alternative as-applied challenge, made on behalf of all voters for whom evading the poll tax, i.e., voting in-person, is a material burden. During this pandemic, this practically includes all voters.[2] The only realistic option to vote for many if not most voters right now is to vote by mail, but the state cannot condition access to the franchise on payment of a fee.

Plaintiffs' as-applied poll tax challenge survives even after the pandemic is over. The vulnerable voters covered by the claim's umbrella includes particular groups of voters, like the elderly and disabled, for whom voting in person is difficult or impossible (and most certainly "material"). The only real way for these vulnerable voters to vote is to pay for postage.

[2] The Secretary will probably argue that Plaintiffs did not spell out these as-applied legal theories with precision in their Complaint. That is irrelevant even if true. *See Frank v. Walker*, 19 F.3d 384, 386-87 (7th Cir. 2016) (legal theory challenging voter ID law as applied to certain voters was not foreclosed by the fact that the complaint did not reference it, even where as-applied challenges were raised years after the complaint). Plaintiffs' counsel also described this as-applied challenge at the April 24 hearing. *See* Doc. 75 at 119:16-22; 150:21-23; 151:25-152:6; 16:3-11; 17:7-10.

3. Voter ID cases support Plaintiffs' poll tax claims

Defendant relies on a string cite of Voter ID cases to argue that paying for postage is "indirect" and thus not a poll tax. Doc. 51 at 22. These cases demonstrate the opposite.

U.S. Supreme Court. Defendant notably omits *Crawford v. Marion Cnty. Elect. Bd.*, 553 U.S. 181 (2008) from his string cite. In *Crawford*, the Supreme Court all but said that "requir[ing] voters to pay a tax or a fee to obtain a new photo identification" to satisfy a voter ID law would be an unconstitutional poll tax. *Id.* at 198 (citing *Harper v. Va. Bd. of Elec.*, 383 U.S. 663 (1966)). Thus, Indiana's voter ID law was not unconstitutional in this respect because "the photo identification cards issued by Indiana's BMV are . . . free." *Id.* Here, postage is required and postage costs money, so postage is an unconstitutional poll tax under the reasoning of *Crawford*. In addition, it makes no difference whether a voter already has stamps, because *Crawford* explained that a poll tax is a poll tax even if "most voters already possess a valid driver's license." *Id.*

Of course, *Crawford* held that, in the *Anderson-Burdick* context, "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."

Id. See infra Part I.B. (discussing this argument as it relates to *Anderson-Burdick*). But given the Constitution's strict prohibition on poll taxes, the similar burdens of voting in-person *do* constitute a "material requirement" that voters should not have to choose to evade the poll tax.

Fifth Circuit. Defendant cites *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc),[3] but that decision also affirms Plaintiffs' proposition that requiring a document to vote is a poll tax when that document costs money precisely because of what *Crawford* said. *See id.* at 266-67 (voter ID "statute would be invalid under *Harper*'s Fourteenth-Amendment poll tax analysis 'if the State *required* voters to pay a tax or a fee to obtain a *new* photo identification'" (quoting *Crawford*, 553 U.S. at 198)). Because Texas's voter ID law allowed voters to present an "Election Identification Certificate" ("EIC"), which in turn was free, *id.* at 225, the EIC was not a poll tax. Here, however, Georgia requires a postage stamp which is not free.

Defendant seems to be relying on the part of *Veasey* which provides that there is no poll tax claim when an "underlying document" like a birth certificate costs money, which the court characterized as an "indirect cost." *Id.* at 266-67. The

[3] The *Veasey* case cited by the Secretary, 796 F.3d 487 (5th Cir. 2015), was the panel decision vacated by the en banc decision cited here.

law did not require voters to show birth certificates, but birth certificates were required to obtain the photo ID that the law *did* require of voters. The court's reasoning seemed based on the fact that birth certificates are two steps removed from voting in this respect. *Id.* at 266. But postage stamps, like photo identification, *are* explicitly required (i.e., one step removed from voting), and stamps cost money.[4]

Furthermore, *Veasey*'s holding was premised in part on the notion that photo identification is connected to voter qualifications, i.e., identity. *See Veasey*, 830 F.3d at 266 (photo ID helps assess "the eligibility and qualifications of voters"). Here, a postage stamp has nothing to do with a voter's qualifications. *Harper*, 383 U.S. at 666. Nor does it have anything to with protecting the integrity or reliability of the electoral process. *See* Doc. 75 at 108:15-109:10. And even if the postage requirement *did* serve some kind of "evidentiary function" towards establishing qualifications, it would still be unconstitutional. *Harman*, 380 U.S. at 544.

Lastly, *Veasey* concluded by saying that the state "does not offer Texas voters a choice between paying a fee and undergoing an onerous procedural

[4] For the record, Plaintiffs as well as the Wisconsin and Missouri Supreme Courts, *see infra*, disagree with *Veasey*'s proposition that there is no poll tax when an underlying document costs money. But this disagreement is irrelevant to this case.

process," because "[a]ll voters must make a trip to the DPS, local registrar, county clerk, or other government agency at some point to receive qualifying photo identification." *Veasey*, 830 F.3d at 267. This analysis was in response to an inchoate argument made by the plaintiffs and is not entirely clear. *Veasey* appeared to say that the process of obtaining a *paid* photo ID (a poll tax), which involved a trip to the driver's license agency and handing over money, was as burdensome as the workaround process of obtaining a *free* photo ID (the EIC), which also involved the same trip to the driver's license agency. *Id.* Thus, the voter who is at the driver's license agency can generally evade the poll tax just by asking for an EIC instead of a driver's license on the spot.

If this interpretation is true, then that would only support Plaintiffs' claim. When a Georgia voter receives their absentee ballot packet, the packet does not come with two large absentee ballot envelopes—one with prepaid postage, and one without—and then all a voter has to do is pick the prepaid one if they refuse to pay the poll tax. Instead, evading the poll tax currently requires voters to expose themselves to the COVID-19 virus by voting in person or buying a stamp.

Ninth Circuit. Defendant's reliance on *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), is also misplaced. The Ninth Circuit held that Arizona's Voter ID

law did not impose a poll tax,[5] but, similar to *Veasey*, rooted its holding in the principle that photo identification helps establish a voter's qualifications. *Id.* at 409 ("any payment associated with obtaining the documents required under [the Voter ID law] is related to the state's legitimate interest in assessing the eligibility and qualifications of voters"). Here, however, stamps do not prove identity and are unconnected to any voter qualifications. *Harper*, 383 U.S. at 666.

Multiple State Supreme Court decisions involving Voter ID also confirm that the monetary cost of a documentary prerequisite constitutes a poll tax.

Wisconsin Supreme Court. In *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 274-77 (Wis. 2014), which was cited by Plaintiffs and unaddressed by Defendant, the Wisconsin Supreme Court noted with approval that "courts have characterized payments to government agencies to obtain documents necessary to voting [is] a de facto poll tax." *Id.* at 275. For that reason, requiring voters to spend money to purchase ID, or an underlying document needed to obtain ID (i.e., a birth certificate), was unconstitutional.

[5] Notably, Arizona's Voter ID law also allowed voters to present documents that did not cost money. *See id.* at 404. Here, stamps and only stamps are required to vote by mail.

Michigan Supreme Court. The Michigan Supreme Court issued an advisory opinion, *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444 (Mich. 2007), that was premised on the very proposition Plaintiffs make in this case: that requiring voters to pay for a document required for voting is an impermissible poll tax. *Id.* at 464-65. The court ultimately concluded that Michigan's voter ID law was not a poll tax, but only because voters could effortlessly work around the requirement by signing an affidavit at the very moment that the voter is required to present photo identification. *Id.* at 451, 465. Signing an affidavit did not require the voter to go someplace else or gather additional documents. Here, the voter cannot sign anything on the absentee ballot envelope to get out of paying for postage (to the extent the U.S. Postal Service ("USPS") would ever allow such a strange mechanism to exist), and must take on the material (or, right now, deadly) burden of voting in person.

Tennessee Supreme Court. Similarly, in *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013), the Tennessee Supreme Court addressed the poll tax issue on the premise that paying for photo identification would make the voter ID law a poll tax. *Id.* at 106. As in Michigan, the Tennessee voter ID law was ultimately found not to be a poll tax because voters could sign an affidavit at the very moment and location where photo ID was required to be presented. *Id.* Georgia voters,

however, cannot sign anything like this on the absentee ballot envelope to be exempt from postage.[6]

Missouri Supreme Court. In *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006), the Missouri Supreme Court also drew on poll tax principles to conclude that requiring voters to pay for "birth certificates and other documentation to acquire a photo ID and vote" was unconstitutional under the Missouri Constitution. *Id.* at 214.

District court cases. Defendant's remaining citations to district court decisions are unavailing. *Common Cause / Georgia v. Billups*, 439 F. Supp. 2d 1294, 1355-56 (N.D. Ga. 2006) only confirms that the *monetary* cost of a documentary prerequisite makes requiring that document a poll tax. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006) is a red herring because Plaintiffs agree that "tangential burdens" do not constitute a poll tax. Direct monetary costs are not tangential, and *Rokita* doesn't say otherwise.

[6] Unlike the affidavit in Michigan, Tennessee law requires voters to swear under penalty of perjury that they are "indigent and unable to obtain proof of identification without payment of a fee." T.C.A. § 2-7-112. Plaintiffs do not waive the argument that this type of humiliating affidavit is inappropriate, especially when "indigent" has no clear meaning and non-lawyers hardly ever use it, barriers other than "indigency" prevent obtaining postage, and "indigency" fails to sufficiently capture vulnerable voters. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1334, 1340 (N.D. Ga. 2005).

In sum, Voter ID decisions from the United States Supreme Court, the Fifth Circuit, and four State Supreme Courts support Plaintiffs' proposition that requiring a document to vote is a poll tax when that document costs money. And the Ninth Circuit's decision in *Gonzalez* provides yet another reason why postage costs are a poll tax: stamps have nothing to do with a voter's qualifications.

4. Defendant's "poll tax definition" argument fails

Defendant argues that the definition of "poll tax" precludes Plaintiffs' claim (hereinafter "the definitional argument"), because poll taxes technically must raise revenue for the entity that imposes it[7] according to the technical dictionary definition of "poll tax," and that the United States Postal Service is technically the one imposing the poll tax, not the Secretary. Doc. 75 at 140:9-22.[8]

The Supreme Court has rejected these kinds of hyper-technical shell games in poll tax claims. *Harman* recognized that "[c]onstitutional rights would be of

[7] Plaintiffs will not repeat arguments about whether the money ends up going to the State (it does). Doc. 75 at 122:19-126:1.

[8] During the April 24 hearing, Counsel for the Secretary faulted Plaintiffs for failing to address the definitional argument. Doc. 75 at 140:9-10. But Defendant's MPI opposition brief admitted that its definitional argument was inchoate and would be fleshed out on a motion to dismiss. Doc. 51 at 19 n.21. The Secretary ended up not developing this argument in his motion to dismiss but instead developed that argument for the first time during the April 24 hearing. Doc. 75 at 140:9-22. So Plaintiffs respond here.

little value if they could be indirectly denied or manipulated out of existence." *Harman*, 380 U.S. at 540 (internal citations and quotations omitted). The Twenty-Fourth Amendment "'nullifies sophisticated as well as simple-minded modes' of impairing the right guaranteed." *Id.* at 541 (citation omitted). For example, under Defendant's proposed fiction, elections officials could require voters to show vehicle deeds in order to vote, then blame car dealerships for not giving voters free cars. *Harman* does not countenance this kind of manipulation, and Defendant's gymnastic arguments should be rejected on that basis alone.

In any event, the suggestion that Post Offices are the cause of the poll tax is wrong. None of the Voter ID cases suggest that a state's driver's license agency is responsible for the poll tax when IDs cost money, that they are the proper defendants, or that the election officials sued in those cases cannot be defendants. That is unsurprising, because Defendants are the ones with the power to impose requirements on voters and the power to condition the right to vote on paying a poll tax. USPS has no specific duty of care to voters while the Secretary does.[9]

[9] To the extent Defendant's motion is a shadow Rule 12(b)(7) motion, Plaintiffs reserve the right to respond more fully to such an argument if a 12(b)(7) motion is formally filed.

Lastly, Defendant is relying on the wrong "poll tax" definition from Black Law's Dictionary. The "poll tax" term defined in Black Law's Dictionary refers to an old usage of the term which meant something different, and it had nothing to do with voting. Specifically, the term was used to describe direct taxes imposed on each person in a jurisdiction, also known as a "capitation," based solely on the citizen's presence in the jurisdiction and without regard to income or transactions. *See Nat'l Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) ("Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a 'head tax' or a 'poll tax'); *Hylton v. United States*, 3 U.S. 171, 175 (1796) (the "direct taxes contemplated by the Constitution [include] "a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance"); *Home Ins. Co. of N.Y. v. City Council of Augusta*, 1874 WL 3131, *8 (Ga. 1874) (equating "poll tax" with "capitation"). That is why Black's Law Dictionary defines a "poll tax" as a "fixed tax levied on each person within a jurisdiction," and why it makes no mention of voting at all.[10] If anything, the more relevant term is "tax" itself, which Black's Law Dictionary defines broadly as

[10] "Capitation," used as a synonym in the cases above, is similarly defined as "tax or payment of the same amount for each person." Black's Law Dictionary (11th ed. 2019).

including any "charge" or "burden," including non-monetary burdens, and that "yield[s] public revenue." The postage requirement fits all those criteria.

Defendant lastly relies on *Coronado v. Napolitano,* No. CV-07-1089-PHX-SMM, 2008 WL 191987, at *5 (D. Ariz. Jan. 22, 2008). It is distinguishable. *Napolitano* ruled that criminal restitution or fines are not poll taxes because they satisfy voter qualifications. *Id.* Here, postage money has nothing to do with a voter's qualifications. *See Harper*, 383 U.S. at 666.

B. Anderson-Burdick claim (Count II)

Unlike Plaintiffs' poll tax claim, the burdens of obtaining postage *are* relevant to Plaintiffs' *Anderson-Burdick* claims—both facial and as-applied. Plaintiffs' facial attack on the postage requirement argues that the widespread and significant burdens imposed by this requirement—making all voters spend money—are not justified by the State's interest in saving money. *See Crawford*, 553 U.S. at 191 (*Anderson-Burdick* claim requires courts to "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule" (citations omitted)).

Plaintiffs' as-applied *Anderson-Burdick* challenge focuses on vulnerable voters who cannot get postage with "reasonable effort," and currently that includes

almost everyone during this deadly pandemic.[11] *See, e.g.*, *Frank v. Walker*, 19 F.3d 384, 385-87 (7th Cir. 2016) (contrasting facial and as-applied challenges to voter ID law).

The State characterizes the postage requirement as a "minimal" burden, Doc. 51 at 26-29, but the Complaint's allegations have plausibly pled that this characterization is untrue, Compl. ¶¶ 8, 29-36. Nor do the State's interests automatically justify the burdens of buying and obtaining postage. While Defendant argued in the poll tax section that stamps "protect the integrity and reliability of the electoral process itself," Doc. 51 at 22, Defendant wisely abandons that argument when it comes to the *Anderson-Burdick* argument. In any event, Plaintiffs do not see how stamps helps with electoral integrity, and Defendant does not know either. *See* Doc. 75 at 108:15-109:10.

Instead Defendant admits upfront that the "purpose of the state's longstanding decision not to pay the cost of return mail is financial." Doc. 51 at 30. But *Crawford* all but says, relying on *Harper*, that asking voters to spend money on a prerequisite document is unjustified by any government interest under *Anderson-Burdick*. *See Crawford*, 553 U.S. at 198. If an interest as heavy as

[11] Plaintiffs will not repeat arguments about the burdens of buying stamps online. Doc. 57 at 6; Doc. 75 at 39:21-40:7.

preventing voter fraud does not justify charging voters money, surely raw financial considerations should not either.

Indeed, courts have generally been skeptical in a variety of contexts about just how much raw financial considerations can justify impinging on the right to vote. *See Stewart v. Blackwell*, 444 F.3d 843, 872 (6th Cir. 2006), *superseded on other grounds*, 473 F.3d 692 (6th Cir. 2007) ("Governments almost always attempt to justify their conduct based on cost and administrative convenience, but the state's reliance on these factors is not necessarily rational."). The cases are legion.[12] At a minimum, this Court should let discovery play out to test just how

[12] *See also, e.g.*, *See also League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 244 (4th Cir. 2014) (reversing district court for "sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing."); *Tashjian v. Republican Party of Conn.*, 470 U.S. 208, 217-18 (1986) ("the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing [the Republican Party's] First Amendment rights"); *League of Women Voters of Missouri v. Ashcroft*, 336 F.Supp.3d 998, 1006 (W.D. Mo. 2018) ("These significant burdens on Plaintiffs in the absence of injunctive relief outweigh any financial burden on Defendants, even assuming Defendants' cost estimate relating for the full scope of relief is accurate."); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *9 (N.D. Ill. Mar. 13, 2006) (while due process "would pose some additional administrative and fiscal burdens" on the government, the burdens were not "so great as to overwhelm plaintiff's interest in protecting his vote"); *Cotham v. Garza*, 905 F. Supp. 389, 399 (S.D. Tex. 1995) (rejecting justification that "the cost of administering elections might increase" if the challenged law was struck down); *Fla. Dem. Party v. Detzner*, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) ("administrative inconvenience" "cannot justify stripping Florida voters of their fundamental right to vote and to have their

strong these interests are, to the extent they are not already illegitimate as a matter of law.

Even putting aside this heavy backdrop of cases, which Defendant cannot overcome at this early stage, the State's financial interests still would not justify charging voters money whenever they vote by mail. The government's financial interests do not justify specifically using *a poll tax* to save money, because there are other ways to raise money. And it is easier for the government to raise money than it is for voters to do so, Compl. ¶ 8, even during the COVID-19 pandemic, which has already economically ruined voters' lives.

Defendant cites two cases which do not help him. In *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016), cost savings barely factored into the analysis, and Defendant does not invoke the other, far weightier interests in that case, like preventing voter fraud. *Id.* at 632-34. *Wilson v. Birnberg*, 667 F.3d 591, 601 (5th Cir. 2012) was a procedural due process case that involved candidates who seek the privilege of elected office, which is a far cry from the fundamental right to vote.

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votes counted"); *Fla. Dem. Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016) (noting that the "case pits the fundamental right to vote against administrative convenience," and ruling in favor of the right to vote).

For the above reasons, Plaintiffs have plausibly stated an *Anderson-Burdick* claim.

C. Federalism concerns do not preclude Plaintiffs' claims

Lastly, with respect to Counts I and II, Defendant invokes federalism. Doc. 67-1 at 22. It hardly bears mention that states must comply with the United States Constitution. *See Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) ("It has long been a settled principle that federal courts may enjoin unconstitutional action by state officials."). But Defendant's federalism arguments fail on their own terms as well.

Defendant argues that the Constitution reserves "most authority regarding the integrity and efficiency of elections to states," citing U.S. Const. Art. I, § 4, cl. 1, and that the "framers of the Constitution intended the States to keep for themselves, as provided by the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991). But the Twenty-Fourth Amendment is also in the Constitution. The text of that amendment bans poll taxes and specifically applies to the "State[s]." U.S. Const. amend. XXIV. All these provisions can live in harmony, and Defendant cites no cases where Article I or the Tenth Amendment were read to erase the Twenty-Fourth Amendment.

To the extent that the Secretary suggests that Article I and the Tenth Amendment *do* overrule the Twenty-Fourth Amendment, that interpretation would violate the basic textualist canon that specific provisions take precedence over general ones. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 183 (2012) (General/Specific Canon). Thus, even if Article I and the Tenth Amendment gave absolute powers to the States over elections, the Twenty Fourth Amendment has carved out an exception.

Defendant relies on language from several cases (*Storer*, *Wexler*, and *Powell*), Doc. 67-1 at 22, stating that courts should carefully consider the State's interest in running their own elections. Courts should. That is why such language planted the seeds for the eventual development of the *Anderson-Burdick* framework. *See Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983) (citing *Storer*); *Burdick v. Takushi*, 504 U.S. 428, 432 (1992) (citing *Storer*); *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 202 (2006) (citing *Storer*). *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970) echoes *Storer*'s language. As does *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986), though that case is further afield because it involved a "substantive due process claim," *id.*, which Plaintiffs are not touching with a ten-foot pole.

In sum, the important concerns Defendant raises about elections operations is already baked into the *Anderson-Burdick* doctrine, and there is no additional, free-floating federalism argument that the test does not already account for. Defendant is free to make these arguments in the context of *Anderson-Burdick* on the merits (or in the context of an MPI with respect to equities), but federalism doesn't justify 12(b)(6) dismissal.

Federalism concerns are also diminished given that the postage requirement is not required—or even addressed—under state law. An injunction would not amend anything in the law, nor would it second-guess the General Assembly, who has never passed any laws on the topic (that Plaintiffs are aware of). *Compare, e.g.*, *Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1286-88 (11th Cir. 2019) (Tjoflat, J., dissenting) (raising federalism concerns because injunction effectively rewrote Georgia statutes).

And of course, none of these concerns about election administration apply to the poll tax claim. The Twenty-Fourth Amendment is not a balancing test. The text reveals an absolute prohibition that is never justified by the purported need to raise money. *Harman*, 380 U.S. at 544 ("For federal elections the poll tax, regardless of the services it performs, was abolished by the Twenty-fourth Amendment."). Contrary to Defendant's suggestion, this Court need not assess whether Plaintiffs'

poll tax claim has demonstrated "patent and fundamental unfairness" or have called into doubt the "very integrity of the electoral process." Doc. 67-1 at 23. Those words aren't in the Twenty-Fourth Amendment.

II. PLAINTIFFS HAVE ESTABLISHED ARTICLE III STANDING

Because Defendant's attack is based solely on the allegations in the complaint, this is considered a "facial attack" where courts do not look outside the pleadings. *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007).[13]

A. Plaintiffs have established injury in fact and traceability

Defendant argues that Plaintiffs have failed to establish "injury in fact," essentially for two reasons: 1) no one knows how long the COVID-19 pandemic will last, so voters may be able to vote in-person any day now, Doc. 67 at 7-8; and,

[13] "Factual attacks," on the other hand, challenge standing based on "'matters outside the pleadings, such as testimony and affidavits.'" *Id.* at 1251 (citation omitted). Defendant's motion is not a "factual attack," as Defendant all but confirms, Doc. 67-1 at 5-6, and Defendant did not incorporate its latest filing, Doc. 79, as part of its motion to dismiss. Thus, the caselaw prohibits Plaintiffs from pointing to extrinsic evidence in response to Defendant's motion. Plaintiffs also will not respond to new standing arguments made in the recent filing (Doc. 79). Should this Court wish to base its standing ruling on extrinsic evidence, Plaintiffs request a fair opportunity to respond, including a response to Defendant's latest filing (Doc. 79), and including relying on Mr. Albright's testimony and affidavits, Doc. 77, which more than answer the standing questions raised by this Court during the hearing. Doc. 75 at 113:24-115:10.

contradictorily, 2) voters can "choose" to vote in-person now anyway, *id.* at 10-11. But Plaintiffs have standing right now precisely because, according to the Complaint, voters actually cannot "choose" between voting by mail and voting in person during this crisis. Compl. ¶ 2.

Plaintiffs also have standing beyond this crisis. Plaintiffs will not repeat standing arguments that demonstrate how Defendant's misunderstanding of Plaintiffs' claims makes Defendant's arguments ultimately irrelevant. Doc. 75 at 14:21-15:17; 16:3-18:20. Plaintiffs simply point to the allegations in the Complaint that, if accepted as true, establish standing on all claims as Plaintiffs have argued. The Complaint alleges that all voters are vulnerable due to COVID-19, Compl. ¶¶ 1-4; that there will always be voters who cannot easily vote in-person, *id.* ¶¶ 5, 14, 36; and that all voters who vote by mail must use postage, *id.* ¶ 4. That is enough.

Defendant repeats his argument that voters have a "choice." *See* Doc. 67-1 at 10-12 ("choice" demonstrates no injury in fact or traceability). Plaintiffs will not repeat arguments on this point, and the substance of those arguments address the standing issue. *See* Doc. 57 at 7-8; Doc. 75 at 151:25-152:15; *see also Harman*, 380 U.S. at 538 ("the issue here is whether the State of Virginia may constitutionally *confront* the federal voter with a requirement that he *either* pay the customary poll taxes as required for state elections *or* file a certificate of residence.

We conclude that this requirement [to choose between these options] constitutes an abridgment of the right to vote in federal elections in contravention of the Twenty-fourth Amendment." (emphasis added)). Defendant's remaining traceability arguments about the USPS are substantively addressed *supra* Part I.A.4.

B. Black Voters Matter Fund has established organizational standing

Defendant next argues that BVM has not established organizational standing on the basis of the Complaint's allegations.

"An organization has standing to sue on its own behalf if the defendant's illegal acts impair [the organization's] ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Common Cause/Georgia v. Billups*, 554 F.3d. 1340, 1350 (11th Cir. 2009). Standing is established if the organizations "'reasonably anticipate[d] that they [would] have to divert personnel and time to educating volunteers and voters on compliance' with the new voting requirements." *Id.* (citation omitted).

Plaintiffs have satisfied this standard because the Complaint demonstrates that BVM will have to divert its resources to deal with the postage issue: "[BVM] must divert scarce resources away from voter education and away from other efforts to facilitate voting by mail, towards making sure that voters know about the postage requirement and how to obtain it." Compl. ¶ 13. Nothing in this allegation

suggests that the need to divert resources is *only* because of the pandemic; this allegation plausibly establishes that even *more* resources must be diverted in specific response to the postage requirement, on top of those already diverted because of COVID-19.

Defendant's only argument is that shifting voter education resources from one topic to another "is not a diversion" because "educating voters about how to vote is voter education." Doc. 67 at 15. Neither of the cases Defendant points to holds that all forms of "voter education" are considered the same activity for standing purposes, no matter the topic, volume, or format of the education. In fact, both cases involved a shift of resources from one type of voter education to another. *See Common Cause/Georgia*, 554 F.3d at 1350 (NAACP diverted resources "from its regular activities," which the court noted included voter education, "to educate voters about the requirement of a photo identification and assist voters in obtaining free identification cards."); *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1260 (11th Cir. 2012) (shift from citizenship classes, which is education, to fielding inquiries, which is also education).

Defendant slides n an argument that an organization must show that its "purpose" has "ceased" because of the postage requirement, Doc. 67-1 at 15,

another proposition that finds no support in the two cases Defendant cites. Indeed, standing cases largely presume that the organization's resources all go towards the same "purpose," which is obvious because organizations are created for the "purpose" of achieving an unwavering goal. *See Fla. NAACP v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008) (standing found because the challenged law "will *hinder* the organizations' ability to carry out *their mission*" (emphases added). Resources, whether diverted or not, all serve the organization's mission.

Lastly, Defendant relies on *Jacobson v. Fla. Sec'y of State*, No. 19-14552 (11th Cir. Apr. 29, 2020), Doc. 79 at ¶ 4, Doc. 79-1, in a recent filing, which Plaintiffs construe as a citation of additional authority connected to Defendant's motion to dismiss. Defendant's reliance is inapposite because Plaintiffs are not currently asserting associational standing. *See Common Cause*, 554 F.3d at 1351 ("Because we conclude that the NAACP has standing on its own behalf, we need not address whether it has associational standing").

C. Plaintiff Megan Gordon and the putative class have standing to assert an *Anderson-Burdick* claim

Defendant argues that Plaintiff Gordon and the putative class lack standing to assert an *Anderson-Burdick* claim. Doc. 67-1 at 15-17. Defendant says that Ms. Gordon has "no burden" because she "has stamps." *Id.* at 16. But she still has to pay for them—just like everyone else in the putative class. *See also Crawford*, 553

U.S. at 198 (poll tax is a poll tax even if "most voters already possess a valid driver's license."). Defendant then says it is not impossible for Ms. Gordon to vote. Doc. 67-1 at 16. But *Anderson-Burdick* is a balancing test that doesn't require voters to demonstrate impossibility.

D. Plaintiffs *Anderson-Burdick* claim is ripe

Plaintiffs' *Anderson-Burdick* claim is ripe. Defendant emphasizes that an action is ripe only "*if*, or *when*, the County elections officials (or the State for that matter) fail to constitutionally carry out their duties." Doc. 67-1 (quoting *Georgia Shift v. Gwinnett Cnty.*, No. 1:19-cv-01135, 2020 WL 864938, at *3 (N.D. Ga. 2020)). But here, "when" is now. Plaintiffs' allege that Defendants are *currently* failing to fulfill their constitutional duties, because they are *currently* requiring voters to spend money when voting by mail. It is thus unsurprising that the three ripeness factors set out in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) tilt decidedly in Plaintiffs' favor.

1. Delayed review would cause "hardship" to Plaintiffs

First, "delayed review would cause hardship to the plaintiffs." *Ohio Forestry*, 523 U.S. at 733. Plaintiffs will not belabor the argument about COVID-19's current impact on voters. BVM as an organization has also demonstrated current injuries, Doc. 77-1 at ¶¶ 21-30, and reasonably anticipates

even more, *id.* at ¶ 1. BVM and voters will not "have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry*, 523 U.S. at 734. Harm is happening now.

2. There is no "administrative action" outside court that will eliminate the poll tax

Second, "judicial intervention" would not "inappropriately interfere with further administrative action." *Ohio Forestry*, 523 U.S. at 733. The purpose of this rule is to ensure that a preestablished administrative procedure is allowed to move forward which might more quickly resolve whatever issue the lawsuit seeks to raise. *Id.* at 735-36; *see Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (ripeness doctrine's "basic rationale is to . . . protect the agencies from judicial interference until an administrative decision has been formalized"), *abrogated on other grounds*, 430 U.S. 99. Thus, for example, in *Ohio Forestry*, there was an elaborate administrative procedure that gave environmental groups opportunities to ask for certain relief, and gave officials the opportunity to grant it, which could obviate the need for litigation. *Ohio Forestry*, 523 U.S. at 735-36.

But here, Defendant points to no preestablished administrative procedure whereby Defendant, on a regular basis, listens to the public's constitutional concerns, then decides whether or not his actions (the ones not pursuant to state law, like the postage requirement) are constitutional. Nor are we in the middle of

an incomplete administrative procedure where Defendant is now carefully assessing the constitutionality of poll taxes and has not yet reached a decision. *Contrast, e.g.*, *Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1310-11 (11th Cir. 2002) (case challenging "tentative" policy not ripe (citing *Nat'l Assoc. of Regulatory Utility Comm'rs v. Dep't of Energy*, 851 F.2d 1424 (D.C. Cir. 1988)); *Pittman v. Cole*, 267 F.3d 1269, 1278 (11th Cir. 2001) (case likely unripe if there is "concern over interference with an agency's decisionmaking process before it has the opportunity to finalize its policies"). In other words, there *is* no "further administrative action" with which to "interfere."

Instead, Defendant says that he "is in the best position to issue new rules, policies and regulations when and where needed to address the challenges COVID-19 may pose to Georgia's elections between now and November." Doc. 67-1 at 19-20. This vague "trust me" system in no way resembles the kind of neutral, open, and regular administrative processes in the above ripeness cases. Moreover, Defendant does not indicate that this process includes an examination of whether his policies are constitutional; rather, it is a cost-benefit analysis. Nor does Defendant talk about the timing of any such decisions. Plaintiffs cannot wait indefinitely for an administrative procedure that does not exist. *See Abbott*, 387

U.S. at 149 (claim was ripe where "no claim is made here that further administrative proceedings are contemplated").

In any event, Defendant has already shut the door on Plaintiffs (and perhaps everyone else as well). As noted above, Defendant has declared that he, and only he, "is in the best position" to decide how to balance COVID-19 with voting issues. And most certainly "not the Plaintiffs." Doc. 67-1 at 19. Thus, Plaintiffs have no other recourse at this point. *See, e.g.*, *Ala. Power Co.*, 307 F.3d at 1310-11 ("It is clear that judicial intervention will be required to save the petitioners from injury in this case.").

3. This is no administrative mechanism to wait for that would efficiently develop or sharpen any facts to aid this Court

Third, the court looks at "whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry*, 325 U.S. at 733. Here, Defendant argues that this case should not be filed because it is unclear when COVID-19 will end. Doc. 67-1 at 19. This argument was addressed *supra* Part II.A.

Defendant adds that "[t]he need for additional factual development in this matter is obvious." Doc. 67-1 at 19. Defendant appears to misunderstand how the third factor works. Almost every lawsuit could use "additional factual development." Instead this factor, like the second factor, is asking whether the

facts are going to be developed or sharpened by some kind of scheduled administrative process and, if so, whether that fact-finding or fact-sharpening process should be completed first before the parties go to court. *See Abbott Labs.*, 387 U.S. at148-49 (ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies"). If so, then it makes sense to let that process play out so that a more accurate picture is presented to the court. *See Ohio Forestry*, 523 U.S. at 736 (claim was not ripe because the lawsuit would have required "time-consuming judicial consideration of the details of an elaborate, technically based plan," "without benefit of the focus that a particular logging proposal could provide").

Here, however, there is no mechanism that develops *Anderson-Burdick* facts in a way that makes adjudication easier. For instance, there is no pre-established administrative procedure that mathematically quantifies the burdens on voters as well as the government's interests and puts it on a spreadsheet in order to help this Court adjudicate an *Anderson-Burdick* claim more easily. Defendant argues that

"[w]aiting for additional facts to develop" is "prudent," but fails to identify who or what will be developing these facts. Or when.[14] Plaintiffs will not wait for Godot.

In sum, this case is beyond ripe to bursting. Every single day, the postage requirement forces voters without stamps to expose themselves to COVID-19 if they want to vote, and this lawsuit appears to be the only way to obtain relief. Defendant points to no administrative procedures that would allow Plaintiffs to ask Defendant to review the constitutionality of his policies outside of court, Defendant points to nothing suggesting he is engaging in some formal administrative process of examining the constitutionality of his own actions, and Defendant doesn't want to hear from Plaintiffs anyway. Nor are there any other mechanisms that can more easily develop the facts in a way that would be helpful to this Court. Thus, this case is ripe.

CONCLUSION

Right now, Defendants are unnecessarily putting Georgia voters at risk of contracting the COVID-19 virus. Thus, Plaintiffs have a claim, and they have a

[14] The Secretary might argue that this case is not "purely legal" and so is not ripe. *Ala. Power Co*., 307 F.3d at 1310. However, being "purely legal" is only one way for a case to be ripe (obviously, because then no case involving discovery would ever be ripe). *Id.* "Significant *present* injuries" is another. *Id.* This case falls in the latter category.

claim right now. For the above stated reasons, Defendant's motion to dismiss should be denied.

Respectfully submitted this 1st day of May, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to N.D. Ga. Local Civil Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with N.D. Ga. Local Civil Rule 5.1(C) in Times New Roman 14-point typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

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