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*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia; DEKALB COUNTY BOARD OF REGISTRATION & ELECTIONS, *Defendants*.	CIVIL ACTION FILE NO. 1:20-cv-01489-AT

SECRETARY OF STATE BRAD RAFFENSPERGER'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS

Secretary of State Brad Raffensperger (the "Secretary") submits this reply to Plaintiffs' Brief in Opposition to Defendant Raffensperger's Motion to Dismiss [Doc. 84].

I. Failure to state a poll tax claim in Count I.

Plaintiffs agree that "the postage requirement is not required—or even addressed—under state law." [Doc. 84 at 23.] Thus, the question is not whether the Secretary is imposing any costs; he is not. The issue presented in Count I is whether the decision not to purchase stamps is the same as

imposing a revenue-generating tax. It is not, either on its face or as applied. In an attempt to "fit a square peg in a round hole," Plaintiffs obfuscate Supreme Court precedent and caselaw on poll taxes.

A. Plaintiffs' facial poll tax claim fails.

Plaintiffs' facial attack alleges that not buying voters' postage is the same as a *per se* poll tax prohibited by the Twenty-Fourth Amendment. This conclusion is supported neither by the text of the Twenty-Fourth Amendment nor the cases applying it.

On the text, Plaintiffs provide no definition of what constitutes a tax under the United States Constitution. Binding precedent has, and it forecloses Plaintiffs' argument. A tax is imposed by a government for the purpose of raising revenue for that government. "The test of validity is whether on its face the tax operates as a revenue generating measure and the attendant regulations are in aid of a revenue purpose." *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972) (relying on *United States v. Kahriger*, 345 U.S. 22 (1953); *United States v. Sanchez*, 340 U.S. 42 (1950); *Sonzinsky v. United States*, 300 U.S. 506 (1937)). The State's policy cannot be a tax, because the State receives no revenue from voters' decision to utilize United States mail. This fact is not a "hyper-technical shell game[]" as Plaintiffs allege; it is a basic and dispositive textual analysis. [Doc. 84 at 14.]

Perhaps cognizant of the complete lack of support within the text of the Constitution, Plaintiffs attempt to extend the holding of *Harman v. Forssenius*, 380 U.S. 528, 542 (1965), which is easily distinguishable. [Doc. 83 at 4.] There, in the wake of the adoption of the Twenty-Fourth Amendment, Virginia law required voters in federal elections to pay a poll tax or "file a certificate of residence in each election year." *Harman*, 380 U.S. at 532. Because one option was an express and blatant poll tax imposed by Virginia and for the benefit of Virginia's treasury, and the other imposed unconstitutional "material requirement[s] solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax," the Court struck the latter. *Id.* at 541. *Harman* is also distinguishable, because the Court considered that the residency certificate "amount[ed] to annual re-registration" and, therefore, constituted "a *penalty*" and "perpetuat[ed] one of the disenfranchising characteristics" of poll tax schemes voided by the Twenty-Fourth Amendment. *Id.* at 542, 540 (emphasis added) (citation omitted). Thus, "the confrontation of the federal voter with a requirement that he either continue to pay the customary poll tax or file a certificate of residence could not be sustained." *Id.* at 544. Plaintiffs have not alleged that voting in person is a *per se* "material" *burden* on voting. *Id.* at 541. This ends the inquiry for the facial claim.

Whereas Virginia mandated requirements to vote, Georgia imposes no such additional requirement to exercise the right to vote. Instead, the State simply does not reimburse voters who choose to deliver ballots in a particular manner. Georgia does not require—as a qualification for voting or for requesting or returning an absentee ballot—that voters utilize the United States mail or make a payment to the State's treasury. *See* O.C.G.A. §§ 21-2-216(a) (elector's qualifications); 21-2-381 (application for absentee ballot); 21-2-385 (voting by absentee electors). Voters have numerous options, and almost all come with some incidental cost: voting in person during early voting or on election day (transportation costs and potentially lost wages); voting absentee by mail and returning the ballot through the United States mail system (postage); or voting absentee and returning the ballot by hand-delivery to the county elections office, including by using a secure drop box (transportation costs and potentially lost wages). In most cases, the cost of postage is the most cost-effective option. Indeed, mail itself may cost nothing.[1]

[1] Third parties can pay the postage for the voter per SEB Rule 183-1-19-.01; alternatively, the USPS will deliver election mail without adequate postage affixed. *See Postal Bulletin 22391 2014 Election and Political Mail Update*, https://about.usps.com/postal-bulletin/2014 /pb22391/html/front_cvr.htm.

Taking Plaintiffs' argument to its logical ends, any government imposes a poll tax when it does not reimburse voters for gasoline, bus fare, or even time. Plaintiffs' contention is supported by neither the actual holding of *Harman* nor any logical extension of its holding. Thus, and unlike the Supreme Court's analysis in *Harman*, voters in Georgia are not forced to either surrender their constitutional right to vote or pay a poll tax in the form of mail postage, which warrants dismissal of Count I.

B. Plaintiffs' as-applied poll tax claim fails.

Plaintiffs also ask this Court to create a new cause of action for an "as-applied" poll tax. [Doc. 84 at 6.] But, government policy cannot be a tax sometimes and not at other times; consequently, Plaintiffs' new theory fails.

Plaintiffs' as-applied theory is really one that requires balancing under *Anderson/Burdick*. *See* [Doc. 84 at 6.] If, however, Plaintiffs' purported as-applied claim arises under the Equal Protection Clause, the Complaint still fails to state a claim for relief. The Supreme Court, in *Harper v. Virginia State Bd. of Elections*, stated that the Equal Protection Clause "restrains the States from fixing *voter qualifications* which invidiously discriminate." *Harper*, 383 U.S. 663, 666 (1966) (emphasis added). This case does not involve voter qualifications, much less the insidious ones at issue in *Harper* that were based on the affluence of the voter. *Id.* at 664 n.1, 666.

Unlike in *Harper*, Georgia requires no payment as a condition of voting. Plaintiffs acknowledge this, and while their brief focuses on "vulnerable voters," Plaintiffs' arguments focus on voters' health rather than their income. [Doc. 84 at 3, 6.] As importantly, Georgia does not establish a qualification to vote on either the basis of health or wealth. This is in sharp contrast to the claims in *Harper*, which renders the Supreme Court's reasoning in *Harper* inapposite.

Even outside the context of poll tax claims under *Harper*, Plaintiffs have failed to state an Equal Protection claim by failing to allege intentional discrimination, *Johnson v. Governor of Florida*, 405 F.3d 1214, 1222 (11th Cir. 2005), or "that discriminatory animus motivated the legislature to enact a voting law." *Democratic Exec. Cmte. of Fla. v. Lee*, 915 F.3d 1312, 1319 n.9 (11th Cir. 2019) (citation omitted). This too renders Count I fatally flawed.

C. Plaintiffs' reliance on voter ID cases is also misplaced.

Plaintiffs' reliance on various cases challenging state voter ID laws does not save Count I. [Doc. 84 at 7-14.] As an initial matter, in each of the cases, the state imposing the voter ID requirement also benefitted from the revenue generated by the photo identification. This matters under any tax analysis, and it is a fact not present in this lawsuit where the federal

government, acting through the USPS, imposes and receives the benefit of postage.

In addition, Georgia's decision to not pay some voters' postage is radically different from the requirements imposed on voters in other voter ID cases. In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Court considered a challenge to Indiana's voter ID law: "The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State *required* voters to pay a tax *or* a fee to obtain a *new* photo identification." *Crawford*, 553 U.S. at 198 (emphasis added). As noted by the Fifth Circuit, "The [*Crawford*] Court implied that requiring voters to obtain photo identification and charging a fee for the required underlying documentation would not qualify as a poll tax, and we similarly conclude that SB 14's similar requirements did not operate as a poll tax." *Veasey v. Abbot*, 830 F.3d 216, 267 (5th Cir. 2016) (citations omitted). Thus, Indiana's photo ID law was not a poll tax because voters are not required to either pay a tax or pay a fee to obtain a new ID in order to vote. Similarly, Georgia voters are not required to either pay a tax or a fee to the State of Georgia in order to vote.

In *Veasey*, the Fifth Circuit held that under the analysis in *Harman* or *Harper*, the Texas voter ID statutes was not a poll tax. *Id.* at 265-68. The Court stated that "the State does not offer Texas voters a choice between paying a fee and undergoing an onerous procedural process." *Id.* at 267. The court recognized that "Plaintiffs and others similarly situated often struggle to gather the required documentation, make travel arrangements and obtain time off from work to travel to the county clerk or local registrar, and then to the DPS, all to receive an EIC." *Id.* at 267-68. However, "Supreme Court jurisprudence has not equated these difficulties, standing alone, to a poll tax." *Id.* at 268 (*citing Harper*, 383 U.S. at 666).

The Ninth Circuit made an analogous conclusion when it upheld Arizona's voter ID law. *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012) (comparing the facts to *Harman*, 380 U.S. at 541-42). The Ninth Circuit held that "[r]equiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents." *Id.* at 409.

Judge Murphy basically ruled the same in the challenge to Georgia's voter ID law when he decided that the plaintiffs there "failed to demonstrate that the cost of obtaining a birth certificate is sufficiently tied to the

requirements of voting so as to constitute a poll tax." *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1355 (N.D. Ga. 2006). Here, payment of postage pertains to a voter's preferred method of casting his or her ballot—it is not a fee imposed on voters as a prerequisite to voting, or a burden imposed on voters who refuse to pay a poll tax.

Plaintiffs' reliance on state court decisions carries no precedential value and is equally unavailing given that those cases involved statutes where, as here, a voter could cast a ballot without paying money to a government agency. *See Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 277 (Wis. 2014). Thus, even under the rationale in these cases, not providing postage to voters does not amount to a constitutional violation.

II. Failure to state a fundamental right to vote claim under *Anderson/Burdick* in Count II.

Plaintiffs attempt to save Count II by arguing that (1) making voters spend any money is an insurmountable burden, even in an abject fiscal crisis; and (2) that the named Plaintiffs (who either have no members and cannot vote, or have stamps) are burdened from the State's decision not to pay for postage. Both contentions fail.

First, Plaintiffs cannot establish a material burden. The Constitution is as silent as to any requirement that the government buy some voters a stamp as it is on an obligation of taxpayers to purchase gasoline or transit fare for other voters who choose to vote in person, and Plaintiffs have offered no meaningful distinction between the two types of voters. This warrants the dismissal of Count II, as all elections will have some burden associated with exercising the right to vote. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). *See also Storer v. Brown*, 415 U.S. 724, 730 (1974) (permitting significant regulation); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (not applying strict scrutiny). Important government interests will typically save a regulation or practice when the law "imposes only reasonable, nondiscriminatory restrictions." *Burdick*, 504 U.S. at 434.

Beyond this general proposition, the Complaint does not support Plaintiffs' characterization of the burden. [Doc. 84 at 18 (citing Compl. ¶¶ 8, 29-36).] Black Voters Matter Fund ("BVMF") does not vote, and it has no alleged members. [Doc. 1 at ¶ 13.] Plaintiff Gordon has postage stamps and alleges no burden—other than her philosophical opposition—to using them. [*Id.* at ¶ 14.] At best, these concerns are outweighed by the need to preserve scarce public resources and prevent voter confusion.

III. Plaintiffs have failed to establish Article III standing.

A. Black Voters Matter Fund has failed to establish organizational standing.

Plaintiffs only alleged basis for BVMF's standing is the anticipated diversion of future resources. [Doc. 84 at 28.] This claim is foreclosed by recent precedent from the Eleventh Circuit Court of Appeals. *Jacobson v. Fla. Sec'y of State*, No. 19-14552 at 21-22 (11th Cir. April 29, 2020). In *Jacobson*, the court affirmed that "our precedent holds that 'an organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.'" *Id.* at 20-21 (citing *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008).

Plaintiffs do not allege that BVMF has diverted any resources to educate voters about returning absentee ballots. [Doc. 84 at 26 (quoting Compl. ¶ 13).] Nor has BVMF articulated the activities from which it is diverting resources to address the alleged harm of Georgia's long running practice. At the very least, the feared diversion is not "likely to occur immediately," which also precludes standing. *Browning*, 522 F.3d at 1165-66.

BVMF alleges neither actual nor future diversion. Instead, it claims it "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 especially for those with less resources." [Doc. 1 at ¶ 13 (emphasis added).] Even giving Plaintiffs the benefit of a reasonable reading of the Complaint, efforts to "mak[e] sure voters know about" a facet of voting is inherently "voter education." Further, "facilitat[ing] voting by mail" also necessarily requires making sure voters know how to vote by mail, including the use of postage (or reliance on USPS's policy of not charging voters for official election mail). [*See id.*] BVMF cannot claim a diversion for merely engaging in its mission. *See Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. Jan. 24, 2020) (finding no organizational standing where the "alleged diversionary actions" did not "divert resources from its mission" because these actions constituted "its mission"). This distinguishes BVMF's claims from those in the authority it cites. *See Billups*, 554 F.3d at 1350 (plaintiff had to divert funds away from a specific goal); *Ga. Latino All. for Human Rights v. Ga.*, 691 F.3d 1250, 1260 (11th Cir. 2012) (plaintiff had to cancel existing work).[2]

[2] This is especially so where, as here, it is not even clear that BVMF itself will be doing anything different in terms of funding. That BVMF's "partners"

B. Plaintiff Megan Gordan has no injury-in-fact for Count II.

Ms. Gordon does not claim it is a burden to purchase stamps; she is just philosophically opposed to using them. [Doc. 1 at ¶ 14.] Plaintiff Gordon's ideological opposition to using stamps she already owns does not establish an injury-in-fact for purposes of Count II's *Anderson-Burdick* claim. For Count II, the issue is not whether Ms. Gordon had to buy stamps, but rather, whether utilizing those stamps constitutes a burden that outweighs the State's articulated concerns in buying them for her and millions of other Georgia voters. [Doc. 84 at 28-29.] Whatever hypothetical burden may be imposed on others (e.g., the sick, those without means of obtaining stamps) is irrelevant. Plaintiffs concede that their putative class is wholly dependent upon Ms. Gordon's standing. *See Goldstein v. Home Depot U.S.A., Inc.*, 609 F. Supp. 2d 1340, 1348 (N.D. Ga. 2009). Her lack of injury, therefore, warrants dismissal of the putative class claims in Count II.

C. Plaintiffs have failed to establish traceability and redressability necessary for standing.

Beyond the injury-in-fact analysis, Plaintiffs still lack standing because their alleged injury is neither traceable to the Secretary nor redressable by

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may do different things with the money BVMF gives them to "facilitate voting by mail" does not establish organizational standing on a resource-diversion theory.

him. Plaintiffs' complaints are based on policies of third parties: county election officials who typically oversee absentee voting, and the USPS, which operates the mail system. [*See* Doc 84 at 14-17, 24-26.]

Standing requires a plaintiff's injury to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs concede that "the postage requirement is not required—or even addressed—under state law." [Doc. 84 at 23.] County elections officials are responsible for the absentee balloting process, and their decision to not pay for voters' postage cannot be imputed to the Secretary. *See* O.C.G.A. § 21-2-384(a)(1)-(2); *Jacobson*, No. 19-14552 at 26 (finding no standing when the Secretary did not control local election officials).

Second, the USPS decides when and how much postage to charge for the use of the United States mail. Just because "voting by mail may become the new normal," [Doc. 1 at ¶ 3], it does not mean that the State has caused any cost to be associated with the use of the mail. *See Lewis v. Governor of Alabama, 944 F.3d 1287,* 1299-1300 *(11th Cir. 2019)* (lack of ability to enforce challenged act "counts heavily against plaintiffs' traceability argument.") This should end the inquiry.

These facts also compel the conclusion that the relief Plaintiffs seek against the Secretary will not redress their injuries, because the Secretary does not control the mechanics of absentee ballots or postage. [Doc. 1, *Ad Damnum Clause* (a), (b).] *See Jacobson*, No. 19-14552 at 27-30 (noting that "[a]n injunction ordering the Secretary not to follow the ballot statute's instructions for ordering candidates cannot provide redress, for neither she nor her agents control the order in which candidates appear on the ballot."

IV. Count II is not ripe as applied to the November election.

In arguing that their *Anderson-Burdick* claim is ripe as to the November election, Plaintiffs rely on the presumption that COVID-19 will remain prevalent in November. This fundamental premise of Plaintiffs' claim is purely speculative. Under these circumstances, an *Anderson-Burdick* analysis for the November 2020 elections is impossible: the Court cannot balance a speculative and unknowable harm against the interests of the State. *See Pittman v. Cole, 267 F.3d 1269, 1278 (11th Cir. 2001)* (ripeness precludes reliance on speculation about the future). Consequently, Count II is not ripe.

V. Federalism governs against consideration of Plaintiffs' claims.

The text of Article I, Section 4 of the United States Constitution leaves the manner of elections to the states. *See also Agre v. Wolf*, 284 F. Supp. 3d

591, 595-619 (E.D. Pa. 2018). Plaintiffs concede that they are not challenging any state statute or rule, and they instead are challenging the practice of not reimbursing voters the cost of postage. The relief sought not only would require this Court to foray deeply into State policy, but also into the State budget at the worst possible time. This court has rejected this invitation in the past, and it should do so again. *Georgia Shift v. Gwinnett Cty.*, 1:19-CV-01135-AT, 2020 WL 864938, at *5 (N.D. Ga. Feb. 12, 2020).

CONCLUSION

The Court should dismiss Plaintiffs' Complaint because Plaintiffs lack standing; their claims are not justiciable; and they have failed to state claims for relief against Secretary of State Raffensperger.

This 6th day of May, 2020.

/s/ Vincent R. Russo
Vincent R. Russo
Georgia Bar No. 242628
vrusso@robbinsfirm.com
Josh Belinfante
Georgia Bar No. 047399
jbelinfante@robbinsfirm.com
Alexander Denton
Georgia Bar No. 660632
adenton@robbinsfirm.com
Brian E. Lake
Georgia Bar No. 575966
blake@robbinsfirm.com
Melanie Johnson
Georgia Bar No. 466756

mjohnson@robbinsfirm.com
Robbins Ross Alloy Belinfante Littlefield LLC
500 14th Street, N.W.
Atlanta, Georgia 30318
Telephone: (678) 701-9381
Facsimile: (404) 856-3250

Christopher M. Carr
Attorney General
Ga. Bar No. 112505
Bryan K. Webb
Deputy Attorney General
Ga. Bar No. 743580
Russell Willard
Sr. Asst. Attorney General
Ga. Bar No. 760280
Charlene McGowan
Asst. Attorney General
Ga. Bar No. 697316

Georgia Department of Law
40 Capitol Square SW
Atlanta, GA 30334
cmcgowan@law.ga.gov
Tel: 404-656-3389
Fax: 404-651-9325

Counsel for State Defendant

L.R. 7.1(D) CERTIFICATION

I certify that this Brief has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this Brief has been prepared using 13-pt Century Schoolbook font.

/s/ Vincent R. Russo
Vincent R. Russo
Georgia Bar No. 242628

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the within and foregoing **SECRETARY OF STATE BRAD RAFFENSPERGER'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system, which automatically sent counsel of record e-mail notification of such filing.

This 6th day of May, 2020.

/s/ Vincent R. Russo
Vincent R. Russo
Georgia Bar No. 242628