

12-1-2020

## ELECTIONS: Elections and Primaries Through the Pandemic

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### Recommended Citation

Joseph M. Brickman & Logan D. Kirkes, *ELECTIONS: Elections and Primaries Through the Pandemic*, 37 GA. ST. U. L. REV. 241 (2020).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol37/iss1/18>

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## ELECTIONS

### *Elections and Primaries Through the Pandemic*

U.S. CONSTITUTION:	U.S. CONST. amends. XIV, XXIV
GA. CONSTITUTION:	GA. CONST. art. III, § 4
CODE SECTIONS:	O.C.G.A. §§ 21-2-9, -50.1; 21-5-35
SUMMARY:	The 2020 election cycle was all but normal. Due to certain health concerns associated with the COVID-19 pandemic, Georgia delayed its primary election three months from March to June and summarily mailed absentee ballot request forms to all active, registered voters. From presidential social media postings to a federal lawsuit, debate ensued over the widespread usage of absentee ballots, their overall effectiveness and security, who would receive request forms, and whether postage requirements qualified as an impermissible poll tax. To further compound these uncertainties, Georgia legislators, who are not permitted to fundraise or campaign during the forty-day legislative session, had to make significant changes to their election campaign strategies to account for the suspended term. This <i>Peach Sheet</i> explores Georgia's 2020 election season and outlines the major issues that faced the state through the ongoing pandemic.

### Introduction

The COVID-19 pandemic stopped the world in its tracks. On March 12, 2020, Georgia Lieutenant Governor Geoff Duncan (R) and Speaker of the House David Ralston (R) addressed their respective chambers, informing members that the Georgia legislative session would be suspended indefinitely.<sup>1</sup> Typically, the Georgia legislature meets for forty days each year, beginning in January.<sup>2</sup> Although lawmakers would prefer to check off those forty days as efficiently as possible, the inception of a bill is a long and strenuous journey.<sup>3</sup> The most stressful part of the legislative session, however, centers around planning—and ultimately agreeing on—a budget for the next fiscal year, which begins on July 1.<sup>4</sup> A normal legislative session typically concludes at the end of March, leaving plenty of time for the State to prepare for incoming budget changes. After the conclusion of the legislative session, the Governor has an additional forty days to sign or veto any of the bills that passed both chambers.

Adding to the pandemic-fueled chaos was the fact that 2020 was an election year. While the last day of a given session fluctuates from year to year, an election year brings with it a greater sense of urgency. Under Georgia law, incumbent members are not permitted

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1. Amanda C. Coyne & Maya T. Prabhu, *Georgia Legislature Suspending Session Indefinitely Amid Coronavirus*, ATLANTA J.-CONST. (Mar. 12, 2020), <https://www.ajc.com/news/state—regional-govt—politics/georgia-leaders-suspend-legislative-session-amid-coronavirus/ADuMnJWxEfYvI9YDvFxfTN/> [https://perma.cc/DJ2H-6JJ6].

2. Mark Niese, *Georgia General Assembly Sets Initial Schedule for 2020 Session*, ATLANTA J.-CONST. (Jan. 13, 2020), <https://www.ajc.com/news/state—regional-govt—politics/georgia-general-assembly-sets-initial-schedule-for-2020-session/VwzKLP6iJkSkvdWGIqERP/> [https://perma.cc/SV2A-HTYZ]. The Georgia Constitution requires that the General Assembly meet on the second Monday in January or as otherwise provided by law and that the General Assembly continue to meet for no longer than forty days in the aggregate. GA. CONST. art. III, § 4, para. 1. Generally speaking, the Constitution also prohibits either house from adjourning for more than three days at a time during a legislative session. *Id.* In other words, the General Assembly is not required to be “in session” every day but typically does not remain “out of session” for more than a few days at a time. *Id.* Moreover, each day that both houses are “in session” will count towards the forty-day limit. *Id.*

3. *Complete Overview of the Legislative Process*, GEORGIANS FOR HEALTHY FUTURE, <https://healthyfuturega.org/get-involved/learn/how-the-legislature-works/complete-overview-of-the-legislative-process/> [https://perma.cc/ZXR6-CX3U].

4. James Salzer, *Georgia Legislators Set to Return to a Much-Different Session*, ATLANTA J.-CONST. (June 12, 2020) [hereinafter *Georgia Legislature Return*], <https://www.ajc.com/news/state—regional-govt—politics/georgia-legislators-set-return-much-different-session/4XYAR1Qierup64Pvqs8vXM/> [https://perma.cc/BDR2-7MFF].

to fundraise for their campaigns until the end of that year's legislative session.<sup>5</sup> The basic logic behind such a condition makes sense: lawmakers should pass laws with all Georgians in mind, free from the influence of political fundraising while entangled in the lawmaking process.<sup>6</sup> As a result, during election years, both chambers arrive in January on a mission to fulfill the forty-day legislative session as quickly as possible in hopes of having as much time as they can to campaign.<sup>7</sup> Thus, when a session is suspended in an election year, the prospect of a normal election cycle all but disappears.

Following the suspension of the 2020 legislative session, Georgia election officials moved the State's primary elections from March 24, 2020, to May 19, 2020, due to the growing concerns of the spread of COVID-19.<sup>8</sup> This decision came after Governor Brian Kemp (R) declared a Public Health State of Emergency on March 13.<sup>9</sup> Georgia law prohibits the Secretary of State, the state's chief election official, from postponing or extending the date of an election more than forty-five days during an emergency.<sup>10</sup> After the Governor subsequently extended Georgia's Public Health State of Emergency until May 13, Secretary of State Brad Raffensperger (R) once again delayed the presidential and general primaries until June 9, 2020, following similar national trends.<sup>11</sup>

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5. O.C.G.A. § 21-5-35 (2019).

6. James Salzer, *Panel Backs Fundraising Ban on Georgia Lawmakers During Suspended Session*, ATLANTA J.-CONST. (Apr. 14, 2020) [hereinafter *Panel Backs Fundraising Ban*], <https://www.ajc.com/news/state—regional-govt—politics/panel-backs-fundraising-ban-lawmakers-during-suspended-session/3oHa7ZUrKCW9AYXgu5kM1J/> [https://perma.cc/4LC8-PZKS]. The prohibition was adopted in 1990 to keep lobbyist money out of politics. *Id.*

7. See § 21-5-35; see also *Panel Backs Fundraising Ban*, *supra* note 6.

8. Greg Bluestein & Mark Niese, *Georgia Delays Presidential Primary due to Coronavirus Pandemic*, ATLANTA J.-CONST. (Mar. 15, 2020), <https://www.ajc.com/news/state—regional-govt—politics/georgia-delay-presidential-primary-due-coronavirus-pandemic/0vJZpHIHdPQdPEda6GtvCP/> [https://perma.cc/E3DX-NF8P].

9. Greg Bluestein, *Kemp Declares Public Health Emergency; 66 Coronavirus Cases in Ga.*, ATLANTA J.-CONST. (Mar. 15, 2020), <https://www.ajc.com/news/state—regional-govt—politics/kemp-declares-unprecedented-public-health-emergency-georgia/gdTeQfD6zJPb1kbYIRLHRO/> [https://perma.cc/B3RB-LBPB].

10. O.C.G.A. § 21-2-50.1 (2019); O.C.G.A. § 38-3-51 (2012 & Supp. 2019).

11. Stephen Fowler, *Georgia's Primary Election Moved to June 9*, GA. PUB. BROAD. (Apr. 9, 2020), <https://www.gpbnews.org/post/georgia-s-primary-election-moved-june-9> [https://perma.cc/D5CH-XVE4].

The presidential primary serves as an opportunity for voters to choose who they want to represent their political party in the upcoming year's presidential election. In 2020, for example, the Democratic Party chose former Vice President Joe Biden (D) in the presidential primary to represent all Democrats against President Donald Trump (R) in the November 2020 presidential election.<sup>12</sup> The general primary, on the other hand, includes nonpartisan elections for various state positions, including justices of the Supreme Court of Georgia, judges of the Georgia Court of Appeals, judges of the superior courts, county judicial officers, and offices of local school boards.<sup>13</sup> These elections take place “in the nonpartisan general election next preceding the expiration of the term of office.”<sup>14</sup>

In addition to changing *when* Georgians would vote in primary elections, the COVID-19 pandemic also changed *the way* that Georgians would vote. Both the Centers for Disease Control and Prevention and the President's COVID-19 Task Force recommended that Americans exercise proper social distancing measures to curb the spread of the virus.<sup>15</sup> Thus, in-person voting for the 2020 election cycle presented certain novel risks.<sup>16</sup> To address such concerns, state election officials prompted the use of absentee ballots in lieu of traditional in-person voting.<sup>17</sup> Under Georgia law, registered voters are permitted to vote by absentee ballot without providing justification for doing so.<sup>18</sup> Obtaining an absentee ballot requires

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12. Toluse Olorunnipa et al., *Joe Biden Officially Becomes the Democratic Party's Nominee on Convention's Second Night*, WASH. POST (Aug. 19, 2020, 12:07 AM), <https://www.washingtonpost.com/elections/2020/08/18/democratic-national-convention-live-updates/> [https://perma.cc/4EGT-5SVB].

13. O.C.G.A. § 21-2-9 (2019).

14. *Id.*

15. *See Keep Your Distance to Slow the Spread*, CTRS. FOR DISEASE CONTROL & PREVENTION [hereinafter *Keep Your Distance*], <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [https://perma.cc/VV2L-D29J] (July 15, 2020); *The President's Coronavirus Guidelines for America*, WHITE HOUSE 2 (Mar. 16, 2020), [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) [https://perma.cc/89RS-CXEC].

16. *See Keep Your Distance*, *supra* note 15.

17. Mark Niesse, *Ballot Drop Boxes Approved for Georgia Voters During Coronavirus*, ATLANTA J.-CONST. (Apr. 19, 2020), <https://www.ajc.com/news/state—regional-govt—politics/ballot-drop-boxes-approved-for-georgia-voters-during-coronavirus/4Bir3Ymx1zL0ZOGsXMazEO/> [https://perma.cc/7PCX-KL94].

18. O.C.G.A. § 21-2-380 (2019).

registered voters to submit an application to the registrar's office or absentee ballot clerk's office by mail, fax, e-mail, or in person.<sup>19</sup> Georgia voters may apply for an absentee ballot up to 180 days before an election, and if approved, the absentee ballot is sent to the voter up to forty-nine days before an election.<sup>20</sup> Voters who receive absentee ballots receive two envelopes: one that contains the ballot itself and the other to return the completed ballot.<sup>21</sup> Voters must also sign an oath of authenticity that is printed on the outside of the return envelope.<sup>22</sup> To submit an absentee ballot, voters mail or personally deliver the ballot to the board of registrar's or absentee ballot clerk's office.<sup>23</sup>

Given the delays in both the date of the primary elections and the legislative session, Georgians and their elected officials found themselves in a peculiar position—especially given Georgia's prohibition on incumbent legislators seeking or accepting campaign contributions until the conclusion of the legislative session.<sup>24</sup> For members of the Georgia General Assembly up for reelection in 2020, receiving campaign contributions before the June 9 primary was virtually impossible given that the legislative session did not resume until June 15.<sup>25</sup>

Some argued that the prospect of increased applications for absentee ballots during the 2020 election cycle could lead to greater opportunities for voter fraud.<sup>26</sup> Examples of such fraud could include “intimidation, coercion[,] and vote buying” behind closed doors.<sup>27</sup> Further, some question remained as to whether the postage required

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19. O.C.G.A. § 21-2-381 (2019).

20. *Id.*; O.C.G.A. § 21-2-384(a) (2019).

21. § 21-2-384(b)–(c).

22. *Id.*

23. O.C.G.A. § 21-2-385 (2019).

24. O.C.G.A. § 21-5-35 (2019).

25. *Georgia Legislature Return*, *supra* note 4.

26. See generally Jim Galloway et al., *The Jolt: As Donald Trump Warns of 'Voter Fraud,' Georgia's Secretary of State Urges Mail-in Balloting*, ATLANTA J.-CONST. (May 21, 2020), <https://www.ajc.com/blog/politics/the-jolt-donald-trump-warns-voter-fraud-georgia-secretary-state-urges-mail-votes/RJbraaRH7ES7xawUUibfPO/> [https://perma.cc/SW7S-PDHS].

27. Video Interview with Rep. Ginny Ehrhart (R-36th) (June 4, 2020) (on file with the Georgia State University Law Review) [hereinafter Ehrhart Interview] (noting the heightened risk of intimidation, coercion, and vote buying that stems from voting within the privacy of an individual's home as opposed to behind the polling curtain in a private voting booth).

to be affixed to a completed absentee ballot returned by mail constitutes an impermissible poll tax.<sup>28</sup> The threat of COVID-19's lingering effects on the voting process, especially in the midst of an election year, elevated tensions between parties to new heights in 2020.<sup>29</sup> To address the concerns of all Georgians in the most constructive manner possible, it is vital to look at the situation through a wholistic lens.

This *Peach Sheet* explores the numerous election-related issues that arose in Georgia during the COVID-19 pandemic. First, this *Peach Sheet* discusses Secretary of State Raffensperger's policy of mailing absentee ballot request forms to all active Georgia voters, the public discourse on the decision, and the safeguards in place to ensure legitimacy through the process. Next, this *Peach Sheet* analyzes the merits of the State of Georgia's current absentee ballot process and procedure (i.e., the poll tax issue). Finally, this *Peach Sheet* concludes by opining that Georgia's election process could proceed moving forward—with or without the threat of a pandemic.

### *Background*

In delaying the state's first primary (originally to May 19, 2020), Georgia Secretary of State Brad Raffensperger (R) cited the "rapid" spread of COVID-19 and the threat it posed to the health of poll workers and the community as a whole.<sup>30</sup> At that time, only one Georgian had been reported to have died from the virus.<sup>31</sup> Four months later, Georgia reported over 3,000 COVID-19-related deaths, with numbers increasing daily.<sup>32</sup> After initially delaying the presidential primary, Secretary Raffensperger announced that his office would be mailing absentee ballot request forms to all 6.9

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28. See Complaint at 17–18, *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-01489-AT, 2020 WL 1808259 (N.D. Ga. Apr. 8, 2020) [hereinafter *Absentee Ballot Complaint*].

29. See O.C.G.A. §§ 21-2-381, -384(a)–(c), -385 (2019); see also § 21-5-35.

30. Bluestein & Niese, *supra* note 8.

31. *Id.*

32. Tim Darnell, *Deadly Toll: Georgia Surpasses 3,000 Coronavirus Deaths*, ATLANTA J.-CONST. (July 12, 2020), <https://www.ajc.com/news/deadly-toll-georgia-surpasses-000-coronavirus-deaths/TUOotCdeBweO4Y2grXkr0H/> [https://perma.cc/8C4N-TKBE]; see also *Georgia COVID Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/georgia-coronavirus-cases.html> [https://perma.cc/XDG4-QUAF].

million active voters in Georgia.<sup>33</sup> To obtain the absentee ballot itself, voters were required to fill out the request form and mail it back to their respective county election office.<sup>34</sup> Though returning the request form by mail required, on its face, the use of a fifty-five cent stamp for postage, the form could also be filled out free of charge via email or returned under the U.S. Postal Service's (USPS) longstanding practice of delivering official election materials with or without adequate postage.<sup>35</sup>

As the May 19 election approached, concerns of election security remained. Voicing these concerns, Speaker of the House David Ralston (R) sent a letter to Secretary Raffensperger on March 26 requesting that Secretary Raffensperger consider again pushing the primary elections to late June.<sup>36</sup> Speaker Ralston's request cited the ongoing safety issues due to COVID-19, as well as the proposition that pushing the primary back until the end of June would allow voters to "vote in the manner in which they are most familiar."<sup>37</sup> On April 9, Secretary Raffensperger responded, once again postponing the primary until June 9, 2020.<sup>38</sup>

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33. Mark Niese, *Voters Mailed Absentee Ballot Request Forms for May 19 Georgia Primary*, ATLANTA J.-CONST. (Apr. 27, 2020), <https://www.ajc.com/news/state—regional-govt—politics/voters-mailed-absentee-ballot-request-forms-for-may-georgia-primary/hc0FkOo85uVCALbWvQUo9L/> [<https://perma.cc/PT6S-BHG3>].

34. *Id.*

35. *Id.*

36. Letter from David Ralston, Speaker, Georgia House of Representatives, to Brad Raffensperger, Georgia Sec'y of State (Mar. 26, 2020) (on file with the Georgia State University Law Review).

37. Mark Niese, *House Speaker Ralston Wants Georgia Primary Delayed Until Summer*, ATLANTA J.-CONST. (Apr. 20, 2020), <https://www.ajc.com/news/state—regional-govt—politics/house-speaker-ralston-wants-georgia-primary-delayed-until-summer/wyBtcqXwpeczSeW5D8Z2eP/> [<https://perma.cc/BSV2-TG6J>].

38. Mark Niese, *Georgia Primary Delayed Again to June 9 During Coronavirus Emergency*, ATLANTA J.-CONST. (Apr. 9, 2020), <https://www.ajc.com/news/state—regional-govt—politics/georgia-primary-delayed-again-june-during-coronavirus-emergency/W5ElsYWTsP5clpNAVITYXnO/> [<https://perma.cc/NJ6K-KUMW>].



*Analysis**The Public Debate*

The majority of debates surrounding Georgia's 2020 election cycle revolved around Secretary of State Brad Raffensperger's (R) decision to send out absentee ballot request forms to all active Georgia voters.<sup>39</sup> Through these debates and conversations, however, it became apparent that the state of affairs in light of COVID-19 placed Georgia at a significant crossroads—potentially affecting how Georgia citizens could vote for years to come.<sup>40</sup>

Representative Ginny Ehrhart (R-36th) and Liz Flowers, Executive Director of the Georgia Senate Democratic Caucus, both voiced their support for Secretary Raffensperger's decision to send out absentee ballot request forms.<sup>41</sup> Recognizing the threats associated with “at-risk” citizens voting in person at a polling precinct, Secretary Raffensperger's decision was not only a tough one but almost inevitable.<sup>42</sup> Director Flowers did note that the Secretary of State's office sent the absentee ballot request forms to only active Georgia voters, not all registered voters.<sup>43</sup> Only voters that have voted within the past three years qualify as “active.”<sup>44</sup> Although Director Flowers applauded Secretary Raffensperger's efforts, she expressed that choosing not to distribute ballot applications to all registered voters constituted “a form of voter suppression,” recognizing that “people can have a number of reasons for not voting in previous election cycles.”<sup>45</sup> Representative Ehrhart took no exception with Secretary

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39. Ehrhart Interview, *supra* note 27; Electronic Mail Interview with Liz Flowers, Exec. Dir., Ga. Senate Democratic Caucus (June 3, 2020) (on file with the Georgia State University Law Review) [hereinafter Flowers Interview].

40. See Ehrhart Interview, *supra* note 27; Flowers Interview, *supra* note 39.

41. Ehrhart Interview, *supra* note 27 (“I do think that he undertook and made the best decision under the circumstances . . .”); Flowers Interview, *supra* note 39 (“[The Georgia Democratic Caucus] applauded this unprecedented effort to ensure voters' voices would be heard.”).

42. See Ehrhart Interview, *supra* note 27 (“Given the circumstances, though, what really [were] our alternatives?”).

43. Flowers Interview, *supra* note 39 (“Georgia's Secretary of State made the decision to mail absentee ballot applications to Georgia's *active* voters—not all registered voters. An active voter has participated in voting during the previous three years.”).

44. *Id.*

45. *Id.*

Raffensperger's decision.<sup>46</sup> She did note, however, that she would have left the decision of requesting an absentee ballot application to individual Georgia voters, recognizing the costs associated with such a decision and that a "good chunk" of Georgians who automatically receive applications could still choose to go vote in person anyway.<sup>47</sup>

Some in the state expressed concerns about the threat of voter fraud stemming from the increased availability and likely submission of absentee ballots.<sup>48</sup> Representative Ehrhart's concerns, on the other hand, centered more on subtle forms of influence.<sup>49</sup> Specifically, her concerns focused on the individual privacy of a voting booth compared to that of one's home.<sup>50</sup> Voting at a polling location, she continued, restricts a voter to the confines and privacy of a single shielded booth.<sup>51</sup> Alternatively, "there is no guaranteed way to ensure . . . that there is not intimidation, or vote buying, or a whole host of [other] things" when using the absentee ballot process.<sup>52</sup> Despite her concerns, Representative Ehrhart made clear that given the "unprecedented circumstances," Secretary Raffensperger's decision was "the best possible response."<sup>53</sup>

Director Flowers, on behalf of the Georgia Senate Democratic Caucus, took a narrower view of voter fraud and focused on the strictest sense of the term.<sup>54</sup> Although actual cases of voter fraud have proven to be "extremely limited" in practice, the threat of voter fraud requires extensive consideration and proactive planning.<sup>55</sup> She explained the intricate process of how the Secretary of State, as well as each county, planned to combat the threat:

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46. Ehrhart Interview, *supra* note 27.

47. *Id.*

48. Stanley Dunlap, *Voting Watchdog Group Created to Monitor State's Voter Fraud Task Force*, GA. RECORDER (May 15, 2020), <https://georgiarecorder.com/brief/voting-watchdog-group-created-to-monitor-states-voter-fraud-task-force/> [<https://perma.cc/5HV5-EQET>].

49. Ehrhart Interview, *supra* note 27.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Flowers Interview, *supra* note 39.

55. *Id.*

The Secretary of State has barcoded each ballot application and mail-in ballot. When they are received, bar code scanning allows for cross referencing and a voter signature check. If there is a discrepancy, that information is uploaded to the State's My Voter Page, which allows the voter to check her status. In-person voting can still take place.<sup>56</sup>

Though the Democratic Caucus hopes for a seamless transition to large-scale use of absentee ballots, Director Flowers noted that they not only understood that issues may arise, but also anticipated encountering such problems due to the sheer number of ballots that would need to be processed.<sup>57</sup>

Another issue stemming from the widespread use of absentee ballots was whether voters should be required to place a postage stamp on their return envelopes.<sup>58</sup> On April 8, 2020, the American Civil Liberties Union (ACLU) of Georgia filed suit against Secretary Raffensperger, arguing that Georgia's method of "requiring" postage on absentee ballots constituted an impermissible poll tax.<sup>59</sup> Director Flowers, on behalf of the Georgia Senate Democratic Caucus, voiced support for the ACLU's position.<sup>60</sup> She also noted that despite the USPS's policy of delivering official election materials with or without postage, the continued inclusion of the "place postage here"

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56. *Id.*

57. *Id.* Director Flowers noted the following:

While the Secretary of State takes the lead on applications, each Georgia county is responsible for receiving and processing the applications and voting. This means that each county's unique staffing and population have a bearing on the vote count process. There has been a significant delay in processing mail-in ballot applications in larger counties such as Fulton County. Additionally, some county offices have been impacted by COVID-19, and staff have been quarantined.

*Id.*

58. Stanley Dunlap, *ACLU Federal Lawsuit: Postage to Vote by Mail Amounts to Poll Tax*, GA. RECORDER (Apr. 8, 2020), <https://georgiarecorder.com/brief/aclu-federal-lawsuit-postage-to-vote-by-mail-amounts-to-poll-tax/> [<https://perma.cc/34UX-E2UZ>].

59. Absentee Ballot Complaint, *supra* note 28, at 2.

60. Flowers Interview, *supra* note 39 ("The Georgia Democratic Caucus supports the ACLU's lawsuit on postage constituting a form of poll tax.").

language on ballot envelopes could create confusion for voters and “limit voter participation.”<sup>61</sup>

Representative Ehrhart refuted the idea that this longstanding and tested procedure constituted an impermissible poll tax, noting that the USPS has maintained the same policy of delivering official election materials with or without adequate postage for many years.<sup>62</sup> In light of this practice, she continued, voters are not actually required to place a stamp on ballots when mailing them in.<sup>63</sup> To further illustrate her thoughts on the ACLU’s allegation that postage constitutes a “poll tax,” Representative Ehrhart posed a question: “If the cost of a stamp to mail your ballot back is considered a poll tax, do you then regard *all* expenses related to the casting of votes as poll taxes?”<sup>64</sup> She continued to make the argument that in almost all circumstances, there is some kind of inherent cost associated with voting in person—whether it is gas money to drive to a local polling station or even lost income from having to leave work.<sup>65</sup> These inherent costs, she said, are hard to differentiate from the expense associated with a stamp, which is not even required to vote.<sup>66</sup>

#### *A Deeper Dive into the Poll Tax Issue*

The Twenty-Fourth and Fourteenth Amendments to the U.S. Constitution prohibit both the federal and state governments from imposing a poll tax.<sup>67</sup> A “poll tax” is “a fixed tax levied on each person within a jurisdiction.”<sup>68</sup> Notably, despite the decades-old, multi-state practice of requiring postage on absentee ballots, no court has ever held that the purchase of postage is a poll tax under either

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61. *Id.*

62. Ehrhart Interview, *supra* note 27 (“This is a policy that has been in place for many years with USPS. This is not a new thing; it is not required—you do not have to put a stamp on your ballot when you mail it back in. I do not believe that it is a poll tax.”).

63. *Id.*

64. *Id.* (emphasis added).

65. *Id.*

66. *Id.* (“Like it or not, in almost all circumstances, there is some kind of cost associated with going to vote. I don’t regard all those inherent costs as a poll tax.”).

67. U.S. CONST. amends. XIV, XXIV; *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966); Harman v. Forssenius, 380 U.S. 528, 544 (1965).

68. *Poll Tax*, BLACK’S LAW DICTIONARY (11th ed. 2019).

the Twenty-Fourth or Fourteenth Amendments.<sup>69</sup> Accordingly, in the lawsuit filed against the State of Georgia regarding the constitutionality of the postage requirement, the State argued that, on its face, the postage requirement cannot be considered a poll tax because the requirement only applied to voters who *choose* to mail in an absentee ballot rather than: (1) voting in person; (2) personally delivering their absentee ballot to county election officials; (3) having third parties pay the cost of postage; or (4) utilizing the USPS's longstanding policy of delivering official election mail with or without sufficient postage—all of which remained viable and fully available options for voters through the 2020 election cycle.<sup>70</sup>

Further, the State contended that opponents to the current policy often overlooked a major consideration: the additional costs associated with mailing postage to every voter in the State of Georgia.<sup>71</sup> The State argued that mailing postage to every voter in Georgia, even those who chose to vote in person or chose not to vote at all, would constitute a needless loss of crucial state funds—funds that became all the more vital in the face of the COVID-19 pandemic.<sup>72</sup> Georgia's annual election budget for Fiscal Year 2020 was originally \$6.12 million.<sup>73</sup> The cost of the Secretary of State's mailing effort was projected to exceed \$5.4 million.<sup>74</sup> Crucial to this calculation was the fact that Georgia is a balanced budget state.<sup>75</sup> Thus, in a year with inevitably lower revenues due to the economic effects of COVID-19, every remaining dollar became all the more crucial to the State's many response and relief efforts.<sup>76</sup> Coupled with the ongoing drain on the state budget due to both front-line and back-

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69. See, e.g., Response of Secretary of State Raffensperger in Opposition to Plaintiffs' Motion for Preliminary Injunction at 17, *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-01489-AT, 2020 WL 2744199 (N.D. Ga. Apr. 20, 2020) [hereinafter Response of SOS].

70. *Id.* at 2–3.

71. See *id.* at 8–15.

72. See generally *id.*

73. GOVERNOR'S OFF. OF BUDGET & PLAN., GOVERNOR'S BUDGET REPORT: AMENDED FISCAL YEAR 2020 & FISCAL YEAR 2021 334 (2020).

74. Response of SOS, *supra* note 69, at 8.

75. GA. CONST. art. III, § 9, para. 4. The Georgia Constitution requires that the State maintain a balanced budget, which means that the State may not spend more money than it collects in revenues in a given year. *Id.*

76. See Response of SOS, *supra* note 69, at 9 (recognizing the “tremendous drop-off in state revenues” anticipated due to decreases in sales tax and income tax revenues).

end expenses incurred while fighting COVID-19 (such as increased strain on public assistance programs), Georgia found itself in a precarious situation.<sup>77</sup> “Put simply, the [S]tate [was] required to provide much more with far less.”<sup>78</sup> Every additional dollar spent on postage for absentee ballots, for example, was one less dollar that could be spent on personal protective equipment for frontline workers, hospital beds for the sick, and other critical infrastructure that became needed during the pandemic.<sup>79</sup>

On August 11, 2020, Judge Totenberg of the U.S. District Court for the Northern District of Georgia issued an order and opinion denying a preliminary injunction in the lawsuit against the State of Georgia regarding the constitutionality of the postage requirement.<sup>80</sup> The court addressed both whether the postage requirement on absentee ballots constituted a de facto poll tax in violation of the Twenty-Fourth and Fourteenth Amendments and whether the postage requirement unconstitutionally burdened the plaintiffs’ right to vote in violation of the First and Fourteenth Amendments.<sup>81</sup> For purposes of the preliminary injunction analysis, the court held that the plaintiffs had not presented sufficient evidence to warrant preliminary injunctive relief on either claim.<sup>82</sup>

On the issue of the poll tax, the court stated that “[t]he fact that any registered voter may vote in Georgia on election day without purchasing a stamp, and without undertaking any ‘extra steps’ besides showing up at the voting precinct and complying with generally applicable election regulations, necessitates a conclusion that stamps are not poll taxes under the Twenty-Fourth Amendment.”<sup>83</sup> On the issue of burdening the right to vote, the court

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77. *Id.*

78. *Id.*

79. *Id.* at 9–10 (“Budget priorities frequently compete in a zero-sum environment: every dollar spent on healthcare, for example, is a dollar that cannot be spent on education, elections, or other priorities.”).

80. *Black Voters Matter Fund v. Raffensperger*, No. 20-cv-01489, 2020 WL 4597053, at \*36 (N.D. Ga. Aug. 11, 2020).

81. *Id.* at \*21, \*27.

82. *Id.* at \*26–27, \*35–36.

83. *Id.* at \*27. The court continued, noting that “[i]n-person voting theoretically remains an option for voters in Georgia, though potentially a difficult one for many voters, particularly during a pandemic,” and “recogniz[ing] that voting in person is materially burdensome for a sizable segment of the population, both due to the COVID-19 pandemic and for the elderly, disabled, or those out-of-town.” *Id.* However, the court concluded that “these concerns—while completely justifiable and

held that the plaintiffs had not met the burden of showing a “substantial likelihood of success on the merits” required for relief at the preliminary injunctive stage but that “discovery and factual development may potentially fortify [the] [p]laintiffs’ claims for permanent injunctive relief.”<sup>84</sup>

In light of the fact that no court has ever held postage requirements to be an impermissible poll tax and that, in practice, postage is not actually *required* to vote, the State’s decision and policy were reasonable responses to the harsh realities of the pandemic. “Incidental costs to voting, such as postage, gas, time, bus, or rideshare fares, are neither poll taxes nor material burdens for voters who want to vote.”<sup>85</sup> The decisions that all Georgians make involve inherent cost-benefit analyses—decisions that sometimes mean tough choices must be made and inherent, incidental costs must be borne in the most efficient manner. The decisions surrounding the circumstances of voting are no different, even in the midst of a pandemic.

### *Conclusion*

Due to the effects of the COVID-19 pandemic, Georgia relied heavily on absentee ballots during the 2020 primary elections. The increased number of absentee ballots and the attempted implementation of new voting machines had tremendous effects on Georgia’s June election.<sup>86</sup> Given what election officials learned

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pragmatically solvable—[were] not the specific evils the Twenty-Fourth Amendment was meant to address.” *Id.*

84. *Id.* at \*36. The court based its decision on the issue primarily on the lack of evidence that the plaintiffs presented regarding the postage requirement’s burden to voters. *Id.* Importantly, the plaintiffs provided evidence of “only one declaration from a voter who could not afford a stamp and was forced to vote in person,” and “not a single declaration from a voter who wanted to vote by drop box but was unable to.” *Id.* Under those circumstances, the court could not find a substantial likelihood on the argument that the burden of purchasing a postage stamp outweighed the cost to the states of funding postage to all absentee voters. *Id.* The court seemed persuaded by the fact that the State “already allocated substantial funds to addressing burdens on the right to vote, including \$3 million to send absentee ballot applications to registered voters . . . providing funding for polling site sanitization, and creating grants for secure drop boxes.” *Id.*

85. Response of SOS, *supra* note 69, at 2; *see also* Ehrhart Interview, *supra* note 27 (likening other incidental costs to the cost of postage on an absentee ballot).

86. *See* Zach Montellaro & Laura Barrón-López, ‘A Hot, Flaming Mess’: Georgia Primary Beset by

during the early stages of the COVID-19 pandemic and its effects on the primary elections, November seemed less daunting than initially thought.<sup>87</sup> That said, the State’s experiences with COVID-19 “forced everyone’s hand,” according to Liz Flowers, Executive Director of the Georgia Senate Democratic Caucus.<sup>88</sup>

Further, the Senate Democratic Caucus contends that, now that Georgians have officially tested out a “vote-by-mail” system, it may be time to reevaluate how Georgia conducts and manages its voting in the future.<sup>89</sup> More than anything, Director Flowers emphasized that “ease of voting should be paramount in *any* election cycle.”<sup>90</sup> She continued to explain that “the Georgia Senate Democratic Caucus has long pushed for expanded voting access that includes same-day voter registration, online voting, and vote-by-mail.”<sup>91</sup> Furthermore, she cited states, such as Colorado and California, whose voting systems have undergone various reforms, resulting in a “vote-by-mail” system becoming the primary avenue used to cast ballots.<sup>92</sup> Notably, she adds, in those states, “voter participation is greater and the cost of voting equipment has been greatly reduced.”<sup>93</sup>

Representative Ginny Ehrhart (R-36th), though not opposed to the widespread use of absentee ballots, reemphasized the importance of Georgians being able to get to the polls and vote, as well as her preference that the State only mail absentee ballot applications to those who need and request them in an election year.<sup>94</sup> Although an

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*Chaos, Long Lines*, POLITICO (June 9, 2020), <https://www.politico.com/news/2020/06/09/georgia-primary-election-voting-309066> [<https://perma.cc/CZ2M-2T9M>] (“Since polls opened early Tuesday morning, voters in Georgia—especially in and around Atlanta—have reported problems with voting machines and long lines, with some voters leaving without casting a ballot.”).

87. See Michelle Mark, *Georgia’s Coronavirus Cases Haven’t Spiked Since Reopening—but There Isn’t a Strong Downward Trend Either*, BUS. INSIDER (May 28, 2020, 4:34 PM), <https://www.businessinsider.com/reopening-georgia-coronavirus-case-data-lag-2020-5> [<https://perma.cc/8A9U-VDU2>] (showing that “the number of new, confirmed coronavirus cases has generally plunged since the start of [May]”).

88. Flowers Interview, *supra* note 39.

89. See *id.* (describing the embrace and success of vote-by-mail systems in states like Colorado and California and arguing that “COVID-19 simply forced Georgia to head towards a voting system that should have been put in place years ago”).

90. *Id.* (emphasis added).

91. *Id.*

92. *Id.*

93. *Id.*

94. See Ehrhart Interview, *supra* note 27 (opining that she is “personally going forward not in favor



incredible amount of uncertainty remains surrounding the prolonged effects of COVID-19, especially in the context of election processes, Representative Ehrhart remains optimistic about the State of Georgia stepping up to the plate to play its part.<sup>95</sup> “Never underestimate the ability of Georgia to have a very loud voice on the national level,” she said.<sup>96</sup> “That is one of the things I love about our state. We are relevant, we are outspoken, and we have an uncanny ability to make headlines—sometimes for good reasons, sometimes for other.”<sup>97</sup>

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of summarily mailing ballots to every registered voter in the [S]tate of Georgia”).

95. *Id.* (emphasizing the “abilities and the good meaning of Georgians to request [absentee] ballots when they need them”).

96. *Id.*

97. *Id.*