

## Whether Requiring Postage for a Mailed Ballot Is an Unconstitutional Poll Tax

*Black Voters Matter Fund v. Raffensperger*  
(Amy Totenberg, N.D. Ga. 1:20-cv-1489)

In light of widespread absentee voting by mail during the 2020 global Covid-19 infectious pandemic, a federal complaint alleged that requiring voters to pay the postage was an unconstitutional poll tax. The district judge denied relief for an imminent primary election for practical reasons. After careful consideration of the law and the facts, the judge ultimately decided that absentee-ballot postage is not a poll tax.

*Subject:* Absentee and early voting. *Topics:* Covid-19; absentee ballots; class action; primary election.

A voting-rights organization and a voter filed a federal class-action complaint in the Northern District of Georgia on April 8, 2020, claiming that requiring voters to pay for postage when they vote by mail is an unconstitutional poll tax and otherwise an unconstitutional burden on voting, especially during the global Covid-19 infectious pandemic, which would keep both voters and poll workers away from the polls.<sup>1</sup> With their complaint, the plaintiffs filed a motion for a preliminary injunction.<sup>2</sup>

On April 10, Judge Amy Totenberg ordered a response to the motion filed by 2:00 p.m. on Friday, April 17, and a reply filed by 2:00 p.m. five days later.<sup>3</sup> She set the case for hearing on the morning of April 24,<sup>4</sup> but as the urgency of the case became more clear, she held additional conferences on April 14 and 17.<sup>5</sup> At the second conference, she set the case for hearing on April 23.<sup>6</sup>

Judge Totenberg generally conducted conferences and discovery hearings by telephone, open to the attorneys and their clients, and other hearings open to the public.<sup>7</sup>

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1. Complaint, *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-1489 (N.D. Ga. Apr. 8, 2020), D.E. 1; *Black Voters Matter Fund v. Sec’y of State*, 11 F.4th 1227, 1230 (11th Cir. 2021); *Black Voters Matter Fund v. Raffensperger*, 478 F. Supp. 3d 1278, 1284 (N.D. Ga. 2020); see Amended Complaint, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. May 11, 2020), D.E. 88; see also Mark Niese, *Lawsuit Argues Cost of Postage to Vote by Mail Is Illegal Poll Tax*, Atlanta J.-Const., Apr. 10, 2020, at 8B.

2. Preliminary-Injunction Motion, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 8, 2020), D.E. 2.

3. Scheduling Order, *id.* (Apr. 10, 2020), D.E. 9.

Tim Reagan interviewed Judge Totenberg for this report by telephone on September 3, 2020.

4. Scheduling Order, *supra* note 3.

5. Transcript, *Black Voters Matter Fund*, No. 1:20-cv-1489 (Apr. 17, 2020, filed Apr. 21, 2020), D.E. 52; Transcript, *id.* (Apr. 14, 2020, filed Apr. 17, 2020), D.E. 39.

6. Minutes, *id.* (Apr. 17, 2020), D.E. 43.

7. Interview with Hon. Amy Totenberg, Sept. 3, 2020.

In light of changing facts, the plaintiffs moderated their request for relief with respect to the upcoming June primary election,<sup>8</sup> and Judge Totenberg rescheduled the hearing for the original April 24 time.<sup>9</sup> The hearing included testimony by two witnesses, and it was conducted using videoconference technology.<sup>10</sup> The public docket sheet included connection information and a notice that outside recording of the hearing was strictly prohibited.<sup>11</sup> Judge Totenberg observed that evidence generally made speedy rulings even more challenging<sup>12</sup>

On April 30, Judge Totenberg ruled that there was not time to provide a remedy for any wrong respecting the June 9 primary election, and she deferred consideration of elections coming up in August and November.<sup>13</sup>

On August 11, after careful consideration of the evidence, she concluded that requiring postage for a returned absentee ballot is not a poll tax:

The 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 elections regulations, necessitates a conclusion that stamps are not poll taxes under the Twenty-Fourth Amendment prism.<sup>14</sup>

Judge Totenberg closed the case by dismissing a second amended complaint on August 28.<sup>15</sup> The court of appeals affirmed the dismissal on August 27, 2021.<sup>16</sup>

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8. Brief, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 17, 2020), D.E. 44.

9. Docket Sheet, *id.* (Apr. 8, 2020) [hereinafter N.D. Ga. Docket Sheet]; see Minutes, *id.* (Apr. 24, 2020), D.E. 69; *Black Voters Matter Fund v. Raffensperger*, 478 F. Supp. 3d 1278, 1284 (N.D. Ga. 2020).

10. Transcript, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 24, 2020, filed Apr. 28, 2020), D.E. 75.

11. N.D. Ga. Docket sheet, *supra* note 9.

12. Interview with Hon. Amy Totenberg, Sept. 3, 2020.

13. Opinion, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 30, 2020), D.E. 83, 2020 WL 2079240; see *Black Voters Matter Fund*, 478 F. Supp. 3d at 1284–85.

14. *Black Voters Matter Fund*, 478 F. Supp. 3d at 1314; see *Black Voters Matter Fund v. Sec’y of State*, 11 F.4th 1227, 1230–31 (11th Cir. 2021).

15. Order, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Aug. 28, 2020), D.E. 144; see Second Amended Complaint, *id.* (Aug. 28, 2020), D.E. 143.

16. *Black Voters Matter Fund*, 11 F.4th 1227.