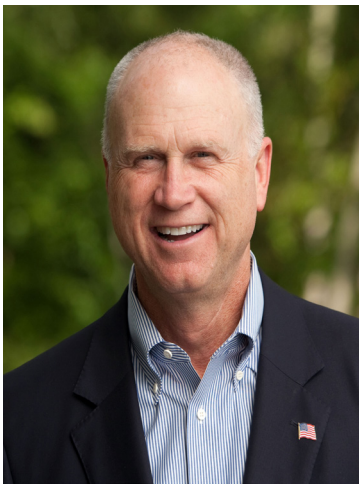
AT ISSUE STATE EDITION

2018 • Volume 3 • Issue 2

Table of Contents



As we draw closer to the start of the 2019 Legislative Session, our study committees have picked up and are in full swing. This year, we have study committees covering a wide variety of topics, many of which are major priorities we need to address as a state. In addition to these committees, Georgians may be seeing some changes in our state based on their votes this November. On the state-wide ballot this year, there will be five measures that citizens will have the opportunity to vote on potentially changing a few of our current laws and procedures. In this edition of At Issue, you will be able to read an overview of these proposed constitutional amendments to see what changes, if any, may be made in Georgia.

As you may know, this past session the Georgia Senate launched our livestreaming feature, where for the first time, constituents, lobbyists and any other interested parties had the opportunity to view the Senate Chamber and committee meetings in real time.

In addition, the videos streamed are archived on our website for anyone who may have missed the livestream to go back and view later. With this new capability, the Senate has also been able to carry this feature to the interim. Study committee meetings held in a room at the State Capitol that are wired to stream have been livestreamed and archived, as well as some other meetings throughout the state. It is important that every Georgian knows that their voices are taken into consideration in every decision that we make, and this technology helps people across the state and nation to know what is going on in the Georgia Senate.

With new technology like livestream also comes new opportunities, as well as new policies. This month's edition of At Issue addresses a couple of topics that you may find to be rather interesting. In two of the articles, we discuss the major role of the internet and technology used in society today. While access to just about anything through our handheld devices is more convenient than we may have ever imagined, it is important that we all stay up-to-date with these growing technologies and their uses. I hope that through these articles you will be able to get a closer look at how this field has developed and some thoughts on how we can stay on the same page with their development.

I hope you find this edition of *At Issue* interesting and useful. If you have topics you would like for us to cover in future editions, please do not hesitate to reach out to my office. Our first Federal Edition of *At Issue* will be coming out soon.

Butch Miller
President Pro Tempore, Georgia Senate
butch.miller@senate.ga.gov

Judiciary

"Can Your Cellphone Be Used to Put You In a Cell?"

Anna Edmondson, Legal Extern
Senate Research Office
anna.edmondson@senate.ga.gov

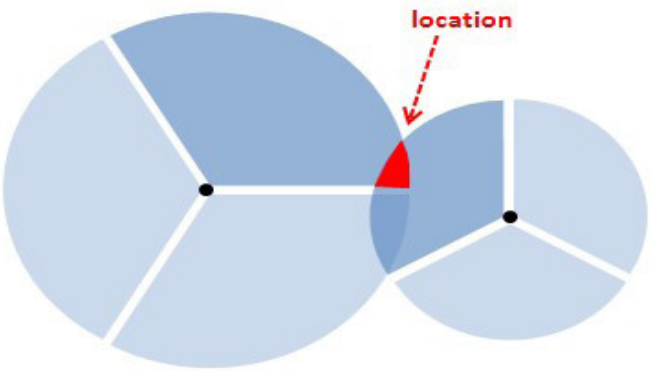
Up until late June, the federal government could obtain information from your wireless service provider that could determine your location, sometimes down to the minute and floor of a building, without a warrant. When your phone is on, it is programmed to constantly search for a network to connect to, and when it does, the service provider managing the cell tower documents each connection, or 'ping,' as a regular part of business. Your cell phone creates this historic cell-site location information (CSLI) even when you are not using your phone or when you turn the location settings off.

(continued on page 2)

("Can Your Cellphone Be Used to Put You In a Cell?" - continued from page 1)

The preciseness of this data varies according to the geographic area covered by networks, thus the greater the concentration of cell sites (mostly occurring in urban areas) the more accurate the data can be. Given the increasing need for more cell towers to accommodate more users, this has divided coverage areas into smaller sectors. Therefore, it has become increasingly possible for the government to use CSLI to calculate a cell phone user's location with GPS precision.

Whether obtaining CSLI data is considered a "search" and protected by the Fourth Amendment depends on whether there is a subjective expectation of privacy in one's CSLI and, if so, whether society is willing to recognize that expectation as reasonable. Although one might subjectively expect their bank notes given to a bank or their numbers dialed to a service provider to be private, that has not been the case under the third-party doctrine, reasoning that if someone has "voluntarily conveyed" private information to a third-party then their expectation to privacy is no longer considered reasonable. Applying this to CSLI data, which has also been found to be "voluntarily conveyed," it is permissible under the Stored Communications Act (SCA) to have a lower hurdle to access CSLI data than the standard of probable cause to obtain a search warrant to search one's home.



Cell phone detected within a certain distance of two cell towers with directional antennae.

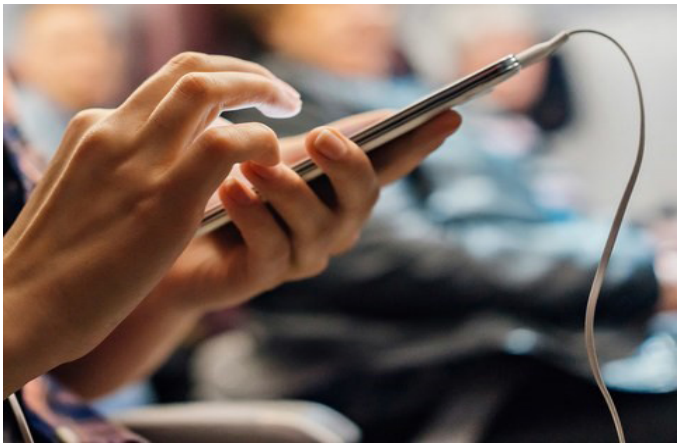
Source: Search Engine Land (https://searchengineland.com/cell-phone-triangulation-accuracy-is-all-over-the-map-14790)

Since 2015, Georgia courts have been bound by the third-party doctrine under United States v. Davis from the United States Court of Appeals for the Eleventh Circuit. Here, the court concluded that any intrusion under the doctrine is minimal since it would not reveal one's personal associations or social, political or religious views. This reasoning has proved problematic because the outcome turned on whether the information was "voluntarily conveyed," and cell phone users do not necessarily "voluntarily convey" their location to service providers since it is constantly pinging. In that same vein, in the cases that have applied the third-party doctrine to CSLI data, it was only able to trace one's location to a general vicinity and not with the accuracy that today's technology is capable of.

The increased tracking precision has led to a crossroads which the United States Supreme Court has yet to address: whether one's CSLI is protected by the Fourth Amendment. This has left lower courts bound by varying outdated decisions based on outdated technology.

On June 22, in a 5–4 decision in Carpenter v. United States, with Chief Justice Roberts delivering the majority opinion, the Court addressed whether one has a reasonable expectation of privacy to their CSLI data. This case stemmed from CSLI data providing circumstantial evidence of Timothy Carpenter's involvement in multiple robberies by showing that his phone was connected to certain cell towers within range of the robberies when they took place.

First, the Court acknowledged that Fourth Amendment protections were created to protect citizens from 'general warrants' of the colonial era which allowed British officers to search people's homes without any restraints. Analyzing the Amendment's protections under the historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted," the Court found that the Amendment seeks to secure "the privacies of life" against "arbitrary power" and to "place obstacles in the way of a too permeating police surveillance."



Source: Digital Trends (https://icdn3.digitaltrends.com/image/34198353-close-up-of-a-man-using-mobile-smart-phone.jpg?ver=1)

The Court found that CSLI is qualitatively different from anything that the Framers could have anticipated and that, in today's world, one's phone is essentially a "feature of the human anatomy" since it "faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." They also reason that this time-stamped data "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious and sexual associations.'" Given the aforementioned conclusions on the nature of CSLI, the Court declined to allow the government access to these records, which in the case at-bar covered more than six days without a warrant; to do otherwise would contravene one's reasonable expectation to privacy. They declined to decide whether a smaller window would require a warrant and allowed exceptions for emergencies such as "bomb threats, active shootings, and child abductions."

Even under the third-party doctrine rationale, the Court held that even though this information is held by a third-party, it does not supersede one's Fourth Amendment expectation of privacy. Those dissenting in the opinion analogize CSLI data and the business records that the Government is lawfully able to obtain under the third-party doctrine rationale, such as bank records and phone call history logs. They note that subpoenas may be used to obtain a wide variety of records held by businesses, even though they could be calculated to reveal private information.

Additionally, the Court relies heavily on data from an FBI agent who testified that to be tracked with pinpoint precision, one would have to be in an urban area. In suburban areas CSLI would only reveal the location of the user within an area of several hundred city blocks which could encompass "bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque," thus not being as invasive and telling of one's private life. Further, in rural areas, CSLI can be "up to 40 times more imprecise."

Further, those dissenting found that requiring probable cause for law enforcement to obtain records hampers "investigations of terrorism, political corruption, white-collar crime" and many other offenses. Justice Kennedy pointed out that it is of the utmost importance that the Government be able to take all necessary steps to stop crime sprees and that CSLI data is uniquely suited to link criminals to crimes, especially in a technology driven world.

It is unclear how this holding might impact other forms of surveillance. The majority opinion specifically mentioned, that this ruling does not address whether Fourth Amendment protections are triggered if the government were to request real-time CSLI or 'tower dumps' (information of all the devices that connected to a particular cell site for a certain time). The ruling also does not address protections for other business records that could possibly reveal private information if compiled, nor does it touch on surveillance concerning foreign affairs or national security.

The Supreme Court's decision in Carpenter ultimately settled a split in decisions between the Circuit Courts, and unified the standard that prosecutors across the United States must apply when using this locational evidence. As previously mentioned, the Eleventh Circuit had bound Georgia to apply the third-party doctrine when using CSLI data as evidence, only requiring Georgia law enforcement seeking access to CSLI data to show that this evidence might be relevant to their investigation. Now Georgia prosecutors, like all prosecutors across the country, must obtain a warrant supported by probable cause to obtain CSLI records expanding beyond the six day window. Although the SCA's standard provided "many legitimate and valuable investigative practices on which law enforcement has rightfully come to rely," this ruling ultimately places more hurdles in front of Georgia prosecutors seeking to use CSLI data in court. Of course, these hurdles juxtapose the growing usefulness of CSLI data as the location technology continues to improve. This decision inevitably impacts law enforcement across the state at varying degrees based on the accuracy of CSLI data within their jurisdiction. In larger metropolitan areas, such as Atlanta and Augusta, where the locational data is more precise, prosecutors may find this change more restrictive as they seek to use CSLI data more frequently than those in rural areas. All in all, the Court issued a long overdue update to the standard regarding privacy rights in a digital age, affirming that one does not have to give up living in the 21st century to be afforded Constitutional protections. - *AE*

Finance

Georgia Sales Tax Set to Enter the Digital Age

Ryan Bowersox, Senior Policy Analyst
Senate Research Office
ryan.bowersox@senate.ga.gov

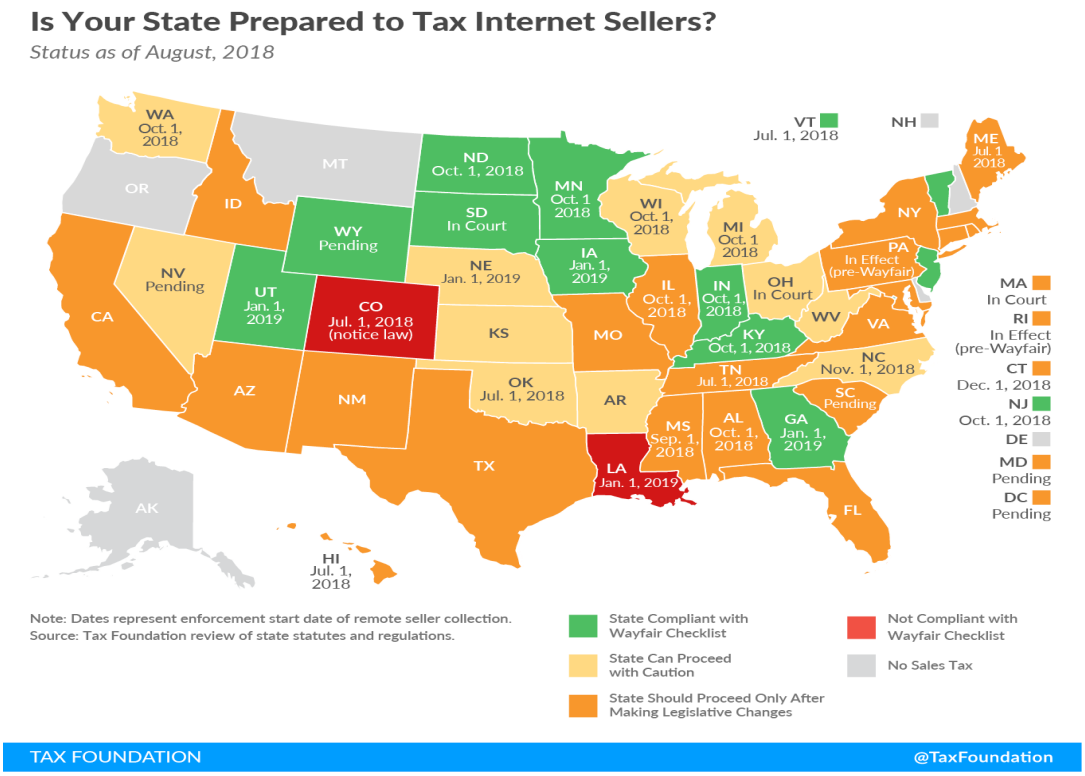
The internet has in its short lifespan drastically changed nearly every facet of our lives. Daily, we rely on the internet to do everything, including streaming our favorite shows, interacting with friends, obtaining our news, and even researching legal articles. One of the largest areas of change the internet has brought about is in the way we now shop. Increasingly, more of our shopping is now performed online, as opposed to traditional brick and mortar stores. In 2000, just a mere 22 percent of Americans participated in online shopping. That number has now increased to 79 percent of our population. Giant online retailers such as Amazon, Wayfair, and Overstock.com have grown to become some of the world's largest retail companies. In 2017, 8.3 percent of all retail sales in the United States were conducted online. Americans have increasingly flocked online to shop, taking advantage of the convenience and selection offered, but online retail has enjoyed another distinct advantage: most online shopping is done with no sales tax.

Even predating the rise of the online marketplace, states were limited in their ability to collect sales tax on transactions where the seller lacked an actual physical presence within the state. This "physical presence rule" originated from the United States Supreme Court during a time when a mail order catalog was the primary out of state retailer. In 1967, the Supreme Court decided in *National Bellas Hess, Inc. v. Illinois* that Illinois could not require an out of state mail order seller to collect and remit sales tax. The Court based their decision on the Constitution's commerce clause, noting that out of state retailers whose only connection to the state was the shipment of the product, lacked the minimum contacts to impose the burden of collecting taxes. In 1992, this restriction was again revisited in *Quill Corp. v. North Dakota* in light of the changes in the economy. There the Court reaffirmed its decision from *National Bellas Hess,* upholding the physical presence rule, requiring a store or employee of the company to be present in the state to mandate sales tax collection. *(continued on page 4)*

(Georgia Sales Tax Set to Enter the Digital Age - continued from page 3)

Since the Court's decision in 1992, online shopping has boomed to a degree unfathomable in the era of these decisions. Based upon the Court's decisions, online retailers used the physical presence rule to determine they often were not required to collect and remit sales tax to a state. In 2017 alone, the Government Accountability Office estimated that an additional $13 billion could have been collected in sales tax by state and local governments without this restriction to out of state sellers. While consumers in most states are required to remit a use tax in place of this uncollected sales tax, this was rarely actually remitted by the average customer. As the online shopping industry continued to grow within the country's economy, Congress was repeatedly urged to address the issue through a nationwide legislative solution. After years of inactivity from Congress, Justice Kennedy, in a 2015 concurring opinion, called on the Court to reexamine the physical presence requirement for companies which maintain a substantial nexus with the state.

It was South Dakota, a state that has no personal income tax and thus relies heavily on sales tax revenue, who answered Justice Kennedy's call. In 2016, South Dakota passed Senate Bill 106 requiring retailers to collect sales tax based on an "economic nexus" to the state, opposed to a physical presence. The law required retailers that have more than $100,000 in sales or more than 200 transactions within the state to collect and remit sales tax. Shortly after the passage of the law, South Dakota sued several large online retailers, including Wayfair, over its enforcement. On June 21, 2018, the Supreme Court delivered its opinion in *South Dakota v. Wayfair,* ruling in favor of South Dakota and overruling *National Bellas Hess* and *Quill*. In the majority opinion, authored by Justice Kennedy, the Court denounced the physical presence rule as "unsound and incorrect," putting an end to this limitation on sales tax collection.



While this decision is clearly monumental, the long-term effects on the states are yet to be determined. There remains the possibility that this action by the Court will encourage Congress to now respond and pass uniform federal law. In the meantime, states are now free to craft individual laws using South Dakota as an example. According to the Tax Foundation, 32 states have passed laws that would allow the collection of sales tax from out of state retailers. Notably, Georgia joined this list of states in 2018, passing House Bill 61. This new law allows the state to require any retailer that either has more than $250,000 in sales or more than 200 separate transactions in the state in the previous or current year to collect and remit sales tax. The Supreme Court outlined what the Tax Foundation refers to as the "The Wayfair Checklist" for states to ensure their remote seller laws will be constitutional. This checklist to ensure potential laws are constitutional includes adopting a *de minimus* threshold, explicitly rejecting retroactive enforcement, and adhering to uniformity and simplification rules in the Streamlined Sales and Use Tax Agreement. Of the 32 states that have passed laws to collect sales tax from out of state retailers, 11 states' laws, including Georgia's, meet all the provisions of the "Wayfair Checklist." According to Georgia's Department of Revenue, Georgia will begin collecting sales tax from qualifying out of state retailers as early as January 1, 2019.

This change in law is an obvious benefit to the state's revenue, but it remains unclear how much additional tax revenue will be collected. Many major retailers who compose a large percentage of online sales already have a significant physical presence within the state and thus were already subject to Georgia sales tax. This includes well established physical stores such as Target and Best Buy, who conduct a large number online sales, and massive exclusive online retailers like Amazon. Furthermore, many online sales will continue to not be subject to Georgia sales tax, if the sellers do not meet the volume requirements in the law. This includes many third party sellers who use popular marketplace websites such as Amazon and Etsy. While there will undoubtedly be collection challenges, along with additional costs to the state, Georgia State University's Fiscal Research Center estimates that the state could collect up to an additional $299 million in revenue in Fiscal Year 2020 from the collection of this sales tax. In addition to the increase in state and local revenue, many are optimistic this change in law will level the playing field between local and online retailers. With online retailers no longer enjoying the systematic advantage of not charging sales tax, there is hope smaller and local businesses may benefit. - *RB*

2018 Constitutional Amendment Ballot Questions

Amendment One: The first amendment authorizes the General Assembly to provide by law for the allocation of up to 80 percent of all moneys received by the state from the sales and use tax collected by sporting goods stores in the immediately preceding fiscal year to be dedicated to the Georgia Outdoor Stewardship Trust Fund for the purposes of funding the protection of conservation land.

House Resolution 238 – Companion Resolution to HB 332/Georgia Outdoor Stewardship Act & Trust Fund
Sponsors: Senator Gooch of the 51st and Rep. Watson of the 172nd
Effective Date: July 1, 2018, provided approval of November 2018 Ballot Question (Signed on May 7, 2018; Act 414)
This is resolution amends the Georgia Constitution by allowing the General Assembly to provide by general law that up to 80 percent of all moneys received by the state from the sales and use tax collected by establishments classified under the 2007 North American Industry Classification Code 451110, sporting goods stores, in the year immediately preceding fiscal year must be paid into and dedicated to the Georgia Outdoor Stewardship Trust Fund. The purpose of such fund is protection and preservation of conservation land. Any general law pertaining to this resolution must sunset and provide for automatic repeal no more than 10 years after its effective date; however, such sunset provision may be extended for a maximum of 10 additional years.

Amendment Two: The second amendment would expand the judicial power of the state by creating a "state-wide business court" with state-wide jurisdiction in an effort to streamline and improve handling of business cases.

House Resolution 993 – Constitutional Amendment Providing for the Creation of a State-wide Business Court
Sponsors: Senator Strickland of the 17th and Rep. Efstration of the 104th
Effective Date: Upon Ratification of November 2018 Ballot Question (Signed on May 6, 2018; Act 410)
This resolution provides a constitutional amendment to expand the judicial power of the state to include a business court. This amendment would not be effective until voted on and ratified. Each court may exercise powers as necessary in aid of its jurisdiction or to protect or effectuate judgments. This resolution allows business courts the power to issue process in the nature of mandamus, prohibition, specific performance, and quo warranto. Also, business courts may grant new trials on legal grounds.

This resolution provides that the state-wide business court must be effective as provided by law. The business court would have state-wide jurisdiction. Superior Courts have concurrent jurisdiction with the state-wide business court in equity cases, and may order removal of a case to the state-wide business court as provided by law. Further, this resolution provides for the venue of the state-wide business court. All cases properly before the business court may have pretrial proceedings in any county provided by law, and any trial of a case that is properly before the business court shall be in the county as is otherwise prescribed by this section.

Business court judges will be appointed by the Governor and subject to approval by a majority of each of the Senate Judiciary Committee and the House Committee on Judiciary. Such judges can be reappointed for any number of consecutive terms as long as they meet the qualifications of appointment at the time of each appointment and approved as required. Business court judges must be admitted to practice law for seven years. State-wide business court vacancies will be filled by appointment of the Governor.

Amendment Three: The third amendment would change the rules for assessing the value of forest land for property tax purposes and allows the state revenue commissioner to collect up to five percent of forest conservation grants to cover certain costs.

House Resolution 51 – Valuation of Forest Land Conservation Use Property Constitutional Amendment
Sponsors: Senator Black of the 8th and Representative Powell of the 171st
Effective Date: Upon Ratification of November 2018 Ballot Question (Signed on May 2, 2018; Act 297)
This resolution is the corresponding proposal for a constitutional amendment to House Bill 85. Under the current version of the Georgia Constitution, forest land tracts of at least 200 acres can be classified as forest land conservation use property. This property is then valued based on its current use, annual productivity, and real property sales data. Local counties are provided assistance grants to offset the revenue lost from this program based on the land's fair market value in 2008. This resolution revises the provision on calculating revenue reduction for local governments to use fair market value of the property in 2016, updated every three years. The resolution also allows the value of the assistance grants to be increased by general law between 2019 and 2023. The resolution allows the General Assembly to classify separately, real property used for producing trees for timber commercial use. The value of this qualified timberland property will be at least 175% of the property's forest land conservation use value.

(continued on page 6)

(2018 Constitutional Amendment Ballot Questions - continued from page 5)

Amendment Four: The fourth amendment, modeled on "SB 127/Marsy's Law," the crime victim's bill of rights, would entitle a victim to certain rights when such victim has suffered or been harmed as a result of an attempted or committed criminal or juvenile delinquent act. This includes requiring the court to notify and include the alleged victims of crimes in most court proceedings.

Senate Resolution 146 – Companion Resolution to SB 127/Marsy's Law
Sponsor: Senator Kennedy of the 18th and Representative Golick of the 40th
Effective Date: January 1, 2019, provided approval of November 2018 Ballot Question (Signed on May 8, 2018; Act 467)
This resolution proposes that a constitutional amendment be placed on the ballot for consideration by Georgia voters. This proposed amendment would entitle a victim to certain rights when such victim has suffered or been harmed as a result of an attempted or committed criminal or juvenile delinquent act. Further, this amendment requires the General Assembly to provide by general law, how a victim may assert these additional rights. When a victim is a minor, legally incapacitated, or deceased, the victims' rights may be asserted by a family member and the General Assembly must provide how such victims' rights may be asserted. Additionally, the victim may be represented by counsel in a proceeding to enforce these rights. However, neither the state, nor any of its political subdivisions are obligated to appoint such counsel.

Amendment Five: The fifth amendment authorizes a school district or group of school districts within a county to call for a sales tax referendum to fund school construction without getting approval from the smaller system.

Senate Resolution 95 – Sales and Use Tax for Education Purposes; Proceeds Distribution
Sponsor: Senator Black of the 8th and Representative Nix of the 69th
Effective Date: January 1, 2019, provided approval of November 2018 Ballot Question (Signed on May 9, 2017; Act 278)
SR 95 from 2017 authorizes a school district or group of school districts within a county to call for a sales and use tax referendum. The district or group of districts that have a majority of the students enrolled within the county based on the last full-time equivalent (FTE) count would be authorized to call for a referendum to impose, levy, and collect a sales tax. The tax would be one percent and last up to five years. Revenue from the sales tax would be divided between school districts within the county according to an agreement between the county school system and independent school district(s), or if such an agreement could not be made, the revenue would be divided based on the ratio of the student enrollment of all districts in the county.

Referendum Question A: The first statewide referendum question would impose a property tax cap, providing a new homestead exemption from ad valorem taxes for municipal purposes for property within the city of Atlanta.

House Bill 820 – Homestead Ad Valorem Exemption
Sponsors: Senator Millar of the 40th and Representative Beskin of the 54th
Effective Date: January 1, 2019, provided approval of November 2018 Ballot Question (Signed on May 3, 2018; Act 346)
This bill provides a new homestead exemption from ad valorem taxes for municipal purposes for property within the city of Atlanta. The homestead will be exempt from ad valorem taxes for municipal purposes equal to the amount which the current year assessed value exceeds the adjusted base year value of the homestead. Adjusted base year value is the previous adjusted base year value adjusted annually by 2.6% plus any change in homestead value, provided that no such change is duplicated for the same addition or improvement. The exemption granted will be in addition to any other homestead exemption for ad valorem taxes for municipal purposes except that it will be in lieu of any other base year assessed value or adjusted base value homestead exemptions provided by local Act.

Referendum Question Two: The second question would expand a property tax exemption on homes for the mentally disabled.

House Bill 196 – Changes to Ad Valorem Taxation Assessment, Exemption, and Refund Statutes
Sponsors: Rep. Dollar of the 45th and Senator Burke of the 11th
Effective Date: January 1, 2019, provided approval of November 2018 Ballot Question (Signed on April 25, 2017; Act 25)
HB 196 from 2017 provides a tax exemption for certain nonprofit-owned homes for the mentally disabled. This proposal clarifies that the existing exemption from ad valorem taxation for nonprofit homes for the mentally disabled applies even when financing for construction or renovation of the homes is provided by a business corporation or other entity. It amends paragraph (13) of Code Section 48-5-41 of the Official Code of Georgia Annotated. If approved by a majority of the voters, the Act becomes effective on January 1, 2019, and applies to all tax years beginning on or after that date.

Senate Research Office
Elizabeth Holcomb, Director
elizabeth.holcomb@senate.ga.ov
204 Coverdell Legislative Office Building
404.656.0015

Senate Budget & Evaluation Office
Melody DeBussey, Director
melody.debussey@senate.ga.gov
208 Coverdell Legislative Office Building
404.463.1970

Senate Press Office
Ines Owens, Director
ines.owens@senate.ga.gov
201 Coverdell Legislative Office Building
404.656.0028