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

BRIONTÉ McCORKLE, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, *Defendant*.	Civil Action No. 1:24-cv-03137-WMR

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Members of the Georgia Public Service Commission (PSC) have been elected statewide using staggered terms for decades. In 2020, Plaintiff McCorkle sought to put a stop to that system, ultimately persuading the district court the statewide election system for PSC did not provide an equal opportunity for Black voters. The district court then cancelled the 2022 and 2024 PSC elections. But the Eleventh Circuit later reversed the district court because there was no violation of federal law in Georgia's method of election for PSC. To solve the problem of cancelled elections, the legislature passed a new statute, HB 1312, to re-stagger the PSC elections over several election cycles.

Plaintiff McCorkle doesn't like the legislative solution to the problem she created. This lawsuit seeks to take Georgia's win in Plaintiff McCorkle's first case and force a result where Georgia would still lose by being required to surrender its strong state interest in staggered terms for PSC. Those terms are specifically designed to avoid having a majority of the members up for election in the same year. There is no basis on which to enter the requested injunction and this Court should deny the gamesmanship of Plaintiffs' motion.

First, Plaintiff McCorkle—the only Plaintiff who presented any evidence regarding a potential injury in the motion for preliminary injunction—has no standing to bring this case or seek relief. As Plaintiffs admit, Georgia PSC elections

are statewide elections in which any eligible elector in Georgia may vote. As a result, Plaintiff McCorkle is in no different position than any other voter—making her complaint a generalized grievance that cannot be heard by this Court.

Second, Plaintiffs cannot show a likelihood of success on the merits. There is no due-process violation because HB 1312 does not rise to the level of fundamental unfairness and complies with the Georgia Constitution. It was passed in direct response to an extremely unusual circumstance—a federal court injunction that cancelled multiple statewide elections across multiple election years and disrupted Georgia's long-standing system of staggered PSC elections. And the district court's injunction, entered at Plaintiff McCorkle's request, ensured that some commissioners would serve beyond six years. The legislature corrected that reality by creating a reasonable timeline to return to staggered elections, including incurring the significant cost of a statewide special election to avoid dragging out the solution. This Court should not further interfere with Georgia's chosen election process and replace an overturned injunction with a new one.

Finally, Plaintiffs cannot show they meet the other necessary prongs of an injunction. There is no irreparable harm because Plaintiff McCorkle is as free to vote in all PSC elections as every other Georgia voter. The balance of the equities and public interest strongly favor the state enforcing its own laws, especially when those laws are a carefully considered response to unwarranted

federal court interference. And because the *Purcell* Principle applies, this Court also cannot enter relief because Plaintiffs do not show that their claims are entirely clearcut in their favor, that they would suffer irreparable harm, that they did not unduly delay, and that the changes they propose are feasible.

Over the Secretary's objections, a federal court cancelled multiple statewide elections on a basis the Eleventh Circuit has now invalidated. To clean up that unprecedented situation, the legislature took all relevant state interests into account, including the interests of Georgia voters. This Court should not further interfere with the state's exercise of its constitutional authority to determine the "manner and time of election of members of the commission," Ga. Const. Art. IV, § 1, Para. 1(c), and should deny Plaintiffs' motion for preliminary injunction. In addition, for all the reasons outlined in the Secretary's motion to dismiss, this Court should also dismiss this case in its entirety.

FACTUAL BACKGROUND

I. Procedural background of *Rose* case.

Understanding what led to the cancellation of the 2022 and 2024 PSC elections will assist the Court with the context of this case, because Plaintiff McCorkle is part of both cases. Since the beginning of *Rose v. Raffensperger*, Case No. 1:20-CV-02921-SDG, in 2020, the Secretary consistently raised the issue that there was no violation of the Voting Rights Act (VRA) because the plaintiffs in that

case did not present the required element of a proper remedy. *Rose* Docs. 22-1, 80-1, 143. Following a trial on the merits, the Court found on August 5, 2022, that the statewide method of election for PSC violated Section 2 of the Voting Rights Act (VRA). *Rose* Doc. 151 at 35, 56–60. That order also cancelled the 2022 elections for PSC and all upcoming elections for PSC using a statewide method of election. *Id.* at 63. Following that order, the Secretary appealed. *Rose* Doc. 152.

After filing the appeal, the Secretary sought a stay of the post-trial order in an effort to allow the 2022 general election to proceed but did not do so based on the *Purcell* Principle.[1] After the Eleventh Circuit granted a stay based on *Purcell* only, *Rose v. Sec'y of State of Georgia*, No. 22-12593, 2022 WL 3572823 at *6 (11th Cir. Aug. 12, 2022), the U.S. Supreme Court reversed, *Rose v. Raffensperger*, 143 S. Ct. 58 (2022), recognizing the Eleventh Circuit had granted the stay based on grounds not sought by the Secretary. By the time the Supreme Court order issued, the Secretary arrived at the deadline for removing the PSC contests from the 2022 general-election ballot and ceased efforts to stay the cancellation of the 2022 PSC

[1] As discussed below, the *Purcell* Principle applies additional elements to a request for an injunction involving elections and requires district courts to not enjoin state election laws close to an election. *See League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022). Because cancelling the PSC elections was less disruptive than some other potential changes to the election process, the Secretary had agreed in *Rose* that it was feasible to cancel the 2022 general elections for PSC if a decision was reached after the trial by a date certain. *Rose* Docs. 151 at 61–63, 112 at 9–10.

elections despite the Eleventh Circuit's invitation to re-apply for a stay. *See Rose v. Raffensperger*, 87 F.4th 469, 478–79 (11th Cir. 2023). Consistent with the *Rose* post-trial order, the 2022 PSC general elections were removed from the ballot and did not occur. Dec. of Blake Evans, attached as Ex. A (Evans Dec.), ¶ 3; [Doc. 1, ¶ 20].

The Eleventh Circuit reversed the *Rose* court's post-trial order in November 2023. *Rose*, 87 F.4th at 469. Following that decision, Plaintiffs petitioned for a writ of certiorari from the U.S. Supreme Court to review the Eleventh Circuit's decision on the merits. *See Rose v. Raffensperger*, No. 23-1060, 2024 WL 3089563, at *1 (U.S. June 24, 2024). At nearly the same time, a judge on the Eleventh Circuit withheld issuance of that court's mandate, so the district court's post-trial injunction against holding PSC elections remained in place. *Rose* 11th Cir. Docs. 64, 65. The Eleventh Circuit later *sua sponte* lifted the district court injunction on April 16, 2024. *Rose* 11th Cir. Doc. 68. The U.S. Supreme Court ultimately denied Plaintiffs' petition for certiorari. *Rose*, 2024 WL 3089563, at *1. After the Eleventh Circuit denied a request for rehearing en banc, the mandate finally issued to the district court. *Rose v. Sec'y of State of Ga.*, __ F.4th __, No. 22-12593, 2024 U.S. App. LEXIS 16841, at *2 (11th Cir. July 10, 2024); *Rose* 11th Cir. Doc. 74. On July 22, 2024, the district court made the mandate of the Eleventh Circuit its judgment. *Rose* Doc. 193. Plaintiffs filed this case days after the mandate issued from the Eleventh Circuit. [Doc. 1].

II. Election processes and the legislative changes.

While the court process was moving forward, the state acted in response to the various court orders. As the beginning of the 2024 election process approached, the *Rose* court's injunction prohibiting elections for PSC remained in place. Qualifying for statewide offices took place on March 4–8, 2024 and did not include any PSC races because the post-trial injunction remained in effect. *See* O.C.G.A. § 21-2-132(d). By the time the Eleventh Circuit lifted the stay on April 16, 2024, 11th Cir. Doc. 68, primary ballots had already gone out to overseas voters (O.C.G.A. § 21-2-384(a)) and domestic voters (O.C.G.A. § 21-2-384(a)(2)) and early voting for the general primary was set to begin in fewer than two weeks. O.C.G.A. § 21-2-385(d)(1). Because the primary was already underway, and Georgia law requires a special primary election for partisan offices prior to a special general election, there was no way to conduct elections for PSC in the 2024 election cycle after the Eleventh Circuit lifted the stay in April. Evans Dec. at ¶¶ 4, 6.

Recognizing the Eleventh Circuit's November order and the timeline for qualifying for the 2024 cycle, the Georgia General Assembly passed legislation during its 2024 regular legislative session setting a new schedule to re-stagger PSC elections and ensure the state's policies of statewide elections and staggered elections are followed. *See* 2024 Ga. Laws Act 380 (HB 1312) (portions codified at O.C.G.A. § 46-2-1.1) [Doc. 1-1]. To address the holdover nature of the incumbents

whose elections were cancelled by the district court's injunction, the legislature chose to incur the significant cost of a statewide special election in 2025, to ensure that all PSC elections are back on their normal six-year tracks by 2028. Evans Dec. at ¶ 16.

Under the legislation, the terms are handled as follows, showing a mix of election dates to ensure the state interest of staggered terms and avoiding a majority of the PSC on the ballot at the same time:

District	Incumbent	Most recent prior election	Next general election without injunction	Next general election under HB 1312	Next general election after election set by HB 1312
1	Jason Shaw	2020	2026	2028	2034
2	Tim Echols	2016	2022	2025	2030
3	Fitz Johnson	N/A appointed 2021	2022 (special)/ 2024 (regular)	2025 (special) / 2026 (regular)	2032
4	Lauren "Bubba" McDonald	2020	2026	2028	2034
5	Tricia Pridemore	2018	2024	2026	2032

Plaintiffs disagree with this approach and do not propose a schedule that solves the issue, but rather just modifies the terms in a different way that results in three incumbents standing for election at the same time in 2024 or 2025:

District	Incumbent	Most recent prior election	Next general election without injunction	Next general election under Plaintiffs' proposal	Next general election after Plaintiffs' proposed election
1	Jason Shaw	2020	2026	2026	2034
2	Tim Echols	2016	2022	2024/25	2028
3	Fitz Johnson	N/A appointed 2021	2022 (special) / 2024 (regular)	2024/25	2030
4	Lauren "Bubba" McDonald	2020	2026	2026	2034
5	Tricia Pridemore	2018	2024	2024/25	2030

See [Doc. 2 at 10]. Plaintiffs' proposal fails to take into account that the Districts 2 and 5 elections that did not occur should have been regular *general* elections and the incumbents continued to stay in office beyond those dates. And Plaintiffs' proposal would result in the individuals elected to Districts 2 and 5 serving shorter than six-year terms from the date of their next election—which is precisely what HB 1312 does with Districts 2 and 3. Further, Plaintiffs' proposal fails to account for the appointment of Commissioner Johnson in District 3, which originally required a special election for the remainder of the former Commissioner's term. O.C.G.A. § 46-2-4. Plaintiffs' proposal would just pretend that no special election for the unexpired term was necessary and would move forward with a new, shortened term. Ultimately, Plaintiffs' proposal is just a different policy approach

that would result in treating the commissioners differently than that chosen by the General Assembly.

III. Infeasibility of Plaintiffs' proposed relief.

Not only does Plaintiffs' proposed relief not take into account the state interests in staggered terms or treat Commissioners similarly, it is also impossible to administer on the timeline they seek. Plaintiffs propose that primary elections be held as soon as the general election or the general runoff election in 2024. [Doc. 2 at 11]. But the only way a special primary could be conducted in conjunction with the general election or general runoff in 2024 is through a "separate and apart election." Evans Dec. at ¶ 7. A separate and apart election is conducted at the same time as another election but uses different check-in equipment, different voting machines, and different poll workers. *Id*. at ¶¶ 7–8. It would also require re-training of poll workers and redesigned election processes. *Id*. at ¶ 12. Due to statutory equipment requirements for presidential elections, O.C.G.A. § 21-2-367(b)(1), there is not sufficient equipment available in the state of Georgia to run three simultaneous statewide elections (general election, Republican primary, and Democratic primary). *Id*. at ¶¶ 10–11. All available equipment must be either deployed for the presidential election or be available for use as replacement equipment. *Id*. Plaintiffs' request that any special election be held in conjunction

with those elections is not feasible and would add significant costs for counties. *Id*. at ¶ 15.

Even if there was sufficient equipment to conduct PSC special primary elections in November 2024, holding a separate and apart election in conjunction with a presidential election is a recipe for significant voter confusion and long lines. *Id*. at ¶ 13. Voters who vote in person would have to check in once for the general election, complete the voting process on one set of equipment (touchscreen and scanner), then check in a second time for the special primary election based on their political party preference and complete the voting process on separate equipment. *Id*. at ¶ 9. In addition to the very real possibility that voters in today's political climate would question voting twice on separate machines, asking voters their political affiliation for the proposed primary election would very likely create confusion at the polls and doubts about election results. *Id*. at ¶¶ 13–14.

Instead of this impossible and chaotic approach suggested by Plaintiffs that could undermine the 2024 presidential election, HB 1312 establishes a primary process in June 2025 with a general election in November 2025 held in conjunction with the municipal elections. [Doc. 1-1, § 2]. Given the responsibilities of election officials following a presidential year, it is critical that election officials have the first six months of 2025 to conduct other activities related to their jobs and not be

saddled with running another statewide election in early 2025, as Plaintiffs alternatively suggest. Evans Dec. at ¶ 18.

Conducting a statewide special election is an extremely expensive proposition for counties and the state. *Id*. at ¶ 16. But conducting the general election at the same time as municipal elections in 2025 provides an opportunity for at least some cost savings. *Id*. at ¶ 17. Such cost savings would not be available if the PSC elections are conducted in early 2025 as Plaintiffs suggest. *Id*.

ARGUMENT AND CITATION OF AUTHORITY

Because preliminary injunctions are such extraordinary and drastic remedies, federal courts may not grant this type of relief "unless the movant clearly established the burden of persuasion as to the four requisites." *McDonald's Corp. v. Robertson*, 147 F. 3d 1301, 1306 (11th Cir. 1998) (cleaned up). Plaintiffs must show that: (1) they have a substantial likelihood of success on the merits of their claims; (2) they will likely suffer irreparable harm in the absence of an injunction; (3) the balance of equities tips in Plaintiffs' favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008).

A preliminary injunction is never granted as a matter of right. *Benisek v. Lamone*, 585 U.S. 155, 158–59 (2018). While it is already a form of extraordinary relief, that relief is even more drastic in the context of elections, because of the public interest in orderly elections and election integrity. *Purcell v. Gonzalez*, 549

U.S. 1, 4–5 (2006). Thus, federal courts considering injunctions "in the period close to an election" must take into account issues like "voter confusion" and generally "not enjoin state election laws in the period close to an election." *League of Women Voters of Fla.*, 32 F.4th at 1370 (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring)).

Further, when "an impending election is imminent and a State's election machinery is already in progress," equitable considerations justify a court denying an attempt to gain immediate relief. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see also Repub. Nat'l Comm. v. Dem. Nat'l Comm.*, 589 U.S. 423, 424 (2020). This is because parties must show they exercised reasonable diligence in filing their request for relief, especially in the context of elections. *Benisek*, 585 U.S. at 159. As discussed below, Plaintiffs have not shown this kind of diligence here. Plaintiffs cannot show any basis to grant the requested injunctive relief.

I. This Court lacks jurisdiction to grant Plaintiffs' motion and should deny the requested relief on that basis alone.

"Federal courts are not 'constituted as free-wheeling enforcers of the Constitution and laws.'" *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc)). Instead, "[t]he Constitution makes clear that federal courts are courts of limited jurisdiction…" *Id.* at 1310 (citing U.S. Const. art. III). Thus, in order for any federal court to pass judgment on the merits of a claim, the plaintiff "must

prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision.'" *Id.* at 1314 (quoting *Jacobson v. Fla. Sec'y of State,* 974 F.3d 1236, 1245 (11th Cir. 2020)). As explained in the Secretary's motion to dismiss filed with this response and incorporated by reference, Plaintiff McCorkle's motion for a preliminary injunction fails to show this Court can grant relief because it lacks jurisdiction to do so. Accordingly, this Court should deny Plaintiffs' request for an injunction on that basis alone.

II. Plaintiffs cannot establish a likelihood of success on the merits because HB 1312 does not violate any federal or state law.

A. HB 1312 complies with the Georgia Constitution.

Plaintiffs root their likelihood-of-success analysis in the concept that voters will be "disenfranchise[d]" and that HB 1312 violates Georgia law. [Doc. 2 at 6–7]. But even if this Court considers this question of state law as an original matter,[2] Plaintiffs are wrong on both counts. The Georgia Constitution provides that the "manner and time of election of members of the [Public Service C]ommission shall be as provided by law." Ga. Const. Art. IV, § I, Para. I(c). Thus, when faced with an injunction that prohibited the election of members of the PSC in 2022 and 2024,

[2] When there is substantial doubt about material questions of state law, those questions should be certified to the Supreme Court of Georgia. *Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996).

the General Assembly had the constitutional power to set the time and manner of the elections for those members. That would normally involve six-year terms. But this was not a normal situation.

Under Georgia law, when a federal-court injunction prevents the holding of elections for a state office, there is no vacancy created in the office as a result of the inability to hold the relevant election. *Garcia v. Miller*, 261 Ga. 531, 531–32 (1991). The Georgia Constitution provides that PSC "[m]embers shall serve until their successors are elected and qualified." Ga. Const. Art. IV, §1, Para. 1(a). And as a matter of state law, state officers "shall discharge the duties of their offices until the successors are commissioned and qualified." O.C.G.A. § 45-2-4; *see also Kanitra v. City of Greensboro*, 296 Ga. 674, 676 (2015); *Clark v. Deal*, 298 Ga. 893, 897 (2016) (new positions on Georgia Court of Appeals were "vacant" offices).

Applying that law to the facts here demonstrates that HB 1312 is appropriate under these unusual circumstances. *Garcia* closely tracks the position in which the State of Georgia found itself in this case. During litigation over judgeships in the late 1980s and early 1990s, a federal court enjoined elections in 1990 for several challenged offices. 261 Ga. at 531. As a result, no elections were held and a voter filed a *quo warranto* action, claiming a judge had served beyond his four-year term under the Georgia Constitution. *Id*. Previous state constitutions included language that judges served "until his successor is qualified" but that language had been

removed in the 1983 Constitution. *Id*. at 531–32. Even without that provision in the constitution (which is still included in the PSC section, Ga. Const. Art. IV, § I, Para. I(a)), the Supreme Court of Georgia determined that the challenged judge who served beyond his term did not result in a vacant office. 261 Ga. at 532.

Thus, under Georgia law there is currently no vacancy in any position on the PSC that would require elections.[3] With two general elections cancelled and the injunction lifted by the Eleventh Circuit, the State of Georgia had to find a solution that "preserve[d] the state's interest in ensuring that members of the commission are elected in staggered elections and serve staggered terms." O.C.G.A. § 46-2-1.1(a). That solution was HB 1312.

As Plaintiffs admit, Public Service Commissioners serve staggered terms and have for decades. [Doc. 1, ¶ 11]. In fact, the Secretary's office cannot identify any election in Georgia in the past 30 years (and possibly longer) where three PSC seats have been up for election at the same time. Evans Dec. at ¶ 19. HB 1312

[3] Plaintiffs incorrectly claim that immediate elections must be held under Georgia law if HB 1312 is enjoined. [Doc. 2 at 10–11]. But none of the statutes they cite support that statement. O.C.G.A. § 21-2-504(a) only requires special primaries or elections when there are vacancies in offices or candidates die or withdraw before taking office. O.C.G.A. § 21-2-540(b) sets the timeline for calling those elections when there is a vacancy and O.C.G.A. § 21-2-541(a) permits special elections to be held at the same time as a general primary or election. Thus, there is no "ample direction" in statute for what must happen when a federal court enjoins an election but there is no vacancy in the office. [Doc. 2 at 10].

protects those interests, preserves staggered terms, treats incumbent commissioners similarly, and restores the regular rhythm of six-year elections, at the price of an expensive statewide special election in 2025 in conjunction with municipal elections. Evans Dec. at ¶ 16–17. That is consistent with the Georgia Constitution's grant of power to set the manner and time of elections for the PSC to the legislature. Ga. Const. Art. IV, § I, Para. I(c).

HB 1312 does not alter the Georgia Constitution as Plaintiffs suggest. Rather, HB 1312 provides a one-time fix for the disruption caused in the PSC election cycles by the judicially imposed cancellation of elections in 2022 and 2024 and provides a path for the restoration of six-year, staggered terms for commissioners. And even if this Court were to ultimately conclude that there is some kind of fundamentally unfair process in HB 1312 (which is plainly not the case), the state's "substantial state interests" require this Court to uphold Georgia's process. *Curry v. Baker*, 802 F.2d 1302, 17 (11th Cir. 1986). Thus, there is no basis to grant Plaintiffs' motion and override the interests of state.

B. Changes in the timing of elections is not a violation of substantive due process.

Plaintiffs overstate existing law when they claim that state officials violate the U.S. Constitution when they violate state laws related to elections. [Doc. 2 at 6]. The Eleventh Circuit has said that a federal due process claim under the Fourteenth Amendment can arise from "the disenfranchisement of a state

electorate in violation of state election law." *Duncan v. Poythress*, 657 F.2d 691, 699 (5th Cir. 1981).[4] But there is no federal due process violation for "garden variety" claims relating to the administrative details of an election that do not result in patent and fundamental unfairness. *See Curry*, 802 F.2d at 1315. At the same time, "there is no single, bright line to distinguish" when a federal court should intervene in a state election process. *Duncan*, 657 F.2d at 703; *see also Bonas v. Town of N. Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001). Indeed, in the procedural due process context, the Eleventh Circuit has recently only "assume[d] that the right to vote is a liberty interest protected by the Due Process Clause." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020) (en banc).[5]

When dealing with substantive due process, the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). But whatever standard is applied, this case does not rise to the level of a constitutional violation. Unlike *Duncan*, this is not a situation where "public officials [] disenfranchise[d] voters in violation of

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[4] This case was decided shortly before the cutoff date for when all existing Fifth Circuit precedent was made binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[5] Also in the procedural due process context, Judge Lagoa has suggested that "voting is not a liberty interest protected by the due process clause" and criticized a district court for not conducting an analysis of "whether the voters' asserted interest in this case was sufficient to trigger due process protection." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1288 (11th Cir. 2020) (Lagoa, J., concurring).

state law so that they may fill the seats of government through the power of appointment." 657 F.2d at 704. Nor is it a situation of a "total and complete disenfranchisement of the electorate as a whole." *Bonas*, 265 F.3d at 75. Instead, it is far more like a challenge to the "counting and marking of ballots," *Curry*, 802 F.2d at 1316 (quoting *Duncan*, 657 F.2d at 703), because it involves *when* elections will be held for *particular* seats on the PSC after an injunction cancelled elections—not whether those elections will be held at all.

As a result, Plaintiffs' motion does not implicate any fundamental unfairness in Georgia elections. It addresses a state's chosen remedy to a federal court's involvement in that election process. And under these circumstances, that cannot rise to the level of a substantive due process violation.[6]

[6] If this Court holds that Plaintiffs can proceed under substantive due process, that raises further questions about the internal consistency of *Duncan*, as well as whether it is consistent with Due Process Clause fundamentals. There is no general federal constitutional right to vote in a state election. *See, e.g., Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8–9 (1982) ("[T]his Court has often noted that the Constitution does not confer the right of suffrage upon any one.") (quotation marks and citations omitted); *see also Pope v. Williams*, 193 U.S. 621, 632 (1904) ("The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. … the privilege to vote in a state is within the jurisdiction of the state itself."). Nor is there any "substantive due process protection" in "areas in which substantive rights are created only by state law." *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc).

C. The cases Plaintiffs cite do not apply to HB 1312.

Plaintiffs do not even attempt to grapple with this reality, instead relying on cases involving *state officials* cancelling elections after appointments that have no bearing here. *Kemp v. Gonzalez*, 310 Ga. 104, 113 (2020), dealt with the question of whether appointees to vacant positions for district attorney begin a new term or fulfil the remainder of the unexpired term of their predecessor. But there are no vacancies on the PSC today—and there is no similar question for this Court to answer, because there is no conflict between a general and specific provision. *Id.* Georgia PSC members could not stand for election for multiple years because of a federal court injunction and the state has a strong interest in ensuring staggered terms. Those offices are not vacant. *Garcia*, 261 Ga. at 531–32. As a result, *Kemp* has no applicability to a situation with no vacancies and a federal-court injunction—not an appointment—resulted in the changes.

The same logic demonstrates that the other cases cited by Plaintiffs are inapplicable. *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1269 (11th Cir. 2020), again involves the situation where an election for district attorney was cancelled based on an understanding of the effect of an appointment, not the statutorily mandated continuation of the term of a currently serving state official. *Duncan* similarly involved the cancellation of an election after an attempted appointment to an office. 657 F.2d at 693. None of these cases offer anything for the Court when

considering the legislature's exercise of its constitutional authority to respond to a highly unusual situation involving the PSC that was only brought about due to a federal court error. And, as discussed previously, this case does not involve a state official's decision to cancel an election nor complete disenfranchisement—it involves differences in policy determinations about how to return to normalcy after a federal court's injunction cancelling elections. *See, e.g., Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1251 (N.D. Ga. 2022).

For all these reasons, Plaintiffs cannot show they are likely to prevail on their claim that HB 1312 is somehow a violation of a right to substantive due process. The General Assembly recognized the important state interests in staggered elections and utilized its authority to set the times of elections for members of the PSC. The holdover of incumbents is authorized by Georgia law and the legislature was well within its constitutional mandate to prescribe the manner of PSC elections once the injunction was lifted. And HB 1312 does not work any fundamental unfairness in Georgia's elections.

III. Plaintiffs cannot establish the remaining elements of a preliminary injunction.

Even if Plaintiffs could establish this Court has jurisdiction and they are likely to succeed on the merits of their claim, the Court should not enter the requested injunction because Plaintiffs cannot show that any of the remaining elements are met.

A. There is no irreparable harm to Plaintiff McCorkle.

Plaintiff McCorkle does not claim she is unable to vote or that voting will be more difficult if an injunction is not entered. Instead, her sole basis for irreparable harm is that she will not be able to vote for the particular Commissioners she wants to at the particular times she wishes to do so. [Doc. 2 at 8]. Indeed, under the relief Plaintiff McCorkle sought in the *Rose* case, she would be unable to vote for four of the five members of the PSC.

Thus, the claimed injury here is not that Plaintiff McCorkle will be unable to vote for PSC members—only that she wants to vote on a different timeline than the one selected by the General Assembly. *See* [Doc. 2 at 10–11]. And "[a]lthough the right to vote is fundamental, '[i]t does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute.'" *Gwinnett Cty. NAACP v. Gwinnett County Bd. of Registration and Elections*, 446 F. Supp. 3d 1111, 1122 (N.D. G.a 2020) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Having to vote on different races than you wish is not a threat to constitutional rights nor a restriction on the right to vote, and thus cannot constitute an irreparable injury. [7]

[7] Despite the presence of some organizations as named parties in this lawsuit, Plaintiffs do not argue anywhere in their motion or complaint that the organizations will suffer an irreparable harm or are asserting third-party standing.

B. The balance of equities and public interest do not favor Plaintiffs.

When a government opposes a preliminary injunction, "its interest and harm merge with the public interest." *Coal. for Good Governance v. Kemp*, 558 F. Supp. 3d 1370, 1392 (N.D. Ga. 2021) (quoting *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020)). Plaintiff McCorkle faces relatively little harm compared to the State of Georgia and its voters, who have been denied their right to vote for PSC Commissioners for years as a direct result of her actions in *Rose*. And in any event, she will be able to vote for two PSC positions instead of the three she prefers in the upcoming elections in 2025. *See* Facts Section II above; [Doc. 2 at 9] (noting election would be "sooner than they otherwise would have"). But the State faces a significant loss of its longstanding practice of staggered elections if Plaintiffs' relief is granted. In fact, Georgia would face an unprecedented situation directly contrary to its longstanding interests, where a majority of the PSC would be up for election at the same time in 2025—after *winning* the case that originally cancelled the elections. Evans Dec. at ¶ 19.

Further, existing commissioners would be treated differently, with some receiving longer terms and others receiving six-year terms. The State's chosen solution to the injunction's disruption of the staggered schedule for PSC election

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See Black Voters Matter Fund v. Raffensperger, 508 F. Supp. 3d 1283, 1301 n.26 (N.D. Ga. 2020).

achieves the most equitable outcome for Georgia voters and members of the PSC when dealing with elections moving forward—while also balancing the important state interests identified by the General Assembly. O.C.G.A. § 46-2-1.1(a). That demonstrates that the equities and public interest favor the Secretary.

On top of everything else, it is hard to imagine something less equitable and fair for the State than for a plaintiff to file a meritless lawsuit, obtain an erroneous injunction, lose on appeal, and then nevertheless achieve her *own* preferences for dealing with the fallout of her own error. Surely this Court should be more cognizant of the interests of the *State*, which was the innocent victim of Plaintiffs McCorkle's mistake.

IV. Plaintiffs' proposed injunction violates the *Purcell* Principle.

Finally, even if all the elements of an injunction are met, this Court should still decline to enter the requested injunction because it does not comply with the *Purcell* Principle. Because the state is near an election, "the 'traditional test for a stay' likewise 'does not apply.'" *League of Women Voters of Fla.*, 32 F.4th at 1370 (quoting *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring)). The requested injunction is sought fewer than four months before the November general election it seeks to alter. *Id.* at 1371 (noting *Purcell* applied when injunction issued fewer than four months before election). Thus, this Court cannot enter the requested relief.

Plaintiffs could perhaps overcome the application of *Purcell* if they could show all four factors from Justice Kavanaugh's concurrence apply. Those factors are "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see also League of Women Voters of Fla.*, 32 F.4th at 1372 n.8 (citing four factors favorably); *Grace, Inc. v. City of Miami*, No. 23-12472, 2023 U.S. App. LEXIS 20292 at *5 (11th Cir. Aug. 4, 2023) (adopting Justice Kavanaugh's framework in *Merrill*).

But none of the four factors apply here. As discussed above, HB 1312 is consistent with the Georgia Constitution and Georgia law and is not a violation of substantive due process. Thus, at the very least, the merits are not "entirely clearcut" in Plaintiffs' favor. *League of Women Voters of Fla.* 32 F.4th at 1374 (quoting *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring)). Plaintiff McCorkle will not suffer any irreparable harm because she will still be entitled to vote in all PSC elections. *Merrill*, 142 S. Ct. at 881. Plaintiffs admit they have known since November 2023 of the reversal of the post-trial order in *Rose* and that the Governor signed HB 1312 on April 18, 2024. [Doc. 2 at 4–5]. But they waited for months to bring this case and have not shown any reason why they delayed. *Merrill*, 142 S.

Ct. at 881. Finally, the proposed changes are not feasible before the general election because of the required use of voting equipment in a presidential election. Evans Dec. at ¶ 11. And the potential for voter confusion running a statewide separate and apart election is massive. *Id*. at ¶¶ 13–14. In an environment of continuing questions around the administration of elections, holding multiple elections at the same time as the presidential election only invites more confusion. *Id*. The lack of feasibility and likely confusion and hardship further demonstrate why Plaintiffs fail to meet this factor. *Merrill*, 142 S. Ct. at 881. As a result, Plaintiffs have failed to overcome the application of the *Purcell* Principle to the injunction they seek.

CONCLUSION

After the cancellation of the 2022 and 2024 elections for PSC, the legislature acted to protect the important state interests of staggered terms and not having a majority of the PSC on the ballot at the same time. This Court has no jurisdiction. But even if it did, Plaintiffs have done nothing to show they are entitled to an injunction altering the election schedule. This Court should deny the injunction and dismiss this case.

Respectfully submitted this 12th day of August, 2024.

Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Bryan K. Webb

Deputy Attorney General
Georgia Bar No. 743580
Elizabeth T. Young
Senior Assistant Attorney General
Georgia Bar No. 707725
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

/s/ Bryan P. Tyson
Bryan P. Tyson
Special Assistant Attorney General
Georgia Bar No. 515411
btyson@theelectionlawyers.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@theelectionlawyers.com
Diane F. LaRoss
Georgia Bar No. 430830
dlaross@theelectionlawyers.com
The Election Law Group
1600 Parkwood Circle
Suite 200
Atlanta, Georgia 30339
678.336.7249 (phone)

Counsel for Defendant Secretary of State Brad Raffensperger

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned certifies that the foregoing Response Brief has been prepared in Book Antiqua 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Bryan P. Tyson
Bryan P. Tyson